

COMMUNICATION FROM THE COMMISSION

First stage consultation of social partners on the portability of supplementary pension rights

1. AIM OF THIS DOCUMENT

The purpose of this document is to consult the social partners, in accordance with Article 138, paragraph 2 of the EC Treaty, on the possible direction of an action at European level on the portability of supplementary pension rights¹.

Such action is now widely expected. The Stockholm European Council (23-24 March 2001) noted the intention of the Commission to present for the 2002 Spring European Council a proposal on the portability of supplementary pensions². More recently, the Commission affirmed this intention in the Action Plan for skills and mobility³. On that occasion the Commission announced the decision to consult with the social partners on the portability of supplementary pension rights in Spring 2002 "with a view to further legislative or equivalent action"⁴.

Art. 137 of the EC Treaty, as modified by the Amsterdam Treaty, recognises the Community competence to act in the field of "social security and social protection of workers". Moreover, according to Article 42 of the EC Treaty, the Council should "adopt such measures in the field of social security as are necessary to provide freedom of movement for workers".

2. GENERAL CONTEXT

The social protection systems of the Member States are faced with the common challenge of an ageing population. Modernisation of national pension systems will require maintaining and, in some cases, improving the adequacy of pensions, their financial sustainability and the ability of pension systems to respond to changing societal needs.

Reforms already adopted or envisaged in many Member States in response to these challenges tend to leave more scope for supplementary pension provision and certain Member States are actively encouraging their development. This adds to the importance of ensuring the portability of supplementary pension rights, as has also

¹ In the present Communication the term "portability" is defined as the possibility of acquiring and keeping pension entitlements in the event of professional mobility. "Transferability" refers to one specific way of achieving portability, namely by transferring a capital representing the acquired pension entitlements from one scheme to another. For the sake of this paper, are referred to as "supplementary pension rights" the benefits derived from all those supplementary pension schemes, which do not come within the scope of Regulation 1408/71/EEC.

² See par. 15 of the Presidency Conclusions.

³ Communication from the Commission to the Council of 8 February 2002 "Commission's Action Plan for skills and mobility (COM (2002) 72).

⁴ See p. 16 of the Commission Communication.

been recognised in the common objectives agreed for the open method of co-ordination in the field of pensions⁵.

Member States regulate the acquisition and preservation of pension rights in different ways. While the portability of statutory social security rights of workers moving within the EU is guaranteed by the system of co-ordination provided for in Regulation 1408/71/EEC, the absence of a comprehensive⁶ common regulatory framework for the portability of supplementary pension rights still leaves barriers to the free movement of workers.

The Social Policy Agenda⁷ for 2000-2005 includes the promotion of mobility as one of the key actions targeted at realising Europe's full employment potential. This involves "dealing with practical and legal problems encountered by workers exercising their right to free movement, as well as removing obstacles in the field of social security, in particular supplementary pensions"⁸.

More recently the Laeken European Council (14-15 December 2001) has stated that "the adequacy of pensions, the sustainability and modernisation of pension systems and the improvement of access to occupational pensions schemes are all of particular importance for dealing with the increasing needs"⁹.

The issue of portability of supplementary pension rights has also been taken up in the Final Report presented on 14 December 2001 by the High Level Task Force on Skills and Mobility. The High Level Task Force on Skills and Mobility has been created in June 2001, according to the Commission Communication on new European labour markets¹⁰ and the Stockholm European Council (23-24 March 2001). The Final Report underlines the need to attain in Europe a higher occupational and geographic mobility, supported by better language and professional skills, and a more transparent and integrated labour market.

With regard to pensions and social protection systems, the High Level Task Force has invited the Commission and the Member States to speed up the modernisation of the regulatory framework governing the transferability¹¹ of pensions and social

⁵ According to the Joint report of the Social Protection Committee and the Economic Policy Committee on objectives and working methods in the area of pensions, which has been drawn up in November 2001 and endorsed by the Laeken European Council of December 2001, Member States should "ensure that pension systems are compatible with the requirements of flexibility and security on the labour market; that, without prejudice to the coherence of Member States' tax systems, labour market mobility within Member States and across borders and non-standard employment forms do not penalise people's pension entitlements and that self-employment is not discouraged by pension systems".

⁶ Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pensions rights of employed and self-employed persons moving within the Community (and which is based on Article 42 of the Treaty) only provides for limited protection.

⁷ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 26 June 2000 (COM (2000) 379 final).

⁸ See p. 19 of the Commission Communication.

⁹ See par. 30 of the Presidency Conclusions.

¹⁰ Communication from the Commission to the Council of 28 February 2001 "New European labour markets, open to all, with access for all" (COM (2001) 116 final).

¹¹ This should be read as "portability".

security rights. Cross-border mobility is still hindered by considerable barriers of legal and administrative nature: in particular, the Task Force has noted that at the present there is no guarantee that supplementary pensions are transferable.

The Commission has responded to the Final Report of the High Level Task Force through the adoption on 13 February 2002 of an Action Plan for skills and mobility¹². The Commission's Action Plan stresses in particular that "progress should be made in the portability of the supplementary pension rights of migrant workers". The Commission invites social partners, Member States and European institutions to "intensify efforts to ensure that portability is improved"¹³.

3. INITIATIVES TAKEN BY THE COMMISSION IN THE AREA OF SUPPLEMENTARY PENSIONS

The Report of the High Level Panel on free movement of persons and the Green Paper on supplementary pensions

The role of supplementary pension schemes in the social protection systems and their implications to the free movement of workers have been first dealt with by the Commission in the Communication of 22 July 1991 on supplementary social security schemes¹⁴. This document clearly identified the obstacles to mobility and prepared the ground for subsequent discussions at the European level.

In the absence of progress on these issues, the Commission referred, in 1996, the problems encountered workers moving from one Member State to another to a high level panel on free movement of persons, chaired by Mrs. Veil. The report presented by the Panel to the Commission on 18 March 1997 underlined that the prospect of a loss of supplementary pension rights is a clear disincentive to mobility and represents a serious obstacle to the exercise of the right of free movement, as foreseen by the EC Treaty. The Panel proposed to the Commission two initiatives: (i) the adoption of a Directive addressing the questions of preservation of acquired rights, cross-border payments and cross-border membership in the case of short term employment in another Member State; and (ii) the creation of a Pensions Forum involving the Member States, the social partners and relevant European federations, which would act as a forum for debate and research into new initiatives on supplementary pensions.

The Commission Green Paper on supplementary pensions in the Single Market of 10 June 1997¹⁵ covered all the main issues relating to supplementary pensions including the operation of pension funds as financial services providers and the obstacles to the

¹² See footnote n. 3.

¹³ See p. 16 of the Commission Communication.

¹⁴ Communication from the Commission to the Council of 22 July 1991 "Supplementary social security schemes: the role of occupational pension schemes in the social protection of workers and their implications for freedom of movement" (SEC (91) 1332 final). See also Council Recommendation of 27 July 1992 on the convergence of social protection objectives and policies (OJ L 245 of 26 August 1992, p. 49) which invites the Member States to promote "changes to the conditions governing the acquisition of retirement and, especially, supplementary pension rights with a view to eliminating obstacles to the mobility of employed workers" (par. 5, h).

¹⁵ Supplementary Pensions in the Single Market - A green paper- (COM (97) 283 final).

free movement of workers. It announced, as a follow-up to the report of the high level panel on the free movement of workers, the Commission's intention to introduce a proposal for a Directive to deal particularly with the preservation of accrued pension rights and the particular problems that apply to workers seconded to another Member State.

Directive 98/49/CE

On 28 June 1998 the Council adopted Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community¹⁶. The directive is the only existing legal instrument at European level on the free movement of persons in relation to supplementary pensions. It is intended to ensure the right to the equality of treatment as regards the preservation of supplementary pension rights when moving within the Community, but it does not concern the conditions of acquisition of supplementary pension rights or their transferability.

According to the directive, Member States are obliged to take the necessary measures to ensure the preservation of vested pension rights for members of a supplementary pension scheme in respect of whom contributions are no longer being made to that scheme as a consequence of their moving from one Member State to another, to the same extent as for members in respect of whom contributions are no longer being made but who remain within the same Member State.

Moreover, Member States have to ensure that supplementary pension schemes make payments in other Member States of all benefits due to workers, net of any taxes and transaction charges that may be applicable.

With regard to posted workers, Directive 98/49/EC provides that contributions can continue to be made to a supplementary pension scheme in the worker's Member State of origin and exempts at the same time the employer from the obligation to make contributions to supplementary pension schemes in the host Member State¹⁷.

Directive 98/49/EC finally requires that workers who move to another Member State receive adequate information on their pension rights and the choices which are available to them under the scheme.

Member States had to implement this directive by July 2001 and to communicate no later than 25 January 2002 the implementation measures that have been taken.

The Pensions Forum

Following the report by the High Level Panel on free movement of persons, the Pensions Forum first met in 2000 and has been officially established by Commission

¹⁶ (OJ L 209 of 25 July 1998, p. 46). Member States had to implement the Directive by 25 July 2001 and were asked to communicate to the Commission the text of the implementation provisions adopted at national level no later than 25 January 2002.

¹⁷ However, this exemption applies only for a limited period of time, in accordance with Regulation 1408/71/EEC.

Decision of 9 July 2001¹⁸. Its role is to assist the Commission in finding solutions to the problems and obstacles associated with cross-border mobility of workers in the area of supplementary pensions.

In order to identify the most serious obstacles to mobility arising from supplementary pension schemes and to explore solutions that exist within Member States that could be promoted at European level, the Pensions Forum set up three working groups in December 2000, concerning, respectively, the acquisition and preservation of supplementary pension rights, the transferability of supplementary pension rights and cross-border membership in supplementary pension schemes. Their reports were presented to the Pensions Forum plenary meeting of 23 February 2001.

Many of the obstacles identified by the three working groups affect workers moving between jobs within a given Member State as well as workers moving from one Member State to another. Consequently the three working groups have underlined that an action removing these obstacles should not be limited to cross-border mobility.

On the acquisition and preservation of supplementary pension rights the first working group noted that many employers traditionally regarded supplementary pensions as a device for rewarding staff loyalty. However, this view has to be considered as out-dated: supplementary pensions should be regarded as deferred income and an essential component of social protection.

Long vesting and waiting periods and high minimum ages for scheme membership all imply reduced supplementary pension rights for mobile staff. Such practices are no longer compatible with the increased mobility needs in today's labour markets and their social implications are, according to the working group's report, no longer acceptable. Moreover, high minimum ages and long vesting and waiting periods are discriminatory against women because they are more likely to take career breaks for family reasons.

The group therefore pronounced itself in favour of action to reduce waiting periods, vesting periods and minimum ages. It suggested that vesting should occur no later than one year after starting employment.

The group was aware of the fact that employers are likely to be concerned with the cost implications of shortened waiting and vesting periods. The group therefore proposed to reduce them gradually over a transition period that could be identical to the current length of the vesting period. This would meet the concern that a sudden change in portability rules could cause unforeseen costs to employers and discourage them from offering supplementary pension schemes to their employees.

On the transferability of supplementary pension rights, the starting point of the second working group was an acknowledgement that before there can be a transfer there must be acquired rights. Once there are acquired rights, these can be handled in two ways: one possibility is the preservation of acquired rights, the other one is the transfer of a capital value.

¹⁸ Commission Decision of 9 July 2001 on the setting-up of a Committee in the area of supplementary pensions (OJ L 196 of 20 July 2001, p. 26).

Transferability should be an option for the employee, not an obligation. Nevertheless there could be a need for setting up the legal framework that offers employees the right to opt for a transfer of acquired rights from one scheme to another - on a national as well as on a EU-wide level. The group concluded that it might also be necessary to define standards and principles for the calculation of transfer values and called upon the creation of a group of experts to solve the technical problems regarding international transfers.

The Pensions Forum therefore convened a new working group in March 2002, in order to identify common solutions to the technical obstacles affecting the transferability of supplementary pensions in the European Union. The group has already presented a first set of proposals, but it also stressed that transferability presupposes the existence of a vested pension right. In this regard progress towards greater transferability also depends on improvement in the acquisition and preservation of supplementary pension rights and thus on a successful outcome of this consultation.

The third working group focused on cross-border membership as a way of facilitating workers' mobility and allowing them to change the country of employment without having to face the costs associated with an interruption in their pension scheme membership (costs arising from not having met vesting requirements, insufficient preservation, losses occurring in the case of transfers).

The group has stated that the main obstacle to cross-border membership is taxation. However, compulsory membership in an occupational pension scheme of the host country could also be a problem, since in that case cross-border membership would lead to double coverage.

Other initiatives of the Commission

In relation to cross-border membership it is worth mentioning two other recent initiatives at EU level. One is the proposal for a Directive on institutions for occupational retirement provision¹⁹ and the other one the Commission Communication of 19 April 2001 on the elimination of tax obstacles to the cross-border provision of occupational pensions²⁰. Both would facilitate remaining in the same pension scheme while moving to a job in another Member State.

The proposal for a Directive is aimed at creating at European level a common legal framework for the activities of institutions for occupational retirement provision, so as to allow them to fully benefit from the advantages of the Internal Market. It proposes in particular the setting up of a full prudential framework which is necessary so as to provide affordability of pensions and a high level of protection for the right of future pensioners. The proposal seeks to ensure that institutions enjoy sufficient freedom to develop an effective investment policy and can benefit from the greater depth and liquidity of the capital markets resulting from the introduction of

¹⁹ Proposal for a Directive of the European Parliament and of the Council on the activities of institutions for occupational retirement provision (COM (2000) 507 final).

²⁰ Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee of 19 April 2001 "The elimination of tax obstacles to the cross-border provision of occupational pensions" (COM (2001) 214).

the Euro. The proposal also seeks to establish the right for institutions for retirement provision to manage pension schemes on a cross-border basis.

In accordance with the co-decision procedure, the proposal for a Directive on institutions for occupational retirement provision is currently being examined by the Council. The European Parliament completed its first reading in July 2001. The Commission's Action Plan for skills and mobility²¹ invited the European Parliament and the Council to intensify their efforts to adopt the Directive by December 2002.

The Commission Communication of 19 April 2001, on the elimination of tax obstacles to the cross-border provision of occupational pensions, proposes a comprehensive strategy to address the tax obstacles that currently can act as a major disincentive to cross-border membership. On the issue of transferability of pension capital, the Communication concludes that there may be cross-border situations where national tax rules are contrary to the Treaty provisions on the freedom of movement for workers and/ or the free movement of capital, in cases where a worker moves from an employer in one Member State to an employer in another Member State and wishes to transfer his accrued pension capital from the old pension scheme to his new one. The Commission is now monitoring national tax rules impeding the cross-border transferability of pension capital and will take the necessary steps to ensure effective compliance with the Treaty.

4. TOPICS FOR CONSULTATION

The measures described above (Directive 98/49/EC, the proposal for a Directive on institutions for occupational retirement provision, the Communication on tax obstacles to the cross-border provision of occupational pensions) still leave unresolved a number of problems regarding the acquisition, the preservation and the transferability of supplementary pension rights.

As stated above, these issues concern both workers who move to another Member State and workers who change jobs, but stay within the same Member State. The Commission considers that it would not be appropriate to take measures that would only apply to migrant workers who would, as a result, enjoy a better protection of their supplementary pension rights than workers who change jobs within their country. On the other hand, the absence of EU-wide measures to improve the acquisition, preservation and transferability of such rights could mean that a change of jobs within a sector covered by a sector-wide pension scheme would not result in reduced pension rights, whereas a change to a job in the same sector, but in another Member State, would diminish the prospective pension entitlement.

The Commission is convinced that the social partners at European level are well placed to make a significant contribution on these issues. Moreover ETUC, UNICE and CEEP, in the Preamble of the framework agreement on fixed-term work²², have recognised that "innovations in occupational social protection systems are necessary

²¹ See footnote n. 3.

²² Implemented by Council Directive 1999/70/EC of 28 June 1999, concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ L 175 of 10 July 1999, p.43).

in order to adapt them to current conditions, and in particular to provide for the transferability of rights".

In the light of the above considerations, and in accordance with Article 138.2 of the EC Treaty, the social partners are called upon to give their opinion on the possible direction of Community action on the portability of supplementary pension rights. In particular, they are invited to answer the following questions:

- (1) Do you consider it advisable to take an initiative in this area? Do you share the Commission's view that the absence of a specific body of provisions concerning the acquisition, the preservation and the transferability of supplementary pension rights at European level has adverse impacts on workers and/or employers in the Internal Market?
- (2) If so, what form do you think action at European level should take (collective agreement, directive, recommendation, code of practice, guidelines, etc.)?
- (3) What should the main features of such a measure be?
- (4) Should action be taken at cross-sectoral and/or sectoral level?
- (5) Should such a measure apply equally to all supplementary pension schemes or should distinctions be made between supplementary pension schemes financed only by an individual employer and those financed jointly by employers and employees; between voluntary and mandatory schemes; between pension entitlements based on individual employment contracts and those based on collective agreements?

