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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)

EXPLANATORY MEMORANDUM

I INTRODUCTION

The European Council meeting in Amsterdam on 16-17 June 1997 reaffirmed the importance the Council 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.

Moreover, the European Council agreed concrete action on making maximum progress towards the final completion of the Single Market: making the rules more effective, dealing with the key remaining market distortions, avoiding harmful tax competition, removing the sectoral obstacles to market integration and delivering a Single Market for the benefit of all citizens.

Furthermore, the European Council attaches paramount importance to creating conditions in the Member States that would promote a skilled and adaptable workforce and flexible labour markets responsive to economic change. This requires active intervention by the Member States and the European Union in order to facilitate the free movement of this workforce within the Union and to help people develop their employability.

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.

The proposal, therefore, provides the means to remove some of the obstacles to the free movement of workers within the Union. This will have a positive effect on labour market mobility since workers will be less hindered from going to work in another Member State if they know that their supplementary pension rights are protected. Similarly, the proposal smoothes the path for companies who wish to make the best use of their human resources by posting workers to other Member States. Increased labour market flexibility and mobility will, in themselves, provide a stimulus to employment and growth.

As has been emphasized in the 1997 Green Paper on supplementary pensions in the Single Market¹ and the Commission Communication on occupational pension schemes of July 1991², supplementary pension schemes play an important role as a second pillar of social security which complements the protection provided by statutory schemes. As many Union citizens turn to supplementary pension schemes as a way to guarantee a secure income in their retirement, the need for protection of these rights becomes more important.

¹ "Supplementary Pensions in the Single Market - A Green Paper" COM(97) 283 of 10 June 1997.

² "Supplementary social security schemes: the role of occupational pension schemes in the social protection of workers and their implications for freedom of movement", SEC(91) 1332.

II. GENERAL CONSIDERATIONS

Article 51 of the EC Treaty specifies that the Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers.

On the basis of Article 51, the Community has already adopted legislation (Regulations (EEC) No 1408/71 and No 574/72)³ which aims to remove obstacles to cross-border mobility of workers in the field of statutory pensions. The legislation does not interfere with the freedom of Member States to determine the organization of their own statutory pension schemes; what it does is to make sure that the potential mobility of a worker is not impeded by being penalized in moving from one Member State to another.

The abovementioned Community Regulations do not apply to supplementary pension schemes which do not emanate from legislation but from initiatives of the private sector. Most of them are based on collective bargaining or agreements concluded between the two sides of industry, others result from the initiative of employers.

In connection with supplementary pension schemes in the European Union, the Commission Communication to the Council of July 1991 set out the necessary guidelines and mapped out the future action to be taken by the Commission in this area. The Communication placed the emphasis primarily on the positive role played by supplementary pension schemes in providing workers with social protection. Nevertheless, it also highlighted a number of possible obstacles to the free movement of workers and thus to the completion of the Single Market.

Action is needed to remove such obstacles in order to promote, at European level, worker cross-border mobility in keeping with the letter and spirit of the Treaties, while taking account of the specific features of supplementary pension schemes.

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 in successive judgments by the Court of Justice⁴.

In February 1996, the Commission decided to investigate the issue of supplementary pensions more closely before making specific proposals and, accordingly, requested a High Level Panel of experts on free movement, chaired by Mrs Simone Veil, to examine the dossier and to prepare a report.

In its report, presented on 28 November 1996, the Panel considers that, given the predominance of contractual rights and the role of the social partners in this field, any legislative intervention by the Community should be the minimum necessary to secure the preservation of rights. However, the Panel also underlined the need to take further initiatives to encourage the voluntary extension of rights.

³ The updated version of these Regulations is published in OJ L 28 of 30 January 1997. Since the extension of the personal scope of the Regulations to self-employed persons, the additional legal basis of Article 235 of the Treaty has been required.

⁴ See Case C-279/93, *Finanzamt Köln-Altstadt v Schumacher*, judgment of 14 February 1995, ECR I-225; Case C-19/92, *Kraus*, judgment of 31 March 1993, ECR I-1663; Case C-80/94, *Wielockx*, judgment of 11 August 1995, ECR I-2493; Case C-107/94, *Asscher*, judgment of 27 June 1996, ECR I-3089.

In arriving at its recommendations, the Panel was guided by a basic principle of Community law, that of "equal treatment": a European citizen who chooses to work for employers in more than one Member State should not, as a result, incur a loss of supplementary pension rights which he or she would not have had to suffer had both the old and new employer been established in the same Member State.

The Panel, therefore, suggested that the Commission should, at least initially, confine any proposal for a Directive to a three-pronged approach, encompassing the following elements:

- (a) preservation of acquired rights;
- (b) cross border payments;
- (c) short-term employment in another Member State and the possibility of continuing contributions to a supplementary pension scheme in the Member State of origin.

In its recent Communication "Modernizing and Improving Social Protection in the European Union"⁵, the Commission recognized that the absence of any coordination at Community level for supplementary pension schemes constitutes a real problem for employed and self-employed persons moving within the European Union and concluded that there is a need for Community legislation building on the High Level Panel's recommendations.

Moreover, in the recent 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. This concerns in particular long vesting periods, difficulties with transferability of vested pension rights and tax difficulties linked to acquiring pension rights in more than one Member State.

In this context, the Commission is presenting this proposal for a Council Directive as a step to removing obstacles to free movement relating to supplementary pensions, in the light of the recommendations of the High Level Panel experts on free movement, and after consultation with all parties concerned.

This proposal is in line with the recent conclusions of the European Council of Amsterdam, which reaffirmed the importance attached to a properly functioning Single Market as an essential element of the overall strategy to promote competitiveness, economic growth and employment throughout the Union. The Council welcomed the Commission's "Action Plan for the Single Market"⁶ and endorsed its overall objective. The four strategic targets in the Action Plan should form the basis for a renewed political effort to remove remaining obstacles so as to ensure that the full potential benefit of the Single Market is realized. This proposal forms one of the actions set out in strategic target 4 of the Action Plan, "Delivering a single market for the benefit of all citizens".

⁵ COM(97) 102 final of 12 March 1997.

⁶ CSE(97) 1 final of 4 June 1997.

III. ACTION AT COMMUNITY LEVEL

Why a Directive?

All of the problems identified in the 1991 Communication weigh heavily on worker mobility within the European Union. Given that freedom of movement is a basic principle of the Treaty, it is essential that any worker exercising his or her right to free movement should be able to take up work in another Member State without fear of losing his or her right to benefits under a supplementary pension scheme. However, the Commission has recognized that this aim cannot be achieved by simply extending existing Community legislation on statutory social protection to cover supplementary pension schemes. Given the multiplicity and diversity of supplementary pension schemes and the fact that employers are often not legally required to set up such schemes, it is accepted that any Community measure aimed at improving protection for migrant workers should allow the Member States and the social partners as much flexibility as possible. Having said that, the only way of achieving the given aim is to make adjustments to the laws of the Member States. This is why a Directive proves to be the most appropriate legal instrument for safeguarding rights under supplementary pension schemes.

In keeping with its 1995-1997 Medium Term Social Action Programme⁷, the Communication on Modernizing and Improving Social Protection in the European Union, the Green Paper on Supplementary Pensions in the Single Market, and the Action Plan for the Single Market, the Commission is presenting this proposal for a Directive on safeguarding the supplementary pension rights of workers moving within the European Union.

In the Directive under consideration here, the Commission has restricted itself to drawing up a general framework setting out the broad approach to be taken.

The legal basis

The legal bases for the proposed Directive are Articles 51 and 235 of the Treaty. Article 51 states that "The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers ...". This Article requires that all obstacles in the field of social security which directly or indirectly hinder freedom of movement shall be eliminated. Article 235 of the Treaty is necessary since Article 51 does not cover the self-employed. Article 235 had already been used to extend the scope of Regulation (EEC) No 1408/71 to cover self-employed persons.

However, it should be emphasized that there is no intention in this proposal to diminish the applicability of the single market provisions and the competition rules of the Treaty to institutions that provide supplementary pension benefits. This is consistent with the approach taken in the Green Paper on supplementary pensions in the single market.

⁷ COM(95) 134 final of 12 April 1995.

IV. COMMENTS ON THE ARTICLES OF THE DIRECTIVE

CHAPTER I

Objective and scope

Article 1

This Article sets out the aim of the Directive, namely to ensure that appropriate protection is given to the individual rights, acquired or in the course of acquisition, of members of supplementary pension schemes - within the meaning of Article 1 of the Directive - who move from one Member State to another within the European Union. This protection covers not only members who are currently contributing to a supplementary pension scheme or on whose behalf contributions are currently being made, but also members in respect of whom contributions have ceased, and relates in particular to the preservation of rights under supplementary pension schemes within the meaning of Article 1 of the Directive, irrespective of whether membership of such schemes is of an optional or compulsory nature.

The references to rights "in the course of acquisition" are made in Articles 1 and 2 in order to cover the situation envisaged by Article 6. This provision aims to enable workers who are posted to another Member State to continue to contribute to a supplementary pension scheme in the Member State of origin.

Article 2

This Article relates to the persons falling within the scope of the Directive. The Directive applies to all members of supplementary pension schemes within the meaning of Article 1 thereof who have acquired rights or are in the process of acquiring rights in one or more Member States and to members of their families and their survivors.

CHAPTER II

Definitions

Article 3

Given the diversity and complexity of supplementary pension schemes in the various Member States, it was felt necessary to provide definitions of some of the terms used in the Proposal for a Directive in order to avoid any confusion.

- (a) It is stated that a supplementary pension means any invalidity, retirement and survivors' benefits intended to supplement or replace those provided in respect of the same contingencies by statutory social security schemes. As far as invalidity is concerned, the scope of this Directive only covers invalidity if and in so far as the supplementary pension schemes in question provide pension rights in the event of invalidity.

- (b) The definition of a supplementary pension scheme given in this paragraph corresponds to the more general definition of occupational or supplementary schemes in Article 2 of Directive 86/378/EEC⁸, as modified by Directive 96/97/EC⁹, on equal treatment for men and women in occupational social security schemes.

Within the meaning of the Directive, supplementary pension scheme refers to 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, irrespective of whether such schemes are compulsory or optional. The Directive does not apply to the statutory supplementary pension schemes which are already covered by Council Regulation (EEC) No 1408/71, such as the Danish ATP, for example.

- (c) This paragraph gives the definition of an "approved supplementary pension scheme". An 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 for the granting of particular tax reliefs that are available in relation to supplementary pension provision. The purpose of this paragraph is to define pension schemes which meet the particular requirements in each Member State for tax-favoured status to be given. This is necessary because Article 7 extends such tax-favoured treatment in a host Member State to contributions made by or on behalf of a posted worker to an approved supplementary pension scheme in the Member State of origin.
- (d) "Pension rights" means any benefits to which a scheme member is entitled under a supplementary pension scheme.
- (e) "Vested pension rights" means the rights which have been accumulated after completion of the vesting period required by the rules of the supplementary scheme of which the worker exercising his or her right of free movement is a member. Given the specific nature and the diversity of supplementary schemes, the Directive does not aim to aggregate periods of insurance completed under different schemes. "Vesting period" means both any waiting period, required by the rules of a supplementary scheme, which a worker must complete in order to be admitted to membership of such a scheme and any minimum period of membership stipulated by those rules which the member must complete in order to acquire pension rights.
- (f) This paragraph gives the definition of worker. In the meaning of the Directive, "worker" covers employees and self-employed persons. It is important to note that Regulation (EEC) No 1408/71 already covers self-employed persons.
- (g) This paragraph defines "posted" workers. A posted worker means a worker who is posted to work in another Member State and who under the terms of Title II of Regulation (EEC) No 1408/71 continues to be submitted to the legislation of the Member State of origin. The aim is to cover posted workers as far as their cross-border affiliation to a supplementary pension scheme is concerned under the same terms of Title II of Regulation (EEC) No 1408/71 relating to the cross-border affiliation of a posted worker to a statutory scheme. For reasons of coherence, the

⁸ OJ L 225, 12.8.1986, p. 40.

⁹ OJ L 46, 17.2.1997 p. 20.

duration of cross-border affiliation to a supplementary pension scheme should be the same as this allowed by statutory schemes. See also the commentary on Article 6, below, for further information on posting under Regulation (EEC) No 1408/71.

- (h) This paragraph deals with the meaning of "Member State of origin". In the context of the Directive, the Member State of origin is the Member State where a worker has worked immediately prior to the posting and in which the supplementary pension scheme of which he is a member is established.
- (i) This paragraph defines "host Member State" as the Member State to which a worker is posted.

CHAPTER III

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

Article 4

Article 4 deals with the preservation of vested rights of members who cease to make contributions to a supplementary pension scheme when moving to another Member State. The aim is that full preservation of vested rights is guaranteed for members who cease to make contributions to a supplementary pension scheme as a consequence of moving from one Member State to another at least to the same extent as for members ceasing to make contributions to the scheme but remaining within the Member State in question. This provision reflects a basic principle of Community law, deriving from Article 48 of the Treaty, namely that a worker making use of his or her right of free movement shall not be treated less favourably than a worker remaining within the Member State of origin. This means that a worker who ceases to make contributions to a supplementary pension scheme as a consequence of going to work for another employer in another Member State should not lose the rights already acquired in this scheme which he or she would have preserved had he or she changed employer while remaining in the same Member State.

Article 5

This Article recalls a very important principle of Community law, namely the free movement of capital (Article 73b of the Treaty). Member States must ensure that in all Member States of the European Union benefits under supplementary pension schemes are paid to members of such schemes or to their dependants (members of their families or survivors). This principle applies in all cases where a member of a supplementary pension scheme has moved from one Member State to another, for whatever reason. This provision, however, is not intended to prevent the taxation of benefits in the Member State in which the supplementary pension scheme is established.

Article 6

1. **Posted workers expect to return to their Member State of origin without a break in the building-up of their pension rights. Consequently, they and their employers often prefer to continue to make contributions to the supplementary pension scheme in the Member State of origin during the posting. The aim of the proposal on this specific point is to enable this to take place and to align the rights of a worker under a supplementary pension scheme with the rights which workers have in relation to statutory social security schemes under Regulation (EEC) No 1408/71.**

This reflects the explicit request made by several Member States during the consultation process (see section VII, below).

Article 14(1)(a) of Regulation (EEC) No 1408/71 provides that a person employed in the territory of a Member State by an undertaking to which he or she is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the Member State of origin, provided that the anticipated duration of that work does not exceed one year. By virtue of Article 14(1)(b), this period can be extended by another year if the host Member State agrees to it. By virtue of Article 17 of Regulation (EEC) No 1408/71, however, two or more Member States may agree to a posting which lasts for more than two years. On the initiative of the Advisory Committee on Social Security for Migrant Workers, composed of the social partners and government representatives, in 1984 the Administrative Commission on Social Security for Migrant Workers adopted Recommendation No 16¹⁰. This aims to promote the use of Article 17 in the case of postings of workers with special knowledge or skills, or in order to meet specific objectives of the undertaking which employs them, on condition that the worker consents. Without saying so explicitly, the Recommendation is aimed particularly at workers in multinational companies.

At the request of the European Commission, a study was carried out in 1995 on the practical application of these provisions. The results of the study were presented during the second European Conference on Social Security, held in Crete in October 1995¹¹. Even though firm conclusions should be drawn with caution from this study¹², it provides a valuable picture not only of the number of persons involved, but also of the length of postings between Member States. In fact, the study showed that in 1994 there were 539 169 postings on the basis of Article 14(1)(a) of Regulation (EEC) No 1408/71 (i.e. postings of less than one year).

Requests to the host Member State to extend the posting to up to two years, under Article 14(1)(b), were very rare: there were only 1 802 cases in 1994. The host Member State nearly always granted permission for such an extension. The study emphasized in particular that where a longer period of posting was required from the start, an Article 17 agreement was nearly always entered into immediately. Usually, the

¹⁰ "Recommendation No 16 of 12 December 1984 concerning the conclusion of agreements pursuant to Article 17 of Council Regulation (EEC) No 1408/71", OJ C 273, 24.10.1985.

¹¹ "The Free Movement of Workers within the European Union: Posting and the perspectives of Community Coordination in the context of Regulation (EEC) No 1408/71."

¹² The available statistical information on the number of posting was incomplete. Smaller Member States with a centralized executive structure had fewer difficulties in producing the figures requested than larger Member States with a decentralized structure.

maximum duration of a posting under Article 17 was five years. Between 1988 and 1994 a total of 43 568 agreements (12 914 of which in 1994 alone) were concluded under Article 17.

It is envisaged that Article 6 will cover the maximum number of posted workers who contribute to supplementary pension schemes. The Commission will continue to monitor this to ensure that the aims of the Directive are met. Therefore, the Commission's report to the Council on the application of the Directive, referred to in Article 12(3), will also examine the application of Article 17 of Regulation (EEC) No 1408/71 to ensure that Member State administrations allow posted workers who contribute to supplementary pension schemes to make use of the provisions of this Article.

2. The second paragraph of Article 6 specifies that when contributions continue to be made by or on behalf of a worker to a supplementary pension scheme in his or her Member State of origin, the host Member State shall recognize this as equivalent to membership of a supplementary pension scheme in that State. In these circumstances, the host Member State will not be able to compel membership of a compulsory scheme established in its territory.

This provision is in line with the case-law of the Court of Justice. In its judgment in the case *Guiot*¹³, the Court held that Articles 59 and 60 of the Treaty preclude a Member State from requiring an undertaking established in another Member State and temporarily carrying out work in the first-mentioned Member State to pay employer's contributions in respect of loyalty stamps and bad-weather stamps with respect to workers assigned to carry out that work, where that undertaking is already liable for comparable contributions, with respect to the same workers and for the same period of work, in the State where it is established.

Article 7

This Article deals with taxation aspects of supplementary pension contributions made by or on behalf of a posted worker to a comparable pension scheme that is established in the Member State of origin. Its scope is limited to situations where contributions continue to be made to such schemes in respect of workers who are posted within the terms of Title II of Regulation (EEC) No 1408/71. The treatment that it provides for this particular category of 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.

The purpose of the Article is to remove possible tax disincentives to posting. In order to do this, and in accordance with the existing principles of non-discrimination and equal treatment established by the Treaty and as interpreted by the case-law of the Court of Justice, the Article provides that the host Member State shall give the same tax treatment to contributions that are made to an approved (i.e. tax approved) supplementary scheme in the Member State of origin as it does to contributions that are made to a comparable approved supplementary scheme that is established in its own territory.

This Article only applies to the extent that the host Member State has taxing rights. It will not, therefore, affect the tax treatment of pension contributions where taxing rights remain with the Member State of origin, as may be the case where postings are of very short duration and workers do not therefore become tax resident in the host Member State.

¹³ *Guiot*, Case C-272/94, judgment of 28 March 1996, ECR I-1905.

Nor does the Article affect the allocation of taxing rights between Member States which is carried out by means of bilateral arrangements.

The Article applies both to contributions paid by the posted worker and to contributions that are paid by another party, such as his or her employer. The tax treatment that it provides for includes deductions or credits that are given in relation to pension contributions. It also includes taxation, or exemption, of the contributions either in the hands of the posted worker or the employer.

In common with Article 6, this Article only applies where contributions continue to be paid to a supplementary pension scheme established in the Member State in which the posted worker worked immediately before the start of the posting. In this way it is targeted on genuine cases where a worker wishes to continue to acquire rights during the period of posting under a supplementary pension scheme of which he or she is already a member.

Article 8

Members should be adequately informed about their supplementary pension benefit rights. They must be given the means to assess the implications as regards their pension if they move to a new job in another Member State, and should be provided with complete information about the possible alternatives as, for example, the transfer value with which they will be credited if they decide to transfer their pension rights (provided that this is possible under the scheme concerned), and the possible agreements existing between Member States, and about the pension benefit amount they would receive if their rights were to be preserved within the same scheme.

CHAPTER IV

Final provisions

Article 9

This Article simply provides for Member States to be able to apply the provisions of Article 6 to postings that commence on or after the date the Directive comes into force.

Article 10

This is a standard provision which is to be found in a number of directives concerning the right of individuals to have recourse to the courts.

Article 11

Pursuant to the Communication of the Commission to the Council and the European Parliament of 3 May 1995 (COM(95) 162 final) on the role of penalties in implementing Community internal market legislation, the Directive includes a final provision on penalties.

Article 12

This Article contains the standard provisions concerning implementation of the Directive. Member States must be given a reasonable period within which to comply with its provisions. As regards certain aspects of the Directive, such as the conditions governing preservation of acquired rights, the social partners may, in the case of some schemes, jointly agree on and put in place the necessary arrangements. In this connection, however, the Member States must take all necessary measures enabling them to guarantee compliance with the Directive. In an effort to achieve transparency and in keeping with the spirit of the Treaty on European Union, the Member States must make reference to the Directive in any measure transposing its provisions. As is customary, the Commission should also draw up a report for submission to the Council concerning the application of the Directive and, where appropriate, propose any amendments which may prove necessary.

Article 13

A standard provision which states when the Directive comes into force.

Article 14

Article 14 states that the Directive is addressed to the Member States.

V. JUSTIFICATION OF THE DIRECTIVE FROM THE POINT OF VIEW OF SUBSIDIARITY

This proposal meets the two criteria for determining compliance with the principle of subsidiarity, namely necessity and proportionality as provided for in Article 3b of the Treaty on European Union.

On the one hand, action at Community level is justified from the point of view of the free movement of workers. This basic freedom enshrined in the Treaty is one of the four pillars of the single market, as is set out in Article 48. Whilst the statutory social security rights of workers taking advantage of this freedom have been protected since 1958 under Regulations for the coordination of the various national security schemes, workers' rights under supplementary pension schemes enjoy no protection. It is undeniable that the loss of such rights constitutes an obstacle to a worker's free movement. Given their complementary or substitutive nature, occupational schemes appear to be the counterpart of statutory social security schemes. However, as has been emphasized in the Commission Communication of March 1997, "Modernizing and improving social protection in the European Union", the current coordination system for statutory schemes does not seem to be the appropriate system for supplementary schemes. The European Community therefore has a duty to adopt a specific instrument suitable for dealing with the matter of pension rights under supplementary schemes.

In addition, the use of legislation (i.e. legally binding obligations) is clearly appropriate to the aim of bringing about freedom of movement in practice, where changes to national laws are necessary. In the present case, a directive is the most appropriate legal instrument and is also a typical example of the operation of the principle of subsidiarity in that it is restricted to setting out in broad terms the aims to be achieved by the Member States without going into detail as regards the organization and functioning of their national schemes. The adoption of the

Single European Act highlighted precisely this need to give greater importance to directives in bringing about an "area without internal frontiers". The Directive thus allows the Member States sufficient room for manoeuvre, which is just what is needed in view of the diversity of supplementary pension schemes.

VI. FINANCIAL CONSEQUENCES OF THE PROPOSAL

Member States, pension fund administrators, employers and other supplementary pension fund operators should not experience any major difficulties in adapting to the provisions of the new proposal for a directive.

Through this proposal, the Commission aims to improve the cross-border mobility of employed and self-employed persons within the Single Market. The proposal covers the preservation of supplementary pension rights, cross-border payments of benefits and, as regards posted workers, the possibility for contributions to continue to be made to their supplementary pension scheme in the State of origin.

Article 4 provides for the preservation of acquired rights when someone moves to another Member State only in the case where, according to the rules of the pension scheme in question, the person would have preserved these rights when moving within the State itself. As a result, the Directive does not impose any additional financial responsibility on the pension scheme concerned than would have been the case if the person had changed jobs within the same Member State. In other words, the rights acquired by the worker at the time when he or she decided to move to another Member State continue to be determined according to the rules of the supplementary pension scheme in question. If, at that point, the worker has failed to complete the minimum qualifying period, there will be no acquired right which can be preserved. In this respect, the worker's situation is no different from that of a colleague changing jobs to another firm in the same Member State.

The second pillar of the proposal is the guarantee of the payment of pensions across borders. This should not produce any additional financial costs since it simply reflects an existing principle of Community law, the free movement of capital, as laid down in the Treaty in Article 73b. This provision is purely declaratory of existing Community law.

The third pillar of the proposal concerns workers who are temporarily posted from one Member State to another. For an indication of the number of postings under Regulation (EEC) No 1408/71, please see the commentary on Article 6, above. It must be borne in mind, however, that only a certain proportion of posted workers will be contributing to a supplementary pension scheme. In 1990, an estimate was made¹⁴ of the total number of migrant workers in the European Union (not only posted workers) with supplementary pension rights. This estimate arrived at a figure of 256 000 for the then twelve Member States, which represented just over ten per cent of the total number of migrant workers. Over 50% came from the United Kingdom and Ireland.

As regards workers in international companies, this provision will in particular facilitate the posting of executive and managerial-level staff to another Member State either within the company or to a subsidiary. Please see also the commentary on Article 6, above, which examines the use of Article 17 of Regulation (EEC) No 1408/71 and Recommendation 16 of the Administrative Commission on Social Security for Migrant Workers.

¹⁴ Paper presented to the "International Seminar on the future of supplementary pension schemes in the European Community - 1992 and beyond" by J. Jolliffe, University of Bremen, 1990.

Finally, it should be noted that according to this proposal, Member States are free to limit the retroactive effect of this provision on posted workers.

Even if the potential tax consequences of the proposal on posting are difficult to predict accurately, it is likely that the consequences will not be great, in the light of the following observations. First of all, the Directive does not interfere with bilateral arrangements to allocate taxing rights between Member States. It only covers the treatment of continuing contributions to a pension scheme to the extent that the host Member State has taxing rights. In many cases, for example where the posting is for a short period of time, the posted worker will remain tax resident in the Member State of origin and will continue to benefit from tax reliefs on contributions in that Member State.

Secondly, the numbers of posted workers with supplementary pension schemes represent a very small proportion of the workforce (please refer to the observations above).

Furthermore, the taxation provisions related to posted workers are limited to cases where contributions continue to be made to an approved supplementary pension scheme which is established in the Member State in which the posted worker worked immediately before the posting. The precise focus on continuing contributions to a scheme in the Member State of origin should prevent differences in tax rules from being exploited for tax avoidance purposes, and will limit the potential revenue effects of the measure.

VII. CONSULTATIONS UNDERTAKEN

A meeting between the Commission and representatives of the Member States to discuss a draft proposal was held on 7 March 1997. Twelve Member States subsequently forwarded more detailed and technical written comments to the Commission. Most of these have been taken into account in the draft proposal.

Member States were generally supportive of the broad approach of the proposal, and considered that it reflected the views of the Veil High-level Group, particularly as regards the way the principle of the preservation of acquired rights is reflected in the draft text.

The Social Partners were asked to comment on a draft proposal on 30 April 1997, and this was followed up by a seminar held on 26 May 1997. As regards the written comments of the social partners, the ETUC was very supportive of the proposal. The CEC (Council of European Professional and Managerial Staff) was also supportive but would have liked the proposal to go further, and underlined the problem of long vesting periods. This problem has been addressed in the Green Paper "Supplementary Pensions in the Single Market"¹⁵ presented by the Commission on 10 June 1997.

Eurocadres fully supported the draft proposal, while UNICE also supported the general approach but expressed some concerns about the wording of a number of provisions. Several of their comments have been taken into account in the current draft.

The CEC and UNICE specifically requested that the proposal should also address taxation issues.

¹⁵ Supplementary Pensions in the Single Market - A Green Paper, 10 June 1997, COM(97) 283.

VIII. APPLICATION IN THE EEA COUNTRIES

Free movement of persons is one of the aims and principles of the Agreement on the European Economic Area which came into force on 1 January 1994. Articles 28, 29 and 30 of Chapter 1 in Part III (Free Movement of Persons, Services and Capital) deal with freedom of movement for workers and self-employed persons. More specifically, Article 29 incorporates the principles set out in Article 51 of the EC Treaty in respect of social security for persons exercising their right to free movement. Therefore, if adopted, this proposal for a directive should be incorporated into the Agreement on the European Economic Area.

Proposal for a
COUNCIL DIRECTIVE

on safeguarding the supplementary pension rights of employed and self-employed persons
moving within the European Union

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission¹⁶,

Having regard to the opinion of the European Parliament¹⁷,

Having regard to the opinion of the Economic and Social Committee¹⁸,

Whereas one of the fundamental freedoms of the Community is the free movement of persons; whereas the Treaty 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;

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

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 Regulations (EEC) No 1408/71¹⁹ and No 574/72²⁰ 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;

Whereas to this end, in its Resolution on Growth and Employment²¹, the aforesaid European Council has agreed on 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 sectoral obstacles to market integration and delivering a Single Market for the benefit of all citizens;

¹⁶ OJ C ...

¹⁷ OJ C ...

¹⁸ OJ C ...

¹⁹ OJ L 149, 5.7.1971, p. 2; Regulation as last updated by Regulation (EC) No 118/97 (OJ L 28, 30.1.1997, p. 1) and as last amended by Regulation (EC) No 1290/97 (OJ L 176, 4.7.1997, p. 1).

²⁰ OJ L 74, 27.3.1972, p. 1; Regulation as last updated by Regulation (EC) No 118/97 (see footnote 19).

²¹ OJ C 236 of 2 August 1997, p. 3.

Whereas in its Recommendation 92/442/EEC of 27 July 1992 on the convergence of social protection objectives and policies²² the Council recommends, in point I.B.5 (h), that Member States should "promote, where necessary, changes to the 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;

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;

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;

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, given that all restrictions on the free movement of payments and capital are now prohibited under Article 73b of the Treaty;

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;

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 of the European Communities in successive judgments;

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 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;

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;

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;

²² OJ L 245, 26.8.1992, p. 49.

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;

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,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

Objective and scope

Article 1

The aim of this Directive is to ensure that appropriate protection is given to rights, whether vested or in the course of acquisition, of members of supplementary pension schemes who move from one Member State to another. 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 Regulation (EEC) 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.

CHAPTER II

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;
- (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;
- (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 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;
- (e) "vested pension rights" means any entitlement to benefits obtained after 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;
- (f) "Worker" means an employed or a self-employed person;
- (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 (EEC) No 1408/71 continues to be subject to the legislation of the Member State of origin, and "posting" shall be construed accordingly;
- (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;
- (i) "host Member State" means the Member State to which a worker is posted.

CHAPTER III

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. 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 Article 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 paragraph 1, contributions continue to be made to a supplementary pension scheme in the Member State of origin, the host Member State shall recognize 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.

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.

CHAPTER IV

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.

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 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.

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 requisite provisions by way of agreement. Member States shall take all necessary steps to enable themselves at all times to guarantee the results imposed by this Directive. They shall immediately inform the Commission thereof.

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 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**

IMPACT ASSESSMENT FORM

THE IMPACT OF THE PROPOSAL ON BUSINESS WITH SPECIAL REFERENCE TO SMALL AND MEDIUM-SIZED ENTERPRISES (SMEs)

Title of proposal: Proposal for a Council Directive on safeguarding the supplementary pension rights of employed and self-employed persons moving within the European Union

Document reference number: 97003

1. Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

The proposed directive is needed to boost the free movement of persons, since it will allow workers to preserve their supplementary pension rights, thus mitigating the current deterrent to making use of the right to freedom of movement.

The impact on business

2. Who will be affected by the proposal?

The proposed directive has implications for all companies with links to a supplementary pension scheme, i.e. mostly insurance companies, the various types of retirement and pension funds, mutual schemes, cooperative associations, provident institutions, etc.

Since company size plays no role, small and medium-sized enterprises are likely to be affected, but it is estimated that the number will be fairly limited, because the persons affected usually work in large companies.

The number of firms affected in the Member States varies widely, since supplementary pension schemes differ greatly across the European Community. The United Kingdom, the Netherlands and Germany are particularly affected, for example.

3. What will business have to do to comply with the proposal?

This directive is addressed to the Member States. The measures to be taken by Member States will have an unavoidable impact on companies operating supplementary pension schemes since they will have to comply with any national regulations adopted in application of the directive.

A distinction must be made between the provisions obliging the Member States to take measures (Articles 4, 5, 6, 7 and 8) and those which urge or invite Member States to take measures (Article 7 and Article 1), since in the latter instance, of course, companies will only have to take specific measures if Member States decide to improve the situation or where sole responsibility is borne by Member States (Article 7).

Given this distinction it is necessary to look at a number of key points contained in the directive, not forgetting that pension rights vary from one Member State to another, which means that some Member States, and consequently the companies operating supplementary schemes, already comply with some of them. In other words, given that variegated supplementary schemes are to be found in the various Member States, the changes dictated by the directive will differ from one Member State to another.

There are five such key points, viz.:

1. Preservation of acquired rights – Article 4.
2. Payment of benefits in another Member State – Article 5.
3. Preservation of membership in scheme of country of origin – Article 6.
4. Taxation – Article 7.
5. Right to information – Article 8.

1. Preservation of acquired rights

Pension funds must take measures to ensure that members preserve their acquired rights when they leave the pension fund, i.e. cease their membership when changing their employment or activity. As a rule, Member States already provide – with a few exceptions – for preservation of acquired rights.

Furthermore, in the case of defined-benefit schemes companies must periodically adjust the rights to avoid them decreasing in money terms. However, at the moment only Austria (book reserves and pension funds), Finland (TEL and registered private schemes), Ireland and the United Kingdom have indexation arrangements for former members' preserved rights. Therefore, the directive will clearly have some legislative impact in the other Member States.

On the other hand, there will be no tangible legislative impact on defined-contribution schemes, in so far as Member States appear to meet the condition set out in the directive. Having said that, the AGIRC and ARRCO supplementary schemes in France are based on the pay-as-you-go approach and are not pre-funded, which allows them to revalue preserved benefits on the basis of the mean trend in their active members' level of remuneration.

2. Payment of benefits in another Member State

Companies operating supplementary pension schemes already have the obligation – pursuant to Articles 73 et seq. of the Treaty – to ensure full payment in other Member States of all benefits due to mobile members or former members. It is essential that benefits already being paid continue to be provided.

3. Continuation of membership in a scheme of country of origin

Companies will find themselves obliged to preserve a worker's membership of a supplementary pension scheme in his Member State of origin when two conditions are met (temporary nature and probable return). Article 6 will have a major legislative impact on companies. It allows people working for multinationals to remain members of the group scheme in their country of origin.

4. Taxation

Article 7, which is highly flexible, will not affect companies, since this is a matter for the tax authorities.

5. Right to information

Article 8 will have an obvious legislative impact on companies. Managers of supplementary pension schemes, and companies too, have the obligation to comply with transparency measures which Member States have to arrange. Companies are therefore duty-bound to provide their members with precise and regular information to allow them to make mobility-related decisions in full possession of the facts. This obligation makes it necessary to be aware of what members' needs are, and thus to remain in contact with them and listen to what they are saying.

Finally, this directive will have some impact, mainly legislative, on companies operating supplementary pension schemes. Generally speaking, the obligations placed on companies will not require a major overhaul of Member States' current national laws, but they will engender changes in the law and the adoption of much more open behaviour and attitudes in practice on the part of companies. However, it should be noted that this impact will be softened by the general principle of non-retroactivity enshrined in Article 9.

4. What economic effects is the proposal likely to have?

(a) on employment

Since this directive helps underpin workers' freedom of movement, the beneficial impact on employment is obvious. Workers will not be so hesitant when it comes to moving to a job in another Member State, i.e. at least they will no longer be put off by possible loss of their supplementary pension rights. This allows workers to apply for vacancies in other Member States, thus increasing their chances of finding a job more in line with their qualifications. The self-employed can also become established in a Member State – or more precisely in a region – where there appear to be development opportunities for their services. Job supply and demand are therefore much more likely to dovetail, which will benefit the employment situation and also contribute to economic and social cohesion within the European Union.

(b) on investment and the creation of new businesses

Supplementary pension schemes are funded differently in Member States, and the financing vehicle (pre-funding, pay-as-you-go, accumulation of reserves – i.e. either as (i) provisions in the form of balance sheet liabilities (book reserves), or (ii) assets held by a pension fund) largely determines the situation in each country, especially as regards investment.

The pre-funding approach is often used to finance private pensions. This involves financial management of capital entailing investments and accumulation of returns. This approach is based on defined contributions. More commonly adopted by pension schemes and insurance companies, it leads to accumulation of large volumes of capital, especially in Member States where this method is dominant, but even in the other Member States such an approach helps increase capital volume.

As for pay-as-you-go schemes, no reserves are accumulated, apart from those in the form of provisions for risks. What is more, France's AGIRC and ARRCO supplementary schemes do not use the approach referred to in Article 4 of the proposal for a directive, i.e. under which the preserved rights represent accumulated "savings" which can be invested.

As for the balance-sheet provision (book reserve) method, it differs from pre-funding because it does not permit the accumulation of assets for investment on the financial markets. Nevertheless, this approach is financially important given that it constitutes a consistent source of self-funding for the company involved.

Financing via a pensions fund also makes use of the pre-funding method, since the monies saved are reinvested in the economy through investment in securities or in the financial markets. Such investments generate a return and the resultant capital belongs to the pension fund, which can reinvest it.

(c) on the competitive position of businesses

This proposal for a directive should not have any major financial repercussions on companies. However, if any changes dictated by new national regulations adopted in implementation of the directive do have financial consequences for companies, the impact of this cost factor will be softened by the gradualist approach provided for in the directive. Any adaptations Member States must make to comply with the provisions are likely to have an impact elsewhere, i.e. on the legislative framework and, above all, in respect of employers', administrators' and tax authorities' traditional perception of the problems connected with workers leaving their home country in the course of their working life.

Effective mobility of workers cannot fail to benefit companies and their productivity level since it fosters labour market flexibility and the transfer of skills and experience at European level.

What is more, preservation of supplementary pension rights plays an undeniable role in staff motivation.

5. Does the proposal contain measures to take account of the specific situation of small and medium-sized firms (reduced or different requirements, etc.)?

The proposal for a directive makes no distinction on the basis of company size, which means that no specific measures for SMEs are included. However, since few SMEs have supplementary pension schemes, they will be only very marginally affected.

Consultation

6. List the organisations which have been consulted about the proposal and outline their main views

The Commission has consulted Member States, social partners and representatives of supplementary pension schemes.

Member States were generally supportive of the broad approach of the proposal since it reflected the views of the High Level Panel on free movement (chaired by Mrs Veil) and the main principles of the Treaty.

As regards the social partners, the ETUC was very supportive of the proposal and considered that it should be a first step to removing obstacles to free movement.

The CEC (Council of European Professional and Managerial Staff) was also supportive but would have liked the proposal to go further, and underlined the problem of long vesting periods. This problem has been addressed in the Green Paper "Supplementary Pensions in the Single Market"²³ presented by the Commission on 10 June 1997.

Eurocadres fully supported the draft proposal, while UNICE also approved the general approach but expressed some concerns about the wording of a number of provisions. Association Europe and Enterprises fully supported the Commission's proposal. Several of their comments have been taken into account in the current draft. For example, under Article 11 there is the possibility for social partners, to jointly agree on and put in place the necessary arrangements in order to comply with the provisions of the directive. The CEC and UNICE specifically requested that the proposal should also address taxation issues. Article 7 reflects these concerns.

Supplementary pension schemes representatives (EFRP) strongly supported the approach of taking account of the findings of the High Level Panel.

²³ Supplementary Pensions in the Single Market - A Green Paper. 10 June 1997, COM(97) 283.

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