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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
- General approach

Delegations will find attached the text of the above proposal as revised in the light of the meeting of the Permanent Representatives Committee on 14 June 2013. The report to Council is set out in doc. 10890/13.

Amended proposal for a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on minimum requirements for enhancing worker mobility between Member States 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 on the Functioning of the European Union, and in particular Article 46 thereof,

Having regard to the proposal from the European Commission¹,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

¹ OJ C [...], [...], p. [...].

² OJ C [...], [...], p. [...].

- (1) The free movement of persons is one of the fundamental freedoms of the European Union. Article 46 TFEU stipulates that the European Parliament and Council, acting in accordance with ordinary legislative procedure and after consulting the Economic and Social Committee shall issue Directives setting out the measures required to bring about freedom of movement for workers as defined in Article 45 TFEU. Article 45 TFEU stipulates that the freedom of movement of workers entails the right to accept offers of employment and "to move freely within the territory of Member States for this purpose". The proposed Directive promotes worker mobility by reducing the obstacles to mobility created by certain rules of supplementary pension schemes linked to an employment relationship.
- (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 46 of TFEU. 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, to self-employed persons and to members of their families moving within the Community³ and in Regulation (EC) No 883/2004/EC of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems⁴ 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 those Regulations, or which have been the subject of a declaration to this effect by a Member State pursuant to those Regulations.

³ 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).

⁴ OJ L 166, 30.4.2004, p. 1.

- (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 Community⁵ 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) The objective of this Directive is to facilitate worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights of scheme members who, after their employment in one Member State, engage in employment in another Member State.
- (6) 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.
- (7) 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.

⁵ OJ L 209 of 25.7.1998, p. 46.

- (8) This Directive should apply to all supplementary pension schemes established in conformity with national legislation and practice, 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.
- (9) 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.
- (10) 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/EC⁶ of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings.
- (11) 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.
- (12) 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 survivor's benefits.

⁶ OJ L 110, 20.4.2001, p. 28.

- (13) A one-off payment which is not related to contributions made for the purpose of supplementary retirement provision, is paid directly or indirectly at the end of an employment relationship, and is financed solely by the employer, should not be considered to be a supplementary pension within the meaning of this Directive.
- (14) 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 and preserving pension rights should be improved in order to reduce obstacles to workers' freedom of movement between Member States.
- (15) The fact that in some supplementary pension schemes pension rights can be forfeited if a worker's employment relationship ends before he or she has completed a minimum period of scheme membership (vesting period) or before he or she has reached the minimum age (vesting age) can prevent mobile workers from acquiring adequate pension rights; long waiting periods required to become a member of a pensions scheme have a similar effect. Such conditions therefore represent obstacles to workers' freedom of movement. By contrast, minimum age requirements for membership do not constitute an obstacle to freedom of movement and are thus not addressed by the present Directive.
- (16) Vesting requirements should not be likened to other conditions laid down for the acquisition of a right to an annuity made with regard to the payout phase under national law or under the rules of certain supplementary pension schemes (particularly defined contribution schemes). For instance, a period of active scheme membership which a member needs to complete after becoming entitled to a supplementary pension in order to claim his or her pension in the form of an annuity or capital sum does not constitute a vesting period.

- (17) 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 may 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. Alternatively, the scheme may reimburse the sum of the contributions.
- (18) 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).
- (19) 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 member 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 scheme members and the interests of retired beneficiaries. Justified administrative costs can also be taken into account where dormant rights are adjusted.
- (20) This Directive does not create any obligation to establish more favourable conditions for dormant rights than for the rights of active scheme members.

- (21) 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 pay the outgoing worker a capital sum equivalent to the value of the vested pension rights. Where applicable, the transfer value or the capital payment will be established in accordance with national law and practice.
- (22) This Directive does not provide for the transfer of vested pension rights; however, in order to facilitate worker mobility between Member States, 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.
- (23) 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 provision⁷, active scheme members and deferred beneficiaries who exercise or plan to exercise their right to freedom of movement should be suitably informed, upon request, about their supplementary pension rights. Member States should be able to stipulate that such information need not be provided more than once per year.
- (24) In view of the diverse nature of supplementary pension schemes, the Union should confine itself to establishing the objectives to be achieved in general terms, which means that a Directive is the appropriate legal instrument.
- (25) Since the objective of this Directive, namely facilitating the exercise of the right of workers to freedom of movement between Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scope of the action, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve this objective.

⁷ OJ L 235 of 23.9.2003, p. 10.

- (26) This Directive establishes minimum requirements, thus enabling the Member States to adopt or maintain more favourable provisions. The transposition of this Directive cannot be used to justify a regression vis-à-vis the existing situation in each Member State.
- (27) 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 avail themselves of an additional period of up to two years in which gradually to implement those provisions which are likely to have effects of this kind.
- (28) The Commission should draw up a report on the application of the Directive no later than five years after the entry into force of the Directive.
- (29) 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 between Member States 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.
 - (d) invalidity or survivor's pensions attaching to supplementary pension schemes.
 - (e) a one-off payment made by an employer to an employee at the end of his or her employment relationship which is not related to retirement provision.

3. This Directive shall apply only to periods of employment falling after its implementation in accordance with Article 8.

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 the accumulated supplementary pension rights after the fulfilment of any acquisition conditions, under the rules of a supplementary pension scheme and, where applicable, under national legislation;
- (e) "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 the accumulated supplementary pension rights;

- (f) "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;
- (g) "outgoing worker" means an active scheme member whose current employment relationship terminates for reasons other than becoming eligible for a supplementary pension and who, within two years, becomes engaged in employment in another Member State;
- (h) "deferred beneficiary" means any outgoing worker 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) where a vesting period and/or a waiting period is applied the total combined period shall under no circumstances exceed three years for outgoing workers;

- (b) where a minimum age is stipulated for the vesting of pension rights, this age shall not exceed 21 years for outgoing workers;
- (c) 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 behalf of the outgoing worker, in accordance with national law or collective agreements or contracts, and where the outgoing worker bears the investment risk, either the sum of the contributions made or the investment value arising from these contributions;
- (d) 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 and do not create obstacles to the freedom of movement for workers.

Article 5

Preservation of dormant pension rights

1. Subject to paragraphs 3 and 4, 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 2 shall be calculated at the point when an outgoing worker's current employment relationship terminates.
2. The Member States shall adopt the measures necessary, having regard to the nature of the pension scheme rules or practice, to ensure that outgoing workers' 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) if the pension rights in the supplementary pension scheme are acquired as an entitlement to a nominal sum, safeguarding the nominal value of the dormant pension rights; or
 - (b) if the value of accrued pensions rights changes over time, adjusting the value of the dormant pension rights by:
 - i. a rate of interest built into the pension scheme, or
 - ii. the return on investments derived by the supplementary pension provider; or
 - (c) if the value of the accrued pension rights is adjusted, for instance, in accordance with the inflation rate or salary levels, adjusting the value of the dormant pension rights accordingly subject to any proportionate limit set by national legislation or agreed by the social partners.
3. 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.
4. 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 and do not create obstacles to the freedom of movement for workers.

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 active scheme members and to deferred beneficiaries, the Member States shall adopt the measures necessary to ensure that active scheme members can obtain on request information on how a termination of employment would affect their supplementary pension rights in accordance with paragraph 2 of this Article.

2. Information shall be provided upon request to active scheme members . 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 upon request to deferred beneficiaries, or, in the case of the death of the deferred beneficiary, his or her surviving beneficiary, if the scheme provides payment of survivor's benefits 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. Member States may stipulate that it need not be provided more than once a year.

Article 7

Minimum requirements — non-regression

1. The Member States may adopt or maintain provisions on the acquisition of supplementary pension rights for workers, on the preservation of supplementary pension rights of outgoing workers and on active scheme members' and deferred beneficiaries' right to information 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 acquisition and preservation of supplementary pensions and scheme members' and beneficiaries' right to information in the Member States.

Article 8

Transposition

1. The Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive no later than three years after the date of entry into force 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 to guarantee the results imposed by this Directive. They shall immediately inform the Commission thereof.
2. Notwithstanding the first paragraph, Member States that face particular difficulties in transposing this Directive may, where justified, have an additional period of up to two years in order to comply with this Directive.

3. Any Member State which requires the additional period mentioned in paragraph 2 shall inform the Commission accordingly, indicating the provisions and schemes concerned and the specific reason for requiring an additional period to comply with the Directive.
4. When Member States adopt the measures referred to in paragraph 1, 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. Member States shall communicate all available information concerning the application of this Directive to the Commission no later than a date four years after the entry into force of the Directive.
2. Five years after the entry into force 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 application of this Directive.

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
