

COUNCIL DIRECTIVE 98/49/EC

of 29 June 1998

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

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 Commission ⁽¹⁾,

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

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

- (1) 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;
- (2) Whereas the social protection of workers is ensured by statutory social security schemes complemented by supplementary social security schemes;
- (3) 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, namely Council Regulations (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 Community ⁽⁴⁾ and (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community ⁽⁵⁾, concern only statutory pension schemes; whereas the system of coordination provided for in those Regulations does not extend to supplementary pension schemes, except for schemes which are covered by the term 'legislation'

as defined by the first subparagraph of Article 1(j) of Regulation (EEC) No 1408/71 or in respect of which a Member State makes a declaration under that Article;

- (4) Whereas the Council has a wide discretion regarding the choice of the most appropriate measures for attaining the objective of Article 51 of the Treaty; and whereas the system of coordination provided for in Regulations (EEC) No 1408/71 and (EEC) No 574/72, and in particular the rules of aggregation, are not appropriate to supplementary pension schemes, except for schemes which are covered by the term 'legislation' as defined by the first subparagraph of Article 1(j) of Regulation (EEC) No 1408/71 or in respect of which a Member State makes a declaration under that Article, and should therefore be subject to specific measures, of which this Directive is the first, in order to take account of their special nature and characteristics and the diversity of such schemes within and between Member States;
- (5) Whereas no pension or benefit should be subject to both the provisions of this Directive and those of Regulations (EEC) No 1408/71 and (EEC) No 574/72, and therefore any supplementary pension scheme which comes within the scope of those Regulations, because a Member State has made a declaration to that effect under Article 1(j) of Regulation (EEC) No 1408/71, cannot be subject to the provisions of this Directive;
- (6) Whereas in its Recommendation 92/442/EEC of 27 July 1992 on the convergence of social protection objectives and policies ⁽⁶⁾ the Council recommended 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';

⁽¹⁾ OJ C 5, 9. 1. 1998, p. 4.

⁽²⁾ OJ C 152, 18. 5. 1998.

⁽³⁾ OJ C 157, 25. 5. 1998, p. 26.

⁽⁴⁾ OJ L 149, 5. 7. 1971, p. 2. Regulation as last amended by Regulation (EC) No 1223/98 (OJ L 168, 13. 6. 1998, p. 1).

⁽⁵⁾ OJ L 74, 27. 3. 1972, p. 1. Regulation as last amended by Regulation (EC) No 1223/98 (OJ L 168, 13. 6. 1998, p. 1).

⁽⁶⁾ OJ L 245, 26. 8. 1992, p. 49.

- (7) Whereas a contribution to this objective can be made if workers who move or whose place of employment moves from one Member State to another are guaranteed equal treatment as regards the protection of their supplementary pension rights with workers who remain or whose place of employment changes but remains within the same Member State;
- (8) Whereas freedom of movement for persons, which is one of the basic rights enshrined in the Treaty, is not confined to employed persons but also extends to self-employed persons;
- (9) Whereas the Treaty does not provide powers other than those of Article 235 to take appropriate measures within the field of social security for self-employed persons;
- (10) Whereas, in order to enable the right of free movement to be exercised effectively, workers and others holding entitlement should have certain guarantees for equal treatment regarding the preservation of their vested pension rights deriving from supplementary pension schemes;
- (11) 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 others holding entitlement under such schemes in all Member States, given that all restrictions on the free movement of payments and capital are prohibited under Article 73b of the Treaty;
- (12) Whereas in order to facilitate the exercise of the right to free movement, national regulations should, where necessary, be adjusted in order to enable contributions to continue to be made to a supplementary pension scheme established in one Member State by or on behalf of workers who are posted to another Member State in accordance with Title II of Regulation (EEC) No 1408/71;
- (13) Whereas in this regard the Treaty requires not only the abolition of any discrimination based on nationality between workers of the Member States but also the elimination of any national measure likely to impede or render less attractive for those workers the exercise of the fundamental freedoms guaranteed by the Treaty as interpreted by the Court of Justice of the European Communities in successive judgments;
- (14) Whereas workers exercising their right to free movement should be adequately informed by employers, trustees or others responsible for the management of supplementary pension schemes, particularly with regard to the choices and alternatives available to them;

- (15) Whereas this Directive is without prejudice to the laws of the Member States concerning collective action to defend the interests of trades and professions;
- (16) Whereas, by reason of the diversity of supplementary social security schemes, the Community should lay down only a general framework of objectives and therefore a Directive is the appropriate legal instrument;
- (17) 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 does not go beyond what is necessary to achieve those objectives,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

OBJECTIVE AND SCOPE

Article 1

The aim of this Directive is to protect the rights of members of supplementary pension schemes who move from one Member State to another, thereby contributing to the removal of obstacles to the free movement of employed and self-employed persons within the Community. Such protection refers to pension rights under both voluntary and compulsory supplementary pension schemes, with the exception of schemes covered by Regulation (EEC) No 1408/71.

Article 2

This Directive shall apply to members of supplementary pension schemes and others holding entitlement under such schemes who have acquired or are in the process of acquiring rights in one or more Member States.

CHAPTER II

DEFINITIONS

Article 3

For the purpose of this Directive:

- (a) 'supplementary pension' means retirement pensions and, where provided for by the rules of a supplementary pension scheme established in conformity with

national legislation and practice, invalidity 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 established in conformity with national legislation and practice such as a group insurance contract or pay-as-you-go scheme agreed by one or more branches or sectors, funded scheme or pension promise backed by book reserves, or any collective or other comparable arrangement intended to provide a supplementary pension for employed or self-employed persons;
- (c) 'pension rights' means any benefits to which scheme members and others holding entitlement are entitled under the rules of a supplementary pension scheme and, where applicable, under national legislation;
- (d) 'vested pension rights' means any entitlement to benefits obtained after fulfilment of the conditions required by the rules of a supplementary pension scheme and, where applicable, under national legislation;
- (e) 'posted worker' means a person 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;
- (f) 'contribution' means any payment made or deemed to have been made to a supplementary pension scheme.

CHAPTER III

MEASURES FOR SAFEGUARDING THE SUPPLEMENTARY PENSION RIGHTS OF WORKERS MOVING WITHIN THE COMMUNITY

Article 4

Equality of treatment as regards preservation of pension rights

Member States shall take the necessary measures to ensure the preservation of vested pension rights for members of a supplementary pension scheme in respect of whom contributions are no longer being made to that scheme as a consequence of their moving from one Member State to another, to the same extent as for members in respect of whom contributions are no longer being made but who remain within the same Member State. This Article shall also apply to other persons holding entitlement under the rules of the supplementary pension scheme in question.

Article 5

Cross border payments

Member States shall ensure that, in respect of members of supplementary pension schemes, as well as others holding entitlement under such schemes, supplementary pension

schemes make payment in other Member States, net of any taxes and transaction charges which may be applicable, of all benefits due under such schemes.

Article 6

Contributions to supplementary pension schemes by and on behalf of posted workers

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 a Member State by or on behalf of a posted worker who is a member of such a scheme during the period of his or her posting in another Member State.
2. Where, pursuant to paragraph 1, contributions continue to be made to a supplementary pension scheme in one Member State, the posted worker and, where applicable, his employer shall be exempted from any obligation to make contributions to a supplementary pension scheme in another Member State.

Article 7

Information to scheme members

Member States shall take measures to ensure that employers, trustees or others responsible for the management of supplementary pension schemes provide adequate information to scheme members, when they move to another Member State, as to their pension rights and the choices which are available to them under the scheme. Such information shall at least correspond to information given to scheme members in respect of whom contributions cease to be made but who remain within the same Member State.

CHAPTER IV

FINAL PROVISIONS

Article 8

Member States may provide that the provisions of Article 6 shall apply only to postings that commence on or after 25 July 2001.

Article 9

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 10

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 36 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 25 January 2002 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.

3. On the basis of the information supplied by Member States, the Commission shall submit a report 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 11

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

Article 12

This Directive is addressed to the Member States.

Done at Luxembourg, 29 June 1998.

For the Council

The President

R. COOK
