



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for 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

(presented by the Commission)

EXPLANATORY MEMORANDUM

1) CONTEXT OF THE PROPOSAL

- **Grounds for and objectives of the proposal**

This proposal is intended to update Community Regulation (EEC) No 1408/71 to reflect changes in Member States' national social security legislation.

- **General context**

This proposal is one of the regular updates of Regulation (EEC) No 1408/71 or, to be more exact, an update of its annexes. The objective is to give a clear picture of developments in the national legal situation and hence to guarantee proper coordination of the national social security systems at Community level.

Regulation (EEC) No 1408/71 was simplified and updated by Regulation (EC) 883/2004, which will apply once its implementing Regulation has come into force. This regular update is intended to be the last one for Regulation (EEC) No 1408/71 before the application of the two new Regulations.

- **Existing provisions in the area of the proposal**

Regulation (EEC) No 1408/71, updated by Regulation (EC) No 118/97 and last amended by Regulation (EC) No 629/2006 of the European Parliament and of the Council.

This proposal will update and amend the references in certain annexes to the Regulation because the national legislation to which they refer has been amended.

- **Consistency with the other policies and objectives of the Union**

Not applicable.

2) CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENTS

- **Consultation of interested parties**

Consultation methods, main sectors targeted and general profile of respondents

Member States were invited to submit requests for amendments updating Regulations (EEC) No 1408/71 and 574/72 to reflect the changes in their national legislation. The Commission staff evaluated the requests, discussed them with Member States' representatives at a meeting of the Administrative Commission on Social Security for Migrant Workers and, where necessary, clarified further details with representatives from the individual Member States concerned.

Summary of responses and how they have been taken into account

Requests considered to be compatible with EU law and to which the Administrative Commission agreed were accepted and incorporated.

- **Collection and use of expertise**

Scientific/expertise domains concerned

Social security coordination.

Methodology used

Discussions in meetings of the Administrative Commission on Social Security for Migrant Workers and, where needed, further discussions to obtain clarification, particularly on the details of national legislation, with representatives on the Administrative Commission from the Member States concerned.

Main organisations/experts consulted

Administrative Commission on Social Security for Migrant Workers, as well as some of the representatives on the Administrative Commission.

Summary of opinions received and used

The existence of potentially serious risks with irreversible consequences was not mentioned.

Agreement to update certain entries for Member States in the Annexes to Regulation 1408/71.

Methods used to make the results of these expert opinions available to the public

Not applicable.

- **Impact assessment**

Member States frequently amend their national social security legislation. As a consequence, the references made to national law in EU legislation coordinating social security schemes become outdated and create legal uncertainty. This has an adverse impact on EU citizens moving within the EU because they are not correctly informed about their rights. It also makes the work of the national social security institutions more complicated, as they have to correctly apply the EU coordinating provisions in this area.

The references in EU coordinating legislation, in particular in Regulations 1408/71 and 574/72, therefore need to be updated to reflect national legislation correctly. EU Regulations can be updated only by another Regulation.

It is in the interests of the citizens concerned that the Community Regulations be updated soon after the national legislation has been amended, even if Regulation No 883/2004 replacing Regulation No 1408/71 came into force on 20 May 2004: this Regulation will not apply until the proposal for the implementing Regulation currently being negotiated has been adopted.

In terms of workload or costs, the proposed amending Regulation will make no particular difference to the present situation of social security institutions and administrations,

workers or employers. On the contrary, the objective of this update is to improve the coordination of social security schemes, thus offering better protection for EU citizens moving within the EU.

3) LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

The proposal is intended to update some of the annexes to Regulation 1408/71 to reflect changes in Member States' national social security legislation. It will therefore facilitate application of the Community legislation coordinating social security schemes by ensuring that it correctly reflects the national legislation in force.

- **Legal basis**

Articles 42 and 308 of the EC Treaty.

- **Subsidiarity principle**

The principle of subsidiarity applies insofar as the proposal does not concern an area in which the Community has exclusive competence.

The objectives of the proposal cannot be achieved to a sufficient extent by the action of Member States for the following reasons:

Community action in the form of coordination measures in the field of social security is required by Article 42 of the Treaty and is necessary to guarantee that the right to free movement for workers laid down in the Treaty can be fully exercised. Without such coordination, there would be a risk that freedom of movement would be inoperable, since people would be less likely to make use of this right if it meant, in essence, losing social security rights already acquired in another Member State. Existing Community legislation on social security does not aim to replace the different national schemes. It should be stressed that the proposal is not a harmonisation measure and does not go beyond what is necessary for effective coordination. The aim of the proposal is merely to update the existing coordinating rules to reflect the changes that have been made to the national legislation.

Even though the proposal is, therefore, mainly based on contributions by Member States, Member States could not adopt such provisions at national level since this could potentially conflict with the Regulation. Therefore it is necessary to ensure that the annexes to the Regulation are properly adapted so that the Regulation can apply effectively in the Member States concerned.

Social security coordination concerns cross-border situations where no Member State can act alone. The Community coordinating Regulation replaces the numerous existing bilateral agreements. This not only simplifies social security coordination for Member States but also ensures equal treatment of persons who are insured in accordance with national social security legislation.

The aims of the proposal can be better achieved through Community action for the following reasons:

Coordination of social security schemes makes sense only at Community level. The aim is to ensure that coordination of social security schemes operates effectively in all the Member States. This is based on, and justified by, the free movement of persons within the EU.

There are no qualitative indicators, but the Regulation concerns each EU citizen moving, for whatever reason, within the EU.

The proposal is purely a coordinating measure which can be taken only at Community level. Member States remain responsible for organising and financing their own social security schemes.

The proposal therefore complies with the subsidiarity principle.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reasons.

Regulation (EEC) No 1408/71 requires this form of action because a Regulation may be amended only by another Regulation. However, Member States remain solely responsible for organising and financing their own social security schemes.

The proposal makes it easier for the Member States to coordinate social security schemes and is therefore beneficial for citizens as well as for national social security authorities. These special provisions are based on proposals by the Member States which means that any potential financial and administrative burden is minimized and proportionate to the above-mentioned objective. Conversely, without such an update of Regulation 1408/71, the financial and administrative burdens would be likely to be greater.

- **Choice of instruments**

Proposed instrument(s): Regulation.

Other instruments would not have been appropriate for the following reasons:

There is no alternative because a text like Regulation (EEC) No 1408/71 can be amended only by another Regulation.

4) BUDGETARY IMPLICATIONS

The proposal has no implications for the Community budget.

5) ADDITIONAL INFORMATION

- **Repeal of existing legislation**

The adoption of this proposal will mean that some legislative provisions must be repealed.

- **European Economic Area**

This draft instrument concerns a matter covered by the EEA Agreement and should

therefore be extended to the European Economic Area.

- **Detailed explanation of the proposal by chapter or by article**

I. Amendments to Annex I

1. Amendment of Part I

Annex I Part I defines the terms "employed persons" or "self-employed persons" where these cannot be determined from the national legislation.

The wording under the heading "I. Ireland" should be amended so that the reference to the legislation takes into account the changes to the Irish reference texts as a result of the consolidation of Irish social legislation, currently contained in the Social Welfare Consolidation Act 2005.

2. Amendment of Part II

Annex I Part II defines the term "family members" where national legislation does not enable a distinction to be drawn between family members and other persons.

The wording under the heading "I. Ireland" should be amended so that the reference to the legislation takes into account the new Irish law creating the Health Service Executive, to replace the former Health Boards/Authority.

II. Amendments to Annex II

1. Amendment of Part I

Annex II Part I defines the special schemes for self-employed persons excluded from the scope of the Regulation pursuant to the fourth subparagraph of Article 1 (j).

The wording under the heading "H. France" should be simplified to take into account the fact that the complementary insurance referred to in paragraph 2 has not been implemented. This reduction of an annex to exclude certain schemes from the scope of the Regulation is a way of simplifying the Regulation.

2. Amendment of Part II

Annex II Part II defines special childbirth or adoption allowances excluded from the scope of the Regulation pursuant to Article 1 u) i).

The wording under the heading "S. Poland" should be amended so that the benefit currently mentioned (supplement to the childbirth allowance) is no longer excluded but is also subject to coordination. The new reference arising from the adoption of the act of 29 December 2005 is possible pursuant to Article 1 u) i).

III. Amendments to Annex IIa

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

The wording under the heading "I. Ireland" should be amended so that the reference to the legislation takes into account the changes to the Irish reference texts as a result of the consolidation of social legislation, currently contained in the Consolidated Act of 2005 on social protection. There are no substantive amendments.

IV. Amendments to Annex III, Part A

Annex III lists the provisions of the bilateral agreements which were in force prior to the application of the Regulation in the Member States concerned. Part A lists the provisions of bilateral agreements which continue to apply, even though they are generally replaced by Regulation (EEC) No 1408/71.

The wording under points "13. Germany-Hungary" and "24. Hungary-Austria" should take into account the fact that an amendment to Hungarian pension law has made the provision in each of the two bilateral agreements pertaining to the calculation of pensions obsolete if the period of insurance in Hungary has been shorter than the average duration laid down by the Hungarian scheme for the calculation of pensions.

V. Amendments to Annex IV

1. Amendment of Annex IV, Part A

Annex IV, Part A lists the legislations referred to in Article 37(1) of the Regulation under which the amount of invalidity benefits is independent of the length of periods of insurance.

The wording under the heading "I. Ireland" should be amended so that the reference to the legislation takes into account the changes to the reference texts as a result of the consolidation of social legislation, currently contained in the Social Welfare Consolidation Act 2005.

The wording under the heading "Q. Netherlands" should be amended to take into account the adoption of the Act of 10 November 2005 "*Wet werk en inkomen naar arbeidsvermogen (WIA)*".

2. Amendment of Annex IV, Part C

Annex IV, Part C lists the "cases referred to in Article 46(1)(b) of the Regulation where the calculation of benefit in accordance with Article 46(2) of the Regulation may be waived", as this will never lead to a higher result.

The wording under the heading "O. Hungary" should be deleted, as the calculations based on the amended legislation suggested that the pro rata calculation could be higher than the calculation of the national pension. As the conditions for waiving the comparative calculation are no longer met, the inclusion on this list should be withdrawn.

The wording under the heading "R. Austria" should be amended in order to take into account cases where, pursuant to the new law on pensions, a comparative calculation of the benefit is not necessary.

VI. Amendments to Annex VI

Annex VI sets out special procedures for applying the legislation of certain Member States.

The wording under heading "C. Denmark" should be amended in points 6 and 11 so as to take into account a purely formal amendment to Danish national law.

The wording under the heading "Q. Netherlands" should be amended in point 4 so as to take into account the adoption of the Act of 10 November 2005 "*Wet werk en inkomen naar arbeidsvermogen (WIA)*".

The wording under heading "R. Austria" should be completed in point 10 to specify how periods abroad are to be taken into account in the pension calculation.

VII. Amendments to Annex VIII

This Annex lists the schemes under which orphans are granted only family benefits or supplementary or special benefits.

The wording under the heading "I. Ireland" should be amended so that the reference to the legislation takes into account the new law creating the Health Service Executive, to replace the former Health Boards/Authority.

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(Text with EEA relevance)

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 Commission¹,

Having regard to the opinion of the European Economic and Social Committee²,

Having regard to the opinion of the Committee of the Regions³,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁴,

Whereas:

- (1) To take account of changes in the legislation of certain Member States, certain annexes to Regulation (EEC) No 1408/71⁵ need to be adapted.
- (2) Regulation (EEC) No 1408/71 should therefore be amended accordingly.
- (3) The Treaty does not provide powers other than those under Article 308 to take appropriate measures within the field of social security for persons other than employed persons,

HAVE ADOPTED THIS REGULATION:

Article 1

Annexes I, II IIa, III, IV, VI and VIII to Regulation (EEC) No 1408/71 shall be amended in accordance with the Annex to this Regulation.

¹ OJ C [...] of [...], p. [...].

² OJ C [...] of [...], p. [...].

³ OJ C [...] of [...], p. [...].

⁴ OJ C [...] of [...], p. [...].

⁵ OJ L 149 of 5.7.1971, p. 2; regulation lastly amended by regulation (EC) n° 1992/2006 (OJ L 392 of 30.12.2006, p. 1).

Article 2

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Union*.

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

The Annexes to Regulation (EEC) No 1408/71 are hereby amended as follows:

1. In Annex I, Part I, under the heading "I. IRELAND", the text is replaced by the following:

"I. IRELAND

1. Any person who is compulsorily or voluntarily insured pursuant to the provisions of Articles 12, 24 and 70 of the Social Welfare Consolidation Act 2005 shall be considered an employed person within the meaning of Article 1 (a) (ii) of the Regulation.

2. Any person who is compulsorily or voluntarily insured pursuant to the provisions of Articles 20 and 24 of the Social Welfare Consolidation Act 2005 shall be considered a self-employed person within the meaning of Article 1 (a) (ii) of the Regulation.

2. In Annex I, Part II, the heading "I. IRELAND" is replaced by the following:

"I. IRELAND

In order to determine the right to benefits in kind for sickness and maternity in application of the Regulation, the term 'family member' shall mean any person considered as being a dependent of an employed person or of a self-employed person for the application of the Health Acts 1947-2004.

3. In Annex II, Part I, heading "H. FRANCE", the text is replaced by the following:

"H. FRANCE

Supplementary benefit schemes for self-employed persons in craft trades, industrial or commercial occupations or the liberal professions, supplementary old-age insurance schemes for self-employed persons in the liberal professions, supplementary insurance schemes for self-employed persons in the liberal professions covering invalidity or death, and supplementary old-age benefit schemes for contracted medical practitioners and auxiliaries, as referred to respectively in Articles L.615-20, L.644-1, L.644-2, L.645-1 and L.723-14 of the Social Security Code".

4. In Annex II, Part II, under the heading "S. POLAND", the text is replaced by the following:

"S. POLAND

Single-payment birth grant (Family Benefits Act)".

5. In Annex IIa, under the heading "I. IRELAND", the text is replaced by the following:

"I. IRELAND

- a) Unemployment benefit (Social Welfare Consolidation Act 2005, Part 3, Chapter 2);
 - b) Old-age pension (non-contributory) (Social Welfare Consolidation Act 2005, Part 3, Chapter 4);
 - c) Widows'/widowers' pensions (non-contributory) (Social Welfare Consolidation Act 2005, Part 3, Chapter 6);
 - d) Invalidity allowance (Social Welfare Consolidation Act 2005, Part 3, Chapter 10);
 - e) Mobility allowance (Health Act 1970, Article 61);
 - f) Pension for the blind (Social Welfare Consolidation Act 2005, Part 3, Chapter 5)".
6. Annex III, Part A, is amended as follows:
- a) Point 13 "GERMANY-HUNGARY" is replaced by the following:
 - "13. GERMANY-HUNGARY
 - a) Article 40(1)(b) of the Agreement of 2 May 1998 on Social Security.
 - b) Point 16 of the Closing Protocol to the said Convention".
 - b) Point 24 "HUNGARY-AUSTRIA" is replaced by the following:
 - "24. HUNGARY-AUSTRIA
 - Article 36(3) of the Convention on Social Security of 31 March 1999".
7. Annex IV, Part A, is amended as follows:
- a) Heading "I. IRELAND" is replaced by the following:
 - "I. IRELAND
 - Part II, chapter 17, of the Social Welfare Consolidation Act 2005".
 - b) Under the heading "Q. NETHERLANDS", the following is added:
 - "c) the Act of 10 November 2005 "*Wet werk en inkomen naar arbeidsvermogen (WIA)*"."
8. Annex IV, Part C, is amended as follows:
- a) Heading "O. HUNGARY" is deleted.
 - b) Heading "R. AUSTRIA" is replaced by the following:

- "1. All applications for benefit under the Federal Act of 9 September 1955 on General Social Security (ASVG), the Federal Act of 11 October 1978 on the Social Security of Self-Employed Workers in Industry and Craft Trades (GSVG) and the Federal Act of 11 October 1978 on the Social Security of Self-Employed Workers in Agriculture and Forestry (BSVG), in as much as Articles 46b and 46c of the Regulation do not apply or, pursuant to Article 45 of the Regulation, another type of pension with more favourable calculation rules can be opted for.
2. All applications for the following benefits on the basis of a pension account under the General Pensions Act (APG) of 18 November 2004, in as much as Articles 46b and 46c of the Regulation do not apply or, pursuant to Article 45 of the Regulation, another type of pension with more favourable calculation rules or the same type of pension with more favourable calculation rules can be opted for
 - a) old age pensions;
 - b) invalidity pensions;
 - c) survivors' pensions, in as much as no increase of benefit is to be calculated on the basis of additional insurance months under Article 7(2) of the APG."

9. Annex VI is amended as follows:

(a) Heading "C. DENMARK":

(i) In point 6, the words "of 20 December 1989" are deleted.

(ii) Point 11 is replaced by the following:

"11. The intermediate benefit paid to unemployed persons who have benefited from the "flexjob" scheme (ledighedsydelse) (pursuant to the Active Social Policy Act) comes under Title III, Chapter 6 (unemployment benefits). As far as unemployed persons going to another Member State are concerned, the provisions of Articles 69 and 71 of this Regulation apply when the Member State concerned has similar schemes for the same category of persons".

(b) In heading "Q. NETHERLANDS", point 4 is replaced by the following:

"4. Application of the Netherlands laws relating to incapacity for work

a) Any employed or self-employed person who is no longer insured under the Act of 11 December 1975 on Invalidity (AAW), the Act of 24 April 1997 on Invalidity Insurance (Self-Employed Persons) (WAZ), the Act of 18 February 1966 on Invalidity Insurance (WAO) and/or the Act of 10 November 2005 on Work and Income according to Labour Capacity (WIA) is considered to be so when the risk materialises, for the purposes of the application of the provisions of Chapter 3 of Title III of the Regulation, if that person is insured under the legislation of another

Member State for the same risk or, failing that, if a benefit is due in pursuance of the legislation of another Member State. The latter condition shall be considered to be fulfilled, however, in the case referred to in Article 48 (1).

- b) If, pursuant to point (a), the person concerned is entitled to a Dutch invalidity benefit, such benefit shall be paid in accordance with the rules laid down in Article 46(2) of the Regulation:
- (i) in accordance with the provisions laid down in the WAO if, prior to the occurrence of the incapacity for work, the person concerned was last engaged in work as an employed person within the meaning of Article 1(a) of the Regulation, if the incapacity for work occurred before 1 January 2004; if the incapacity for work occurred on or after 1 January 2004, the amount of the benefit is calculated on the basis of the Act of 10 November 2005 on Work and Income according to Labour Capacity (WIA);
- (ii) in accordance with the provisions laid down in the Invalidity Insurance (Self-Employed Persons) Act (WAZ) if, prior to the occurrence of the incapacity for work, the person concerned was last engaged in work in a capacity other than that of an employed person within the meaning of Article 1(a) of the Regulation.
- (c) For the calculation of the benefits paid in accordance with the aforementioned Act of 18 February 1966 on Invalidity Insurance (WAO), the Act of 10 November 2005 on Work and Income according to Labour Capacity (WIA) or the Act of 24 April 1997 on Invalidity Insurance (Self-Employed Persons) (WAZ), the Dutch institutions will take account of:
- periods of paid employment and periods treated as such completed in the Netherlands before 1 July 1967;
 - periods of insurance completed under the abovementioned Act of 18 February 1966 (WAO);
 - periods of insurance completed by the person concerned after the age of 15 years under the abovementioned Law of 11 December 1975 (AAW) in so far as these do not coincide with the periods of insurance completed under the abovementioned law of 18 February 1966 (WAO);
 - periods of insurance completed in accordance with the Act of 24 April 1997 on Invalidity Insurance (Self-Employed Persons) (WAZ);
 - periods of insurance completed in accordance with the Act of 10 November 2005 on Work and Income according to Labour Capacity (WIA).
- (d) In the calculation of the Netherlands invalidity benefit pursuant to Article 40(1) of the Regulation, the Dutch institutions do not take into account

any supplements granted under the provisions of the Law on Supplements. The right to the supplement and the amount thereof are calculated only on the basis of the Law on Supplements".

(c) Under heading "R. AUSTRIA", the following point is to be added:

"10. To calculate the theoretical amount in respect of benefits based on a pension account under the General Pensions Act (*Allgemeines Pensionsgesetz – APG*) of 18 November 2004 for the purposes of Article 46(2)(a) of the Regulation, the competent institution takes into account, for each insurance month completed under other Member States' legislation, that portion of the total credit determined in accordance with the APG on the reference date which corresponds to the quotient of the total credit and the number of insurance months on which the total credit is based."

10. In Annex VIII, the heading "I. IRELAND" is replaced by the following:

"I. IRELAND

Child benefits, orphan's (contributory) allowance and increases of widow's (contributory) pension and widower's (contributory) pension payable in respect of children eligible under the Social Welfare Consolidation Act 2005 and subsequent amending legislation".