

Acquis Communautaire related to pensions

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1. Definition of the *acquis communautaire*

The *acquis communautaire* is the body of common rights and obligations which binds all Member States within the European Union. It is constantly evolving and comprises:

- content, principles and political objectives of the treaties;
- legislation adopted pursuant to the treaties and the case law of the Court of Justice;
- declarations and resolutions adopted by the Union;
- documents relating to the Common Foreign and Security Policy;
- measures relating to justice and home affairs;
- international agreements concluded by the Community and those entered into by the Member States among themselves within the sphere of the Union's activities¹.

The *acquis communautaire* related to supplementary pensions comprises Community law, all acts adopted under the second and third pillars of the European Union and the common objectives laid down in the treaties.

The European Union is committed to maintaining and developing the *acquis communautaire* as a whole. The EU has a role of co-ordination with regard to the first pillar i.e. social security schemes (a.o. by means of regulation 1408/71²). In the field of supplementary pensions (occupational and individual), it endeavours to ensure the fundamental Treaty provisions and to maximise the potential of the Euro and the single financial market.

The new Member States had to adopt the *acquis communautaire* before joining the EU and new candidate countries have to accept the *acquis communautaire* before they can join the Union. Derogations therefrom are granted only in exceptional circumstances and are limited in scope.

The basis of the *acquis communautaire* consists of freedoms enshrined in the Treaty (free movement of workers, freedom of establishment, freedom to provide services and free movement of capital). These are reinforced in pension matters by Regulation 1408/71, which aims at protecting the social security rights of persons moving within the European Union and the Directive on equal treatment for men and women. Related to supplementary pension provision, by the Life Insurance Directives, the Directive on Institutions for Occupational Retirement Provision (IORP) 2003/41/EC and other measures to ensure the safeguarding and portability of vested rights.

¹ EU definition.

² Council Regulation (EEC) N° 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

2. Co-ordination of the social security schemes

2.1. The basic Treaty freedoms and Council Regulation 1408/71

Social security is an important issue for persons exercising their fundamental right to free movement. But without proper coordination at European level national social security regulation may lead to difficulties for European citizens and their families who move within the European Union. True free movement therefore needs protection of these rights.

The articles 39, 43, 49 and 56 of the Treaty guarantee free movement of workers, freedom of establishment, freedom to provide for services and free movement of capital and they prohibit restrictions to these freedoms including in taxation matters.

Article 137 (1) enumerates points in which the Community should support and complement the activities of the Member States:

- “*improvement in particular of the working environment to protect workers’ health and safety;*
- *working conditions;*
- *the information and consultation of workers;*
- *the integration of persons excluded from the labour market;*
- *equality between men and women with regard to labour market opportunities and treatment at work.”*

EU Regulation 1408/71 offers practical solutions to most of the cross-border problems that may arise in the field of social security. This Regulation does not harmonise but co-ordinates the social security schemes of EU Member States, i.e. it does not replace the different national social security systems by a single European scheme. Therefore, Member States are free to determine the details of their own social security systems, including which benefits shall be provided, the conditions of eligibility and the value of these benefits, as long as they adhere to the basic principle of equality of treatment and non-discrimination.

2.2. Directive 79/7/EEC³ on the progressive implementation of the principle of equal treatment for men and women in matters of social security

The scope of this directive is to ensure equality (of opportunities and treatment) for men and women in the social security schemes.

Article 4 of the directive refers to the principle of equal treatment:

“(...) *there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular or concerning:*

³ of 19 December 1978, amended by Directive 96/97/EC of 20 December 1996 on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

- *the scope of the schemes and the conditions of access thereto,*
- *the obligation to contribute and the calculation of contributions,*
- *the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.”*

This principle of equality between men and women has been re-affirmed by the European Court of Justice in its case law. In particular, in the Barber case⁴, the Court confirmed that benefits paid by an occupational pension scheme are considered to be pay and must, therefore, comply with the principle of equal pay for men and women.

3. Co-ordination of supplementary pension schemes

3.1. Directive 2003/41/EC⁵ on the activities and supervision of institutions for occupational retirement provision (IORP), (the so-called Pension Fund Directive)

The scope of the Pension Fund Directive is to create a Community legal framework covering institutions for occupational retirement provision (IORP). In Article 6 of this directive, an IORP is defined as:

“an institution, irrespective of its legal form, operating on a funded basis, established separately from any sponsoring undertaking or trade for the purpose of providing retirement benefits in the context of an occupational activity on the basis of an agreement or contract concluded:

- *individually or collectively between the employer(s) and the employee(s) or their respective representatives, or*
- *with self-employed persons, in compliance with the legislation of the home and host Member States and which carries out activities directly arising therefrom.”*

The purpose of the Directive is to achieve security and affordability of pensions, and to encourage provision of occupational pensions, by:

- providing a prudential framework to protect members and beneficiaries of IORPs;
- ensuring that IORPs have flexibility within the prudential framework to develop an effective investment strategy;
- improving transparency; and
- enabling an IORP located in one Member State to provide benefits for employees in another Member State (enable cross-border activities).

⁴ Barber case of May 17, 1990. Article 141 of the Treaty requires equal pay for men and women where they carry out the same work.

⁵ of 3 June 2003.

To ensure these objectives, the Directive encompasses 5 groups of provisions:

First group: security on the asset and liability sides

- “fit” and proper criteria and legal separation of the assets of the pension fund from the sponsor
- funding rules, technical provisions and actuarial valuations for Defined Benefit type plans
- regulatory own funds

The regulations related to calculations and funding of technical provisions and to investment rules are to ensure security on the liability side whilst achieving greater efficiency and affordability on the asset side.

Second group: facilitate access by improving efficiency and affordability (therefore eliminating or at least reducing investment restrictions)

- Investments based on prudent principles i.e. a qualitative rather than a quantitative approach to investments⁶. Member States can be more restrictive if appropriately justified⁷. In this case, the pension fund must be allowed to invest:
 - Up to 70% of the technical provisions for Defined Benefit type plans (and the remainder totally) or up to 70% of the whole portfolio for Defined Contribution type plans in shares, negotiable securities and corporate bonds
 - In non-matching currencies up to 30% of the technical provisions
 - In risk capital consistent with the prudent person concept.
- Rules may be stricter in the event of cross-border activity. The host Member State may, only if they themselves apply the same or stricter rules require:
 - A minimum of 70% of the assets that correspond to the activities carried out in the particular host Member State to be invested in shares, other securities treated as shares and debt securities which are admitted to trading on a regulated market or a maximum of 30% of these assets in shares, other securities treated as shares and debt securities, which are not admitted to trading on a regulated market
 - A maximum of 5% of the above-defined assets in the same undertaking and maximum 10% in undertakings belonging to a single group
 - A maximum of 30% of the above-defined assets in non-matching currencies
- Home Member States may require ring-fencing of the assets.

⁶ Article 18 (1): “Member States shall require institutions located in their territories to invest in accordance with the “prudent person” rule (...”).

⁷ Article 18 (5) ”In accordance with the provisions of paragraphs 1 to 4, Member States may, for the institutions located in their territories, lay down more detailed rules, including quantitative rules, provided they are prudentially justified to reflect the total range of pension schemes operated by these institutions. (...”).

Third group: improved transparency

- powers of intervention and duties of the competent authorities,
- information to be provided to the Supervisory Authority and to members and beneficiaries usually on request for these latter groups,
- annual report and annual accounts are mandatory,
- requirement of a Statement of Investment Policy Principles (SIP) in writing to be submitted at least every three years to the Supervisory Authority and on request to the members and beneficiaries. The Directive precises what needs to be provided: at least the investment risk measurement methods, the risk-management processes implemented and the strategic asset allocation with respect to the nature and duration of pension liabilities. This statement is to be revised every 3 years and without delay after any significant change in the investment policy.

Fourth group: cross-border activities

- free provision of services
- mutual recognition of supervisory principles
- co-operation between competent authorities
- prudential rules of the home Member State
- social and labour law of the host Member State

Fifth group: level playing for similar operations

- coherence with life insurance directives
- option for Member States to apply provisions of specific articles of the Pension Fund Directive to insurance companies for similar activities⁸
- obligation to ring-fence assets and liabilities.

The deadline for implementation of the Directive by the Member States is September 23rd, 2005. Member States are required to regularly exchange information and experience with the Commission related to their progress on implementing the Directive and to the difficulties they might encounter to do this. The Commission is expected to issue a report reviewing the application of the Directive by 2007.

3.2. Directive 80/987/EEC⁹ 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

The Directive on Worker Protection in Employer Insolvency (80/987/EC), amended by Directive 2002/74/EC, aims to provide a minimum degree of protection for employees

⁸ Art. 4: “Home Member State may choose to apply the provisions of articles 9 to 16 and articles 18 to 20 of this Directive to the occupational retirement provision business of insurance undertakings, which are covered by Directive 2002/83/EC. In that case, all assets and liabilities corresponding to the said business shall be ring-fenced, managed and organised separately from the other activities of the insurance undertakings, without any possibility of transfer.”

⁹ of 20 October 1980.

in the event of the insolvency of their employer. To this end, it requires the Member States to establish a body which guarantees payment of the outstanding claims of the employees concerned.

The Directive allows for limited exceptions for certain categories of employees, in specific cases.

3.3. Safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses¹⁰

In the event of a change of employer it is necessary to provide for the protection of employees, in particular, to ensure that their rights are safeguarded. The scope of the Directive 2001/23/EC is defined in article 1 (a) “(...) *any transfer of an undertaking, business or part of an undertaking or business to another employer as a result of a legal transfer or merger*”. This Directive shall apply to national law as regards the definition of contract of employment or employment relationship. The rights and obligations arising from a contract of employment or from an employment relationship existing at the time of the transfer ought to be transferred to the new employer. This does not include – unless Member States provide otherwise - the old-age, invalidity or survivors' benefits under supplementary pension schemes outside statutory schemes. The former and the new employers shall inform the employees and/or their representatives of the transfer, the legal, economic and social implications and the measures envisaged in relation to the employees.

3.4. The Life Insurance Directives

The Directive 2002/83/EC¹¹ aims to simplify European regulation governing life assurance by recasting into a single, consistent text all the relevant directives in force. It replaces all the directives adopted in this field since 1979 and includes the provisions relating to supervision, solvency of insurance undertakings and freedom to provide life-assurance services in the EU. This Directive therefore represents an important step in the transformation of national markets into an integrated market. The Directive applies to both individual and group life assurance, but not to the management of group pension funds.

From the point of view both of the right of establishment and of the freedom to provide services in the Member States it is necessary to complete the internal market in direct life assurance by making it easier for assurance undertakings to cover commitments situated within the EU and to make it possible for policy holders to have recourse not only to assurers established in their own country, but also to assurers which have their head office in the EU and are established in other Member States.

¹⁰ Directive 2001/23/EC of the Council of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

¹¹ Directive 2002/83/EC of 5 November 2002 concerning life assurance.

3.5. Directive 98/49/EC¹² on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community

The scope of this Directive is defined in the 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) N° 1408/71". This Directive applies to members of supplementary pension schemes who have acquired or are in the process of acquiring rights in one or more Member States.

It ensures the safeguarding of supplementary pension rights but it does not cover the "portability" of supplementary pensions i.e. the possibility of acquiring pension rights and keeping pension entitlements by transferring them to a new scheme in the event of professional mobility.

According to article 4, Member States are obliged to take the necessary measures to ensure the preservation of vested pension rights for members of a supplementary pension scheme in the event of moving within the European Union or on changing jobs/plans within a Member State.

Article 6 allows a person posted to another Member State to continue to contribute to the scheme in his "home" Member State.

4. The Open Method of Co-ordination

The Open Method of Co-ordination for issues related to social exclusion and pensions has been adopted during the Stockholm European Council in March 2001. This method allows "mutual learning, benchmarking, best practice and peer pressure to achieve objectives" as well as aims to encourage Member States to progressively develop their own policies as to safeguard the adequacy of pensions whilst maintaining their financial sustainability and facing the challenge of changing social needs. Within this framework three broad common objectives are defined: adequacy of pensions, financial sustainability of public and private pension schemes and modernisation of these.

Adequacy refers to pension systems which should effectively prevent poverty and social exclusion among older people by providing a decent standard of living in retirement and allow older people to share in the economic well-being of their country. Adequate pension provision is only possible if sufficient financing is available. To ensure financial sustainability of pension systems in the long term, it is therefore important raising employment participation.

To achieve these overall common objectives, 11 principles (which form a part of *acquis communautaire*) have been identified and referred to in the Laeken summit

¹² of 29 June 1998.

conclusions¹³ as it is important to develop clear and integrated strategies to cope with the ageing challenge. These do not only focus on the first pension pillar but on the two other pillars as well, which have an important role to play with respect to overall adequacy and sustainability of pension provision.

Member States are encouraged to design appropriate implementation measures to realise these common objectives. As a first step, they have been required to each issue a national strategic report on adequate and sustainable pensions, to be reviewed regularly. These reports have been analysed and aggregated by the Commission and the Council in their joint report on adequate and sustainable pensions¹⁴. By the middle of July 2005, the Member States (EU-25) will issue national strategy reports on pensions containing an analysis of the situation in their respective countries, documenting the state of reform of their pension systems and setting out their strategies in the light of the common objectives agreed for the OMC on pensions.

5. Conclusions

The ageing of the population presents a challenge for pension systems, economic growth, public finances and health care systems. Certain measures at Community level can play a useful role as regards occupational pensions, particularly in establishing a prudential framework allowing pension funds to operate efficiently throughout the European Union.

The Lisbon strategy requires the co-ordination by the EU of national pension policies with respect to public finances, employment and social cohesion by means of the Open Method of Co-ordination (OMC). The OMC is an invaluable instrument to facilitate co-operation among the Member States and should be encouraged as much as possible.

The cost of adequate pension provision will be staggering in the years ahead mainly due to longevity. It will be necessary that appropriate measures are implemented to ensure financial sustainability.

Member States should implement the Pension Fund Directive before 23rd September 2005. It seems, however, that a number of countries will not be able to comply by that date.

After consultation of the social partners, the European Commission is likely to propose a Directive on the portability of occupational pensions. In addition, the Commission and the European Court of Justice are likely to pursue their determined action to tackle tax discrimination against pension funds established in other Member States.

¹³ 14-15 December 2001.

¹⁴ Joint report by the Commission and the Council on adequate and sustainable pensions from the Economic Policy Committee and the Social Protection Committee to the Council of 3 March 2003 (6527/2/03 REV 2).

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