NOTE
From: The Presidency
To: The Working Party on Social Questions
On: 5 November 2012

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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 note from the Presidency with a view to the meeting of the Working Party on Social Questions on 5 November 2012.
Introduction

The proposed Directive on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights (the so-called 'Portability Directive') goes back some years. Various Presidencies have made intensive efforts to reach agreement in Council on this dossier, yet it has so far not been possible to reach the required unanimity. Although the Commission has not withdrawn its proposal, no active discussion in the Council has taken place since the first half of 2008.

The Presidency believes that the time is now right to re-launch discussions in the preparatory bodies of the Council on this initiative, for the following reasons:

- **Labour market mobility is more important than ever** given the economic crisis, high levels of unemployment and imbalances in employment opportunities across the EU;

- **Supplementary pensions are growing in importance** both in relative and nominal terms in many parts of the EU, given the typically declining generosity of statutory state pension schemes;

- **There is political support for action** in this area, as evidenced by the Statement by the Members of the European Council in January\(^1\) which called for "enhancing cross-border labour mobility, through ... progress on the acquisition and preservation of supplementary pension rights for migrating workers."

- The European Council reiterated its support for action in this area in June 2012, calling for "the acquisition and preservation of cross-border pension rights and other social security rights for EU workers" to be strengthened.\(^2\)

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\(^2\) Conclusions of the European Council of 28/29 June 2012. EUCO 76/12.
- The Commission's White Paper³ on pensions published on 16th February 2012 states that "In 2012, the Commission will, in close cooperation with the Council and the European Parliament, resume work on a pension portability Directive setting minimum standards for the acquisition and preservation of supplementary pension rights."

- The European Parliament, having already adopted its opinion in first reading in 2007, naturally wishes to see progress on this file.⁴

- The majority of respondents to the Commission's pensions Green Paper⁵ consultation supported renewed action on the basis of setting minimum standards for the acquisition and preservation of supplementary pension rights (see Summary of Responses⁶).

This note is divided into three parts. First, it provides a short factual background describing the evolution of this dossier and recalling the state of play of the discussions in Council.

Second, it highlights why this issue matters and how developments since it was last actively considered make it still more important.

Third, it sets out the starting point for consideration in Council and poses a number of questions with a view to resuming the negotiations.

The aim is to re-launch the initiative while minimising the need to go over old ground. The discussion could then immediately focus on the main outstanding issues, building on previous efforts.

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³ White Paper An Agenda for Adequate, Safe and Sustainable Pensions 6715/12.
⁵ Green Paper towards adequate, sustainable and safe European pension systems 12102/10.
⁶ Summary of consultation responses to the Green Paper "Towards adequate, sustainable and safe European pension systems" See 6918/11.
**Background on portability**

**Facilitating mobility**

In order to facilitate mobility, statutory social security pensions (often referred to as 'pillar I' pensions) earned in different Member States are co-ordinated under Regulation 883/2004/EC\(^7\) (which superseded the earlier regulation 1408/71). This ensures that if a person works in more than one Member State they do not lose out when it comes to their statutory social security pension entitlements. However, occupational pensions (so-called 'pillar II' pensions) are subject to no such arrangement which means that people who move jobs (including within Member States if this involves changing occupational pension schemes as is often the case) may lose out.

Recognising the need to close this gap, the Commission has sought to introduce a solution for supplementary pension schemes.

**1998 Directive on safeguarding the supplementary pension rights of people moving within the EU**

Following extensive analytical work, a first basic legislative step was Council Directive 98/49/EC which, in broad terms, effectively ensures that people moving across borders and those moving within a Member State receive equal treatment as regards the preservation of pension rights. This Directive has a very limited scope. The principal provisions can be briefly summarised as follows:

- A person who leaves a scheme because he moves to another Member State must not be treated differently to a person who leaves the scheme but remains in the Member States, as far as his/her vested rights are concerned, (Article 4).

- 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 others holding entitlement under such schemes in all Member States, (Article 5).

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- A person posted to another Member State must be allowed to continue to make contributions to the scheme in his "home" Member State (Article 6).

- Workers exercising their right to free movement should be adequately informed by employers, trustees or others responsible for the management of supplementary pension schemes (Article 7).

Proposal for a new Directive in 2005

Recognising the limited nature of the 1998 Directive, the Commission proposed a new Directive in October 2005 on improving the portability of supplementary pension rights. This had three elements – (1) transfers of pension rights, (2) timely acquisition of pension rights and (3) preservation of pension rights once granted. The proposal was subject to unanimity in Council and co-decision with the Parliament. The European Parliament adopted its opinion in first reading in June 2007. However, the discussions within the Council did not result in an agreement.

Revised 2007 proposal

Following the European Parliament's first reading, the Commission issued a revised proposal in 2007. This incorporated various amendments suggested by the European Parliament, along with technical improvements arising from the discussions in the Council Working Party. In addition, the Commission took full account of the request by the European Council for an amended proposal based on enhancing worker mobility by improving the vesting and preservation of supplementary pension rights. Accordingly, the pension transfers element was removed from the amended proposal; thus the proposed Directive would focus on ensuring the timely acquisition of pension rights (by finding a balanced solution on vesting periods) and on the preservation of such rights (i.e. on ensuring that they are indexed in some way so that inflation does not unfairly erode deferred members' pension rights, as compared with the rights of active scheme members and retired scheme members).

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9 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. 13857/1/07 REV 1 + COR 1.
10 See Explanatory Memorandum to the revised proposal. 13857/1/07 REV 1 + COR 1.
Based on the revised proposal, discussions continued under the German, Portuguese and Slovenian Presidencies in 2007-2008. The provisions on preservation seemed broadly acceptable (provided there was sufficient flexibility for schemes which have conditional indexation), whereas the issue of the vesting of pension rights gave rise to divergent views.

The 2007 revised proposal set the waiting period at a maximum of 1 year. The vesting period was not to exceed 1 year for persons over 25 and 5 years for persons under 25, whilst the minimum age for the accrual by an active scheme member of vested pension rights was not to exceed 21 years.

Possible approaches to the vesting issue considered during the discussions in Council included abolishing the waiting period limit, extending the vesting period to 2 years (but for all people – i.e. dropping the difference in treatment of persons under the age of 25) and raising the minimum age to 23. Discussions also focused on the scope of the Directive, information requirements, implementation periods and reporting.

Despite the efforts made to reach a compromise, the requisite unanimity could not be found and active discussion ceased after the first half of 2008, although the revised proposal has remained 'live', not having been formally withdrawn by the Commission.

The Green Paper

Given the apparent deadlock in Council, the Commission decided to consult on how to proceed. This was done as part of the holistic Green Paper on pensions which considered the entire EU level pension framework. On portability, the results of the consultation were characterised by universal support for removing any obstacles to mobility caused by pension rules, but less agreement on what this should mean in practice. However, the majority of respondents felt that the Commission should focus on setting minimum standards for the timely acquisition and subsequent preservation of supplementary pension rights, leaving aside the issue of pension transfers. In other words the approach already set out in the 2007 revised proposal, which dropped transfers, was supported by most respondents.
The White Paper

Following the outcome of the Green Paper consultation, the Commission's subsequent White Paper on pensions stated that work would resume on a pension portability Directive setting minimum standards for the acquisition and preservation of supplementary pension rights.

Legal basis for the proposed Directive and the impact of the Lisbon Treaty

Since the proposed Directive was last discussed in Council in the first half of 2008, the Lisbon Treaty has come into force (in December 2009). The original proposal of 2005 as well as the revised proposal of 2007 rested on the dual legal basis of Articles 42 and 94 TEC. This dual legal basis was consistent with the existing 1998 Portability Directive (which rests on the sole legal basis of Article 42 TEC). Both articles provided for the same voting method in Council (unanimity). However, Article 42 TEC provided for co-decision with the Parliament, whilst Article 94 TEC only provided for consultation. The approach taken was to apply the higher standard of co-decision to the proposal as a whole and Parliament adopted its opinion in first reading on this basis in 2007.

When the Lisbon Treaty came into effect, the numbering of the articles changed: Article 42 TEC became Article 48 TFEU and Article 94 TEC became Article 115 TFEU. More fundamentally, Article 48 TFEU (former Article 42 TEC) now provides for the ordinary legislative procedure, meaning qualified majority voting in Council, whereas Article 115 TFEU (former Article 94 TEC) still provides for unanimity. The Commission's Omnibus exercise at the end of 2009 maintained the dual legal basis, whilst simply updating the article numbers of the proposal to reflect the Lisbon Treaty.

The legal basis and voting rules thus need to be clarified as discussions resume in the Council Working Party.
Why is the issue important?

Freedom of movement

The freedom of movement of persons, as prescribed in the Lisbon Treaty, is a fundamental principle of the European Union. Together with the free movement of goods, services and capital, it is a cornerstone of the Single Market. It also has significant social and economic dimensions as it fosters the social, economic and cultural inclusion of EU migrants' workers within the host countries and contributes to the better allocation of human resources within the EU. So any barriers to free movement must be tackled, including those stemming from a lack of protection for the acquisition and preservation of supplementary pension rights which currently constitute a disincentive to worker mobility.

Labour mobility

Labour mobility underpins healthy, growing economies, allowing people who wish to do so to move to fill skill shortages where a clear economic need has been identified, for the benefit of the economy and the persons concerned.

In the context of the Europe 2020 Strategy\(^\text{11}\), increasing labour mobility has been recognised as a key challenge in the drive to support long-term growth and sustainable labour markets. Against the background of the crisis, the 2012 Annual Growth Survey\(^\text{12}\) and the Employment Package\(^\text{13}\) released by the European Commission (notably the proposal aimed at creating 'a genuine EU labour market') have further underlined this priority. This was recognised by the European Council in June 2012, when it pointed out that 'Labour mobility within the EU should be facilitated' inter alia through the strengthening of the 'acquisition and preservation of cross-border pension rights and other social security rights for EU workers'\(^\text{14}\).

\(^\text{13}\) COM(2012) 173 final, Towards a job-rich recovery.
\(^\text{14}\) European Council, 28-29 June 2012, Conclusions (EUCO 76/12).
In 2012, around 3.0% of the working-age (15-64) European citizens lived in another EU Member State than their own. This level of mobility represents a 50% increase compared to the year 2005 (when it was only 2.0%). Moreover, around 10% of EU citizens have lived and worked in another EU Member State in the past\textsuperscript{15}.

Moreover, the economic crisis has led to high levels of unemployment and the existence of differences in employment opportunities across the EU\textsuperscript{16}. Significant numbers of unfilled vacancies in high growth areas coexist today with high unemployment in other parts of the EU and hence, facilitating quality labour mobility may now be more important than ever as it could support counter-cyclical stabilisation in countries affected by the recession while responding to the existing needs of regions where there is high level of labour demand.

Cross-border mobility \textit{intentions} are reported to be high, notably among young people\textsuperscript{17} whilst a recent analysis by the European Commission confirms some early signs of a rise in mobility flows from countries affected by high unemployment (in particular in the south of Europe) to countries recording a high number of job vacancies\textsuperscript{18}.

Beyond geographical mobility, job-to-job mobility has also been underlined as a key aspect of the flexibility and efficiency of future EU labour markets and future European labour markets are expected to be characterised by an increased frequency of transitions between jobs\textsuperscript{19}.

\textsuperscript{15} Special Eurobarometer 337 – Geographical and labour market mobility.
\textsuperscript{16} According to Eurostat, while unemployment rates were in June 2012 around or below 5% in Luxembourg, the Netherlands, Austria and Germany, they were close to 15% in Portugal and Ireland and around 20-25% in Spain and Greece.
\textsuperscript{17} According to the Eurobarometer on Youth on the Move (2011), 53% of young people in the EU would like to work in another EU country in the future. This share is notably higher (more than 2/3) in Nordic Member States, Bulgaria, Romania, Spain and Ireland.
\textsuperscript{18} EU Employment and social situation, Quarterly review, June 2012, Special Focus: Increased South-North mobility due to divergence of labour market conditions across EU countries?, pp.31-40.
\textsuperscript{19} European Commission, \textit{Mobility in Europe}, 2010.
Supplementary pensions are growing in importance

Statutory state pay-as-you-go pensions, although remaining the most important part of pension provision for the vast majority of EU citizens, are typically declining in generosity all else being equal (ie assuming no change in career length/contributions etc). This is due to changes made to ensure that pension systems can remain sustainable in the face of the cost increases from demographic ageing as people live longer and have fewer children than in the past.

This means the relative importance of supplementary pensions is typically growing, as they will form a bigger proportion of overall retirement income for many people in the future. In addition, supplementary pensions are also growing in nominal terms in a number of countries, as they are expected make up for some of this decline in statutory pensions. This nominal increase can be from the expansion of existing schemes and/or the establishment of new schemes. (See figure 1 below).

**Figure 1: Projected change in replacement rates of statutory and supplementary pension schemes between 2008 and 2048 (in pp.)**

[Bar chart showing projected change in replacement rates]

Notes: based on Theoretical Replacement Rate calculations
We can expect this trend to continue so that citizens can have better opportunities to help support the adequacy of their overall pension provision. The Commission's 2012 Annual Growth Survey\(^{20}\) called for "Pursuing the reform and modernisation of pension systems… by… supporting the development of complementary private savings to enhance retirement incomes."

The importance of enhancing citizens' opportunities for supplementary pension saving has also been highlighted in the context of the European Semester.\(^{21}\)

It has long been recognised that mobile workers should not lose out on statutory pension rights when they move and Regulation 883/2004/EC (and its predecessor) was adopted to ensure they do not. As supplementary pensions grow in importance, it becomes ever more important to ensure there is a solution to also protect these supplementary rights when people move jobs.

The economic crisis has also led to more involuntary job changes (via periods of unemployment) which make it harder still to justify people losing pension rights in the process – certainly arguments about pension rules supporting worker loyalty cannot apply in such cases.

**What is the starting point?**

The revised proposal from 2007 remains on the table and the approach it takes is supported by the majority of respondents to the Commission's Green Paper. The Commission's White Paper commits it to resuming work on a pension portability Directive setting minimum standards for the acquisition and preservation of supplementary pension rights, in close cooperation with the Council and the European Parliament.

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\(^{20}\) Communication from the Commission Annual Growth Survey 2012. 17229/11.

\(^{21}\) See Country Specific Recommendations issued by the Council on 10\(^{th}\) July 2012 (doc. 11296/3/12 REV 3.).
The Presidency considers that the 2007 revised proposal\footnote{Available here \url{http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0603:FIN:EN:PDF}} could serve as a starting point for resuming discussions, and hopes that further work within the Council can also build on the progress made in the earlier discussions.
Questionnaire

PART 1

In the first part of the meeting, delegations will be invited to present their views on the implications of the entry into force of the Lisbon Treaty, on the legal basis and on possible changes thereto (see "Legal basis for the proposed Directive and the impact of the Lisbon Treaty" above). In this context, they will also be invited to address Question 1 (as the legal basis can have implications for the scope of the 2007 revised proposal and vice versa).

1) What are your views on the scope proposed in the 2007 revised proposal?

PART 2

In the second part of the meeting, delegations will be invited to present their initial views on Questions 2-6, with a view to identifying those areas which will need intensive further work and those issues where solutions may be easier. These questions relate to the provisions set out in the Commission's 2007 revised proposal and focus on issues where previous Council discussions suggest there may be particular interest.

2) On acquisition:

(A) Is the maximum one-year waiting period an acceptable starting point? How should we consider the possible interactions between waiting periods and vesting periods?

(B) Is a vesting period not exceeding one year for those over 25 and not exceeding five years for those under 25 acceptable as a starting point? Would such a difference in treatment based on age be in line with current attitudes to age-based differences in treatment in general and with evolving concepts of age discrimination?

(C) For the minimum age for vesting, is a (maximum) age of 21 an acceptable starting point, once again taking into account current attitudes to age-based differences in treatment in general and with evolving concepts of age discrimination?
3) Preservation of dormant rights:

(A) Is the proposal that vested rights can remain in the scheme, in which case they are to be treated in line with either active scheme members, or pensions in payment, or otherwise fairly treated (e.g.: the rights are set as a nominal sum; or they continue to the benefit from a rate of interest or returns on investment; or they are adjusted to inflation or salary levels) an acceptable starting point?

(B) Is the proposal to allow pension rights (the limit for which is to be set by Member States) to be paid out to outgoing workers upon leaving the scheme an acceptable starting point?

4) Information

(A) Are the proposals regarding information provided to active pension scheme members upon request about the impacts of terminating employment on supplementary pension rights (acquisition, vested rights, future treatment) an acceptable starting point?

(B) Are the proposals about information to be provided to deferred beneficiaries an acceptable starting point?

5) Implementation

(A) Is implementation within 2 years of adoption by the Member States or the social partners an acceptable starting point?

(B) Is the potential for an extension of 60 months an acceptable starting point?
6) Reporting

(A) Is a reporting requirement every 5 years (starting 2 years after adoption) an acceptable starting point?

(B) Is the proposal that the first report would cover the application of the Directive and also review the conditions of transfers an acceptable starting point, bearing in mind that transfers have been rejected by the majority of respondents in the Green Paper consultation and also that the rise of Defined Contribution pension schemes has the potential to make transfers a less technically challenging issue for a growing number of pension scheme members?