COMMON POSITION (EC) No 7/2005

adopted by the Council on 15 November 2004

with a view to adopting Regulation (EC) No …/2005 of the European Parliament and of the Council of … amending Council Regulations (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 (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71

(2005/C 38 E/02)

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,

Having regard to the opinion of the European Economic and Social Committee ([1]),

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ([2]),

Whereas:

(1) Certain amendments should be made to Regulations (EEC) No 1408/71 ([3]) and (EEC) No 574/72 ([4]), in order to take account of recent developments in the case law of the Court of Justice of the European Communities, to facilitate the application of those Regulations and to 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 judgments should be drawn, particularly in the cases of Johann Franz Duchon v. Pensionsversicherungsanstalt der Angestellten ([5]) and Office national de l'emploi v. Calogero Spataro ([6]).

(3) The judgments in Friedrich Jauch v. Pensionsversicherungsanstalt der Arbeiter and Ghislain Leclere, Alina Deaconescu v. Caisse nationale des prestations familiales ([7]), 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 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 judgment in the Jauch case in order to protect the rights of beneficiaries.

(4) On the basis of the case-law relating to the relationships between Regulation (EEC) No 1408/71 and the provisions of bilateral social security agreements, it is necessary to review Annex III to that Regulation. The entries in part A of Annex III are only justified in two cases: where they are more favourable to migrant workers ([8]), 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 that Regulation and from Articles 12, 39 and 42 of the Treaty ([9]).

([1]) OJ C 80, 30.3.2004, p. 118.

([2]) Opinion of the European Parliament of 11 March 2004 (OJ C 102 E, 28.4.2004, p. 804), Council Common Position of 15 November 2004 and position of the European Parliament of ..... (not yet published in the Official Journal).

([3]) OJ L 149, 5.7.1971, p. 2. Regulation updated by Regulation (EC) No 118/97 (OJ L 28, 30.1.1997, p. 1), last amended by Regulation (EC) No 631/2004 of the European Parliament and of the Council (OJ L 100, 6.4.2004, p. 1) and repealed with effect from the date of entry into force of the implementing regulation by Regulation (EC) No 883/2004 of the European Parliament and of the Council (OJ L 166, 30.4.2004, p. 1); Regulation to be repealed from the date of application of Regulation (EC) No 883/2004 of the European Parliament and of the Council (OJ L 166, 30.4.2004, p. 1).

([4]) OJ L 74, 27.3.1972, p. 1. Regulation as last amended by Regulation (EC) No 631/2004 of the European Parliament and of the Council (OJ L 100, 6.4.2004, p. 1).

([5]) Judgment of 18 April 2002 in Case C-290/00 [ECR] 2002 I-3567.

([6]) Judgment of 13 June 1996 in Case C-170/95 [ECR] 1996 I-2921.

([7]) Judgments 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.

([8]) The principle of the most favourable treatment has been recalled by the European Court of Justice in its Judgments of 7 February 1991, Case C-227/89 [ECR] 1991 I-323; of 9 November 1995, Case C-475/93 [ECR] 1995 I-3813; of 9 November 2000, Case C-75/99 [ECR] 2000 I-9399; and of 5 February 2002, Case C-277/99 [ECR] 2002 I-1261.

([9]) Judgment of 30 April 1996, Case C-214/94 [ECR] 1996 I-2253; Judgment of 30 April 1996, Case C-308/93 [ECR] 1996 I-2097; Judgment of 15 January 2002, Case C-55/00 [ECR] 2002 I-413.

(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 that Regulation.

(6) The revision of Annex IIa to Regulation (EEC) No 1408/71 will lead to the removal of some existing entries and, taking into account legislative amendments in some Member States, to the inclusion of certain new entries. In the latter case, it is then for these Member States to consider the need for transitional arrangements or bilateral solutions to address the situation of persons whose acquired rights may be affected as a consequence,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EEC) No 1408/71 is hereby amended as follows:

1. Article 3 shall be amended as follows:

   (a) in paragraph 1, the words 'resident in the territory of one of the Member States' shall be deleted;

   (b) in paragraph 3, the words 'and the provisions of conventions concluded pursuant to Article 8(1)' shall be deleted;

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

   '2a. This Article shall apply to special non-contributory cash benefits which are provided according to legislation which, because of its personal scope, objectives and/or conditions for entitlement has characteristics both of the social security legislation referred to in paragraph 1 and of social assistance.

   "Special non-contributory cash benefits" means those:

   (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 paragraph 1, and which guarantee 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) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided 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.';

3. Article 7(2)(c) shall be replaced by the following:

   '(c) certain provisions of social security conventions entered into by the Member States before the date of application of this Regulation provided that they are more favourable to the beneficiaries or if they arise from specific historical circumstances and their effect is limited in time if these provisions are listed in Annex III.';

4. Article 9a shall be replaced by the following:

   '*Article 9a*

   Prolongation of the reference period

   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, industrial accidents at work or occupational disease 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.';

5. Article 10a(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.';

6. in Article 23, the following paragraph shall be inserted:

'2a. The provisions of paragraphs 1 and 2 shall also apply where the legislation applied by 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.';

7. Article 35(2) shall be deleted;

8. Article 69(4) shall be deleted;

9. the following Articles shall be inserted:

'Article 95f

Transitional provisions relating to Annex II, section I, under the headings "D. GERMANY" and "R. AUSTRIA".

1. Annex II, section I, under the headings "D. GERMANY" and "R. AUSTRIA", as amended by Regulation (EC) No …/2005 of the European Parliament and of the Council of.... amending Council Regulations (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 (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (*), shall not establish any entitlement for the period prior to 1 January 2005.

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 2005, 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 2005.

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 2005, 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 2005 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 2005, 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 2005, 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, in Annex IIa, of the entry relating to 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.

(*) OJ L…'.

10. 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 is hereby amended as follows:

1. Article 4(11) shall be deleted;

2. the following Article shall be inserted:

'Article 10c

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

For the application of Article 13(2)(d), 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 shall be replaced by the following:

'Rules applicable in respect of the persons referred to in Article 14(2) and (3), Article 14a(2) to (4) and Article14c 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:

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

(c) the following paragraph shall be inserted:

'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 or place of business 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 that of its publication in the *Official Journal of the European Union*.

Article 1(9), as far as Article 95f of Regulation (EEC) No 1408/71 is concerned, Annex I points (1)(a) and (1)(b) and Annex II points (2) and (4) shall apply from 1 January 2005.

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 are hereby amended as follows:

1. Annex II shall be amended as follows:

   (a) In section I, under the heading 'D. GERMANY', the text shall be replaced by the words: 'does not apply'.

   (b) in section I, under the heading 'R. AUSTRIA', the text shall be replaced by the words: 'does not apply'.

   (c) section II shall be amended as follows:

      (i) under the heading 'G. SPAIN', the word 'None' shall be replaced by the following:

      '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 'H. FRANCE', the text shall be replaced by the following:

      'Birth or adoption grant (early childhood benefit)';

      (iii) under the heading 'W. FINLAND', the text shall be replaced by the following:

      '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';

   (d) in section III, under the heading 'D. GERMANY', point (b) shall be deleted;

2. Annex IIa shall be replaced by the following text that includes, unchanged, the entries as set out in the 2003 Act of Accession:

'*ANNEX IIa*

SPECIAL NON-CONTRIBUTORY CASH BENEFITS

Article 10a

A. BELGIUM

(a) Income replacement allowance (Law of 27 February 1987)

(b) Guaranteed income for elderly persons (Law of 22 March 2001).

B. CZECH REPUBLIC

Social allowance (State Social Support Act No 117/1995 Sb).

C. DENMARK

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

D. GERMANY

Basic subsistence income for the elderly and for persons with reduced earning capacity under Chapter 4 of Book XII of the Social Code.

E. ESTONIA

(a) Disabled adult allowance (Social Benefits for Disabled Persons Act of 27 January 1999).

(b) State unemployment allowance (Social Protection of the Unemployed Act of 1 October 2000).

F. GREECE

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

G. 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;

(d) allowances to promote mobility and to compensate for transport costs (Law No 13/1982 of 7 April 1982).

H. FRANCE

(a) supplementary allowances of the special invalidity fund and the old age solidarity fund (Law of 30 June 1956, codified in Book VIII of the Social security code);

(b) disabled adults' allowance (Law of 30 June 1975, codified in Book VIII of the Social security code);

(c) special allowance (Law of 10 July 1952, codified in Book VIII of the Social security code).

I. IRELAND

(a) Unemployment assistance (Social Welfare (Consolidation) Act 1993, Part III, Chapter 2);

(b) old-age (non-contributory) pension (Social Welfare (Consolidation) Act 1993, Part III, Chapter 4);

(c) widow's (non-contributory) pension and 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);

(e) mobility allowance (Health Act 1970, Section 61);

(f) blind pension (Social Welfare (Consolidation) Act 1993, Part III, Chapter 5).

J. 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 (Article 1 (1) and (12) of Law No 544 of 29 December 1988 and successive amendments).

K. CYPRUS

(a) Social Pension (Social Pension Law of 1995 (Law 25(I)/95), as amended);

(b) severe motor disability allowance (Council of Ministers' Decision Nos 38.210 of 16 October 1992, No 41.370 of 1 August 1994, No 46.183 of 11 June 1997 and No 53.675 of 16 May 2001);

(c) special grant to blind persons (Special Grants Law of 1996 (Law 77(I)/96), as amended).

L. LATVIA

(a) State Social Security Benefit (Law on social assistance of 26 October 1995);

(b) allowance for the compensation of transportation expenses for disabled persons with restricted mobility (Law on social assistance of 26 October 1995).

M. LITHUANIA

(a) Social pension (Law of 1994 on social pensions);

(b) special transport compensation for the disabled who have mobility problems (Law of 2000 on Transport Compensation, Article 7).

N. LUXEMBOURG

Income for the seriously disabled (Article 1(2), Law of 12 September 2003), with the exception of persons recognised as being disabled workers and employed on the mainstream labour market or in a sheltered environment.

O. HUNGARY

(a) Invalidity annuity (Decree No 83/1987 (XII 27) of the Council of Ministers on Invalidity Annuity);

(b) non-contributory old-age allowance (Act III of 1993 on Social Administration and Social Benefits);

(c) Transport allowance (Government Decree No 164/1995 (XII 27) on Transport allowances for persons with severe physical handicap).

P. MALTA

(a) Supplementary allowance (Section 73 of the Social Security Act (Cap. 318) 1987);

(b) age pension (Social Security Act (Cap. 318) 1987).

Q. NETHERLANDS

(a) Disablement Assistance Act for Handicapped Young Persons, of 24 April 1997 (Wajong);

(b) supplementary Benefits Act of 6 November 1986 (TW).

R. 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).

S. POLAND

Social pension (Act of 29 November 1990 on social assistance).

T. PORTUGAL

(a) Non-contributory State old-age and invalidity pension (Decree-Law No 464/80 of 13 October 1980);

(b) non-contributory widowhood pension (Regulatory Decree No 52/81 of 11 November 1981).

U. SLOVENIA

(a) State pension (Pension and Disability Insurance Act of 23 December 1999);

(b) income support for pensioners (Pension and Disability Insurance Act of 23 December 1999);

(c) maintenance allowance (Pension and Disability Insurance Act of 23 December 1999).

V. SLOVAKIA

Adjustment of pensions as the sole source of income (Act No 100/1988 Zb.).

W. FINLAND

(a) Disability allowance (Disability Allowance Act, 124/88);

(b) childcare allowance (Child care Allowance Act, 444/69);

(c) housing allowance for pensioners (Act concerning the Housing Allowance for Pensioners, 591/78);

(d) labour market support (Act on Unemployment benefits 1290/2002);

(e) special assistance for immigrants (Act on Special Assistance for Immigrants, 1192/2002).

X. SWEDEN

(a) Housing supplements for persons receiving a pension (Law 2001:761);

(b) financial support for the elderly (Law 2001:853);

(c) disability allowance and care allowance for disabled children (Law 1998:703).

Y. UNITED KINGDOM

(a) State Pension credit (State Pension Credit Act 2002);

(b) income-based allowances for jobseekers (Jobseekers Act 1995, 28 June 1995, Sections 1, (2)(d)(ii) and 3, and Jobseekers (Northern Ireland) Order 1995 of 18 October 1995, Articles 3(2)(d)(ii) and 5);

(c) income Support (Social Security Act 1986 of 25 July 1986, Section 20 to 22 and Section 23, and Social Security (Northern Ireland) Order 1986 of 5 November 1986, Articles 21 to 24);

(d) disability living allowance (Disability Living Allowance and Disability Working Allowance Act 1991 of 27 June 1991, Section 1, and disability living allowance and disability working allowance (Northern Ireland) order 1991 of 24 July 1991, Article 3);

(e) attendance allowance (Social Security Act 1975 of 20 March 1975, Section 35, and Social Security (Northern Ireland) Act 1975 of 20 March 1975, Section 35);

(f) carer's allowance (Social Security Act 1975 of 20 March 1975, Section 37, and Social Security (Northern Ireland) Act 1975 of 20 March 1975, Section 37).';

3. Annex III shall be amended as follows:

(a) the following paragraph shall be introduced on top of the Annex under 'General comments':

'3. Account being taken of the provisions of Article 6 of this Regulation, it is to be noted that the provisions of bilateral Conventions which do not fall within the scope of this Regulation and which remain in force between Member States are not listed in this Annex, *inter alia*, provisions providing for aggregation of insurance periods fulfilled in a third country.';

(b) in part A, the following points shall be deleted:

points 2, 3(b), 5, 6, 7, 8, 9, 13, 16, 17, 19, 22, 23, 24, 48, 50, 51, 52, 53, 54, 58, 61, 62, 64, 69, 71(a) and (c), 73(a) and (b), 74, 75, 83(a), (b), (c), (d), (e), (f), (g), 85, 88, 89, 111, 112, 113, 114, 118, 121, 122, 124, 127, 128, 129, 130, 131, 132, 136, 139, 140, 145, 146, 147, 148, 149, 153, 156, 157, 159, 162, 163, 164, 165, 169, 172, 173, 175, 178, 179, 184, 188, 190, 193, 194, 195, 237, 238, 240, 243, 244, 245, 265, 270, 271, 272, 274, 277, 278, 279, 288, 289, 299, 300;

(c) in part A, point 3(a) (Belgium – Germany) shall be replaced by the following:

'Articles 3 and 4 of the Final Protocol of 7 December 1957 to the General Convention of that date, as in the Complementary Protocol of 10 November 1960 (reckoning of insurance periods completed in some border regions before, during and after the Second World War)';

(d) in part A, point 67 (Denmark – Finland) shall be replaced by the following:

'Article 10 of the Nordic Convention on Social Security of 15 June 1992, concerning coverage of extra travel expenses in case of sickness during stay in another Nordic country making a more expensive return travel to the country of residence necessary';

(e) in part A, point 68 (Denmark – Sweden) shall be replaced by the following:

'Article 10 of the Nordic Convention on Social Security of 15 June 1992, concerning coverage of extra travel expenses in case of sickness during stay in another Nordic country making a more expensive return travel to the country of residence necessary';

(f) in part A, point 71(b) (Germany – Greece) shall be replaced by the following:

'Articles 8(1), (2)(b) and (3), 9 to 11 and Chapters I and IV, in so far as they concern these Articles, of the Convention on unemployment insurance of 31 May 1961, together with the note in the minutes of 14 June 1980 (reckoning of insurance periods for unemployment benefits in case of transfer of residence from one State to another)';

(g) in part A, point 72 (Germany – Spain) shall be replaced by the following:

'Article 45(2) of the Social Security Convention of 4 December 1973 (representation by diplomatic and consular authorities)';

(h) in part A, point 73 (Germany – France) of paragraphs (c), (d), (e) and (f) shall be replaced by the following:

'(a) Complementary Agreement No 4 of 10 July 1950 to the General Convention of the same date, as in Supplementary Agreement No 2 of 18 June 1955 (reckoning of periods of insurance completed between 1 July 1940 and 30 June 1950);

(b) Title I of the said Supplementary Agreement No 2 (reckoning of periods of insurance completed before 8 May 1945);

(c) Points 6, 7 and 8 of the General Protocol of 10 July 1950 to the General Convention of the same date (administrative arrangements);

(d) Titles II, III and IV of the Agreement of 20 December 1963 (social security in the Saar)';

(i) in part A, point 79 (Germany – Luxembourg) shall be replaced by the following:

'Articles 4, 5, 6 and 7 of the Treaty of 11 July 1959 (reckoning of insurance periods completed between September 1940 and June 1946)';

(j) in part A, point 83 (Germany – Austria) of paragraphs (h) and (i) shall be replaced by the following:

'Article 1(5) and Article 8 of the Convention on Unemployment Insurance of 19 July 1978 and Article 10 of the Final Protocol to this Convention (granting of unemployment allowances to frontier workers by the previous State of employment) shall continue to apply to persons who have exercised an activity as a frontier worker on or before 1 January 2005 and become unemployed before 1 January 2011';

(k) in part A, point 90 (Germany – United Kingdom) of paragraphs (a), (b) and (c) shall be replaced by the following:

'(a) Articles 7(5) and 7(6) of the Convention on social security of 20 April 1960 (legislation applicable to civilians serving the military forces);

(b) Articles 5(5) and 5(6) of the Convention on unemployment insurance of 20 April 1960 (legislation applicable to civilians serving the military forces)';

(l) in part A, point 142 (Spain – Portugal) shall be replaced by the following:

'Article 22 of the General Convention of 11 June 1969 (export of unemployment benefits)';

(m) in part A, point 180 (Ireland – United Kingdom) shall be replaced by the following:

'Article 8 of the Agreement of 14 September 1971 on social security (concerning the transfer and reckoning of certain disability credits)'.

(n) in part A, point 267 (Netherlands – Portugal) shall be replaced by the following:

'Article 31 of the Convention of 19 July 1979 (export of unemployment benefits)'.

(o) in part A, point 298 (Finland – Sweden) the text shall be replaced by the following:

'Article 10 of the Nordic Convention on Social Security of 15 June 1992, concerning coverage of extra travel expenses in case of sickness during stay in another Nordic country making a more expensive return travel to the country of residence necessary';

(p) in part B, the following entries shall be deleted:

2, 3, 5, 6, 7, 8, 9, 13, 16, 17, 19, 22, 23, 24, 48, 50, 51, 52, 53, 54, 58, 61, 62, 64, 67, 68, 69, 71, 72, 73, 74, 75, 79, 82, 83, 85, 88, 89, 90, 111, 112, 113, 114, 118, 121, 122, 124, 127, 128, 129, 130, 131, 132, 136, 139, 140, 142, 145, 146, 147, 148, 149, 153, 156, 157, 159, 162, 163, 164, 165, 169, 172, 173, 175, 178, 179, 180, 184, 187, 188, 190, 193, 194, 195, 237, 238, 240, 243, 244, 245, 265, 267, 270, 271, 272, 274, 277, 278, 279, 288, 289, 290, 298, 299, 300;

4. in Annex IV, section B shall be amended as follows:

(a) under the heading 'D. GERMANY', the text shall be replaced by the following:

'Farmers' old-age insurance (Alterssicherung der Landwirte)';

(b) under the heading 'J. ITALY', the text shall be replaced by the following:

'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)

— psychologists (psicologi)

— 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)';

(c) under the heading 'R. AUSTRIA', the text shall be replaced by the following:

'Pension schemes of pension institutions of liberal profession associations (Kammern der Freien Berufe)';

5. Annex VI shall be amended as follows:

(a) Under the heading 'C. DENMARK', point 6 (b) shall be deleted.

(b) under the heading 'C. DENMARK', the following text shall be added:

'11. The temporary benefit for unemployed persons who have been admitted to the "flexible-job" scheme (ledighedsydelse) (Law No 455 of 10 June 1997) is covered by Title III, chapter 6 (Unemployment benefits). As regards unemployed persons going to another Member State, Articles 69 and 71 of this Regulation will be applicable when this Member State has similar employment schemes for the same category of persons.';

(c) under the heading 'D. GERMANY', points 3, 11 and 17 shall be deleted and the following points shall be added:

'24. For the calculation of the theoretical amount referred to in Article 46(2)(a) of the Regulation, in pension schemes for liberal professions, the competent institution shall take as the basis, in respect of each of the years of insurance completed under the legislation of any other Member State, the average annual pension entitlement acquired during the period of membership of the competent institution through the payment of contributions.

25. Article 79a of the Regulation shall apply *mutatis mutandis* to the calculation of orphans' pensions and increases or supplements in respect of children from pension schemes for liberal professions.';

(d) under the heading 'H. FRANCE', the text in point 7 shall be replaced by the following:

'Notwithstanding Articles 73 and 74 of this Regulation, the housing allowances and the supplement for child-care of the parents' choice (early childhood benefit) shall be granted only to persons concerned and to members of their families residing in French territory.';

(e) under the heading 'I. IRELAND', point 11 shall be deleted;

(f) under the heading 'R. AUSTRIA', the following points shall be added:

'8. For the calculation of the theoretical amount in accordance with Article 46(2)(a) of this Regulation concerning benefits or parts of benefits of a pension scheme of the liberal profession associations (Kammern der Freien Berufe), financed exclusively by the funded scheme method or based on a pension account system, the competent institution shall take into account, in respect of each month of insurance completed under the legislation of any other Member State, capital in proportion to the capital actually accrued in the pensions scheme concerned, or considered to have accrued in the pension account scheme, and the number of months of the insurance periods in the pension scheme concerned.

9. Article 79a of the Regulation shall apply mutatis mutandis to the calculation of orphans' pensions and increases or supplements to pensions in respect of children from a pension scheme of the liberal profession associations (Kammern der Freien Berufe).';

(g) under the heading 'Y. UNITED KINGDOM', the text shall be amended as follows:

(i) in point 2(b), points (i) and (ii) shall be replaced by the following:

'(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.';

(ii) point 22 shall be deleted.

ANNEX II

The Annexes to Regulation (EEC) No 574/72 are hereby amended as follows:

1. in Annex 2, under the heading 'X. SWEDEN', point 2 shall be replaced by the following:

   ' 2. For unemployment benefits: Inspektionen för arbetslöshetsförsäkringen (Swedish Unemployment Insurance Board)';

2. in Annex 4, under the heading 'D. GERMANY', the following point shall be added:

   '9. Pension schemes for liberal professions:

   Arbeitsgemeinschaft Berufsständischer Versorgungseinrichtungen, Köln';

3. In Annex 10, under the heading 'C. DENMARK', point 1 first indent shall be replaced by the following:

   '1. For the purposes of applying Articles 10c, 11(1), 11a(1), 12a, 13(2) and (3), 14(1), (2) and (3) of the implementing Regulation: Den Sociale Sikringsstyrelse, København';

4. in Annex 10, under the heading 'R. AUSTRIA', point 1 shall be replaced by the following:

   '1. For the application of Article 14(1)(b), Article 14a(1)(b) and Article 17 of the Regulation:

   Bundesminister für soziale Sicherheit, Generationen und Konsumentenschutz (Federal Minister for Social Security, Generations and Consumer Protection), in agreement with the respective public administration with regard to special schemes for civil servants and in agreement with the respective pension institution with regard to pension schemes of the liberal profession associations (Kammern der Freien Berufe)';

5. Annex 11 shall be deleted.

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

On 27 August 2003, the Commission submitted to the Council a 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 (miscellaneous amendments).

The Economic and Social Committee delivered its opinion on 10 December 2003.

Acting in accordance with Article 251 of the Treaty, the European Parliament delivered its first reading opinion on 11 March 2004.

The Commission subsequently presented on 30 April 2004 its amended proposal, wholly accepting the four amendments adopted by the European Parliament.

The Council accepted three of these amendments in full and one as regards the substance.

In accordance with Article 251(2) of the EC Treaty, the Council adopted its common position on 15 November 2004.

II. OBJECTIVE

The purpose of the Regulation is to update Regulations (EEC) No 1408/71 [1] and No 574/72 [2] to take account of changes in national legislation and to clarify the legal situation with regard to certain articles of these regulations. It takes account of recent developments in the case-law of the European Court of Justice, in particular those rulings concerning special non-contributory cash benefits, which are non-exportable if they meet specific criteria and are entered in Annex IIa of Regulation (EEC) No 1408/71. The Regulation also takes account of 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.

III. ANALYSIS OF THE COMMON POSITION

1. European Parliament amendments

The European Parliament adopted four amendments to the Commission proposal.

All of these amendments were incorporated into the amended Commission proposal as they stood.

2. Council's position on the European Parliament's amendments

The Council could accept in full the following three amendments:

— Amendment 1 which seeks to insert into the list of special non-contributory cash benefits, as contained in Annex IIa to Regulation (EEC) No 1408/71, a benefit provided by Spanish legislation: 'mobility allowance to cover transport costs'. The Council could accept this amendment since this benefit fully meets the revised criteria laid down in the common position (i.e., it must be 'intended to provide solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned');

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[1] 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.

[2] Council Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71.

— Amendment 2 which seeks to insert into the list of special non-contributory cash benefits, as contained in Annex IIa of Regulation (EEC) No 1408/71, a benefit provided for by Irish legislation: 'mobility allowance'. The Council could again accept this amendment as it also fully meets the revised criteria laid down in the common position;

— Amendment 3 which seeks to insert in the list of special non-contributory benefits, as contained in Annex IIa to Regulation (EEC) No 1408/71, a benefit provided by UK legislation: 'income support'. The Council also accepted this amendment as it fully meets the revised criteria in the common position.

The Council also accepted, subject to redrafting, the principle underlying an oral amendment of the Parliament which seeks to invite Member States to take measures to ensure that the prejudicial effects of certain amendments made to the list of benefits in Annex IIa (in particular when a benefit becomes non-exportable due to its inclusion in the Annex) are mitigated, with regard to persons who previously received these benefits, through transitional arrangements or bilateral solutions (see recital 6).

IV. ARTICLE 1(5) OF THE COMMISSION PROPOSAL

Article 1(5) of the Commission proposal aims to amend Article 33(1) of Regulation (EEC) No 1408/71 to specify that the deduction of sickness and maternity contributions may be carried out on all pensions paid to pensioners if national legislation so provides.

The Council has decided not to incorporate this part of the Commission proposal into its common position while awaiting the entry into force of Regulation (EC) No 883/2004 on the coordination of social security systems.

The Council accepts the need for balance between contributions deducted and the cost of benefits paid, as envisaged by Article 33(1) of Regulation (EEC) No 1408/71. The possibility of deducting contributions on the basis of all the pensions paid to a pensioner derives from this principle. However, in the context of the process of reform and simplification of Regulation (EEC) No 1408/71, and recalling the agreement that the modalities of application of Article 5 (assimilation of facts) in relation to Article 30 (contribution by pensioners) of the simplified Regulation (EC) No 883/2004 would be provided for in the implementing Regulation, the Council considers that it would be premature to take such a measure at the present time. However, the Council also considers that it must be clear that it is not possible to levy on the basis of national legislation more contributions than would be the case if the person concerned was receiving all the pensions under the legislation of that Member State.

V. SPECIFIC ISSUES RELATING TO ANNEX IIA OF COUNCIL REGULATION (EEC) NO 1408/71

The Commission proposal sought, *inter alia*, to amend Article 4(2a) and Annex IIa of Council Regulation (EEC) No 1408/71 which relate to special non-contributory benefits, in the light of recent jurisprudence of the European Court of Justice with regard to the classification of 'special non-contributory benefits', namely the Judgments of 5 March 1998 in case C-160/96, Molenaar v *Allgemeine Ortskrankenkasse Baden-Wurttemberg* (ECR 1998 I-843), 8 March 2001 in case C-215/99, Friedrich Jauch v *Pensionsversicherungsanstalt der Arbeiter* (ECR 2001 I 1901) and the judgment of 31 May 2001 in case C-43/99, Ghislain Leclere, Alina Deaconescu and *Caisse nationale des prestations familiales* (ECR 2001 I-4265).

Special non-contributory benefits can be defined as being half-way between 'conventional' social security benefits and social assistance. Annex IIa contains the list of such benefits which are granted to persons exclusively in the territory of the Member State in which they reside, under the terms of Article 10a of Regulation (EEC) No 1408/71 (and are therefore not 'exportable' when such persons move to another Member State).

In order to facilitate the free movement of persons within the European Union, the Commission proposed that this list should be streamlined and that a number of benefits currently listed in Annex IIa of Council Regulation (EEC) No 1408/71 should be removed from the list in accordance with the Court of Justice's jurisprudence.

The Council unanimously agreed with the revised criteria for classification of the entries in this Annex as set out in the amended version of Article 4(2a) of the Regulation, detailed in the common position. These criteria are identical to those included in the text of Article 70 of Regulation (EC) No 883/2004 on the coordination of social security systems for the purposes of the corresponding Annex in that Regulation (Annex X). To assist in the objective application of these criteria, it was proposed that the application of Article 4(2a) should aim to ensure that:

— benefits of the same type which share identical or equivalent features should be categorised in the same way to ensure consistent and coherent treatment;

— if a benefit is not regarded as a 'special' non-contributory benefit, the appropriate system of coordination under Article 4(1), if any, should be specified.

The Council also sought to agree criteria for the inclusion of entries in Annex IIa and to identify some key characteristics of disability schemes which would assist in the classification of such schemes as providing 'solely specific protection for the disabled'. On the basis of the above approach, unanimous agreement could be reached on classifying the vast majority of Annex IIa entries, resulting in a substantial streamlining of the Annex.

However, unanimous agreement could not be reached on the Commission's proposal to remove certain specific entries from Annex IIa. The Member States concerned did not accept that the criteria proposed should be used to define benefits which were appropriate for listing in Annex IIa. These Member States wanted to maintain their entries in the Annex as they regarded them as fulfilling the requirements of Article 4(2a) and they considered that current European Court of Justice jurisprudence did not justify their removal from the Annex.

In order to allow for the adoption of the Regulation in view of the significant progress made overall, the Council agreed to maintain these entries in Annex IIa pending future European Court of Justice jurisprudence which could clarify the relevant criteria and subsequently entail revision of the Annex.

In this context, the Commission made a statement to the Council's minutes stressing that the list of entries might need to be revised on the basis of new jurisprudence from the European Court of Justice, in particular in relation to the benefits concerned. The Commission stated that it reserved the 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.

The Council also agreed that the issue of coordination of benefits for the disabled including, in particular, those which are removed from Annex IIa of Regulation (EEC) No 1408/71, either in application of European Court of Justice jurisprudence or under this Regulation, should be further considered, taking into account the objectives of Article 42 of the Treaty, with a view to specific proposals being submitted before the end of 2005.

VI. CONCLUSION

The Council considers that its common position both fulfils the key aims of the Commission's original proposal and, by incorporating the amendments mentioned in Section III of this statement, to a large extent takes into account the opinion of the European Parliament in first reading.