



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 27.05.1998
COM(1998) 325 final

97/0265 (CNS)

Amended proposal for a

COUNCIL DIRECTIVE

**ON SAFEGUARDING THE SUPPLEMENTARY PENSION RIGHTS
OF EMPLOYED AND SELF-EMPLOYED PERSONS
MOVING WITHIN THE EUROPEAN UNION**

(presented by the Commission pursuant to Article 189 a (2)
of the EC-Treaty)

EXPLANATORY MEMORANDUM

On 8 October, the Commission presented a proposal for a Council Directive on safeguarding the supplementary pension rights of employed and self-employed persons moving within the European Union¹.

The purpose of this Directive is to provide protection, as regards supplementary pension schemes (retirement, invalidity or survivors), for the pension rights of workers and members of their families who move from one Member State of the European Union to another. Such protection covers, in particular, the preservation of supplementary pension rights under supplementary schemes, whether membership thereof is optional or compulsory, as well as cross-border payment of benefits and possible cross-border affiliation for posted workers.

In the Green Paper on Supplementary Pensions in the Single Market, the Commission posed a number of questions to all interested parties (including governments, social partners, and supplementary pension scheme representatives) which are intended to deepen the analysis of the remaining problems which constitute obstacles to free movement. At present, the Commission services are analysing the reactions of all involved parties and in the light of the outcome of this debate, the Commission could take further action in this area.

The Economic and Social Committee and the European Parliament have been consulted on the basis of Articles 51 and 235 of the Treaty, and the Economic and Social Committee has given a favourable opinion on the proposal.

The European Parliament, in its plenary session of April 1998, adopted several amendments to the initial text of the Commission.

The Commission could accept the majority of the amendments proposed by the European Parliament because these amendments clarify the existing provisions.

Therefore the Commission proposes, on the basis of Article 189 a § 2 of the Treaty, to modify its initial proposal in order to take account of certain amendments proposed by the European Parliament in its legislative resolution.

¹ COM(97) 486 final, JO C-005 du 09.01.98, p. 4

COMMENT ON PROPOSED MODIFICATIONS

1. **Amendment consisting in the addition of a new Recital 5a after the 5th Recital of the initial proposal.**

This amendment reflects the proposal of the Economic Affairs Committee of the EP.

2. **Amendment consisting in the addition of a new Recital 7a after the 7th Recital**

This amendment reflects the position of the EP which would like to cover the situation of temporary and part-time employment. These forms of employment are covered by the proposal of the Commission implicitly. The EP is very sensitive to this aspect.

3. **Amendment consisting in the addition of a new Recital 12a after the 12th Recital**

This amendment clarifies that this Directive is a first step on removing obstacles to free movement and that there is a need for further action in the future for the remaining obstacles relating to the supplementary pensions.

4. **Amendment relating to the 13th Recital**

This amendment clarifies the scope of Article 7 to which refers Recital 13.

5. **Amendment relating to Article 1**

This amendment clarifies the scope of the Directive by insisting that this Directive promotes the free movement of employed and self-employed persons within the European Union.

6. **Amendment relating to Article 2**

Amendment to replace the words "members of supplementary pension schemes" by "persons entitled to supplementary pension schemes" and the words "members of their families and their survivors" by "other entitled persons under such schemes". This amendment clarifies certain notions.

7. **Amendment relating to Article 3(a)**

Amendment clarifying that the notion "supplementary pension" means invalidity, retirement and survivors' benefits intended to supplement or replace those provided in respect of the same contingencies by schemes covered by Regulation (EEC) n° 1408/71.

8. **Amendment relating to Article 3(d)**

Amendment consisting of clarifying that the notion of "pension rights" covers the invalidity, retirement or survivors' benefits.

9. **Amendment relating to Article 4**

This amendment consists to clarify to scope of Article 4 which ensures the principle of equal treatment between persons moving within the same Member State and persons moving in another Member State, as far as the preservation of vested rights is concerned. It replaces also the words "members of their families or their survivors" by the words "other entitled persons under these schemes".

10. **Amendment relating to Article 5**

Amendment consisting to replace the words "members of their families and their survivors" by the words "other entitled persons under these schemes". As for amendment relating to Article 2, this amendment intends to clarify the personal scope of the Directive

11. **Amendment relating to Article 12(3)**

Amendment consisting to reduce the 6 years period to present a report on the implementation of the Directive to a four years period.

PROPOSAL FOR A COUNCIL DIRECTIVE COM(97) 486 final of 8 October 1997 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the European Union

AMENDED PROPOSAL FOR A COUNCIL DIRECTIVE on safeguarding the supplementary pension rights of employed and self-employed persons moving within the European Union

PREVIOUS VERSION

presented by the Commission on 8 October 1997

NEW VERSION

Taking account of certain amendments of the European Parliament

THE COUNCIL OF THE EUROPEAN UNION,

Unchanged

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

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas one of the fundamental freedoms of the Community is the free movement of persons; whereas the Treaty establishing the European Community provides that the Council shall, acting unanimously, adopt such measures in the field of social security as are necessary to provide freedom of movement of workers;

Unchanged

Whereas the social security of workers is assured by statutory social security schemes and by supplementary social security schemes;

Unchanged

Whereas the legislation already adopted by the Council with a view to protecting the social security rights of workers moving within the Community and of members of their family, and more particularly

Unchanged

Regulations (EEC) Nos 1408/71¹ and 574/72² concern only statutory pension schemes;

Whereas the European Council meeting in Amsterdam on 16-17 June 1997 reaffirmed the importance it attaches to a properly functioning Single Market as an essential element of the overall strategy to promote competitiveness, economic growth and employment throughout the Union;

Unchanged

Whereas to this end, in its Resolution on Growth and Employment, the European Council meeting in Amsterdam on 16-17 June 1997 has agreed concrete action on making maximum progress with the final completion of the Single Market: making the rules more effective, dealing with the main remaining market distortions, avoiding harmful tax competition, removing the sectorial obstacles to market integration and delivering a Single Market for the benefit of all citizens³;

Unchanged

Recital 5a (new)

Whereas the free movement of workers is not only an essential element for the proper functioning of the single market but also a condition for the proper functioning of Economic and Monetary Union.

Whereas in its Recommendation 92/442/EEC of 27 July 1992 on the convergence of social protection objectives and policies⁴ the Council recommends, in point I.B.5 (h), that Member States should "promote, where necessary, changes to the

Unchanged

¹ OJ No L149, 5.7.1971, p.2 ; Regulation as updated by Council Regulation (EC) No 118/97 of 2 December 1996 amending and updating Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ No L28, 30.1.1997)

² OJ no L74, 27.3.1972, p. 1 ; Regulation as updated by Council Regulation (EC) No 118/97

³ OJ No C236, 2.8.1997

⁴ OJ No L245, 26.8.1992, p.49

conditions governing the acquisition of pension and, especially, supplementary pension rights with a view to eliminating obstacles to the mobility of employed workers";

Whereas this objective can be achieved only if supplementary pension rights are afforded appropriate protection when a worker moves from one Member State to another;

Unchanged

Recital 7a (new)

Whereas adequate pension rights must be better guaranteed in respect of temporary and part-time employment, which is becoming increasingly common; whereas, therefore, the Commission should also take account of such employment when formulating pension proposals.

Whereas freedom of movement for persons, which is one of the cornerstones of the Community, is not confined to employed persons but also extends to self-employed persons in the framework of the freedom of establishment and the freedom to provide services;

Unchanged

Whereas, in order to enable the right to free movement to be exercised effectively, workers should have certain guarantees regarding the preservation of their vested rights deriving from supplementary pension schemes;

Unchanged

Whereas the Member States should take the necessary measures to ensure that benefits under supplementary pension schemes are paid to members and former members thereof as well as to members of their families or their survivors in all Member States of the European Union, given that all restrictions on the free movement of payments and capital are now prohibited under Article 73b of the Treaty establishing the European Community;

Unchanged

Whereas in order to facilitate the exercise of the right to free movement, national regulations should be adjusted in order to enable contributions to continue to be made to an approved supplementary pension scheme established in one Member State by or on behalf of workers who are posted, for a short duration, to another Member State;

Unchanged

Whereas in this regard the Treaty requires not only the abolition of any discrimination based on nationality but also the elimination of any national measure likely to impede or render less attractive the exercise by workers of the fundamental freedoms guaranteed by the Treaty as interpreted by the Court of Justice in successive judgements;

Unchanged

Recital 12a (new)

Whereas this directive is merely a first step towards the regulation of the supplementary pension system with the aim of removing obstacles to the mobility of workers; whereas, where necessary, the Council will in future adopt further legal acts

Whereas this Directive in the limited field of application of posted workers is without prejudice to the need to find a suitable solution to the wider problem of the taxation of supplementary pensions within the Community.

Whereas this Directive in the limited field of application of posted workers is without prejudice to the need to find a suitable solution at Community level to the wider problem of the taxation of supplementary pensions within the Community, in particular concerning the tax deductibility of supplementary pension contributions and the taxation of the final benefits.

Whereas workers exercising their right to free movement should be adequately informed by the managers of supplementary pension schemes, particularly with regard to the choices and alternatives available to them;

Unchanged

Whereas this Directive is without prejudice to the applicability to supplementary pension schemes of the single market rules and the competition rules of the Treaty establishing the European Community;

Unchanged

Whereas, by reason of the diversity of supplementary social security schemes, the Community should lay down only a general framework of objectives, leaving the Member States to choose freely what measures to adopt to implement those objectives;

Unchanged

Whereas the Member States, in order to attain these objectives, must adjust their national laws and, this being the case, a directive is the appropriate legal instrument;

Unchanged

Whereas, in accordance with the principles of subsidiarity and proportionality as set out in Article 3b of the Treaty, the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community; whereas this Directive limits itself to the minimum required for the attainment of those objectives and does not go beyond what is necessary for that purpose;

Unchanged

Whereas one of the fundamental freedoms of the Community is the free movement of persons; whereas the Treaty establishing the European Community provides that the Council shall, acting unanimously, adopt such measures in the field of social security as are necessary to provide freedom of movement of workers;

Unchanged

HAS ADOPTED THIS DIRECTIVE

Article 1

The aim of this Directive is to ensure that appropriate protection is given to rights, acquired or in the course of acquisition, of

The aim of this Directive is to promote the free movement of employed and self-employed persons within the

members of supplementary pension schemes who move from one Member State to another within the European Union. Such protection refers in particular to the preservation of pension rights under both voluntary and compulsory supplementary pension schemes, with the exception of schemes already covered by Council Regulation (EEC) N° 1408/71.

European Union by ensuring that the pension rights of persons entitled to supplementary pensions and who move from one Member State to another are suitably protected. Such protection refers to pension rights under both voluntary and compulsory supplementary pension schemes with the exception of schemes covered by Regulation No 1408/71.

Article 2

This Directive shall apply to members of supplementary pension schemes who have acquired or are in the process of acquiring rights in one or more Member States, and to members of their families and their survivors.

This Directive shall apply to persons entitled to supplementary pension schemes and other entitled persons under such schemes who have acquired or are in the process of acquiring rights in one or more Member States

SECTION 2

Definitions

Article 3

For the purpose of this Directive:

a) "supplementary pension" means invalidity, retirement and survivors' benefits intended to supplement or replace those provided in respect of the same contingencies by statutory social security schemes;

a) 'supplementary pension' means invalidity, retirement and survivors' benefits intended to supplement or replace those provided in respect of the same contingencies by schemes covered by Regulation (EEC) No 1408/71.

b) "supplementary pension scheme" means any occupational pension scheme and collective arrangement serving the same aim, such as a group insurance contract, branch or sectoral pay-as-you-go scheme, funded scheme or pension promise backed by book reserves, intended to provide a supplementary pension for employed or self-employed persons;

Unchanged

c) "approved supplementary pension scheme" means a supplementary pension scheme which, in the Member State in which it is established, satisfies the conditions required by that Member State

Unchanged

for the granting of particular tax reliefs that are available in relation to supplementary pension provision;

d) "pension rights" means any benefits to which a scheme member is entitled under a supplementary pension scheme;

'pension rights' means any invalidity, retirement or survivors' benefits to which a scheme member is entitled under a supplementary pension scheme.

e) "vested pension rights" means any rights to benefits obtained after the fulfilment of the minimum conditions, in particular of vesting periods, required by the rules of a supplementary pension scheme. "Vesting period" means any period taken into consideration for admission to a supplementary pension scheme and for the acquisition of rights thereunder;

Unchanged

f) "Worker" means an employed or a self-employed person;

Unchanged

g) "Posted worker" means a worker who is posted to work in another Member State and who under the terms of Title II of Regulation (EC) 1408/71 continues to be subject to the legislation of the Member State of origin, and "Posting" shall be construed accordingly;

Unchanged

h) "Member State of origin" means the Member State in which a worker has worked immediately prior to the posting and in which the supplementary pension scheme of which he is a member is established;

Unchanged

i) "host Member State" means the Member State to which a worker is posted.

Unchanged

SECTION 3

Measures for protecting the supplementary pension rights of workers moving within the European Union

Article 4

Member States shall take the necessary measures to ensure that the vested pension rights of supplementary pension scheme members are preserved when they move from one Member State to another within the European Union. To this end Member States shall ensure that full preservation of vested pension rights shall be guaranteed for members in respect of whom contributions are no longer being made to a supplementary pension scheme as a consequence of their moving from one Member State to another, at least to the same extent as for members in respect of whom contributions are no longer being made but who remain within the Member State in question. This provision shall also apply to members of their families and their survivors.

Article 5

Member States shall ensure that, in respect of members of supplementary pension schemes, as well as members of their families and their survivors, supplementary pension schemes make full payment in other Member States of all benefits due under such schemes.

Article 6

1. Member States shall adopt such measures as are necessary to enable contributions to continue to be made to a supplementary pension scheme established in the Member State of origin by or on behalf of a posted worker who is a member of such scheme during the period of his or her posting to the host Member State.

2. Where, pursuant to this Article, contributions continue to be made to a supplementary pension scheme in the

Member States shall take the necessary measures to ensure that the vested pension rights of supplementary pension scheme members are preserved when they move from one Member State to another. To this end, Member States shall ensure that full preservation of vested pension rights shall be guaranteed for members, even if contributions are no longer being made to a supplementary pension 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 Member State in question. This Article shall also apply to other entitled persons under these schemes.

Member States shall ensure that, in respect of members of supplementary pension schemes, as well as members of other entitled persons under these schemes, supplementary pension schemes make full payment in other Member States of all benefits due under such schemes.

Unchanged

Member State of origin, the host Member State shall recognise these as equivalent to contributions to a supplementary pension scheme in the host Member State.

Article 7

Where contributions continue to be made in accordance with Article 6 (1) to an approved supplementary pension scheme, a host Member State shall, to the extent that it has taxing rights, treat such contributions in the same way as it would treat contributions paid to a comparable approved supplementary pension scheme established in the host Member State. **Unchanged**

Article 8

Member States shall take measures to ensure that managers of supplementary pension schemes provide adequate information to scheme members as to their pension rights and the choices which are available to them under the scheme when they move to another Member State. **Unchanged**

SECTION 4

Final Provisions

Article 9

Member States may provide that the provisions of Article 6 shall apply only to postings that commence on or after the date of entry into force of this Directive. **Unchanged**

Article 10

Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply the provisions of this Directive to pursue their claims by judicial process after possible recourse to other competent **Unchanged**

authorities.

Article 11

Member States shall lay down the system of penalties for breaching the national provisions adopted pursuant to this Directive, and shall take all the measures necessary to ensure that those penalties are applied. The penalties thus provided for shall be effective, proportionate and dissuasive. Member States shall communicate the relevant provisions to the Commission not later than 18 months following the entry into force of this Directive and shall communicate any subsequent changes as soon as possible. **Unchanged**

Article 12

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 18 months following the date of its entry into force, or shall ensure by that date at the latest that management and labour introduce the required provisions by way of agreement; the Member States being obliged to take all necessary steps enabling them at all times to guarantee the results imposed by this Directive: They shall immediately inform the Commission thereof. **Unchanged**

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

They shall inform the Commission of the national authorities to be contacted regarding the application of this Directive.

2. Not later than two years following, the entry into force of this Directive, Member **Unchanged**

States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Member States shall supply, by the same date, a correlation table showing the pre-existing national provisions or those which have been introduced in order to comply with each provision of this Directive.

3. On the basis of the information supplied by Member States, the Commission shall draw up a report for submission to the European Parliament, the Council and the Economic and Social Committee, within six years of the entry into force of this Directive.

The report shall deal with the application of this Directive and shall, where appropriate, propose any amendments that may prove necessary.

Article 13

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

Article 14

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

On the basis of the information supplied by Member States, the Commission shall draw up a report for submission to the European Parliament, the Council and the Economic and Social Committee, within four years of the entry into force of this Directive.

Unchanged

Unchanged

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