

***Proposal for a Regulation amending Regulation (EC) No 883/2004
on the coordination of social security systems and
Regulation (EC) No 987/2009 laying down the procedure
for implementing Regulation (EC) No 883/2004***

**Statement of the
European Social Insurance Platform (ESIP)**

on

Long-term care benefits

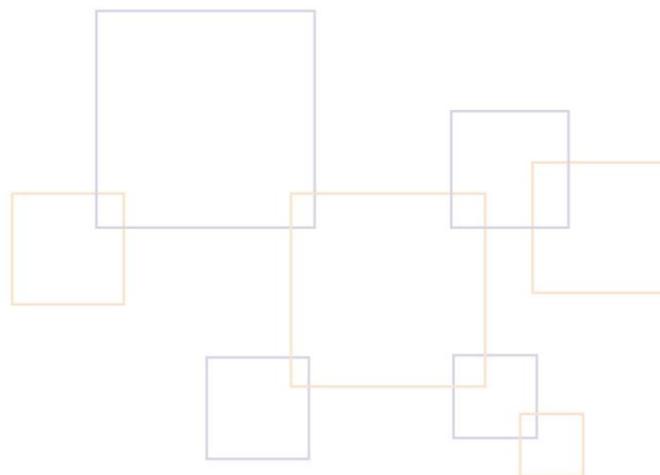
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About the European Social Insurance Platform (ESIP)

The *European Social Insurance Platform (ESIP)* represents over **40 national statutory social insurance organisations** (covering approximately **240 million citizens**) in **15 EU Member States and Switzerland**, active in the field of health insurance, pensions, occupational disease and accident insurance, disability and rehabilitation, family benefits and unemployment insurance. The aims of ESIP and its members are to preserve high profile social security for Europe, to reinforce solidarity-based social insurance systems and to maintain European social protection quality. ESIP builds strategic alliances for developing common positions to influence the European debate and is a consultation forum for the European institutions and other multinational bodies active in the field of social security.

Statement regarding positions submitted by ESIP: *ESIP members support this position in so far as the subject matter lies within their field of competence.*

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Introduction

On 13 December 2016, the European Commission submitted a Proposal to revise the EU's legal provisions on the coordination of the social security systems. All in all, the proposals provide for amendments in economically inactive EU citizens' access to the Member States' social benefits systems, in the provisions on the posting of workers, in long-term care and unemployment benefits, in family benefits and in technical requirements.

The goal pursued by the European Commission is to make the complex coordinating legislation fairer, more user friendly and easier to enforce, and also to prevent fraud. The modernisation of this set of European rules is intended to promote mobility on the European Internal Market and hence help further employment and growth.

ESIP explicitly welcomes the initiative to modernise the coordinating legislation, as well as the aims being pursued by the European Commission. The coordination of long-term care benefits is particularly relevant for ESIP's members.

Long-term care benefits

The European Commission is proposing the following amendments with regard to long-term care benefits:

- introduction of long-term care benefits as a distinct branch of social security,
- introduction of a definition of long-term care benefits specifying the constituent elements of such benefits,
- introduction of a separate chapter for the coordination of long-term care benefits, and
- a detailed list of long-term care benefits in the Member States.

The proposed rules for long-term care follow the principles of the coordination of benefits in case of sickness. Long-term care benefits are already coordinated in accordance with the provisions contained in the Regulations on sickness benefits, on the basis of the case-law of the European Court of Justice.

With the proposals, the European Commission intends to make the coordination of long-term care benefits more transparent for citizens and to codify the status quo for these benefits - as a result of the case-law of the European Court of Justice. This is not intended to change the previous coordination rules in respect of sickness benefits.

Definition of long-term care benefits

The introduction of a definition of long-term care benefits is welcomed since it contributes to clarification for citizens and institutions (No 9, Article 1 (vb)). No problems in its application are anticipated by ESIP members.

Introduction of a separate chapter for long-term care benefits

The introduction of a separate chapter for long-term care benefits (No 17, Chapter 1a) alongside the provisions of Chapter 1 on sickness benefits may lead to unwanted derogations from the previous

coordination mechanism, i.e. from the status quo. This may cause significant difficulties for EU citizens when it comes to exercising their rights, as well as leading to the unfair distribution of burden between the Member States. To apply the provision of the sickness Chapter 1 mutatis mutandis would mean, that each time those provisions use the term “benefits in kind” it has to be read as “long-term care benefits in kind”. Therefore, separate coordination of long-term care benefits, corresponding to but independent from sickness benefits, is contingent to long-term care benefits in kind existing in the Member States which can be provided mutually. Each Member State already had a health insurance system with corresponding benefits in kind when the chapter on sickness benefits was introduced. However, long-term care benefits in kind are not currently provided for in all Member States. This causes major problems, such as possible changes in competences and additional effort concerning the reimbursement between Member States, but it also creates obstacles for insured persons when it comes to gaining access to benefits and may lead to loss of entitlements.

The potential for changes in competences and loss of entitlements

The consequence of the introduction of a separate chapter for long-term care benefits is that the branches of sickness benefits and long-term care benefits will need to be kept strictly separate in future. For instance, the determination of competence for long-term care benefits relating to pensioners, who are the group most likely to be affected, may only be based on whether an entitlement to long-term care benefits in kind exists. Since ten Member States have no long-term care benefits in kind, there may be a change/shift in competence for long-term care benefits and a loss of entitlements where pensions are received from one of these ten States. This is currently not an issue since long-term care benefits are regarded as sickness benefits. It is therefore possible today to rely on the entitlement to a sickness benefit in kind as a starting point if there is no entitlement to long-term care benefits in kind. The current lack of separation between competences for sickness benefits and long-term care benefits means that the individual in question is subject to the legislation of only one Member State.

The European Commission’s Proposal introduces the risk that competence for sickness and long-term care benefits may, in certain constellations, lie in two Member States in future. This contradicts the fundamental principle enshrined in the coordination Regulations, namely that the social insurance legislation of only one Member State may apply to an individual.

Example of loss of entitlements
<p>A pensioner, who resides in the Flemish Region of Belgium, receives a pension from Belgium and the Netherlands. Belgium is competent for sickness benefits in kind [Article 23 of Regulation (EC) No 883/2004].</p>
<p>Since, at the moment, there exist no long-term care benefits in kind in Belgium as per the list set out in Article 34 (2) of Regulation (EC) No 883/2004, according to the Commission’s proposal the Netherlands would be competent for long-term care benefits in kind and in cash [Article 24 Regulation (EC) No 883/2004].</p>

In the Netherlands long-term care benefits in kind exist but not exportable long-term care benefits in cash. As a consequence, the pensioner has to pay contributions in the Netherlands but can neither receive benefits in kind in Belgium nor benefits in cash from the Netherlands. So far, the pensioner receives long-term care benefits in cash from the Flemish institution.

Obstacles for insured persons and additional effort

The coordination of long-term care benefits in a specific chapter will create new obstacles to mobility for insured persons. Unlike inclusion in the previous system of coordination of sickness benefits, instead of one joint document proving their entitlement to sickness benefits and long-term care, insured persons will need to use two different documents in the future, and may need to contact two different institutions in the respective Member States.

Furthermore, treating the branches of sickness and long-term care separately means that only insurance periods which relate to the risk of requiring long-term care are taken into account. Only Germany, Luxembourg, the Netherlands and the Flemish part of Belgium have separate long-term care insurance from which periods completed could be taken into account. This makes access to insurance and long-term care benefits more difficult, thus entailing an obstacle to the free movement of people.

Furthermore, a separate reimbursement system will have to be set up for long-term care benefits, with all the consequences that this entails such as the creation of new business use cases, the implementation of structured electronic documents (SEDs) in view of EESSI (Electronic Exchange of Social Security Information), other forms, etc.

Detailed list of long-term care benefits

The proposal to create a detailed list of long-term care benefits (No 17, Article 35a (2)) is fundamentally welcomed. Such a list provides clarity as to the existence of corresponding benefits in each Member State. What is however uncertain is the relationship between the list of long-term care benefits and the proposed Annex XII of the Regulation, which is to contain the long-term care benefits that can be coordinated in accordance with other chapters of the Regulation.

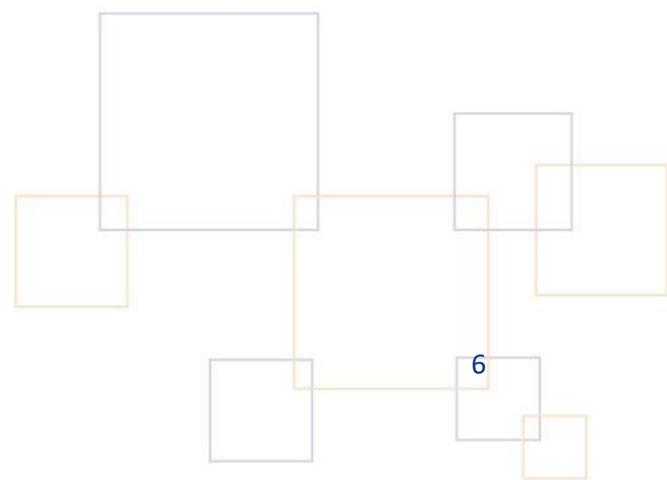
Conclusion regarding the provisions on long-term care

ESIP welcomes the goal of creating a more unambiguous legal framework for long-term care benefits, which is to be achieved for instance with the definition of long-term care benefits and the list of long-term care benefits existing in the Member States. In its current form, the European Commission's proposal to introduce a new chapter for long-term care benefits however risks raising difficulties for insured persons, even leading to the loss of their entitlements. This would place insured persons at a disadvantage compared to their situation as the law currently stands, and would not be compatible with the goal of the European Commission to make the legal status quo more transparent and more user friendly.

We consider that there are better, less laborious ways of achieving this goal e.g. by including specific provisions on long-term care benefits within the Chapter on sickness benefits (Chapter 1).



Appropriately amending the existing provisions for sickness benefits could make the coordination of long-term care benefits for insured persons clearer without changes to competencies or losses of entitlements.



Annex

ESIP's proposals regarding long-term care benefits

Article 1 (Amendment of Regulation (EC) No 883/2004)

No 9

Article 1

Text proposed by the Commission

Article 1 is amended as follows:

(a) In Point (c) the term "Title III, Chapters 1 and 3" is replaced by the term "Title III, Chapters 1, 1a and 3".

(b) In Point (i)(1)(ii) after the term "Title III, Chapter 1 on sickness, maternity and equivalent paternity benefits" the term "and Chapter 1a on long-term care benefits" is inserted.

(c) In Point (va)(i) after the term "Title III, Chapter 1 (sickness, maternity and equivalent paternity benefits)," the term "and Chapter 1a (long-term care benefits)" is inserted and the last sentence is deleted.

(d) The following point is inserted after point (va):

"(vb) "long-term care benefit" means any benefit in kind, cash or a combination of both for persons who, over an extended period of time, on account of old-age, disability, illness or impairment, require considerable assistance from another person or persons to carry out essential daily activities, including to support their personal autonomy; this includes benefits granted to or for the person providing such assistance;"

Statement

Re (a): The amendment results from the introduction of the new Chapter 1a. This chapter should be deleted in ESIP's view (see No 17), so that the amendment is unnecessary.

Re (b): The amendment results from the introduction of the new Chapter 1a. This chapter should however be deleted in ESIP's view (see No 17). The remaining Chapter 1 should be referred to without specifying the title, so that the amendment is unnecessary.

Re (c): The version proposed for Article 1 Point (va)(i) of Regulation (EC) No 883/2004 furthermore links the latter with medical treatment by also naming sickness and long-term care benefits in kind within a single definition. This connection might create scope for a restrictive interpretation of the entitlements of mobile insured persons. Long-term care benefits in kind, such as bodily long-term care and support benefits for coping with and shaping everyday life in the domestic environment would no longer be included in the proposed definition. There is therefore a need to make separate reference to the definition of long-term care benefits.

Re (d): The definition of long-term care benefits proposed by the European Commission in Article 1 Point (vb) does not explicitly refer to cognitive and mental impairments. One may however presume that the definition of “impairments” covers these important aspects.

Proposed amendment

Re (a): The proposed amendment should be deleted.

Re (b): The proposed amendment should be replaced with the following:

Point (i)(1)(ii) should read: “[...] sickness, maternity, equivalent paternity benefits and long-term care benefits [...]”

Re (c): Article 1 Point (va)(i) should read as follows:

(va) 'Benefits in kind' means:

(i) for the purposes of Title III, Chapter 1 with regard to sickness, maternity and equivalent paternity benefits, benefits in kind provided for under the legislation of a Member State which are intended to supply, make available, pay directly or reimburse the cost of medical care and products and services ancillary to that care [...]. This shall also include long-term care benefits in kind within the meaning of Article 1 Point (vb) of this Regulation.

Re (d): None.

Article 1 (Amendment of Regulation (EC) No 883/2004)

No 17

Chapter 1a

Text proposed by the Commission

After Article 35, the following Chapter is inserted:

“CHAPTER 1a

Long-term care benefits

Article 35a

General provisions

- (1) Without prejudice to the specific provisions of this Chapter, Articles 17 to 32 shall apply mutatis mutandis to long-term care benefits.
- (2) The Administrative Commission shall draw up a detailed list of long-term care benefits which meet the criteria contained in Article 1 (vb) of this Regulation, specifying which are benefits in kind and which are benefits in cash.
- (3) By way of derogation from paragraph 1, Member States may grant long-term care benefits in cash in accordance with the other Chapters of Title III, if the benefit and the specific conditions to which the benefit is subject are listed in Annex XII and provided that the outcome of such

coordination is at least as favourable for the beneficiaries as if the benefit was coordinated under this Chapter.

Article 35b

Overlapping of long-term care benefits

(1) If a recipient of long-term care benefits in cash granted under the legislation of the competent Member State receives, at the same time and under this Chapter, long-term care benefits in kind from the institution of the place of residence or stay in another Member State, and an institution in the first Member State is also required to reimburse the cost of these benefits in kind under Article 35c, the general provision on prevention of overlapping of benefits laid down in Article 10 shall be applicable, with the following restriction only: the amount of the benefit in cash shall be reduced by the reimbursable amount for the benefit in kind which is claimable under Article 35c from the institution of the first Member State.

(2) Two or more Member States, or their competent authorities, may agree on other or supplementary measures which shall not be less favourable for the persons concerned than the principles laid down in paragraph 1.

Article 35c

Reimbursement between institutions

(1) Article 35 shall apply mutatis mutandis to long-term care benefits.

(2) If the legislation of a Member State where the competent institution under this Chapter is situated does not provide for long-term care benefits in kind, the institution which is or would be competent in that Member State under Chapter 1 for the reimbursement of sickness benefits in kind granted in another Member State shall be deemed to be the competent one also under Chapter 1a.”

Statement

Re Chapter 1a:

The introduction of a new chapter for long-term care benefits is in line with the intention to codify the status quo for these benefits arising as a result of the case-law of the European Court of Justice, but not to change it. ESIP does not consider this to have been achieved by handling long-term care benefits in a separate chapter. In our view, the status quo is extensively changed by Chapter 1a, resulting in significant difficulties for EU citizens when exercising their rights and to an unfair distribution of burden between the Member States.

Obstacles may in particular emerge for insured persons if the treatment of the long-term care benefits in a separate chapter leads to specific business use cases and forms being needed in order to certify the entitlement. Instead of requesting, as previously, a form for sickness and need of long-term care (e.g. E 121 or PD S1) from a competent institution and presenting it to an institution in the place of residence, the separate treatment by risk areas would mean that insured persons might

have to contact two institutions on both sides. The separation of the competences might even necessitate the involvement of institutions from two competent Member States.

It is also not clear which institutions are competent for registering and for processing the procedures if the competent State or the State of residence has no long-term care benefits in kind, which is currently the case in ten Member States. Article 35c(2) only explicitly provides for the health insurance institution to be claimed against for a cost reimbursement. The goal of creating a clear legal framework for long-term care benefits, and thus permanently establishing the status quo and contributing towards a fair burden of cost distributions, could be better achieved by including specific regulations on long-term care benefits in Chapter 1 on sickness benefits.

Re Article 35a (1):

ESIP has concerns that the application of Articles 17 to 32 to long-term care benefits as a separate branch of social security in its own chapter will lead to a change in the status quo with regards to long-term care benefits where these Articles refer to sickness benefits in kind:

- Competence for sickness and long-term care benefits in kind is separate in ten Member States which do not have long-term care benefits in kind in accordance with the list set out in Article 34(2) of Regulation (EC) No 883/2004. This for instance affects situations in which individuals reside in Member State A and receive a pension there, but the legislation of State of residence A - unlike Member State B, from where they also receive a pension - does not provide for any long-term care benefits in kind. In such cases, in accordance with Article 23 of Regulation (EC) No 883/2004, the institution of the State of residence would be competent for sickness benefits in kind. In accordance with the wording of Article 23 of Regulation (EC) No 883/2004, the competence of the institution of the State of residence is contingent on a right to benefits in kind existing in the State of residence. In view of the lack of an entitlement to long-term care benefits in kind, the preconditions for the meeting of costs for long-term care benefits in kind by the institution of the State of residence in accordance with 35a(1) in conjunction with Article 23 of Regulation (EC) No 883/2004 would not be satisfied. Hence, in accordance with Article 35a(1) in conjunction with Article 24 of Regulation (EC) No 883/2004, the institution of Member State B would be competent for long-term care benefits instead of Member State A. In ESIP's view it is difficult to align this separation of competences with the fundamental principle enshrined in Regulation (EC) No 883/2004, in accordance with which "Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only" [Article 11(1)].
- What is more, a person who receives a pension from two Member States may be disadvantaged if their State of residence has no long-term care benefits in kind, but provides for cash benefits (e.g. Flemish Region) and the other Member State which pays a pension has benefits in kind but no cash benefits (e.g. the Netherlands). In this case, the person receiving a pension would have to pay contributions for long-term care benefits, but would be unable to claim either cash or long-term care benefits in kind in their State of residence.

- The combination of the right to long-term care benefits in kind, which indirectly impacts on the determination of competence for this branch of social security (see first indent), and of the exportable right to cash benefits, places in particular the sixteen Member States, including Germany and Austria, which have long-term care benefits in cash as covered by Regulation (EC) No 883/2004, at a disadvantage given that they would incur a one-sided cost burden.
- The application of Articles 17 to 32 to long-term care benefits in a dedicated chapter as a separate branch of social security leads to a situation in which, in order to gain access to insurance and to long-term care benefits, only insurance periods may be taken into account which relate to the risk of long-term care. Only Germany, Luxembourg, the Netherlands, and the Flemish Region in Belgium have long-term care insurance.

It is uncertain when it comes to long-term care benefits necessitated during a temporary stay in another Member State how the need for long-term care is to be determined in accordance with the preconditions for entitlement stipulated in Article 19, given the short stay. In this context, the European Court of Justice has already pointed out in Case C-562/10 (European Commission against Federal Republic of Germany) that benefits relating to the risk of reliance on care — being generally long-term benefits — are not, in principle, intended to be paid on a short-term basis (cf. paragraph 51). ESIP considers that it is necessary to at least supplement Decision No S₃ of the Administrative Commission¹ in order to bring about a uniform arrangement addressing long-term care benefits in case of temporary stay. The Administrative Commission should also provide information here as to the interpretation of Article 20(2) of Regulation (EC) No 883/2004. It is not clear under which prerequisites consent to the planned taking up of long-term care benefits must be granted in another Member State.

Re Article 35a (2):

The list that exists so far in accordance with Article 34(2) of Regulation (EC) No 883/2004 only contains a Yes/No statement as to whether long-term care benefits in kind and in cash exist in a Member State which fall within the scope of Regulation (EC) No 883/2004. When it comes to coordinating long-term care benefits, difficulties occur in practice with regards to the question of which benefits are to be attributed to the categories “benefits in kind” or “cash benefits” in the individual Member States. ESIP hence wholeheartedly welcomes the initiative to draw up a detailed list separating long-term care benefits in kind and in cash.

Re Article 35a (3):

Paragraph 3 permits the coordination of long-term care benefits in cash in accordance with other chapters of Title III, i.e. for instance in accordance with the provisions on family benefits. This is contingent to the cash benefit being listed in Annex XII, and to the result of such coordination being at least as favourable for the beneficiaries as with the coordination of the benefit in accordance with

¹ Decision No S₃ of 12 June 2009 defining the benefits covered by Articles 19(1) and 27(1) of Regulation (EC) No 883/2004 of the European Parliament and of the Council and Article 25(A)(3) of Regulation (EC) No 987/2009 of the European Parliament and of the Council, OJ C 106/40.

Chapter 1a. In the past, the only possibility of deviating provisions with regard to the overlapping of long-term care benefits in kind and in cash was provided for in Article 34(3) of Regulation (EC) No 883/2004.

A possibility to deviate with regard to the overall coordination of long-term care benefits in cash constitutes an undesirable caesura in the framework of the Regulation. The Regulations on the coordination of social security systems are in line with the principle that benefits are first of all defined in order to be attributed to a specific chapter of the Regulation. The possibility to derogate from this attribution poses a risk of legal uncertainty. Furthermore, the proposed amendment provides that “in derogation from paragraph 1”, coordination can take place in accordance with other chapters of Title III. Paragraph 2 is not specified in this context, so that it is unclear whether the cash benefits in accordance with Annex XII also need to be included in the list in accordance with paragraph 2.

What is more, it is questionable whether the provision contained in Article 35b on the overlapping of long-term care benefits in kind and in cash applies in circumstances in which long-term care benefits in cash are granted in accordance with other chapters of Title III. Should it be possible to offset the benefits in kind against the cash benefits, institutions would have to exchange information on the receipt of cash benefits and of benefits in kind by a person in need of long-term care both between branches and internationally. If Article 34 or 35b were not to be applicable to such cases, the general prohibition of the overlapping of benefits in accordance with Article 10 of Regulation (EC) No 883/2004 would apply, and this could lead to a significant loss of benefits for mobile EU citizens. This would in turn not be in harmony with the stipulation that coordination must be at least as favourable for the beneficiaries as the coordination of the benefit in accordance with Chapter 1a.

In view of the above, Article 35a (3) is to be valued as constituting a retrograde step in comparison to the status quo. The procedures for mobile EU citizens would be more complex, the competences ambiguous and entitlements to benefits lower in the worst case.

Re Article 35b:

This Article transfers into the new Chapter 1a the previous Article 34 of Regulation (EC) No 883/2004 in case of the overlapping of benefits in kind and cash benefits. ESIP considers that this provision should remain in Chapter 1, Article 34.

Re Article 35c:

The provision for the settling of long-term care benefits in kind corresponds to Article 41 of Regulation (EC) No 883/2004 for the benefits in kind in respect of accidents at work and occupational diseases (Chapter 2). Article 41 of Regulation (EC) No 883/2004 determines the corresponding application of the provisions relating to cost reimbursement for sickness benefits in kind. Despite the application *mutatis mutandis*, the cost settlement for benefits in kind in respect of accidents at work and occupational diseases is however carried out separately from the settlement for sickness benefits in kind in accordance with Chapter 1 in the framework of separate business use cases, including separate forms. Taking this system as a basis would mean that it would no longer

be possible to settle long-term care benefits in kind in accordance with Chapter 1a via the health insurance institutions. New business use cases would have to be laboriously developed, including forms/datasets. The procedure would also have to be carried out by different institutions than was previously the case since the long-term care benefits are provided by institutions which are not social security institutions in the classical sense, such as local authorities or regions. This would mean domestic and foreign institutions, which have no previous experience with the Regulation, having to deal with the application and implementation of its provisions. This would endanger the goal of enhancing the rights of mobile EU citizens. Article 35c (2) confirms the method of separate cost settling in which the institution for long-term care benefits has competence for cost reimbursement as a matter of principle. The sickness insurance institutions should only be competent for the cost reimbursement of long-term care benefits in kind if no long-term care benefits in kind are provided for in the competent Member State. We therefore consider that the provision contained in Article 35c should be rejected.

In conclusion, the Proposal of the European Commission to introduce a separate Chapter 1a for long-term care benefits does not make the procedures any easier for the insured persons (cf. recital No 4). Quite the contrary, ESIP's members consider that the proposed provisions would make procedures considerably more complex. Together with the considerations that have already been put forward on the separation of the competences for sickness and long-term care, ESIP is therefore extremely critical of the introduction of a separate Chapter 1a for long-term care benefits. It is our belief that the goal of creating an unambiguous legal framework could better be achieved by including specific regulations on long-term care benefits with in Chapter 1 on sickness benefits.

Proposed amendment

The Chapter 1a contained in the Proposal of the European Commission should be deleted.

The title of Title III, Chapter 1 of Regulation (EC) No 883/2004 should be replaced with the following: "Sickness, maternity and equivalent paternity benefits, as well as long-term care benefits."

The resulting need for an amendment has been taken into account in the other parts of this statement (see at Article 1, No 16 re Article 34 and at Article 2, No 17 re Article 31).