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No. Amd. prop. : 13857/07 SOC 368 CODEC 1062 - COM(2007) 603 final + REV 1 + COR 1 +
REV 1 COR 1

Subject : Amended proposal for a Directive of the European Parliament and of the Council
on minimum requirements for enhancing worker mobility by improving the
acquisition and preservation of supplementary pension rights

Delegations will find attached a set of drafting suggestions prepared by the Presidency, with a view to advancing the technical discussion.

It is recalled that, at this stage, all delegations have general scrutiny reservations on the proposal.

Changes in relation to the previous version (5788/13)¹ are indicated as follows: new text is in **bold** or **bold underlined** and deletions are marked "[...]".

¹ The text of the draft Directive as annexed to doc. 5788/13 was taken from the Commission's amended proposal (doc. 13857/1/07 REV 1).

Amended proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights

(Text with EEA relevance)

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 94 thereof,]

Having regard to the proposal from the Commission²,

Having regard to the opinion of the European Economic and Social Committee³,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁴,

Whereas:

- (1) The free movement of persons is one of the fundamental freedoms of the Community; in Article 42, the Treaty stipulates that the Council, acting in accordance with the procedure referred to in Article 251, shall adopt such measures in the field of social security as are necessary to provide freedom of movement for workers.

² OJ C [...], [...], p. [...].

³ OJ C [...], [...], p. [...].

⁴ OJ C [...], [...], p. [...].

- (2) The social protection of workers with regard to pensions is guaranteed by statutory social security schemes, together with supplementary pension schemes linked to the employment contract, which are becoming increasingly common in the Member States.
- (3) The Council has wide powers of discretion regarding the choice of measures which are the most appropriate when it comes to achieving the objective of Article 42 of the Treaty; the system of coordination provided for in 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 Community⁵ and Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71⁶ and, in particular, the rules applicable to aggregation do not relate to supplementary pension schemes, except for schemes covered by the term “legislation”, as defined in the first paragraph of Article 1(j) of Regulation (EEC) No 1408/71, or which have been the subject of a declaration to this effect by a Member State pursuant to this Article.
- (4) Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community⁷ represents an initial specific measure designed to improve the exercise of the right of workers to freedom of movement as regards supplementary pension schemes.
- (5) Recourse should also be made to Article 94 of the Treaty, given that the disparities between the national legislation governing supplementary pension schemes are likely to hamper both the exercise of the right of workers to freedom of movement and the operation of the internal market. Thus, in order to improve the rights of workers moving within the Community and within the same Member State, provision should be made for certain minimum requirements for the establishment of pension rights and preservation of the vested pension rights of outgoing workers in a supplementary pension scheme linked to an employment relationship.

⁵ OJ L 149 of 5.7.1971, p. 1. Regulation as last amended by Regulation (EC) No 631/2004 (OJ L 100 of 6.4.2004, p. 1).

⁶ OJ L 74 of 27.3.1972, p. 1. Regulation as last amended by Regulation (EC) No 77/2005 (OJ L 16 of 20.1.2005, p. 3) due to be repealed by Regulation (EC) 883/04 coming into force

⁷ OJ L 209 of 25.7.1998, p. 46.

- (5a) Moreover, account should be taken of the characteristics and special nature of supplementary pension schemes and the way they differ within and among the Member States. The introduction of new schemes, the sustainability of existing schemes and the expectations and rights of current pension scheme members should be adequately protected. This Directive should also take particular account of the role of the social partners in designing and implementing supplementary pension schemes.
- (5b) This Directive does not call into question the right of Member States to organise their own pension systems. Member States retain full responsibility for the organisation of such systems and when transposing this Directive into national law are not obliged to introduce legislation providing for the setting up of supplementary pension schemes.
- (5c) This Directive should apply to all supplementary pension schemes established in conformity with national legislation and practise, that offer supplementary pensions for workers, such as group insurance contracts, pay-as-you-go schemes agreed by one or more branches or sectors, funded schemes or pension promises backed by book reserves, or any collective or other comparable arrangement.
- (5d) This Directive should not apply to supplementary pension schemes or, where applicable, subsections of such schemes, that have been closed to the effect that no new members can be accepted because the introduction of new rules could place an unjustifiable burden on such schemes.
- (5e) This Directive does not aim to harmonise or affect national law on reorganisation measures and winding-up proceedings; it is irrelevant whether any proceedings are opened because of insolvency, or whether they are entered into voluntarily or compulsorily. Similarly, this Directive does not affect national legislation on reorganisation measures under Directive 2001/17/EC⁸.

⁸ Directive of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings (OJ L 110, 20.4.2001, p.28).

- (5f) This Directive should not affect any arrangements for insolvency protection or compensation arrangements which are not part of a supplementary pension scheme linked to an employment relationship and which aim to protect the pension rights of workers in the event of insolvency of the undertaking or the pension scheme. Similarly, this Directive should not affect national pension reserve funds.
- (5g) This Directive applies only to supplementary pension schemes existing due to an employment relationship that are based on reaching retirement age or on fulfilling other requirements, as laid down by the scheme or by national legislation. This Directive does not apply to individual pension arrangements, other than those concluded through an employment relationship. Nor does this Directive apply to invalidity and survivors benefits.
- (5h) A one-off payment which is not considered substantial income, is not related to contributions made for the purpose of purchasing an annuity, is paid directly or indirectly at the end of a career, and is financed solely by the employer, should not be considered to be a supplementary pension within the meaning of this Directive.
- (5i) Since supplementary retirement provision is becoming increasingly important in many Member States for securing people's standard of living in old age, the conditions for acquiring, preserving and transferring acquired rights should be improved in order to reduce obstacles to workers freedom of movement and occupational mobility within the EU.
- (5j) Vesting requirements should not be likened to other conditions laid down for the acquisition of a right to an annuity made with regards to the payout phase under national law or under the rules of certain supplementary pension schemes (particularly defined contribution schemes).

- (6a) Where employment is terminated before an outgoing worker has accrued vested pension rights and when the scheme or the employer bears the investment risk (in particular in defined benefit schemes), the scheme should always refund the contributions of the outgoing worker. Where employment is terminated before an outgoing worker has accrued vested pension rights and when the outgoing worker bears the investment risk (in particular in defined contributions schemes), the scheme should refund the value of the investments derived from those contributions. The value may be more or less than the contributions paid by the outgoing worker. If the value is negative there is nothing to refund.
- (6b) Outgoing workers should have the right to leave their vested pension rights as dormant rights in the supplementary pension scheme in which their entitlement was established. As regards the preservation of dormant rights, protection may be considered equivalent where, particularly in the context of a defined contribution scheme, the outgoing workers are afforded the possibility of having the value of their vested pension rights discharged to a supplementary pension scheme which meets the conditions laid down in Article 5.1.
- (7) In accordance with national law and practice, steps should be taken to ensure the preservation of dormant rights or the value of such dormant rights. The value of the rights at the time when the worker leaves the scheme should be established in accordance with national law and practice. Where the value of dormant rights are adjusted, account should be taken of the particular nature of the scheme, the interests of the deferred beneficiaries, the interests of the remaining active pension scheme members and the interests of retired beneficiaries. Justified administrative costs can also be taken into account where dormant rights are adjusted.
- (7a) This Directive does not create any obligation to establish more favourable conditions for dormant rights than for the rights of active scheme members.

- (8) When the vested pension rights or the value of the vested pension rights of an outgoing worker are not in excess of any thresholds established by the Member State concerned, and in order to avoid excessive administrative costs resulting from the management of a large number of low-value dormant rights, pension schemes may be given the option not to preserve these vested rights but to either transfer the value of the vested pension rights or use a capital payment representing the vested rights. Where applicable, the transfer value or the capital payment will be established in accordance with national law and practice.
- (9a) This Directive does not stipulate provisions for the transfer of vested pension rights, however, in order to encourage occupational mobility Member States should endeavour as far as possible and in particular when introducing new supplementary pension schemes, to improve the transferability of vested pension rights.
- (11) Without prejudice to Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision⁹, active scheme members and workers who exercise or plan to exercise their right to freedom of movement should be suitably informed, particularly regarding how a termination of their employment would affect their supplementary pension rights. Member States may stipulate that such information need not be provided more than once per year.
- (12) In view of the diverse nature of supplementary pension schemes, the Community must confine itself to establishing the objectives to be achieved in general terms, which means that the directive is the appropriate legal instrument.

⁹ OJ L 235 of 23.9.2003, p10.

- (13) Given that the objectives of the measures envisaged, namely to reduce the obstacles to the exercise of the right of workers to freedom of movement and occupational mobility and to the operation of the internal market, cannot be achieved satisfactorily by the Member States and may therefore, because of the scope of the measures, be achieved more effectively at Community level, the Community may take action in accordance with the subsidiarity principle set out in Article 5 of the Treaty. In accordance with the principle of proportionality referred to in that Article, this Directive, based on an impact assessment conducted with the help of the committee in the area of supplementary pensions (the Pensions Forum), will not go beyond what is necessary to achieve its objectives.
- (14) This Directive establishes minimum requirements, thus enabling the Member States to adopt or maintain more favourable provisions. The implementation of this Directive cannot be used to justify a regression vis-à-vis the existing situation in each Member State.
- (15) In view of the need to take account of the effects of this Directive, in particular on the financial sustainability of supplementary pension schemes, the Member States may be granted more time in which gradually to implement those provisions which are likely to have effects of this kind.
- (15a) The 5 yearly reports shall review recent trends in the provision of supplementary pensions. The first report shall also contain an assessment of an employer's liability within national legislation in regards to the outgoing pension rights of workers who transfer their rights to another pension scheme. The assessment shall also explore options for ensuring legal liability ends once transfers are executed.
- (16) In accordance with the national provisions governing the organisation of supplementary pension schemes, the Member States may grant the social partners, at their joint request, responsibility for implementing this Directive as regards the provisions relating to collective agreements, provided that the Member States take all the necessary steps to ensure that they are at all times able to guarantee the outcomes prescribed in this Directive,

HAVE ADOPTED THIS DIRECTIVE:

Article 1
Objective

The aim of this Directive is to facilitate the exercise of the right of workers to freedom of movement and to facilitate workers' occupational mobility, by reducing the obstacles created by certain rules concerning supplementary pension schemes linked to an employment relationship.

Article 2
Scope

1. This Directive applies to supplementary pension schemes apart from the schemes covered by Regulation (EEC) No 883/04. [...]
2. This Directive does not apply to the following:
 - (a) supplementary pension schemes, which, on the date of entry into force of this Directive, no longer accept new active members and remain closed to them;
 - (b) supplementary pension schemes that are subject to measures involving the intervention of administrative bodies established by national legislation or judicial authorities, which are intended to preserve or restore their financial situation, including winding-up proceedings. This exclusion shall not extend beyond the end of the intervention;
 - (c) insolvency guarantee schemes, compensation schemes and national reserve funds.
3. **This Directive shall apply only to periods of employment falling after its entry into force and, in any event, no later than two years after the adoption of the Directive.**

Article 3
Definitions

For the purposes of this Directive:

- (a) "supplementary pension" means a retirement pension provided for by the rules of a supplementary pension scheme established in conformity with national legislation and practice;
- (b) "supplementary pension scheme" means any occupational retirement pension scheme established in conformity with national legislation and practice and linked to an employment relationship, intended to provide a supplementary pension for employed persons;
- (c) "active scheme members" means workers whose current employment relationship entitles them or is likely to entitle them, after fulfilling any acquisition conditions, to a supplementary pension in accordance with the provisions of a supplementary pension scheme;
- (d) "vested pension rights" means any entitlement to a supplementary pension after the fulfilment of any acquisition conditions, under the rules of a supplementary pension scheme and, where applicable, under national legislation;
- (da) "vesting period" means the period of active membership of a scheme, required under national law or the rules of a supplementary pension scheme, in order to trigger entitlement to a supplementary pension;
- (db) "waiting period" means the period of employment, required under national law or by the rules of a supplementary pension scheme or by the employer, before a worker becomes eligible for membership of a scheme;**
- (f) "outgoing worker" means an active scheme member whose current employment relationship terminates for reasons other than he or she becoming eligible for a supplementary pension;

- (h) "deferred beneficiary" means any former active scheme member who has vested pension rights in a supplementary pension scheme, but is no longer an active member of that scheme and is not yet in receipt of a supplementary pension from that scheme;
- (i) "dormant pension rights" means vested pension rights retained within the scheme in which they have been accrued by a deferred beneficiary;
- (j) "value of the dormant rights" means the capital value of the pension rights calculated in accordance with national law and practice.

Article 4

Conditions governing acquisition

The Member States shall take all necessary steps to ensure that:

- (a) [...]
- (b) where a minimum age is stipulated for the accrual by an active scheme member of vested rights, this age shall not exceed 21 years;
- (c) where a vesting period **and/or a waiting period** is applied **the total combined vesting and/or waiting period** shall under no circumstances exceed two years [...]for active scheme members. [...]
- (d) where an outgoing worker has not yet acquired vested pension rights when the employment relationship is terminated, the supplementary pension scheme shall reimburse the contributions paid by the outgoing worker, or paid on the worker's behalf in accordance with national law or collective agreements or contracts, and where the outgoing worker bears the investment risk, the investment value arising from these contributions;
- (e) Member States shall have the option of allowing the social partners to lay down different provisions by collective agreement, to the extent that those provisions provide **no less favourable** [...] protection to the rights of workers and active scheme members.

Article 5

Preservation of dormant pension rights

- 1. Subject to paragraphs 2 and 3, Member States shall adopt the measures necessary to ensure that the vested pension rights of outgoing workers can remain in the supplementary pension scheme in which they vested. The initial value of these rights for the purposes of paragraph 1 shall be calculated at the point when an outgoing worker's current employment relationship terminates.
1. The Member States shall adopt the measures necessary having regard to the nature of the pension scheme rules or practise, to ensure dormant pension rights or their values are treated in line with the value of the rights of active scheme members, or the development of pension benefits currently in payment, or by other means which are considered fair treatment, such as:
 - (a) the pension rights in the supplementary pension scheme are set as a nominal sum; or
 - (b) the deferred beneficiary continues to benefit from a rate of interest built into the pension scheme, or from the return on investments derived by the supplementary pension provider; or
 - (c) the value of the dormant pension rights is adjusted in accordance with the inflation rate or salary levels which may be subject to a proportionate limit set by national legislation or agreed by the social partners.
2. The Member States may allow supplementary pension schemes not to retain the vested rights of an outgoing worker but to pay a capital sum equivalent to the value of the vested pension rights to the outgoing worker, as long as the value of the vested pension rights does not exceed a threshold established by the Member State concerned. The Member State shall inform the Commission of the threshold applied.

3. Member States shall have the option of allowing the social partners to lay down different provisions by collective agreement, to the extent that those provisions provide **no less favourable** [...]protection to the rights of outgoing workers and deferred beneficiaries.

Article 6

Information

1. Without prejudice to the obligations of the institutions for occupational retirement provision stemming from Article 11 of Directive 2003/41/EC, to provide information to scheme members and beneficiaries, the Member States shall adopt the measures necessary to ensure that active pension scheme members can obtain on request information on how a termination of employment would affect their supplementary pension rights in accordance with paragraph 2.
2. Information shall be provided to active scheme members who request it. It shall relate, in particular, to the following:
 - (a) the conditions governing the acquisition of supplementary pension rights and the effects of applying them when employment is terminated;
 - (b) the value of their vested rights or an assessment of the vested pension rights carried out no more than 12 months preceding the date of the request and;
 - (c) the conditions governing the future treatment of dormant pension rights;
3. Information shall be provided to deferred beneficiaries who request it concerning:
 - (a) the value of their dormant rights or an assessment of the dormant pension rights carried out no more than 12 months preceding the date of the request; and
 - (b) the conditions governing the treatment of dormant pension rights.
4. Information shall be provided clearly and within a reasonable period of time.

Article 7

Minimum requirements — non-regression

1. The Member States may adopt or maintain provisions on the establishment of pension rights for workers and the preservation of supplementary pension rights of outgoing workers which are more favourable than those set out in this Directive.
2. The implementation of this Directive may not under any circumstances be used as a reason for reducing existing rights for the establishment and preservation of supplementary pensions in the Member States.

Article 8

Implementation

1. The Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive no later than [...(2 years after the adoption of this Directive)], or shall ensure that the social partners, introduce the required provisions by way of agreement by that date. Member States are required to take the necessary steps enabling them at all times to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.
2. Notwithstanding the first paragraph, the Member States may be granted, where necessary, an extension of 60 months starting on [...(2 years after the adoption of this Directive)], in order to achieve the objective referred to in Articles 4 and 5. Any Member State wishing to be granted this extension shall inform the Commission accordingly, indicating the provisions and schemes concerned and the specific reasons for the extension.
3. When the Member States adopt these measures, these shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

Article 9

Report

1. [...] Five years after [...] (2 years after the adoption of this Directive)], the Commission shall draw up a report for submission to the European Parliament, the Council and the European Economic and Social Committee on the basis of the information provided by the Member States.
2. The [...] report shall deal with the application of this Directive and contain a specific report that shall review the conditions of transferring capital representing workers' supplementary pension rights. On the basis of that report, the Commission will, if appropriate, examine options for a proposal containing any amendments to this Directive or other instruments which prove necessary in order to further reduce obstacles to the mobility of workers created by certain rules concerning supplementary pension provision.

Article 10

Entry into force

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

Article 11

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
