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COMMISSION OF THE EUROPEAN COMMUNITIES

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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**

(presented by the Commission pursuant to Article 250 (2) of the EC Treaty)

EXPLANATORY MEMORANDUM

The Commission presents an amended proposal for a Directive of the European Parliament and of the Council on improving the portability of supplementary pension rights. Incorporated within the amended proposal are amendments proposed by the European Parliament at its first reading which are acceptable to the Commission, along with technical improvements that are the product of discussions with experts within Council working groups. In addition, the Commission takes 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.

1) BACKGROUND

On 20 October 2005, the Commission adopted a proposal for a Directive of the European Parliament and of the Council on improving the portability of supplementary pension rights. This proposal was forwarded to the European Parliament and the Council on 21 October 2005.

The European Economic and Social Committee gave its opinion on 20 April 2007 and proposed amendments to the Commission proposal.

The European Parliament adopted a legislative resolution at its first reading on 20 June 2007.

2) OBJECTIVE OF THE COMMISSION'S PROPOSAL

The social protection systems in the different Member States have to address the problem of demographic ageing. The reforms adopted or envisaged in most Member States are moving towards the further development of supplementary pension schemes, something which is actively encouraged by many Member States.

It is thus urgent to ensure that the rules governing the operation of these schemes do not hamper the freedom of movement of workers across Member States or mobility within any Member State, therefore reducing the opportunities for mobile workers to build up sufficient pension rights by the end of their careers. Failure to achieve this will reduce the flexibility and effectiveness of the labour market. Even if there are many factors which can determine the choice of any individual to be more mobile, the possibility of losing supplementary pension rights may make an individual think seriously about changing jobs.

This amended proposal therefore directly addresses the issue of reducing those obstacles found within some supplementary pension schemes in order to facilitate worker mobility. The potential barriers to worker mobility relate to, in particular, the conditions under which an individual acquires pension rights; and the conditions in which those rights are treated once an individual has changed jobs. Furthermore the amended proposal addresses the issue of a workers right to information on how mobility will affect the acquisition and preservation of their supplementary pension rights.

3) COMMISSION OPINION ON THE AMENDMENTS ADOPTED BY THE EUROPEAN PARLIAMENT

On 20 June 2007, the European Parliament adopted 34 amendments on the proposal for a Directive to improve the portability of supplementary pension rights. The Commission considers that a majority of the European Parliament's amendments are acceptable in full, in principle, or in part, as they maintain the aims and political viability of the proposal and in many cases enhance the original drafting. A main feature of the European Parliament's amendments is to shift the focus of the Directive onto the acquisition and preservation of dormant rights and away from provisions for transfers. The European Parliament considers that the introduction of a compulsory transfer option at this time would place too great a burden on some supplementary pension schemes and would, furthermore, cause considerable technical difficulties. Having taken careful note of the European Parliament's decision and the views expressed by experts within the Council working group, the Commission acknowledges this change of priorities and accepts the removal of article 6 (transfer provisions). Accordingly the Commission proposes to amend the title of the Directive, accepting in part the language used by the European Council in their reference to the draft Directive in June 2007. The amended proposal is now entitled: "*Proposal for a directive on the minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights*".

The Commission therefore accepts in full or in part, the following amendments of the European Parliament:

3.1 Scope of application and other general provisions (Articles 1-3)

Objective: Amendments 1 and 18 relate to the objective of the Directive with amendment 1 deleting reference to the word portability in recital 5, reflecting the removal of article 6 on transfers. The amendment also replaces the term '*harmonisation*' with '*minimum requirements*' in line with changes to articles 4 and 5. The Commission accepts this amendment in full. Amendment 18 replaces the term '*workers*' with '*persons*' in article 1 and expands the objective of the Directive. The Commission cannot accept this amendment on the grounds that the Directive is concerned with removing obstacles within supplementary pension schemes that impact on workers' freedom of movement or mobility. The Community does not have the power to require Member States to undertake '*the early development of supplementary pension schemes*'. The Commission has taken into account technical modifications discussed in Council and accordingly made minor drafting amendments to Article 1.

Amendment 2 proposes a new recital highlighting the importance of ensuring the sustainability of supplementary pension provision is not undermined by this Directive and that the protection of the rights of remaining workers and scheme pensioners is considered in full. It also highlights the important role that social partners play in the design and implementation of supplementary pension schemes. The Commission fully accepts this amendment (now seen as 5a). **Amendment 3** introduces a new recital (now seen as 5b) emphasising that the Directive does not require the introduction of legislation to establish supplementary pension schemes where none exist previously. The Commission accepts this amendment in principle and clarifies the text - based in part on technical work by experts in Council working groups - that Member States, whilst obliged to transpose the provisions of this Directive into national law, retain responsibility for organising their own pension systems.

Scope. Amendment 5 is a new recital (now seen as 5c) clarifying the Directive's scope which the Commission accepts in full. **Amendments 6, 7, 8 and 19** should be considered together for their modifications of article 2 and its corresponding recitals. Amendment 6 introduces a new recital (now seen as 5d) which clarifies the exemption from the application of the Directive of those schemes that are closed to new members. The Commission accepts that this restriction is a compromise and can be considered a proportionate measure to ensure the ongoing sustainability of some supplementary pension schemes. The Commission therefore accepts the amendment in full with the addition of a technical clarification relating to '*sub-sections*' of closed schemes to ensure that where applicable, only those parts of supplementary schemes closed to new members will be exempt. Amendment 7 is a technical clarification and introduces a new recital (now seen as 5e) making it clear that the Directive has no impact on reorganisation or winding-up measures which the Commission accepts in part, rejecting the reference to article 16(2) 2003/41/EC, which is irrelevant for the purposes of the clarification. Amendment 19 concerns article 2 as a whole and is accepted in principle, subject to technical clarifications developed with experts in Council working groups. Amendment 8 introduces a new recital (now seen as 5f) clarifying that the Directive will not apply to insolvency protection systems, compensation arrangement schemes or national reserve funds and the Commission accepts this amendment in full.

Definitions. Amendment 20 consists of technical changes to the definition of terms within Article 3. The Commission accepts the changes to article 3(a) in full, as well as the incorporation of a new definition 3(da), dealing with the term '*vesting period*'. The amendment to 3(b) is accepted, other than the proposed deletion of the word '*occupational*' which the Commission considers would reduce the clarity of the definition. The amendment to 3(c) is accepted in part with drafting changes to describe more clearly that the conditions an '*active scheme member*' may need to fulfil, are those acquisition conditions set out in article 4. The amendment to article 3(d) is accepted with minor drafting changes. The amendment to article 3(f) is accepted in principle, whilst utilising language developed by experts in Council working groups. The change to article 3(h) replacing the term '*deferred beneficiary*' with the term '*inactive scheme member*' is not accepted, as the Commission considers the original term was technically clearer. The Commission does however accept the remaining technical changes within 3(h) in principle, whilst using language developed in part through Council work. The changes to article 3(i) are accepted, with the exception of the term '*inactive scheme member*'. The change to article 3(j) involves the introduction of a new concept, '*value of dormant entitlement*' and the deletion of the term '*transfer*'. The Commission accepts the rationale for this new definition but considers the term '*value of dormant rights*' as more accurate and drafts accordingly. Articles 3(e) and 3(g) are deleted by the Commission to reflect the restructuring and modification of the Directive as a whole, these definitions are therefore no longer required.

Amendment 4 introduces a new recital (now seen as 5g) that clarifies the definition of '*supplementary pension schemes*' further. The Commission accepts the new recital in principle whilst drawing on the work of experts in Council to improve the technical drafting. The Commission also simplifies the description of conditions where individual pension arrangements should be considered as supplementary schemes for the purposes of this Directive. The Commission recognises that the taxonomy of pension systems, in particular with regards to individual pension arrangements, is not always clear-cut. Therefore the recital clarifies that individual pension arrangements

concluded through an employment relationship should be considered as within the scope of this Directive. In addition, the Commission has introduced a new recital (5h) in order to clarify that special, small payments, made at the end of a career and financed solely by an employer are not considered supplementary pensions for the purposes of this Directive.

3.2 Conditions governing acquisition (Article 4)

Amendment 22 develops the Commission's original proposal for the acquisition of pension rights. The approach Parliament has taken to introducing minimum acquisition requirements strikes a different balance from that of the Commission whilst maintaining the principle of reducing obstacles to mobility found within some supplementary pension schemes. The central aspect of the amendment proposes the removal of any reference to minimum ages for vesting as found in article 4(b), to be replaced with a new formulation that intrinsically links the concept of a maximum permitted vesting period and the age of the active scheme member. The amendment, therefore, proposes a maximum *vesting period* of 5 years (where stipulated) for active scheme members under the age of 25 and the exclusion of any *vesting conditions* for those over the age of 25.

The Commission recognises that the intent of this amendment is to acknowledge that in general, younger workers have greater mobility than those over the age of 25 and that the accrual of pension rights for those under the age of 25 may be less urgent than for those above this age. The Commission therefore accepts the proposal to allow, where applicable, a vesting period that does not exceed five years for those under the age of 25 as a compromise measure. With regards to the prohibition of any vesting conditions for the over 25s, the Commission, whilst supporting the principle of workers' rights vesting at the earliest opportunity, accepts that some supplementary pension schemes may face significant administrative and technical difficulties if a short vesting period is not permitted. This is particularly the case for schemes where national legislation does not allow for a mandatory period of employment before joining a pension scheme. As such, the Commission is unable to accept the proposition to eliminate vesting conditions beyond the age of 25 and instead proposes that where vesting periods are present, these may not exceed one year. This remains a proportionate approach that reduces obstacles to mobility, whilst remaining mindful of placing undue burdens on supplementary pension schemes. The Commission has therefore redrafted Article 4(c) on this basis whilst clarifying that a vesting period of one year always applies once an active scheme member reaches 25 years of age, regardless of the age at which they began accruing rights.

The European Parliament's restructuring of article 4 to combine the concept of ages and maximum *vesting periods* leaves an element of uncertainty as to whether a minimum *vesting age* can still be applied for those under the age of 25. With the Commission's further revision of this proposal to allow for a maximum vesting period of 1 year (for those over 25) this uncertainty is amplified. Therefore, for clarity, the Commission rejects the deletion of article 4(b) which states: '*where a minimum age is stipulated for the acquisition of pension rights, this is not more than 21 years*', and instead makes minor drafting amendments. In addition the Commission makes technical amendments to the original article 4(c) and moves it to 4(a) to improve the overall structure and consistency of article 4. **Amendment 43** redrafts and expands the original article 4(a) (now seen as 4(d)) and further clarifies how contributions made

before vesting occurs are dealt with. The Commission accepts these changes in full, subject to minor drafting amendments. The Commission also accepts in principle the corresponding new recital introduced by **amendment 11**. This is redrafted as recital 6(a) following expert comment in Council working groups clarifying further the means in which non-vested rights and outgoing workers are dealt with.

Amendment 24 outlines the role that social partners - through collective agreements - can play when introducing the provisions of articles 4(a-d). The Commission accepts these proposals in principle and introduces them as new article 4(e) with drafting changes discussed in Council which offer greater legal clarity.

Amendment 9 concerns a general recital for the whole of article 4 which in part replaces the original recital 6 removed by **amendment 10**. It states that due to the increased importance of supplementary pension provision to incomes in retirement, the acquisition, preservation and transfer of pension rights should be improved. The Commission accepts the amendment in full as recital 5i whilst making additional reference to reducing obstacles to freedom of movement and occupational mobility to ensure consistency with the Directive's objective. As an additional technical clarification the Commission introduces a new recital 5j to avoid confusion as to the meaning of the term '*vesting requirement*', which in some Member States can be interpreted as relating to the purchase of an annuity.

3.3 Preservation of dormant rights and transfers (Articles 5 and 6)

Preservation of dormant rights. **Amendment 12** introduces a new recital (6b) emphasising the right of outgoing workers to leave their vested pension rights as dormant rights in the scheme in which they vested. The Commission accepts this amendment in principle, with additional drafting reflecting work within Council, in particular relating to certain situations where highly mobile workers, particularly in the context of defined contribution pension schemes, may have their rights discharged to another supplementary pension scheme that fulfils the provisions laid down in article 5.1.

Amendment 13 recasts recital 7 in line with the general principle of clarifying how dormant rights should be calculated and preserved, whilst emphasising the need to consider the particular nature of the scheme and the rights of scheme members who are not outgoing workers. The Commission accepts the amendment in principle and draws on technical work from experts in Council working groups in its redrafting. The text now refers to '*national law and practise*' for the calculation of pension right values, rather than '*actuarial standards*' to avoid confusion with the cross-border provisions within Directive 2003/41/EC¹. Utilising further work undertaken by experts during Council working groups, the text also contains reference to justified administrative costs that may be taken into account in the event of dormant rights being adjusted. The Commission considers this to be a proportionate and necessary addition.

Amendment 14 clarifies recital 8 with regards to the discharging of small amounts of vested pension rights of outgoing workers. The Commission accepts this amendment in principle and adds clarifications concerning the concept of calculating capital

¹ Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision.

payments.

Amendment 25 reforms article 5 by the introduction of a new article 5.-1 permitting outgoing workers - subject to the conditions set out in 5.2 and 5.3 – the right to leave their dormant rights within the scheme where they vested. The Commission accepts this amendment in principle with drafting changes reflecting in part technical discussions in Council. To ensure clarity of intent the Commission also incorporates text to clarify that where applicable, the value of newly formed dormant pension rights should be calculated at the moment a worker leaves a scheme. This value acts as the reference point for the future treatment of dormant rights as set out in article 5.1. Amendment 25 also adds considerable detail to article 5.1 and in particular contains explicit reference to ways in which '*fair adjustment*' (described as '*fair treatment*' in the amendment) should be considered fair. In part this involves incorporating text from the original recital 7. The amendment also proposes that dormant rights should be protected in the event of insolvency of the sponsoring employer. The Commission cannot accept the introduction of insolvency protection within this Directive as it is already subject to European legislation through the provisions of Article 8 of Council Directive 80/987/EEC². The other changes the Commission accepts in principle whilst making use of technical language developed within Council working groups. The Commission however, whilst accepting the principle of providing more detail in article 5.1, considers that the structure of the proposed amendment does not fully achieve its aim of defining '*fair treatment*' in a more explicit manner. Therefore, the amended proposal recasts and clarifies article 5.1 by placing two common and specific methods of treating dormant rights (development in line with the rights of active scheme members and development in line with pension benefits currently in payment) alongside the concept of fair treatment at the head of the article. Other methods that can be considered fair treatment are then listed as proposed by amendment 25. For additional clarity to complement these changes the Commission introduces a new recital (7a), stating that the Directive does not create any obligation to establish more favourable conditions for dormant rights than for the rights of active scheme members.

The Commission also introduces – following expert advice from the Council working group – extra clarification to article 5.1(c) permitting Member States to set proportionate limits when dormant rights are adjusted in line with price or wage inflation. The Commission considers this a reasonable compromise to protect the long term sustainability of supplementary pension provision. As a consequence of these changes the implementation provision found at article 9.5 is redundant and accordingly deleted.

Amendment 25 also proposes drafting changes to article 5.2 with regards to how pension schemes can discharge liabilities as a capital sum when accrued rights are below a specific threshold set by national legislation. The Commission accepts these changes in full, subject to minor drafting changes. The Commission also accepts in principle the introduction of article 5.3 which makes explicit the role social partners may play when introducing the provisions of article 5 through collective agreements.

Transfers. Amendments 15, 16 and 17 reflect the changes to article 5 and the removal

² Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer as amended by Directive 2002/74/EC

of article 6, whilst emphasising that the Directive does not aim to discourage the transfer of pension rights. The recitals recommend that Member States should seek to improve conditions of transfer wherever possible. The Commission accepts amendments 15 and 17 which delete recitals 9 and 10 and the Commission also accepts, with drafting changes, amendment 16 (now seen as new recital 9a) stating that transfers should be particularly encouraged in new supplementary pension schemes.

Amendment 26 proposes the deletion of article 6 on the transfer of pension rights. The Commission fully accepts this amendment whilst regretting that provisions specifying how the transfer of pension rights should be undertaken do not feature in the amended proposal. The Commission recognises that at this point in time, due to the technical difficulties involved in agreeing general provisions for transfers and concerns over the impact on the financial sustainability of some supplementary pension schemes, Article 6 should be removed.

3.4 Information and non-regression (Articles 6 and 7)

Information. Amendment 27 refers to the provision of information to workers, active scheme members and outgoing workers in article 7.1 (now seen as 6.1). The amendment proposes that active scheme members have the right to request information pertaining to their supplementary pension rights in the event of their employment being terminated. The Commission accepts this part of the amendment in full. The changes to article 7.2 and 7.3 (now seen as 6.2 and 6.3) are accepted in full or in principle whilst utilising some technical text developed through work in Council. The proposal to remove 7.4, describing the method of information provision, and place it within 7.2 is not accepted as the Commission considers the original structure of the article to be clearer. The text in 7.4 (now seen as 6.4) is however developed reflecting technical discussions with experts in Council. As a consequence of these changes additional text allowing for an administrative safeguard is introduced by the Commission within recital 11, to make clear that there is no obligation to provide information more often than once a year.

Non-regression. Amendment 28 clarifies the non-regression article, by replacing the term '*portability*' with '*establishment and preservation of pension rights*' reflecting the removal of transfer provisions from the Directive. The amendment is accepted in full other than the reference to outgoing workers in the final line of the article, which is not deemed necessary. The Commission has in addition clarified the effect of the article to make clear that preservation affects outgoing workers, whereas the acquisition of rights concerns workers more generally.

3.5 Implementation and reporting (Articles 8 and 9)

Implementation. Amendments 29 and 42 propose that Member States, when implementing the Directive, may be granted an extension of 60 months with regards to implementing both articles 4 and 5. The Commission accepts this proposal as well as the minor drafting changes as proportionate to balancing the elements of reducing obstacles to freedom of movement and mobility and ensuring the ongoing sustainability of supplementary pension provision. The Commission has also amended the date of implementation to reflect the current situation. **Amendment 30** deletes article 9.3 which the Commission accepts as the provision is now obsolete due to the

removal of transfer provisions.

Reporting. Amendment 31 specifies that one element of the 5 yearly reports set out in article 10 (now article 9) should assess the '*willingness of employers*' to offer supplementary pensions following the implementation of this Directive. The Commission accepts this amendment in principle, but proposes to place this feature of reporting within a new recital, (15a). The Commission also makes technical language changes and inserts reference to '*development of supplementary provision*' rather than '*willingness*'. The Commission considers *willingness* to be a difficult concept to quantify. **Amendment 32** proposes a new clause to article 10 (now seen as article 9) requiring the first report to assess how an employer's liability for supplementary pension rights is affected following a transfer of pension rights. The Commission accepts this extra element in principle and for clarity of drafting also includes it within recital (15a). **Amendments 52 and 33** propose the deletion of article 10.2 to be replaced with a new paragraph (article 10.2 (a)). The new paragraph requires the Commission to review in particular the conditions for the transfer of pension rights within 5 years of the adoption of the Directive. On the basis of this report the Commission should bring forward any necessary proposals to further reduce obstacles to mobility. The Commission accepts both of these amendments and for drafting clarity has amended article 10.2 (now 9.2) accordingly. The Commission has also added additional text to clarify that any proposals to amend the Directive will only be forthcoming if the situation at the time necessitates further legislation.

CONCLUSION

Having regard to article 250 (2) of the EC treaty, the Commission modifies its proposal as follows:

Amended Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on ~~improving the portability of supplementary pension rights~~ minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 42 and 94 thereof,

Having regard to the proposal from the Commission³,

Having regard to the opinion of the European Economic and Social Committee⁴,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁵,

Whereas:

- (1) The free movement of persons is one of the fundamental freedoms of the Community; in Article 42, the Treaty stipulates that the Council, acting in accordance with the procedure referred to in Article 251, shall adopt such measures in the field of social security as are necessary to provide freedom of movement for workers.
- (2) The social protection of workers with regard to pensions is guaranteed by statutory social security schemes, together with supplementary ~~social security~~ **pension** schemes linked to the employment contract, which are becoming increasingly common in the Member States.
- (3) The Council has wide powers of discretion regarding the choice of measures which are the most appropriate when it comes to achieving the objective of Article 42 of the Treaty; the system of coordination provided for in Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community⁶ and Council Regulation

³ OJ C [...], [...], p. [...].

⁴ OJ C [...], [...], p. [...].

⁵ OJ C [...], [...], p. [...].

⁶ OJ L 149 of 5.7.1971, p. 1. Regulation as last amended by Regulation (EC) No 631/2004 (OJ L 100 of 6.4.2004, p. 1).

(EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71⁷ and, in particular, the rules applicable to aggregation do not relate to supplementary pension schemes, except for schemes covered by the term “legislation”, as defined in the first paragraph of Article 1(j) of Regulation (EEC) No 1408/71, or which have been the subject of a declaration to this effect by a Member State pursuant to this Article. ~~Supplementary pension schemes should therefore be the subject of specific measures in order to take account of their nature and specific characteristics and of the diverse nature of these schemes within the Member States and from one Member State to another, and in particular the role played by the social partners in their implementation.~~

- (4) Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community⁸ represents an initial specific measure designed to improve the exercise of the right of workers to freedom of movement as regards supplementary pension schemes.
- (5) Recourse should also be ~~had~~ **made** to Article 94 of the Treaty, given that the disparities between the national legislation governing supplementary pension schemes are likely to hamper both the exercise of the right of workers to freedom of movement and the operation of the internal market. Thus, in order to improve the portability of the supplementary pension rights of workers moving within the Community and within the same Member State, **provision should be made for certain conditions governing the acquisition of minimum requirements for the establishment of pension rights and preservation of the vested pension rights must be harmonised and the rules on the preservation of dormant rights and the transfer of acquired rights must be brought closer together of outgoing workers in a supplementary pension scheme linked to an employment relationship.**
- (5a) Moreover, account should be taken of the characteristics and special nature of supplementary pension schemes and the way they differ within and among the Member States. The introduction of new schemes, the sustainability of existing schemes and the expectations and rights of current pension scheme members should be adequately protected. This Directive should also take particular account of the role of the social partners in designing and implementing supplementary pension schemes.
- (5b) This Directive does not call into question the right of Member States to organise their own pension systems. Member States retain full responsibility for the organisation of such systems and when transposing this Directive into national law are not obliged to introduce legislation providing for the setting up of supplementary pension schemes.**
- (5c) This Directive should apply to all supplementary pension schemes established in conformity with national legislation and practise, that offer supplementary pensions for workers, such as group insurance contracts, pay-as-you-go schemes**

⁷ OJ L 74 of 27.3.1972, p. 1. Regulation as last amended by Regulation (EC) No 77/2005 (OJ L 16 of 20.1.2005, p. 3) due to be repealed by Regulation (EC) 883/04 coming into force

⁸ OJ L 209 of 25.7.1998, p. 46.

agreed by one or more branches or sectors, funded schemes or pension promises backed by book reserves, or any collective or other comparable arrangement.

- (5d) This Directive should not apply to supplementary pension schemes or, where applicable, sub-sections of such schemes, that have been closed to the effect that no new members can be accepted because the introduction of new rules could place an unjustifiable burden on such schemes.
- (5e) This Directive does not aim to harmonise or affect national law on reorganisation measures and winding-up proceedings; it is irrelevant whether any proceedings are opened because of insolvency, or whether they are entered into voluntarily or compulsorily. Similarly, this Directive does not affect national legislation on reorganisation measures under Directive 2001/17/EC⁹.
- (5f) This Directive should not affect any arrangements for insolvency protection or compensation arrangements which are not part of a supplementary pension scheme linked to an employment relationship and which aim to protect the pension rights of workers in the event of insolvency of the undertaking or the pension scheme. Similarly, this Directive should not affect national pension reserve funds.
- (5g) This Directive applies only to supplementary pension schemes existing due to an employment relationship that are based on reaching retirement age or on fulfilling other requirements, as laid down by the scheme or by national legislation. This Directive does not apply to individual pension arrangements, other than those concluded through an employment relationship. Nor does this Directive apply to invalidity and survivors benefits.
- (5h) A one-off payment which is not considered substantial income, is not related to contributions made for the purpose of purchasing an annuity, is paid directly or indirectly at the end of a career, and is financed solely by the employer, should not be considered to be a supplementary pension within the meaning of this Directive.
- (5i) Since supplementary retirement provision is becoming increasingly important in many Member States for securing people's standard of living in old age, the conditions for acquiring, preserving and transferring acquired rights should be improved in order to reduce obstacles to workers freedom of movement and occupational mobility within the EU.
- (5j) Vesting requirements should not be likened to other conditions laid down for the acquisition of a right to an annuity made with regards to the payout phase under national law or under the rules of certain supplementary pension schemes (particularly defined contribution schemes).
- ~~(6) In order to ensure that the conditions for acquiring supplementary pension rights do not undermine the exercise of the right of workers to freedom of movement within the European Union, limits must be established concerning the conditions governing the~~

⁹ Directive of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings (OJ L 110, 20.4.2001, p.28).

acquisition of such rights so that workers, when they exercise their right to freedom of movement or move within a Member State, can receive a satisfactory pension at the end of their career.

- (6a) Where employment is terminated before an outgoing worker has accrued vested pension rights and when the scheme or the employer bears the investment risk (in particular in defined benefit schemes), the scheme should always refund the contributions of the outgoing worker. Where employment is terminated before an outgoing worker has accrued vested pension rights and when the outgoing worker bears the investment risk (in particular in defined contributions schemes), the scheme should refund the value of the investments derived from those contributions. The value may be more or less than the contributions paid by the outgoing worker. If the value is negative there is nothing to refund.**
- (6b) Outgoing workers should have the right to leave their vested pension rights as dormant rights in the supplementary pension scheme in which their entitlement was established. As regards the preservation of dormant rights, protection may be considered equivalent where, particularly in the context of a defined contribution scheme, the outgoing workers are afforded the possibility of having the value of their vested pension rights discharged to a supplementary pension scheme which meets the conditions laid down in Article 5.1.**
- (7) In accordance with national law and practice, steps should must also be taken to ensure a the preservation adjustment of dormant rights or the value of such dormant rights, so as to avoid that outgoing workers are penalised. This objective could be achieved by adjusting dormant rights in line with a variety of reference measures, including inflation, wage levels, or pension contributions which are in the course of being paid, or the rate of return on assets under the supplementary pension scheme. The value of the rights at the time when the worker leaves the scheme should be established in accordance with national law and practice. Where the value of dormant rights are adjusted, account should be taken of the particular nature of the scheme, the interests of the deferred beneficiaries, the interests of the remaining active pension scheme members and the interests of retired beneficiaries. Justified administrative costs can also be taken into account where dormant rights are adjusted.**
- (7a) This Directive does not create any obligation to establish more favourable conditions for dormant rights than for the rights of active scheme members.**
- (8) When the vested pension rights or the value of the vested pension rights of an outgoing worker are not in excess of any thresholds established by the Member State concerned, and in order to avoid excessive administrative costs resulting from the management of a large number of low-value dormant rights, pension schemes must may be given the option not to preserve these vested acquired rights but to either use a transfer the value of the vested pension rights or use a capital a payment of a capital sum representing the vested acquired rights when these do not exceed a threshold established by the Member State concerned. Where applicable, the transfer value or the capital payment will be established in accordance with national law and practice.**

(9) ~~Workers who change jobs must be granted the possibility of choosing either to retain their pension rights acquired under the original supplementary pension scheme or to transfer the corresponding sum to another supplementary pension scheme, including one in another Member State.~~

(9a) This Directive does not stipulate provisions for the transfer of vested pension rights, however, in order to encourage occupational mobility Member States should endeavour as far as possible and in particular when introducing new supplementary pension schemes, to improve the transferability of vested pension rights.

(10) ~~For reasons of financial sustainability of supplementary pension schemes, the Member States have the possibility in principle to exempt unfunded schemes from the obligation to allow workers to transfer acquired rights. However, to ensure equal treatment for workers covered by funded schemes and workers covered by unfunded schemes, Member States should endeavour to progressively improve the transferability of rights from unfunded schemes.~~

(11) Without prejudice to Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision¹⁰, **active scheme members and** workers who exercise or plan to exercise their right to freedom of movement should be suitably informed ~~by those responsible for managing supplementary pension schemes,~~ particularly regarding how a termination of their employment would affect their supplementary pension rights. **Member States may stipulate that such information need not be provided more than once per year.**

(12) In view of the diverse nature of supplementary ~~social security~~ **pension** schemes, the Community must confine itself to establishing the objectives to be achieved in general terms, which means that the directive is the appropriate legal instrument.

(13) Given that the objectives of the measures envisaged, namely to reduce the obstacles to the exercise of the right of workers to freedom of movement **and occupational mobility** and to the operation of the internal market, cannot be achieved satisfactorily by the Member States and may therefore, because of the scope of the measures, be achieved more effectively at Community level, the Community may take action in accordance with the subsidiarity principle set out in Article 5 of the Treaty. In accordance with the principle of proportionality referred to in that Article, this Directive, based on an impact assessment conducted with the help of the committee in the area of supplementary pensions (**the Pensions Forum**), will not go beyond what is necessary to achieve its objectives.

(14) This Directive establishes minimum requirements, thus enabling the Member States to adopt or maintain more favourable provisions. The implementation of this Directive cannot be used to justify a regression vis-à-vis the existing situation in each Member State.

¹⁰ OJ L 235 of 23.9.2003, p10.

(15) In view of the need to take account of the effects of this Directive, in particular on the financial sustainability of supplementary pension schemes, the Member States may be granted more time in which gradually to implement those provisions which are likely to have effects of this kind.

(15a) The 5 yearly reports shall review recent trends in the provision of supplementary pensions. The first report shall also contain an assessment of an employer's liability within national legislation in regards to the outgoing pension rights of workers who transfer their rights to another pension scheme. The assessment shall also explore options for ensuring legal liability ends once transfers are executed.

(16) In accordance with the national provisions governing the organisation of supplementary pension schemes, the Member States may grant the social partners, at their joint request, responsibility for implementing this Directive as regards the provisions relating to collective agreements, provided that they **Member States** take all the necessary steps to ensure that they are at all times able to guarantee the outcomes prescribed in this Directive,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Objective

The aim of this Directive is to facilitate the exercise of the right of workers to freedom of movement and **to facilitate workers'** ~~of the right to~~ occupational mobility ~~within the same Member State~~, by reducing the obstacles created by certain rules ~~governing~~ **concerning** supplementary pension schemes ~~in the Member States~~ **linked to an employment relationship**.

Article 2

Scope

1. This Directive applies to supplementary pension schemes apart from the schemes covered by Regulation (EEC) No 1408/71¹¹.

2. This Directive does not apply to the following:

(a) supplementary pension schemes, which, on the date of entry into force of this Directive, no longer accept new active members and remain closed to them;

(b) supplementary pension schemes that are subject to measures involving the intervention of administrative bodies established by national legislation or judicial authorities, which are intended to preserve or restore their

¹¹ Due to be repealed and replaced by Regulation (EC) 883/04 coming into force.

financial situation, including winding-up proceedings. This exclusion shall not extend beyond the end of the intervention;

(c) insolvency guarantee schemes, compensation schemes and national reserve funds.

Article 3

Definitions

For the purposes of this Directive, the following definitions shall apply:

- (a) “supplementary pension” means a 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 **retirement pension** scheme established in conformity with national legislation and practice, ~~such as a group insurance contract, a pay as you go scheme agreed by one or more branches or sectors, a funded scheme or a pension promise backed by book reserves, or any collective or other comparable arrangement~~ **and linked to an employment relationship,** intended to provide a supplementary pension for employed or self-employed persons;
- (c) “**active** scheme members” means **workers** ~~those persons~~ whose **current employment relationship** ~~occupation~~ entitles them or is likely to entitle them, **after fulfilling any acquisition conditions,** to a supplementary pension in accordance with the provisions of a supplementary pension scheme;
- (d) “**vested** pension rights” means any **entitlement to a supplementary pension after the fulfilment of any acquisition conditions,** 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;
- (da) "vesting period" means the period of active membership of a scheme, required under national law or the rules of a supplementary pension scheme, in order to trigger entitlement to a supplementary pension;**
- ~~(e) “termination of employment” means a decision to terminate an employment relationship;~~
- (f) “outgoing worker” means **an active scheme member whose current** ~~a worker who, before becoming eligible for a pension, leaves an employment relationship through which he has acquired pension rights or could have acquired such rights by remaining in that employment relationship~~ **terminates for reasons other than he or she becoming eligible for a supplementary pension;**

- (g) ~~“portability” means the option open to workers of acquiring and retaining pension rights when exercising their right to freedom of movement or occupational mobility;~~
- (h) ~~“deferred beneficiary” means any former **active** scheme member whose pension rights remain dormant under the **who has vested pension rights in a supplementary pension scheme, until the eligibility requirements for but is no longer an active member of that scheme and is not yet in** receipt of a supplementary pension have been met **from that scheme**;~~
- (i) ~~“dormant pension rights” means **vested** pension rights retained under **within** the scheme **under in** which they have been acquired **accrued** by a deferred beneficiary who will receive a pension through this supplementary scheme once the eligibility requirements have been met;~~
- (j) ~~“**transfer value of the dormant rights**” means the **capital value of the pension rights calculated in accordance with national law and practice** payment by a supplementary pension scheme of a capital sum representing all or part of the pension rights acquired under the scheme, with the possibility of transferring this sum to a new supplementary pension scheme or another financial institution which provides pension rights.~~

Article 4

Conditions governing acquisition

The Member States shall take all necessary steps to ensure that:

- (a) ~~where pension rights have not yet been acquired when employment is terminated, all the contributions paid by, or on behalf of, the outgoing worker are reimbursed or transferred **active scheme membership is made conditional upon a period of employment, this period shall not exceed one year**;~~
- (b) ~~where a minimum age is stipulated for the **accrual by an active scheme member of vested** acquisition of pension rights, this **age shall not exceed** is not more than 21 years;~~
- (c) ~~a worker may join a supplementary pension scheme after a maximum period of employment of one year or, where necessary, no later than once he has reached the required minimum age **where a vesting period is applied this shall under no circumstances exceed one year for active scheme members over the age of 25. For active scheme members below this age vesting periods shall not exceed five years**;~~
- (d) ~~a **where an outgoing** worker acquires pension rights after a maximum membership period of two years **has not yet acquired vested pension rights when the employment relationship is terminated, the supplementary pension scheme shall reimburse the contributions paid by the outgoing worker, or paid on the worker's behalf in accordance with national law or collective agreements or contracts, and where the outgoing worker bears the investment risk, the investment value arising from these contributions**;~~

- (e) Member States shall have the option of allowing the social partners to lay down different provisions by collective agreement, to the extent that those provisions provide at least equivalent protection to the rights of workers and active scheme members.

Article 5

Preservation of dormant pension rights

- ~~1.~~ Subject to paragraphs 2 and 3, Member States shall adopt the measures necessary to ensure that the vested pension rights of outgoing workers can remain in the supplementary pension scheme in which they vested. The initial value of these rights for the purposes of paragraph 1 shall be calculated at the point when an outgoing worker's current employment relationship terminates.
1. The Member States shall adopt the measures ~~they deem~~ necessary having regard to the nature of the pension scheme rules or practise, to ensure dormant pension rights or their values are treated in line with the value of the rights of active scheme members, or the development of pension benefits currently in payment, or by other means which are considered ~~in order to ensure a fair adjustment treatment, of dormant pension rights so as to avoid that outgoing workers are penalised~~ such as:
- (a) the pension rights in the supplementary pension scheme are set as a nominal sum; or
- (b) the deferred beneficiary continues to benefit from a rate of interest built into the pension scheme, or from the return on investments derived by the supplementary pension provider; or
- (c) the value of the dormant pension rights is adjusted in accordance with the inflation rate or salary levels which may be subject to a proportionate limit set by national legislation or agreed by the social partners.
2. The Member States may allow supplementary pension schemes not to retain the vested ~~preserve acquired rights of an outgoing worker~~ but to pay ~~use a transfer or payment of a capital sum~~ equivalent to the value of the vested pension rights to the outgoing worker, as long as the value of the vested pension rights does ~~representing the acquired rights when these do not exceed a threshold established by the Member State concerned. The Member State shall inform the Commission of the threshold applied.~~
3. Member States shall have the option of allowing the social partners to lay down different provisions by collective agreement, to the extent that those provisions provide at least equivalent protection to the rights of outgoing workers and deferred beneficiaries.

Article 6

Transferability

- ~~1. Unless a capital payment is made in accordance with Article 5(2), the Member States shall take the necessary action to ensure that if an outgoing worker is not covered by the same supplementary pension scheme in his new job, he may obtain on request and within 18 months after the termination of his employment the transfer within the same Member State or to another Member State of all his acquired pension rights.~~
- ~~2. Member States, in accordance with their national practice, shall ensure that where actuarial estimates and those relating to the interest rate determine the value of the acquired rights to be transferred, these shall not penalise the outgoing worker.~~
- ~~3. Under the supplementary pension scheme to which the rights are transferred, the rights shall not be subject to conditions governing acquisition and shall be preserved at least to the same extent as dormant rights in accordance with Article 5(1).~~
- ~~4. Where administrative costs need to be paid during a transfer, the Member States shall take the necessary action to prevent them from being disproportionate to the length of time the outgoing worker has been a scheme member.~~

Article 76

Information

1. Without prejudice to the obligations of the institutions for occupational retirement provision stemming from Article 11 of Directive 2003/41/EC, **to provide** concerning the information ~~to be provided to~~ **scheme** members and beneficiaries, the Member States shall adopt the necessary measures **necessary** to ensure that **active pension scheme members can obtain on request information on** ~~workers are informed by the person responsible for managing the supplementary pension scheme of how a termination of employment will~~ **would** affect their supplementary pension rights **in accordance with paragraph 2.**
2. Sufficient ~~i~~**Information** shall be provided ~~within a reasonable period of time to workers~~ **active scheme members** who request it. It shall relate, in particular, to the following:
 - (a) the conditions governing the acquisition of supplementary pension rights and the effects of applying them when employment is terminated;
 - (b) ~~the pension benefits envisaged when employment is terminated~~ **the value of their vested rights or an assessment of the vested pension rights carried out no more than 12 months preceding the date of the request and;**
 - (c) the conditions governing the **future treatment** ~~preservation~~ of dormant pension rights;
 - ~~(d) the conditions governing the transfer of acquired rights.~~
3. ~~A deferred beneficiary who so requests shall receive from the person responsible for managing the supplementary pension scheme~~ ~~i~~**Information on dormant pension rights and on all changes to the rules governing the supplementary pension scheme**

concerning them: shall be provided to deferred beneficiaries who request it concerning:

(a) the value of their dormant rights or an assessment of the dormant pension rights carried out no more than 12 months preceding the date of the request; and

(b) the conditions governing the treatment of dormant pension rights

4. The ~~i~~Information referred to in the present article shall be provided clearly and within a reasonable period of time in writing and in a comprehensible form.

Article 87

Minimum requirements — non-regression

1. The Member States may adopt or maintain provisions on the establishment of pension rights for workers and the preservation ~~portability~~ of supplementary pension rights of outgoing workers which are more favourable than those set out in this Directive.
2. The implementation of this Directive may not under any circumstances be used as a reason for reducing the existing rights for the establishment and preservation of supplementary pensions ~~degree of portability of supplementary pension rights which exists in the Member States.~~

Article 98

Implementation

1. The Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive no later than ~~1 July 2008~~ ... (2 years after the adoption of this Directive), or shall ensure that ~~may grant the social partners, introduce~~ at their joint request, ~~responsibility for implementing this Directive as regards the~~ required provisions by way of agreement by that date. ~~relating to collective agreements. In that case, Member States shall ensure that, no later than 1 July 2008, the social partners have introduced the requisite measures by agreement; the Member States concerned must~~ are required to take all the necessary steps enabling them at all times ~~to ensure that they are at all times able to guarantee the outcomes prescribed in~~ results imposed by this Directive. They shall forthwith inform the Commission thereof.
2. Notwithstanding the first paragraph, the Member States may be granted, where necessary, an extension of 60 months starting on ~~1 July 2008~~ ... (2 years after the adoption of this Directive), in order to achieve the objective referred to in Articles ~~4 and 5~~ 4 and 5 ~~(d)~~. Any Member State wishing to be granted this extension shall inform the Commission accordingly, indicating the provisions and schemes concerned and the specific reasons for the extension.

- ~~3. Notwithstanding the first paragraph, and in order to take account of specific conditions duly substantiated and linked to financial sustainability of supplementary pension schemes, the Member States may exempt pay-as-you-go schemes, support relief funds and companies which constitute book reserves with a view to paying pensions to their workers from the application of Article 6(1). Any Member State wishing to make use of this possibility shall immediately notify the Commission, indicating the schemes concerned and the specific reasons for the exemption, together with the measures adopted or planned with a view to improving the transferability of rights from the schemes concerned.~~
4. When the Member States adopt these measures, these shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.
- ~~5. The Member States shall inform the Commission of the measures taken in order to implement the provisions of Article 5.~~

Article 109

Report

1. Every five years after 1 July 2008 [**...(2 years after the adoption of this Directive)**], the Commission shall draw up a report for submission to ~~the Council~~, the European Parliament, **the Council and** the European Economic and Social Committee ~~and the Committee of the Regions~~ on the basis of the information provided by the Member States.
2. ~~No later than 10 years after 1 July 2008, the Commission shall draw up~~ **The first report shall deal with the application of this Directive and contain** a specific report on the application of Article 9(3). On the basis thereof, if appropriate, the Commission shall present a proposal containing any amendments to this Directive which prove necessary in order to ensure equal treatment in terms of transferability of acquired rights for workers covered by funded schemes and workers covered by schemes as referred to in Article 9(3). **that shall review the conditions of transferring capital representing workers' supplementary pension rights. On the basis of that report, the Commission will, if appropriate, examine options for a proposal containing any amendments to this Directive or other instruments which prove necessary in order to further reduce obstacles to the mobility of workers created by certain rules concerning supplementary pension provision.**

Article ~~11~~10

Entry into force

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

Article ~~12~~11

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President