



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 10.01.1996
COM(95) 735 final

96/0001 (CNS)

Proposal for a

COUNCIL REGULATION (EC)

amending, for the benefit of beneficiaries of pre-retirement benefits,
Regulation (EEC) No 1408/71 on the application of social security schemes
to employed persons, to self-employed persons and to the
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

of the proposal for a Council Regulation (EC) amending, for the benefit of beneficiaries of pre-retirement benefits, 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

I. GENERAL COMMENTS

On 18 June 1980, the Commission submitted a proposal for the revision of the provisions governing unemployment benefits as laid down in Regulation (EEC) No 1408/71 and in Regulation (EEC) No 574/72 and for the insertion into these Regulations of provisions concerning pre-retirement schemes (OJ C 169, 9 .7.1980, p. 22).

The elements gleaned from an analysis of the pre-retirement schemes, which were instrumental in prompting the Commission to submit the relevant proposals, are just as pertinent now as they were then.

In this context, it is called to mind that in view of the high rise in unemployment, various Member States have adopted schemes aimed at the withdrawal of elderly employed persons and self-employed persons from the labour market. To this end, statutory provisions and the terms of collective agreements provide for the award in advance of old-age pensions, or guarantees a specific income level up to the normal retirement age for elderly employed persons who have become unemployed or who have resigned their employment. It has been decided to call this last category of benefits "pre-retirement benefits".

To be more precise, the point at issue is the benefit awarded from a specified age to employed persons who have either been made redundant or have resigned voluntarily, for the purpose of inducing elderly employed persons to make way for younger employed persons or to refrain from requesting the employment services to help them in finding work. These benefits guarantee a specific income level until they reach the age at which they qualify for an old-age pension.

These schemes, which differ considerably from one Member State to another, are aimed not only at easing the situation on the labour market, but also at providing special cover for employed persons approaching retirement age. The amount of the benefits awarded to them is, as a rule, higher than the unemployment benefits.

The pre-retirement schemes, however, are not explicitly covered by the scope of Regulation (EEC) No 1408/71.

The lack of coordination between the various schemes in the Member States covering pre-retirement benefits can give rise to problems, particularly where the employed person concerned resides outside the competent Member State (eg. frontier workers) or moves to another Member State, after which he becomes entitled to pre-retirement benefits. In the latter case, the award of benefits depends at present exclusively on the concept of national legislation or on the terms of collective agreements, which permit the export of benefits in some cases but not in others.

This only adds to the problems concerning family benefits and sickness benefits.

The problems arising from the lack of coordination between the Member States in the matter of pre-retirement benefits have given rise for many years to a steady flow of complaints, petitions and applications to the Community's institutions.

Community action would therefore seem to be called for not only in respect of the statutory schemes but also for collective agreements. In fact, it concerns mainly collective agreements, the conception or administration of which is left to the discretion of the two sides of industry.

However, the proposal submitted in 1980 did not receive the necessary unanimous vote of acceptance from the Council, the main reason being that the two subjects (unemployment and pre-retirement) were linked together in one single proposal, which made the adoption procedure more difficult. Furthermore, bearing in mind that the aforementioned Regulations have been amended several times since 1980, that proposal is no longer up to date from a technical point of view.

The Commission is therefore of the opinion that it would be expedient to withdraw the abovementioned proposal and to submit a new proposal on pre-retirement benefits and a separate proposal on unemployment benefits, both to be submitted at the same time. The submission of these two proposals was announced in the Medium-Term Social Action Programme (1995-97).

With this in mind, the Commission consulted the Administrative Commission on Social Security for Migrant Workers (made up of a government representative of each of the Member States; see Article 80 of Regulation (EEC) No 1408/71). The results of the discussion within the Administrative Commission are reflected in the text of this proposal. The Commission also sought the opinion of the organizations representing the two sides of industry. From the replies received from these organizations it appeared that the majority, and in particular the workers' organizations, are in favour of the ideas set out in this proposal.

When formulating the proposal, the Commission was equally mindful of the report from the European Parliament of 13 June 1995 (report from Mrs Oomen-Ruijten; OJ C 166 of 3 July 1995, p. 24) and of the report of 29 November 1995 (report from Mr Imaz San Miguel; not yet published).

For the most part, this proposal takes on board the amendments already proposed in 1980, which are compatible with the present provisions of the abovementioned Regulations. However, bearing in mind the case law of the Court of Justice, in particular the Judgment handed down on 5 July 1983 in Case 171/82 (Valentini), according to which pre-retirement benefits are to be treated as distinct from other branches of benefits, it is proposed that a separate chapter be created for these benefits in Title III of Regulation (EEC) No 1408/71.

III. EXAMINATION OF THE ARTICLES

Article One

Amendment to Regulation (EEC) No 1408/71

- 1 and 2. The term "pre-retirement benefits" means cash benefits for elderly employed persons who have become unemployed, either compulsorily or voluntarily, ensuring those concerned of an income substitution benefit until the age at which they qualify for an old-age pension or an unreduced early retirement pension.

These cash benefits can be awarded in the context of a statutory scheme or by virtue of an agreement covering all employed persons or certain fixed professional categories.

The essential elements of such schemes, financed or not by public funds, are as follows:

- the condition governing the age of an employed person;
- the cessation, voluntary or not, of the pursuit of a professional or trade activity as set out in the legislations or agreements concluded between the two sides of industry instituting such schemes;
- the lack of any obligation to remain available to the employment services of the Member State in which these benefits are awarded.

The latter element is decisive for the justification of the export of benefits in the context of Article 51 of the EC Treaty.

Furthermore, the Commission is of the opinion that, for the sole purpose of the export of benefits, there are no legal obstacles to extending the scope of "matters covered" of the Regulation to schemes relating to collective agreements, which have hitherto been excluded from Community rules. Failing to do so would deprive the coordination rule, which forms the subject matter of this proposal, of all meaning.

3. This paragraph is aimed at extending the application of Article 12(3) of Regulation (EEC) No 1408/71 to beneficiaries of a pre-retirement benefit. For, it would be expedient to permit the application of national rules against overlapping aimed at reducing the amount of pre-retirement benefits in the case where the beneficiary pursues a professional or trade activity even in the territory of another Member State.
4. This paragraph is aimed at granting to beneficiaries and to members of their families, covered by new Article 71b, the right to sickness and insurance benefits.

5. The precise detail inserted into Article 44(3) is aimed at preventing the application of the provisions of the Chapter on "Pensions" to pre-retirement benefits, which form the subject matter of this proposal, for which provisions are laid down in a separate chapter.
6. The insertion of a new Chapter 6a in Title III of Regulation (EEC) No 1408/71 is justified by the fact that the nature of the pre-retirement benefits is so specific that it cannot be inserted in any of the other chapters.

The new Article 71a is aimed at ensuring that as far as the aggregation of periods of insurance or employment and the calculation of benefits are concerned, the same rules will be applied as those laid down for unemployment benefits (Articles 67 and 68). These rules should prevent the persons concerned from any unjustified forfeiture of entitlement.

The new Article 71b is aimed at the award of the pre-retirement benefits in question to beneficiaries of these benefits in a Member State who transfer their place of residence to another Member State and also to persons who at the time of their last employment already resided in a Member State other than the competent State.

Article 71b(1) reflects the principle of export of pre-retirement benefits for an employed person who is entitled to these benefits in the competent Member State and who transfers his place of residence to another State.

The principle of export of benefits is considered to be preferable to that of payment of benefits by the institution of the country of residence:

- (a) because it provides a direct link between the last employment and the right to benefits;
- (b) by virtue of the fact that in the Member State where the beneficiary resides there may not necessarily be a pre-retirement scheme.

Paragraph 2 is aimed at ensuring the export of pre-retirement benefits for employed persons who, during the course of their last employment, resided in a Member State other than the competent State.

However, it is stipulated that the institution of the place of residence, which normally bears the costs of unemployment benefits for that category of employed person, in application of Article 71(1)(a)(ii) and (b)(ii), first sentence of Regulation (EEC) No 1408/71, shall reimburse the pre-retirement benefits to the competent institution up to the amount that it would normally be obliged to pay pursuant to the aforementioned provisions.

Paragraph 3 enshrines the principle of checks to be carried out by the institution of the Member State of residence for the purpose of confirming whether the person concerned continues to satisfy the conditions required in order to retain the right to benefits provided for by the legislation of the competent Member State.

7. This paragraph is aimed at ensuring the award of benefits and family allowances for employed persons who are entitled to these benefits under the new Article 71d.

Article 2

Amendment to Regulation (EEC) No 574/72

1. It is considered expedient to insert a new Article 26a for the purpose of regulating the situation provided for by new Article 25a of the Regulation.
2. This paragraph lays down the procedure for having checks carried out by the institution of the place of residence of the person concerned pursuant to Article 71b(3) of Regulation (EEC) No 1408/71.

III. JUSTIFICATION OF THE PROPOSAL CONCERNING SUBSIDIARITY

The proposal is in line with the principle of subsidiarity in the two criteria, namely necessity and proportionality as written into Article 3B of the Treaty of Maastricht.

For, on the one hand, the need for Community action is justified with regard to the freedom of movement of employed persons. This fundamental freedom as laid down in the Treaty constitutes one of the four pillars of the internal market as laid down in Article 48 of the EC Treaty.

Without coordination of the national social security schemes, it would be impossible to realize to the full this freedom of movement for employed persons. If, however, despite the absence of coordination, this freedom is nevertheless exercised, it could lead to certain losses in the field of social security for the person concerned, particularly in the field of retirement benefits. Consequently, Article 51 obliges the Council to adopt such measures in the field of social security as are necessary to provide freedom of movement for employed persons. It should be noted that Regulation (EEC) No 1408/71 in its present version also covers persons who have been insured as employed persons or self-employed persons by the social security scheme of a Member State.

On the other hand, a legal measure, i.e. the imposition of a legal constraint, is manifestly proportional to the aim of an effective freedom of movement, which calls for an instrument providing direct award of the relevant rights to the persons concerned. It is for that very reason that the Regulation is considered to be the most appropriate instrument.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 51 and 235 thereof,

Having regard to the proposal of the Commission¹, submitted after consulting the Administrative Commission on Social Security for Migrant Workers,

Having regard to the Opinion of the European Parliament²,

Having regard to the Opinion of the Economic and Social Committee³,

Whereas certain shortcomings in the Community rules concerned have emerged during implementation of Regulation (EEC) No 1408/71; whereas it is expedient to make certain improvements to the rights of migrant workers;

Whereas, in particular, account should be taken of various measures taken in the Member States to induce elderly workers to make way for younger workers or to refrain from requesting the employment services to help them in finding work, by providing them with a specific guaranteed income level until they reach retirement age;

Whereas the granting of these benefits, in accordance with their objective and unlike normal unemployment benefits, is not subject to the condition that the beneficiary remain available to the employment services; whereas the condition of residence that may be linked to the payments of these benefits should therefore be abolished for the beneficiaries; whereas for this purpose the export of benefits should be guaranteed for workers already receiving such benefits in the territory of the competent State who transfer their place of residence to the territory of another Member State; whereas provision should also be made for the payment of these benefits to beneficiaries who during their last employment resided in the territory of a Member State other than the competent Member State;

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Whereas there are grounds for adapting the provisions governing sickness benefits and family benefits to the new provisions applicable to beneficiaries of pre-retirement benefits;

Whereas there are grounds for completing Regulation (EEC) No 574/72 for the purpose of laying down the necessary procedure for any checks that may have to be carried out;

Whereas in order to attain the objective of the free movement of workers in the domain of social security, it is necessary and appropriate for an amendment of the rules on the coordination of national social security schemes to be made through a Community legal instrument that is binding and directly applicable in each Member State;

Whereas this is in conformity with the provisions of the third paragraph of Article 3B of the Treaty,

HAS ADOPTED THIS REGULATION

Article 1

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

1. In Article 1

- (a) the third subparagraph of (j) shall be replaced by the following:

"The provisions of the preceding subparagraph shall not have the effect of exempting from the scope of this Regulation the contractual provisions concerning pre-retirement benefits."

- (b) The following paragraph shall be added after (v):

"(w) "pre-retirement benefits" mean all cash benefits, other than an early retirement benefit provided to wholly unemployed workers from a specified age until the age at which they qualify for an old-age pension or an unreduced early retirement pension, the receipt of which is not conditional upon the person concerned being available to the employment services of the competent State."

2. In Article 4

the following point (i) shall be added:

"(i) the pre-retirement benefits".

3. In Article 12

paragraph 3 shall be replaced by the following:

"3. The provisions of the legislation of a Member State for reduction, suspension or withdrawal of benefit in the case of a person in receipt of invalidity benefits or anticipatory old-age benefits or pre-retirement benefits pursuing a professional or trade activity may be invoked against such person even though he is pursuing the activity in the territory of another Member State."

4. The following new Article 25a shall be added after Article 25:

"Section 3a

Beneficiaries of pre-retirement pensions and members of their families

Article 25a

1. The provisions of Article 19 shall apply mutatis mutandis to beneficiaries of pre-retirement pensions and to members of their families.

2. The provisions of Article 20 shall apply mutatis mutandis to beneficiaries of pre-retirement benefits and to members of their families in so far as these beneficiaries pursued their last professional trade or activity as frontier workers in the competent Member State.

5. In Article 44

paragraph 3 shall be replaced by the following:

"3. This chapter shall not apply to:

- (a) pre-retirement benefits, or
- (b) to increases in pension or to supplements for pensions in respect of children or to orphans' pensions granted in accordance with the provisions of Chapter 8."

6. The following new Chapter 6a shall be inserted after Chapter 6 of Title III:

"CHAPTER 6a

PRE-RETIREMENT

Article 71a

Aggregation of periods of insurance or employment - Calculation of benefits

Articles 67 and 68 shall apply mutatis mutandis to pre-retirement benefits

Article 71b

Rules relating to the granting of pre-retirement benefits to beneficiaries transferring their place of residence to a Member State other than the State in which they were last employed and to beneficiaries who, during their last employment, resided in a Member State other than the competent State.

1. Beneficiaries of a pre-retirement pension under the legislation of a Member State who reside in that State shall retain the right to such benefit if they transfer their place of residence to the territory of another Member State.
2.
 - (a) An employed person who, during his last employment, resided in the territory of a Member State other than the competent State, shall qualify for the pre-retirement benefits provided for by the legislation of the latter State as though he resided there.
 - (b) The institution of the place of residence of such worker shall reimburse that benefit to the competent institution up to the amount of the unemployment benefits that it would have had to pay to the person concerned in accordance with Article 71(1)(a)(ii) or (b)(ii) if he had made himself available for work to the employment services of the place of residence.
 - (c) The reimbursements referred to in (b) shall be determined and made by common assent between the Member States concerned or the competent authorities of these States. These States or their competent authorities may waive all reimbursements between the institutions coming under their jurisdiction.
 - (d) The obligation to make reimbursements shall lapse if the worker referred to in (a) transfers his place of residence to another Member State.
3. The institution of the place of residence shall carry out or have carried out any checks necessary to ascertain whether the beneficiary of the pre-retirement benefit still satisfies the conditions governing the retention of the right to benefits provided for by the legislation of the competent State. The procedure for such checks shall be laid down in the implementing Regulation."

7. The following new Article 74a shall be added after Article 74:

"Article 74a

Beneficiaries of pre-retirement benefits, the members of whose families reside in a Member State other than the competent State.

A beneficiary of a pre-retirement benefit under the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State, subject to the provisions of Annex VI."

Article 2

Regulation (EEC) No 574/72 is hereby amended as follows:

1. The following new Article 26a shall be added after Article 26:

"The application of Article 25a

Article 26a

The provisions of Articles 17-19 of the implementing Regulation shall apply mutatis mutandis to the employed persons referred to in Article 25a of the Regulation."

2. The following new Article 84a shall be added after Article 84:

"The application of Article 71b

Article 84a

The granting of pre-retirement benefits to beneficiaries who do not reside in the competent Member State.

1. In order to retain the right to pre-retirement benefits, a beneficiary within the meaning of Article 71b of the Regulation shall be obliged to present to the institution of his place of residence a certificate on which the competent institution shall indicate any facts by virtue of which the right to benefits could be withdrawn or amended.
2. The institution of the place of residence of the person concerned shall carry out or have carried out any necessary checks on these facts. It shall inform the competent institution of the occurrence of any fact referred to in paragraph 1 as soon as it comes to its notice."

Article 3

This Regulation shall enter into force on the first day of the month following its publication in the Official Journal of the European Communities.

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

Done at

For the Council
The President

ISSN 0254-1475

COM(95) 735 final

DOCUMENTS

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Catalogue number : CB-CO-95-771-EN-C

ISBN 92-77-98791-X

Office for Official Publications of the European Communities

L-2985 Luxembourg

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