



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

**COUNCIL REGULATION**

**extending the provisions of Regulation (EC) No 883/2004 and Regulation (EC) No [...] 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) CONTEXT OF THE PROPOSAL

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

This proposal is intended to replace Regulation (EC) No 859/2003 and extend the provisions of Regulation (EC) No 883/2004 and its implementing Regulation to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality.

In the spirit of updating and simplification, it is in fact useful and necessary to restate the existing provisions for these third-country nationals in a new text which will replace Regulation (EC) No 859/2003.

- **General context**

Regulation (EC) No 859/2003 extended the application of the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries. 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 proposal aims to ensure that the same rules for coordinating social security schemes are applied to nationals of third countries as those which apply to European citizens since the entry into force of Regulation (EC) No 883/2004 and its implementing Regulation.

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

Council Regulation (EC) No 859/03 of 14 May 2003.

This proposal pursues the same objectives as Regulation (EC) No 859/03, which is to extend the scope of the Community provisions in force in the field of coordinating social security schemes to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality.

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

This proposal is consistent with the Union's policy on immigration and the integration of third country nationals.

### 2) CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

It was not necessary to consult interested parties because this proposal is primarily a recasting of Regulation (EC) No 859/03.

- **Collection and use of expertise**

No recourse to external expertise has been necessary.

- **Impact assessment**

Technically, this proposal is virtually a copy of current Regulation (EC) No 859/03.

It is needed in order to build legal bridges between third-country nationals who are legally resident in the Community and are in a cross-border situation and the updated system of coordination of social security systems provided for by Regulation (EC) No 883/04 and its implementing Regulation, which apply to Community nationals. This link, i.e. Regulation (EC) No 859/03, currently exists under Regulation (EEC) No 1408/71 and its implementing Regulation (EEC) No 574/72.

This proposal is therefore a key extension to the coordination of social security systems both in terms of equal treatment and non-discrimination with respect to the nationals of third countries and in terms of administrative simplification, the reduction of administrative costs and legal clarity for all parties involved (national administrations, social security institutions and the persons insured).

Failure to extend the updated coordination to third-country nationals would result in complexity and excessive administrative management costs, which would be hard to control. The outcome would be that social security institutions in the Member States would continue to apply the old coordination rules (Regulations (EC) Nos 1408/71 and 574/72) to third-country nationals only.

Given the progress made in the context of the future implementing regulation for Regulation (EC) No 883/2004, it is important to continue the momentum so that all the legislative texts enabling the implementation of updated and simplified coordination (beginning of 2009) are submitted to the Council and the European Parliament and complete their legislative process on time. It is therefore important that once Regulation (EC) No 883/2004 has entered into force, the Member States and their social security institutions do not find themselves in the situation of having to continue to apply Regulations (EC) Nos 1408/71 and 574/72 to the nationals of third countries only whilst they apply the provisions of Regulation (EC) No 883/2004 to Community nationals.

The fact that the scope of Regulation (EC) No 883/2004 also covers persons who are not professionally active (non-active persons) will not have a significant impact on the burden borne by the Member States for two reasons:

- the small number of persons who will be concerned in comparison with the current situation;
- coordination of the rights of these persons is based on the principle of the competence of the Member State of residence.

There are no data available to estimate how many people are concerned by this extension of the provisions of Regulation (EC) No 883/2004.

### **3) LEGAL ELEMENTS OF THE PROPOSAL**

- **Summary of the proposed action**

This proposal is intended to extend the provisions of Regulation (EC) No 883/2004 on the coordination of social security systems to nationals of third countries who are legally resident in a Member State and who are not already covered by these provisions solely on the ground of their nationality.

This proposal will replace Regulation (EC) No 859/2003.

- **Legal basis**

Article 63(4) of the 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 may not be achieved to a sufficient extent by the action of Member States for the following reasons:

Article 63(4) of the Treaty states that the Council shall 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 systems is unquestionably a key element in this context. It is also necessary to ensure equal treatment and non-discrimination with respect to the nationals of third countries who are legally resident on the territory of the European Union.

This proposal concerns cross-border situations where no Member State can act alone.

The aims of the proposal may be better achieved through Community action for the following reasons.

The extension of the application of the provisions regarding the coordination of social security systems only makes sense at Community level. The objective is to guarantee the coordination of social security systems in the Member States for nationals of third countries who are legally resident in the EU and who are in a cross-border situation. This Community action ensures that all nationals of third countries who are legally resident in the EU are treated in the same way.

By imposing the same coordination rules for nationals of third countries as for European citizens, this proposal simplifies the coordination of social security systems for the Member States.

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

The extension of the application of the Community provisions regarding the coordination of social security systems to nationals of third countries who are legally resident in a Member State only makes sense at Community level. The objective is to guarantee that these provisions are applied to third-country nationals in all the Member

States.

There is no quantitative indicator which makes it possible to estimate exactly how many people are concerned by this proposal.

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.

The proposal guarantees the equal treatment of Community nationals and third-country nationals in the field of the coordination of social security systems in the Member States. It aims to simplify and clarify the legal rules applicable in this field by extending them to the aforementioned category of persons in the Community.

A Regulation is deemed to be the most appropriate instrument for achieving this objective.

This proposal simply seeks to align Community provisions in the field of the coordination of social security systems applicable to nationals of third countries who are legally resident in the EU with those applicable to Community nationals. The financial and administrative burden involved will be proportionate to the above-mentioned objectives. Conversely, failure to carry out this alignment will lead to a complex administrative situation resulting in higher administrative costs for the social security institutions in the Member States.

- **Choice of instruments**

Proposed instrument(s): Regulation.

Other means would not be adequate for the following reason(s).

This proposal aims to replace Regulation (EC) No 859/2003.

The choice of a coordinating regulation to safeguard the social security rights of nationals of third countries who are legally resident in the EU and are in a cross-border situation is proportionate to the objective pursued, as defined by the legislator in Article 63(4) of the Treaty.

#### **4) BUDGETARY IMPLICATION**

The proposal has no implication for the Community budget.

## 5) ADDITIONAL INFORMATION

- **Simplification**

The proposal introduces simplified administrative procedures applicable to the public authorities (national or European).

The proposal introduces simplified administrative procedures applicable to the public authorities and private entities and individuals.

The proposal makes it possible for the same provisions as regards the coordination of social security to be applied to nationals of third countries as are applied to Community nationals.

- **Repeal of existing legislation**

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

- **Review/revision/sunset clause**

The proposal includes a sunset clause on all or part of the legislative act if predefined conditions are met.

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

### Article 1

This article aims to apply the provisions of Regulation (EEC) No 883/04 and its implementing Regulation to nationals of third countries who, pursuant to Article 2, 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. To benefit from the Regulation in a 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 883/04 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.

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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>1</sup>,

Having regard to the opinion of the European Parliament<sup>2</sup>,

Having regard to the opinion of the European Economic and Social Committee,<sup>3</sup>

Having regard to the opinion of the Committee of the Regions,<sup>4</sup>

Whereas:

- (1) Since the special meeting in Tampere in 1999 the European Parliament<sup>5</sup>, the Council and the European Economic and Social Committee<sup>6</sup> have called for the better integration of nationals of third countries who are legally resident in the territory of Member State by giving them a set of uniform rights as close as possible to those enjoyed by citizens of the European Union.
- (2) The Justice and Home Affairs Council of 1 December 2005 stressed that the European Union must ensure fair treatment of third-country nationals residing legally in the territory of the Member States and that a more vigorous integration policy should be geared to granting them rights and obligations comparable to those of EU citizens.
- (3) Council Regulation (EC) No 859/2003 of 14 May 2003 extended the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 on the coordination of Member States' statutory social security schemes to the nationals of third countries

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<sup>1</sup> OJ C [...] of [...], p. [...].

<sup>2</sup> OJ C [...] of [...], p. [...].

<sup>3</sup> OJ C [...] of [...], p. [...].

<sup>4</sup> OJ C [...] of [...], p. [...].

<sup>5</sup> OJ C 154, 5.6.2000, p. 63.

<sup>6</sup> OJ C 339, 31.11.1991, p. 82.

who were not already covered by these provisions solely on the ground of their nationality<sup>7</sup>.

- (4) Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems<sup>8</sup> replaces Regulation (EEC) No 1408/71. Regulation (EC) No [...] replaces Regulation (EEC) No 574/72. Regulations (EEC) No 1408/71 and (EEC) No 574/72 shall be repealed with effect from the date of application of Regulation (EC) No 883/04 and Regulation (EC) No [...].
- (5) Regulation (EC) No 883/2004 and its implementing Regulation significantly update and simplify the coordination rules for insured persons as well as social security institutions. For the latter, the updated coordination aims to accelerate and facilitate the processing of data on insured persons' rights to benefits and to reduce the corresponding administrative costs.
- (6) In order to avoid a situation where employers and national social security bodies have to manage complex legal and administrative situations concerning only a limited group of persons, it is important to enjoy the full benefits of modernisation and simplification in the field of social security by making use of a single legal coordination instrument in the form of Regulation (EC) No 883/2004 and its implementing Regulation.
- (7) Hence, it is necessary to adopt a legal instrument to replace Regulation (EC) No 859/2003 with the basic aim of substituting the application of Regulation (EEC) No 883/2004 for Regulation (EC) No 1408/71.
- (8) The application of Regulation (EEC) No 883/2004 and Regulation (EC) No [...] to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality 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.
- (9) The provisions of Regulation (EEC) No 883/2004 and Regulation (EC) No [...] are, by virtue of this Regulation, applicable only in so far as the person concerned is already legally resident in the territory of a Member State. Being legally resident is therefore a prerequisite for the application of these provisions.
- (10) The provisions of Regulation (EEC) No 883/2004 and Regulation (EC) No [...] shall not apply in a situation which is confined in all respects within a single Member State. This concerns, inter alia, the situation of a third country national who has links only with a third country and a single Member State.
- (11) The continued right to unemployment benefit, as laid down in Article 64 of Regulation (EC) No 883/04, is subject to the condition of registering as a job-seeker with the employment services of each Member State entered. Those provisions may only therefore apply to a third-country national provided he/she has the right, where appropriate pursuant to his/her residence permit or long-term resident status, to

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<sup>7</sup> OJ L 124, 20.5.2003, p.1.

<sup>8</sup> OJ L 166, 30.4.2004, p.1.

register as a job-seeker with the employment services of the Member State entered and the right to work there legally.

- (12) Given that Regulation (EC) No 859/03 shall be repealed as of the date of entry into force of Regulation (EC) No 883/04 and Regulation (EC) No [...], 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.
- (13) This Regulation is without prejudice to rights and obligations arising from international agreements with third countries to which the Community is a party and which afford advantages in terms of social security.
- (14) Since the objectives of the proposed action cannot be sufficiently achieved by the Member States on account of cross-border situations and can therefore, by reason of the Community scale 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 accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to achieve those objectives.
- (15) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation and is not bound by it nor subject to its application.

HAS ADOPTED THIS REGULATION:

#### *Article 1*

The provisions of Regulation (EEC) No 883/04 and Regulation (EC) No [...] shall apply to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality, as well as to members of their families and to their survivors, provided they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State.

#### *Article 2*

1. This Regulation shall not create any rights in respect of the period before 1 June 2003.
2. Subject to the provisions of paragraph 1, any period of insurance and, where appropriate, any period of employment, self-employment or residence completed under the legislation of a Member State before the date of entry into force of this Regulation 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 the date of entry into force of this Regulation.

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 June 2003, 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 1 June 2003 obtained the award of a pension may be reviewed at their request, account being taken of the provisions of this Regulation.

### *Article 3*

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

It shall be applicable as of the date of entry into force of the Regulation implementing Regulation (EC) No 883/2004.

Regulation (EC) No 859/2003 shall be repealed from that date.

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

Done at Brussels, [...]

*For the Council*

*The President*  
[...]