Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 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

REGULATION (EC) No 647/2005 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 13 April 2005

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

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 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, 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)].

(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 under 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 647/2005 of the European Parliament and of the Council of 13 April 2005 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[(10)], 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.

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 Article 14c 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 a member of 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*.