

Opinion on the proposals for:

- a Council Regulation concerning the adaptation of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, with a view to applying it to self-employed persons and their families
- a Council Regulation concerning the adaptation of the Annexes to Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, with a view to applying it to self-employed persons and their families

The text referred to the Committee has been published in *Official Journal of the European Communities* No C 14 of 18 January 1978, page 9.

A. LEGAL BASIS FOR THE OPINION

On 12 January 1978, the Council referred the abovementioned proposal to the Economic and Social Committee in accordance with Articles 51, 198 and 235 of the Treaty establishing the European Economic Community.

B. OPINION OF THE ECONOMIC AND SOCIAL COMMITTEE

The Economic and Social Committee prepared its opinion on the above matter at its 159th plenary session, held in Brussels on 31 May and 1 June 1978.

The full text of the opinion is as follows:

THE ECONOMIC AND SOCIAL COMMITTEE,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 51, 198 and 235,

Having regard to the request made by the Council of the European Communities on 13 January 1978 for an opinion of the Committee,

Having regard to the decision taken on 18 January 1978 by the chairman of the Committee, under Article 22 of the Rules of Procedure, instructing the Section for Social Questions to prepare a draft opinion and a report on the matter,

Having regard to the opinion given by the Section for Social Questions, dated 18 May 1978,

Having regard to the report drawn up by the rapporteur, Mr Purpura, and submitted by Mr Pronk,

Having regard to the discussions at its 159th plenary session of 31 May and 1 June 1978 (meeting of 31 May 1978),

Whereas social security for employed persons and their families moving within the Community is covered by Council Regulation (EEC) No 1408/71 of 14 June 1971 and by Council Regulation (EEC) No 574/72 of 21 March 1972;

Whereas Regulations (EEC) No 1408/71 and (EEC) No 574/72 have been subsequently amended and

supplemented by further Community measures, namely Council Regulation (EEC) No 1392/74 of 4 June 1974, Council Regulation (EEC) No 1209/76 of 30 April 1976 and Council Regulation (EEC) No 2595/77 of 21 November 1977; whereas the Implementing Council Regulation has also been amended by Council Regulation (EEC) No 2139/74 of 15 October 1974;

Whereas the Economic and Social Committee has requested the Commission and the Council on several occasions in the last decade to adopt social security provisions for self-employed persons, in particular in its recent opinion of 26 October 1977 on the proposal for a Regulation amending Regulations (EEC) No 1408/71 and (EEC) No 574/72 on social security for employed persons and their families moving within the Community, as well as in its opinion of 14 November 1977 on the proposal for a Directive to coordinate the laws of the Member States relating to self-employed commercial agents;

Whereas the time has now come to take the action requested by the Committee and extend Regulations (EEC) No 1408/71 and (EEC) No 574/72, several times amended, to cover self-employed persons and their families moving within the Community in order to pursue a professional or trade activity on the basis of the right of establishment and the freedom to provide services,

HAS ADOPTED THE FOLLOWING OPINION

nem. con., with three abstentions:

1. Introduction

1.1. The Committee welcomes the Commission's initiative, even though it is rather late (15 years after the European Conference on Social Security in December 1962 and some five years after the Social Action Programme was submitted in April 1973). For this reason, the Committee requests the Council to adopt the proposed Regulations as soon as the European Parliament and the Committee have given their opinions, so as to make up for the time taken in preparing these proposals.

1.2. The Committee approves the two proposed Council Regulations to amend the social security provisions for employed persons and their families moving within the Community, extending them to self-employed persons and their families who move within the Community on the basis of the right of establishment and the freedom to provide services. Approval is subject, however, to the following general and specific comments.

2. General comments

2.1.1. In its general appraisal of the proposed Regulations, the Committee wishes to emphasize the close connection between social security for self-employed persons on the one hand and the right of establishment and freedom to provide services on the other; to make these rights fully effective, self-employed persons must be given not only legal protection in the pursuit of their work but also social security and insurance protection as well.

2.1.2. This will supplement and strengthen the protection already given to self-employed persons under Community legislation. The self-employed will then be more inclined to move freely within the nine Member States to establish their activities on a permanent or temporary basis, secure in the knowledge that they will enjoy the same social security benefits as national self-employed persons.

2.2.1. In examining the proposed Regulations, the Committee notes that, following established practice, the Commission wished to have the Committee's opinion, even though this is not mandatory. The Committee wishes to emphasize its continuing keen interest in the matter of social security for both employed and self-employed persons moving within the Community.

2.3.1. The Committee notes that the legal basis for the Commission's two proposals is provided by Articles 2 and 7 of the Treaty (which set out the political, economic and social objectives of the Community and prohibit discrimination on the grounds of nationality); by Article 51 (social security for migrant workers); and Article 235, which gives the Council the power to take appropriate measures 'if action by the Community should prove

necessary to attain one of the objectives of the Community, and this Treaty has not provided the necessary powers'.

2.3.2. The Committee agrees with the Commission and recalls that on more than one occasion it has called for Article 235 of the Treaty to be implemented to provide a legal solution to social problems.

2.4.1. As far as the form of the two proposals is concerned, the Commission has opted for the following solution:

- (a) It has amended Regulation (EEC) No 1408/71 on employed persons making it applicable also to self-employed persons (craftsmen, small businessmen, owner-occupier farmers and those engaged in the professions), instead of drawing up a single new Regulation for both categories of workers, or drafting a separate Regulation for the self-employed while leaving Regulation (EEC) No 1408/71 unchanged. In other words it has changed the title of Regulation (EEC) No 1408/71 and amended the content of individual Articles;
- (b) It has prepared two separate Regulations, one amending the text of Regulation (EEC) No 1408/71 and the other amending some of the Annexes to this Regulation.

2.4.2. The Committee notes first of all that although the provisions introduced by the Commission improve social security protection for all categories of workers, some of the provisions of Regulation (EEC) No 1408/71 unfortunately still do not apply to self-employed workers.

2.4.3. The Committee believes it is not sufficient merely to change the title of Regulation (EEC) No 1408/71 in order to extend its applicability to self-employed persons, when the recitals remain unchanged, making no mention of the need to enlarge the scope of the Regulation. However, taking into account the various arguments for and against, the Committee is prepared to accept the system adopted by the Commission. It nevertheless hopes that the Commission will eventually take a fresh look at the matter with a view to consolidating the legislation and thereby clarifying certain basic issues.

2.4.4. With regard to the 'unity' of the two proposals, the Committee believes that the Annexes are an integral part of the Regulations proper, the amendments proposed to some of the Annexes relating directly to the extension of the existing rules to self-employed persons. It is very doubtful whether Article 95 of Regulation (EEC) No 1408/71 alone is enough to provide the legal basis, since the new rules have changed the applicability of the

legislation. The Committee therefore requests the Council to consider whether it would not be appropriate to combine the two proposals into a single text, as it has done on other occasions. The Council should bear in mind that, from a practical point of view and until such time as the legislation is consolidated, we must avoid having a large number of different legal provisions since this can lead to uncertainty and confusion for Community citizens. The texts must be clear, in order to avoid discrimination against the workers concerned.

2.5.1. The two proposed Regulations relate solely to the amendment and adaptation of Regulation (EEC) No 1408/71 of 14 June 1971, with its subsequent amendments. The Commission also intends to prepare as soon as possible a proposal for a Regulation to 'supplement similarly the implementing procedure laid down in Regulation (EEC) No 574/72 of 21 March 1972, with subsequent amendments'.

2.5.2. The Committee notes that the proposed rules will only come into effect six months after publication in the *Official Journal of the European Communities* of the Regulation adapting Regulation (EEC) No 574/72 to self-employed persons. It therefore urges the Commission to press on faster with its work and submit the proposed implementing Regulation (amending Regulation (EEC) No 574/72 and Annexes) to the Council as soon as possible, so as to give immediate effect to the social security provisions for self-employed persons.

3. Specific comments and proposals

3.1.1. In the proposed Regulation, an employed or self-employed person is defined as such, not on the basis of the occupation he pursues, but in accordance with the definitions given by national social security legislation. Moreover, the new definition of the beneficiaries of social security differs from the original Article 1 of Regulation (EEC) No 1408/71, in that the requirement that persons insured under a voluntary scheme must have previously been compulsorily insured has now been dropped.

3.1.2. The Committee approves the criterion used in the new definition, which is modelled on the case law of the Court of Justice of the European Communities. The Committee recognizes the importance of the new provision and agrees that the requirement that persons must have previously been insured under a compulsory insurance scheme should be dropped.

Thus, under Article 1 (a) (a) of the new Regulation, those who are insured only on a voluntary basis under the legislation of a Member State, without having been compulsorily insured previously for the same contingency in the same Member State, will also be covered by the Community's social security provisions.

3.1.3. However, the definition excludes those who in some Member States receive national insurance benefits as residents, but not as employed or self-employed persons, and who cannot show that they have previously been insured as workers.

3.1.4. The Committee regrets this unjustified discrimination and urges the Commission and the Council to delete the following phrase from Article 1 (a) (a) (iv) of the proposed Regulation: 'if he has previously been insured under such a scheme as an employed or self-employed person within the meaning of (ii) or (iii)'.

3.2.1. The proposed Regulation covers 'all legislations and social security schemes of the Member States applicable to self-employed persons, regardless of whether they are special schemes for this category of insured persons or schemes covering all residents or the whole working population', with two exceptions: (a) in France, the invalidity and life insurance schemes for self-employed persons in occupations outside agriculture; and (b) in Germany, the schemes for the professions set up by special statute and coming under the jurisdiction of the Länder and not of the Federal State.

3.2.2. Although it appreciates the legal reasons why these schemes have been excluded, the Committee points out that they may in some cases make acquisition of benefit rights in each of the countries concerned difficult by not allowing aggregation of insurance periods credited to the insured in other Member States despite the Treaty provision to the contrary. The Committee therefore advises the Commission to call upon the Member States to prompt or support action by the professional organizations concerned to secure application of the Community rules in these schemes and in particular to secure mutual recognition of insurance periods credited under these schemes and under schemes in other Member States.

3.3.1. The newly amended Articles 13 and 14 of Regulation (EEC) No 1408/71 are still based on the 'principle that only one legislation shall apply'. This principle therefore also applies to self-employed persons who pursue their professional or trade activities in several Member States. With a few exceptions, this principle is in the interests of workers both as regards contributions and benefits. The Committee agrees with the Commission on this.

3.3.2. It must be pointed out, however, that in the Italian text of the proposed Regulation, the revised point 2 (b) of Article 13 (2) was omitted, no doubt because of a printing error. This omission must be corrected and the following phrase added: '(b) in the first line of paragraph (b), the word "employed" shall be replaced by the words "who pursues his professional or trade activity".'

3.3.3. The revised version of Article 14 may lead to uncertainty and confusion, since some clauses refer only to self-employed persons, others to employed persons and still others to both categories. The Committee would therefore like the Commission to reword Title II of Regulation (EEC) No 1408/71 to make it quite clear whether the provisions apply to the employed, the self-employed or both.

3.4.1. There are one or two cases where Community provisions on employed persons are not extended to self-employed persons, namely:

- (a) certain methods of aggregating insurance periods for entitlement to pensions;
- (b) the possibility of drawing unemployment benefits outside the State in question.

The first of these exceptions, (a), relates to special invalidity, old-age and life insurance schemes, under Article 38, revised paragraph 3 of the Regulation. The second, (b), relates to self-employed persons, under Article 69 (1), Article 70 (1) (2) and Article 71 (1) (a) (i), and concerns the rules governing the acquisition, conservation and transfer of entitlement to unemployment benefits.

3.4.2. The Committee recognizes the difficulties involved in removing these two exclusions and is aware of the resistance on the part of some Member States. But it considers them to be rather serious, even though in practice they apply only to a limited number of cases. With regard to unemployment benefits, the law is also unwise in that it does not take into account the psychological effects on self-employed persons, particularly those in intellectual jobs. It therefore calls upon the Council and the Commission to reconsider the matter.

We must also consider another case where the treatment accorded to employed persons might not be extended to self-employed persons. This concerns the revised paragraph 5 of Article 45 of Regulation (EEC) No 1408/71.

3.5.1. Article 45 of Regulation (EEC) No 1408/71 states that where the legislation of a Member State makes the granting of invalidity benefits conditional upon a

worker being subject to its legislation at the time when the risk materializes, any employed person who becomes invalid when he is no longer subject to that legislation may obtain such benefits if he can establish a claim to benefits under the legislation of another Member State.

But self-employed persons are excluded from this possibility since the revised paragraph 5 refers to 'employed persons'.

3.5.2. Although aware that this discrimination stems from the specific nature of Dutch legislation, which is of the typically 'risk-oriented' kind, the Committee asks the Commission to reconsider the matter and come up with a fair solution.

4. Conclusions

4.1.1. In formulating its conclusions and proposals on the draft Regulation, the Committee would like to emphasize that the problems involved in coordinating the national social security laws over the past few years – first for employed persons and then for self-employed persons – are largely attributable to the wide variety of laws in the individual States.

This has already been stated by the Committee in its opinion of 25 January 1967 on the proposal later to become Regulation No 3 rev.; in its opinion of 27 October 1971 on the proposal for Regulation (EEC) No 574/72; and in other subsequent opinions.

4.1.2. The Committee believes that the time has now come to take a bold stand and gradually adopt a series of concrete measures to align national laws, within the meaning and in the spirit of Articles 117 and 118 of the Treaty. What is needed is political will, since European unity in economic and social matters can only be achieved if individual States are prepared to abandon their conflicting legislation and harmonize their laws in one 'common law'.

Given political will, the legal problems hindering Community action can be overcome, now that the Commission and the Council have begun to use Article 235 of the Treaty.

Done at Brussels, 31 May 1978.

The Chairman
of the Economic and Social Committee
Basil de FERRANTI