



COMMISSION OF THE EUROPEAN COMMUNITIES

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2002/0039 (CNS)

Proposal for a

**COUNCIL REGULATION**

**extending the provisions of Regulation (EEC) No 1408/71 to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality**

(presented by the Commission)

## EXPLANATORY MEMORANDUM

### 1. GENERAL COMMENTS

#### 1.1. The background

The purpose of this proposal is to extend Regulation (EEC) No 1408/71 to nationals of third countries. It replaces the Commission's proposal of 12 November 1997<sup>1</sup> which is withdrawn. Regulation (EEC) No 1408/71<sup>2</sup> provides for Community coordination of the Member States' social security schemes. This Regulation currently applies to Community nationals and certain categories of nationals of third countries.

The Commission proposal of 12 November 1997 was designed to address the requirement of equal treatment of Community citizens and third country nationals legally resident in the Community. In addition, its objective was to simplify the rules by reducing the number of national and international instruments governing the coordination of social security schemes for this category of persons, which should considerably reduce the administrative costs. These grounds are still valid.

The objective of equal treatment has been confirmed by the Community institutions since the Commission introduced the proposal.

The European Council, at its special meeting in Tampere on 15 and 16 October 1999, acknowledged the need to ensure fair treatment of third-country nationals who reside legally on the territory of its Member States. It declared that a more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. This policy should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia. The European Council also acknowledged that the legal status of third-country nationals should be approximated to that of Member States' nationals<sup>3</sup>.

Subsequently, the European Social Agenda annexed to the conclusions of the Nice European Council of December 2000 included a commitment to a more vigorous integration policy for third-country nationals who reside legally on the territory of the Union.

In its Resolution of 27 October 1999, the European Parliament called for prompt action on promises of fair treatment for third-country nationals legally resident in the Member States and on the definition of their legal status, including uniform rights as close as possible to those enjoyed by the citizens of the European Union<sup>4</sup>.

Following the entry into force of the Amsterdam Treaty and in line with the conclusions of the Tampere European Council, the Commission presented a proposal for a Council Directive

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<sup>1</sup> OJ C 6, 10.01.1998, p. 15.

<sup>2</sup> Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 5.7.1971, p. 2. Regulation updated by Regulation (EC) No 118/97 (OJ L 28, 30.1.1997, p. 1) and last amended by Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001 (OJ L 187, 10.7.2001, p. 1).

<sup>3</sup> Conclusions of the Presidency, points 18 and 21.

<sup>4</sup> OJ C 154, 5 June 2000, p. 63.

concerning the status of third-country nationals who are long-term residents<sup>5</sup>, whose second part concerns the conditions under which long-term residents may take up residence in another Member State to work, study or for other purposes. This proposal implies extension of the scope of Regulation No 1408/71 in the framework of the Commission's commitment to ensure the genuine integration of third-country nationals who have settled long-term on the territory of the Member States and to offer equal treatment to long-term residents in the field of social protection.

The extension of Regulation (EEC) No 1408/71 is also designed to encourage worker mobility. In its Communication of 28 June 2000<sup>6</sup> on the Social Policy Agenda, the Commission recalled the need to extend Regulation (EEC) No 1408/71 to third-country nationals, in particular to encourage worker mobility. To this end, and in particular with a view to promoting new European labour markets which are open to all, with access for all, the Communication from the Commission of 28 February 2001<sup>7</sup> also called for support for mobility for third-country nationals.

Finally, the Charter of Fundamental Rights of the European Union, solemnly proclaimed in December 2000 at Nice by the European Parliament, the Council of the European Union and the European Commission, enshrines a certain number of rights which are recognised both in respect of nationals of the Member States and nationals of third countries resident in the Member States.

## **1.2. Choice of the legal basis**

The Council has discussed the choice of the legal basis to be used for extending Regulation (EEC) No 1408/71 to third-country nationals. The Commission's initial proposal of 12 November 1997 took the legal basis of Regulation (EEC) No 1408/71 itself, i.e. Articles 51 and 235, now 42 and 308, of the EC Treaty.

Following the entry into force of the Amsterdam Treaty and the new provisions of Title IV of the Treaty and in the light of the recent case law of the Court of Justice (cf. in particular the judgment of 11 October 2001 in *Khalil* (C-95/99)), it was necessary to reexamine the legal basis initially proposed. It emerged that, in the present case, Article 63(4) on the conditions of entry and residence of third-country nationals in the Community would constitute an appropriate legal basis for the application and co-ordination of the social security schemes of the Member States to all third-country nationals who satisfy the substantive conditions of Regulation No 1408/71 and who are currently excluded on grounds of their nationality.

In its conclusions of 3 December 2001 the Council agreed on the possibility of using Article 63(4) of the EC Treaty as a legal basis for such an extension. It also considered that the coordination applicable to third-country nationals should grant them a set of uniform rights as close as possible to those enjoyed by the citizens of the European Union.

The Laeken European Council of 14 and 15 December 2001 took note of the political agreement concerning the extension of the coordination of social security schemes to third

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<sup>5</sup> OJ C 240 E of 28 August 2001, p.79.

<sup>6</sup> COM (2000)379, 28 June 2000.

<sup>7</sup> COM(2001)116, 28 February 2001

country nationals and invited the Council to adopt the necessary rules as soon as possible (see point 29 of the Conclusions of the Presidency) <sup>8</sup>.

In this context, the Commission considers it appropriate to make a new proposal with Article 63(4) of the EC Treaty as the legal basis. This amended proposal will enable the Council to continue its work and the European Parliament can be consulted afresh.

Article 63(4) was introduced by the Amsterdam Treaty. It stipulates that the Council must adopt "measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States." The coordination of social security schemes is certainly a factor if nationals of third countries are to reside in another Member State or to move within the Community.

The proposal for a regulation must be adopted under the procedure referred to in Article 67 of the Treaty: the Council acts unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament. Title IV of the EC Treaty does not apply to the United Kingdom and Ireland, unless these countries decide otherwise in accordance with the procedures laid down in the Protocol on the Position of the United Kingdom and Ireland annexed to the Treaties. Neither does Title IV apply to Denmark, pursuant to the Protocol on the position of Denmark, annexed to the Treaties.

### **1.3. Subsidiarity and proportionality**

The European Community's powers must be exercised in compliance with Article 5 of the EC Treaty, i.e. only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. This proposal for a regulation meets these criteria.

A binding rule in the form of a regulation is proportionate to the objective pursued. It is necessary to guarantee equal treatment in the field of coordination of the Member States' social security schemes between Community nationals and the nationals of third countries and to simplify and clarify the legal rules applicable in this area to members of this latter category who are not already covered by Regulation (EEC) No 1408/71. A regulation is the instrument which was considered most appropriate for achieving this objective.

## **2. COMMENTS ON THE INDIVIDUAL ARTICLES**

### **Article 1**

This article aims to apply the provisions of Regulation (EEC) No 1408/71 to nationals of third countries who, pursuant to Articles 2 and 22a, are not already covered by this Regulation on the ground of their nationality. Certain categories of third-country nationals are already included in its scope – namely stateless persons, refugees and members of families and survivors of Community nationals as defined by this Regulation.

The nationals of third countries covered by this text must be legally resident on the territory of a Member State and hence have a temporary or permanent right of residence. This requirement meets the objective which the Commission has consistently upheld, notably in its

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<sup>8</sup> Point 29 of the Presidency conclusions.

recent Communication on a Common Policy on Illegal Immigration,<sup>9</sup> to prevent illegal immigration. To benefit from the Regulation in the second Member State, the third-country national does not however have to satisfy the residency conditions, but may simply move to the second country, in compliance with that country's national legislation on entry and residence.

The reference to the provisions of Regulation (EEC) No 1408/71 is dynamic so that they will apply to the persons referred to in the version in force at any given time, hence including possible modifications at a later date.

## **Article 2**

This article contains provisional rules designed to protect the persons covered by this Regulation, so as that they do not lose their rights as a result of its entry into force and to permit in particular the award, resumption or revision of the benefits.

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<sup>9</sup> COM(2001)672 , 15.11.2001.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and in particular Article 63(4) thereof,

Having regard to the proposal from the Commission<sup>10</sup>,

Having regard to the opinion of the European Parliament<sup>11</sup>,

Whereas:

- (1) As its special meeting in Tampere on 15 and 16 October 1999, the European Council proclaimed that the European Union should ensure fair treatment of third-country nationals who reside legally on the territory of its Member States, grant them rights and obligations comparable to those of EU citizens, enhance non-discrimination in economic, social and cultural life and approximate their legal status to that of Member States' nationals.
- (2) In its resolution of 27 October 1999, the European Parliament called for prompt action on promises of fair treatment for third-country nationals legally resident in the Member States and on the definition of their legal status, including uniform rights as close as possible to those enjoyed by the citizens of the European Union<sup>12</sup>.
- (3) The Economic and Social Committee has also appealed for equal treatment of Community nationals and third-country nationals in the social field, notably in its opinion of 26 September 1991 on the status of migrant workers from third countries<sup>13</sup>.
- (4) Article 6(2) of the Treaty on European Union provides that the Union shall respect fundamental rights, as guaranteed by the European Convention on the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
- (5) This Regulation respects the fundamental rights and observes the principles which are notably enshrined in the Charter of Fundamental Rights of the European Union.

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<sup>10</sup> .....

<sup>11</sup> .....

<sup>12</sup> OJ C 154, 5.06.2000, p. 63.

<sup>13</sup> OJ C 339, 31.12. 991, p. 82.

- (6) The promotion of a high level of social protection and the raising of the standard of living and quality of life in the Member States are objectives of the Community.
- (7) As regards the conditions of social protection of third-country nationals, and in particular the social security scheme applicable to them, the Employment and Social Policy Council argued in its conclusions of 3 December 2001 that the coordination applicable to third-country nationals should grant them a set of uniform rights as near as possible to those enjoyed by EU citizens.
- (8) Currently, Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, which is the basis for the coordination of the social security schemes of the different Member States, applies only to certain third country nationals<sup>14</sup>. The number and diversity of legal instruments governing problems encountered by nationals of third countries in connection with the coordination of the Member States' social security schemes give rise to legal and administrative complexities. They create major difficulties both for the individuals concerned, their employers, and the competent national social security bodies.
- (9) Hence, it is necessary to provide for the application of the coordination rules of Regulation (EEC) No 1408/71 to third-country nationals legally resident in the Community who are not currently covered by the provisions of this Regulation on grounds of their nationality and who satisfy the other conditions provided for in this Regulation.
- (10) The application of Regulation (EEC) No 1408/71 to these persons must not give them any entitlement to enter, to stay or to reside in a Member State or to have access to its labour market.
- (11) Transitional provisions should be adopted to protect the persons covered by this Regulation and to ensure that they do not lose rights as a result of its entry into force.
- (12) To achieve these objectives it is necessary and appropriate to extend the scope of the rules coordinating the national social security schemes by adopting a Community legal instrument which is binding and directly applicable in every Member State which adopts this Regulation.
- (13) Since the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved at Community level, the Community may take measures in accordance with the principles of subsidiarity enshrined in Article 5 of the Treaty. In compliance with the principle of proportionality as set out in said article, this Regulation does not go beyond what is necessary to achieve these objectives;

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<sup>14</sup> Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 5.7.1971, p. 2. Regulation updated by Regulation (EC) No 118/97 (OJ L 28, 30.1.1997, p. 1) and last amended by Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001 (OJ L 187, 10.7.2001, p. 1).

HAS ADOPTED THIS REGULATION:

*Article 1*

The provisions of Regulation (EEC) No 1408/71 shall apply to nationals of third countries who are not already covered by its provisions solely on the ground of their nationality, provided they are legally resident on the territory of a Member State and move legally within the Community.

*Article 2: transitional rules*

1. This Regulation shall not create any rights in respect of the period before ...\*.
2. Any period of insurance and, where appropriate, any period of employment, self-employment or residence completed under the legislation of a Member State before ..... shall be taken into account for the determination of rights acquired 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 if it relates to a contingency arising prior to ....
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..., provided that the rights for which benefits were previously awarded did not give rise to a lump-sum payment.
5. The rights of persons who prior to..., obtained the award of a pension may be reviewed at their request, account being taken of the provisions of this Regulation.
6. If the request referred to in paragraph 4 or paragraph 5 is lodged within two years from ....., rights deriving from this Regulation shall be acquired from that date and the provisions of the legislation of any Member State on the forfeiture or lapse of rights may not be applied to the persons concerned.
7. If the request referred to in paragraph 4 or paragraph 5 is lodged after expiry of the deadline referred to in paragraph 6, rights not forfeited or lapsed shall be acquired from the date of such request, subject to any more favourable provisions of the legislation of any Member State.

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\* date of entry into force of the Regulation based on this proposal



*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 Brussels,

*For the Council*  
*The President*