

Addressing the Pension Challenge: Can the EU Respond?

Towards Facilitating the Portability of Supplementary (Occupational) Pension Rights

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Abstract

The European economic crisis has underlined the challenges that Member States of the European Union face towards ensuring adequate social protection provision for their citizens. The effects of the crisis have and can further impact on the capacity of pension schemes, both state provided and privately managed, that constitute a significant aspect of social protection, to deliver pension promises. This paper highlights the current situation that the common pension challenges pose for Member States and focuses on a particular issue around occupational pension provision, which has been on the European Commission's agenda for a long time, and on which limited progress had been made. This is the issue of cross-border portability of supplementary pension rights. It is argued that current circumstances facilitate EU action to be taken in this area. In the first section, the paper identifies the main challenges around pension provision stemming from demographic ageing and the effects of the economic crisis. Section two provides a brief overview of the Commission's holistic approach envisaged in its 2012 White Paper on safe, adequate, and sustainable pensions. Section three provides an overview of the issue of the portability of supplementary pension rights for EU workers. Section four outlines previous attempts and recent developments towards the adoption of legislative measures to promote the portability of such pension entitlements. The paper concludes by arguing that the renewed focus on pensions, in the context of current challenges and the need to enhance workers' mobility and to provide adequate social protection, have paved the way towards the adoption of measures in this area.

Keywords: Economic crisis, social protection, pension provision, occupational pensions, cross-border portability of pension rights.

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A Introduction

The European economic crisis has underlined the challenges that Member States of the European Union (EU) face towards ensuring adequate social protection provision for their citizens. The effects of the crisis have and can further impact on the capacity of pension schemes, both state provided and privately managed, that constitute a significant aspect of social protection, to deliver pension promises. As a result, the crisis has aggravated existing concerns about the safety, adequacy, and sustainability of pension systems and the entitlements for EU citizens who reach retirement age.

Pension provision and the organisation of social security schemes have been traditionally considered to fall within the Member States' competence. The EU has limited ways to intervene in this area. Nevertheless, the common challenges that Member States currently face, increased by the economic crisis, underpin the need for action to be taken at all appropriate levels. As a result, an opportunity for a coordinated approach at EU level has been, arguably, provided to support Member States in responding to existing and newly arising difficulties related to pension provision and to ensure that EU citizens will enjoy an adequate standard of living at retirement.

This paper highlights the current situation that the common pension challenges pose for Member States and focuses on a particular issue around occupational pension provision, which has been on the European Commission's (Commission) agenda for a long time, and on which limited progress had been made. This is the issue of cross-border portability of supplementary pension rights. It is argued that the particular circumstances created by the crisis facilitate EU action to be taken in this area.

In the first section, the main challenges around pension provision stemming from demographic ageing and the effects of the economic crisis are identified. Section two provides a brief overview of the Commission's holistic approach envisaged in its 2012 White Paper on Safe, Adequate, and Sustainable pensions, aiming to support Member States in addressing the common challenges around pension provision.¹ In it, the advanced role envisaged for supplementary pension provision is restated.

Section three provides an overview of the issue of the portability of supplementary pension rights for EU workers. It underlines the limits of EU competence to engage in the area of pensions in general, as well as in this area. Identifying developments that have occurred through European integration, and considering the effects of the economic crisis, the importance of promoting the portability of supplementary pension rights is considered.

Section four outlines previous attempts and recent developments towards the adoption of legislative measures to promote the portability of such pension entitlements. It is argued that the renewed focus on pensions, in the context of

1 European Commission, White Paper 'An Agenda for Adequate, Safe and Sustainable Pensions' COM(2012)55 final; accompanying document: Commission Staff Working Document, 'Impact Assessment', SWD(2012)7 final.

the current challenges and the need to enhance workers' mobility and to provide adequate social protection, have paved the way towards the adoption of measures in this area.

B Common Challenges to Pension Provision: Demographic Ageing and the Effects of the Financial and Economic Crisis

Pension provision, as part of national social security systems, represents one of the most important aspects of welfare provision within EU Member States. Pension systems aim to ensure that a level of income for those who can no longer work, or have retired, is provided and maintained. Looking at the various pension systems of the EU Member States, pensions seem to aim to fulfil three interrelated functions: to protect against old age poverty, to insure against risks of ageing, and to enable savings.² Related to the EU-level aspirations, pension systems can also contribute to an adequate level of standard of living for EU citizens and to combat poverty and social exclusion.³

Nevertheless, social security in general, and pension provision in particular, have often represented a challenge for national finances. The economic crisis has increased pressures on national budgets and social protection expenditure. It has, as a result, highlighted existing problems Member States are facing, deriving from demographic trends and the need to reform their social protection systems, and

2 Y. Stevens, 'Developing common definitions on European pensions' policy', in T. Sakellariopoulos & J. Berghman (Eds.), *Connecting Welfare Diversity within the European Social Model*, Social Europe Series, Vol. 9, Intersentia 2004, p. 97.

3 See Art. 3(3) TEU and European Commission, 'Europe 2020, A Strategy for Smart, Sustainable and Inclusive Growth', COM(2010)2020 final.

has created new challenges towards ensuring the EU objectives of providing adequate and sustainable pensions⁴ through both public and private provision.⁵

These objectives have, for a long time, called for the modernisation of pension systems⁶ and a shift towards multi-pillar pension arrangements, in order for Member States to be able to fulfil their obligations and to protect their economies, which could be substantially burdened by a need to increase national expenditure.

- 4 See Joint Report on Pensions, by the Economic Policy Committee, the Social Protection Committee, and the Commission services, 'Progress and key challenges in the delivery of adequate and sustainable pensions in Europe', Occasional papers No. 71 (2010). On the objectives, see the three-pronged strategy for dealing with the long-term sustainability of public finances agreed by the Stockholm European Council, consisting of: reducing debt at a fast pace; raising employment rates and productivity; and reforming pension, healthcare, and long-term care systems and the common objectives for pensions agreed in the Laeken European Council (14-15 December 2001). See also Council Conclusions on 'Adequate, Safe and Sustainable pensions for all European citizens', 6 December 2010. For an analysis on the adequacy and sustainability of pensions, see report prepared jointly by the Directorate-General for Employment, Special Affairs and Inclusion of the European Commission and the Social Protection Committee Pension Adequacy in the European Union 2010-2050.
- 5 Following the various European Commission's classification, retirement income arrangements can be broadly classified into three categories according to the so-called three-pillar model: the first pillar represents the statutory pension schemes; occupational pension schemes form the second pillar and will provide the focus for section D and E of this article; and finally, the third pillar consists of individual private pension arrangements through savings and insurance policies (see, for example, European Commission, 'Proposal for a Directive on Improving the Portability of Supplementary Pension Rights', COM(2005)507 final). The three pillars may be highly interdependent and distinctions between pension schemes may be difficult to make. See study by the Social Protection Committee (SPC), on 'Privately Managed Funded Pension Provision and their Contribution to Adequate and Sustainable Pensions', 2008. With 28 Member States, the landscape is becoming even more diverse and it is harder to classify schemes according to this structure. See also D. Natali, 'Reforming Pensions in the EU: National Policy Changes and EU Coordination', *European Social Observatory (OSE)*, 2011, on the 'Basic Glossary for the Analysis of Pension Institutions'.
- 6 See, for example, European Commission, 'A concerted Strategy for Modernizing Social Protection', COM(97)347 final; 'The Future Evolution of Social Protection from a long-term Point of View: Safe and Sustainable Pensions', COM(2000)622 final; 'Supporting national strategies for safe and sustainable pensions through an integrated approach', COM(2001)362 final; 'Working together, working better: A new framework for the open coordination of social protection and inclusion policies in the European Union', COM(2005)706 final; and *supra* note 4.

I Demographic Challenges

The challenge that an ageing EU population places on the sustainability and adequacy of Member States' pension systems has been acknowledged and discussed at EU level for a number of years.⁷

Demographic ageing, evidenced through the increase of life expectancy and the decline of fertility rates, will result in pension benefits being provided for a longer period of time to the elderly population, while at the same time, the size of the working population that supports existing pensioners is shrinking.⁸ This is particularly apparent within state-provided pay-as-you-go (PAYG) pension systems, which are based on intergenerational solidarity and still generally constitute the main pension income across Member States.

These trends can have an important effect on pension schemes' sustainability and can create significant pressures and implications for public spending and the viability of public finances of the Member States that could be substantially burdened by a need to increase the cost for national expenditure towards providing pension income and adequate social protection.⁹

The decrease of a working-age population can also have adverse effects on the labour market and overall economic growth for Member States, as it may result in reduced rates of employment. At the same time, demographic ageing can lead to more public spending in order to respond to healthcare services and other social security-related expenses that an elderly population may require.

As public pension expenditure is expected to increase in the future, public pension benefits will need to be reduced to ensure sustainability of public finances. However, this may have implications for the adequacy of pension income of future pensioners. To respond to such arising challenges for pension systems, various reforms have taken place within various Member States.¹⁰ Nevertheless, there is still a need for further action to be taken to ensure safety, adequacy, and sustainability of pension schemes. Towards this, the prolonging of the employ-

7 For an overview of the demographic trends in Europe and their implications on national systems, see European Commission, 'The 2012 Ageing Report: Economic and budgetary projections for the 27 EU Member States (2010-2160)', *European Economy* 2, 2012. It has been argued that the EU is essentially facing a 'retirement' challenge. From this prism, the current situation is a result of the social security systems and European Social Model not being adequately reformed to respond to the changing demographic trends that reflect the advancements achieved in Europe, where Europeans live longer and in good health (Commissioner Rehn, 'Conference on the Green Paper on Pensions: Themes for discussion', Brussels, 29 October 2010).

8 The demographic dependency ratio (the population of those above 65 years of age to the population of those aged 15-64) is expected to increase from 26% in 2010 to 50% in 2050 and more in 2060. In addition, the so-called baby boom generation, which significantly contributes towards pension incomes, is now reaching retirement. White Paper, *supra* note 1.

9 See report, *supra* note 7. In 2012, 10% of the GDP at EU level was spent on PAYG pensions. This is expected to rise to 12.5% by 2060. In addition, the issues arising in terms of Member States having adequate funds to attribute pension entitlements is further aggravated by the fact that in reality, the actual work-exit age can be lower than the one legally defined, through national legislation (SWD7, *supra* note 1, at point 2).

10 See Commission Staff Working Document (SWD(2012)7 final), 'Annexes to the Impact Assessment, Accompanying the document White Paper, An Agenda for Adequate, Safe and Sustainable Pensions', Annex 6.

ment life and the importance of developing complementary pension provision, which the portability examined below relates to, has been highlighted and promoted at EU level.¹¹

II *The Economic and Financial Crisis*

The global economic and financial crisis and the more recent Eurozone crisis and its social consequences pose further challenges on national budgets and pension systems (public and private),¹² aggravating existing concerns stemming from the demographic crisis. The economic crisis continues to put pressures on social protection systems. As a result of the delays in economic recovery, limited economic growth, and continuing financial instability, pension schemes and the Member States' capacity to meet pension promises might be further affected.

Persistent high unemployment rates, interruptions of employment, and flexible forms of employment, which may include unregistered workers,¹³ resulting from the crisis, may also affect the capacity and sustainability of public PAYG pension systems, as they may result in a reduced number of workers, across various Member States contributing to social security schemes. At the same time, citizens are prevented from accumulating pension entitlements towards both public and private pension income.

Fiscal austerity measures along with the pressures on public finances (including budget deficits and debt burdens) further limit the capacity of national systems. In addition, Member States whose budgetary deficits require changes in their social protection systems have had to resort to significant reforms that have, in turn, led to reduction in employment and welfare benefits that may affect future pension provision.¹⁴

Further implications of the current crisis, including the inability of citizens to save and invest money, can also impact on the future position of the current pop-

11 *Supra* note 6.

12 See, for example, B.H. Casey, 'The implications of the economic crisis for pensions and pension policy in Europe', *Global Social Policy*, Vol. 12, 2012, pp. 246-265; D. Natali, 'Pensions after the economic and financial crisis: a comparative analysis of recent reforms in Europe', Working Paper 2011.07, European Trade Union Institute (ETUI) and D. Natali & F. Stamatii, 'Reforming pensions in Europe: a comparative country analysis', Working Paper 2013.08, ETUI. For a review of social protection expenditure developments in the crisis, see O. Bontout & T. Lokajickova, 'Social protection budgets in the crisis in the EU', Working Paper 1/2013, European Commission.

13 See, for example, 'Draft Joint Employment Report, Accompanying the Communication from the Commission on Annual Growth Survey 2014', COM(2013)801 final; European Commission, 'EU Employment and Social Situation', *Quarterly Review*, June 2013; Eurostat data available at: <http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Unemployment_statistics>.

14 For examples of legislative reforms, see European Commission, 'The 2012 Ageing Report: Underlying Assumptions and Projection Methodologies', *European Economy* 4, 2011. On pension reforms, see also Report of the Social Protection Committee, 'Social policy reforms for growth and cohesion: Review of recent structural reforms 2013'. For a broader overview, see P. Antolin & F. Stewart, 'Private Pensions and Policy Responses to the Financial and Economic Crisis', *OECD Working Papers on Insurance and Private Pensions*, No. 36, 2009 (OECD Publishing). For a general comment on the implications on social policy of the Economic Governance of the EU, see N. Bruun, 'Economic Governance of the EU crisis and its Social Policy Implications', in N. Bruun, K. Lorcher & I. Schomann (Eds.), *The Lisbon Treaty and Social Europe*, Hart Publishing 2012.

ulation when they reach retirement age and require Member States to increase spending to respond to future needs.

Private (funded) pensions can also be affected in times of recession.¹⁵ In Member States where a significant role is envisaged for complementary funded pension provision, and pension funds are key actors in financial markets, the effects of economic crisis on such schemes may also negatively impact on the economy and economic growth and result in lower returns and, for some types of pension schemes,¹⁶ in diminished pension entitlements for future pensioners.

As the 2012 Report on Pension Adequacy acknowledges, achieving the “goal of cost-effective and safe delivery of adequate pension benefits that are also sustainable” constitutes a real challenge. Given the interrelation between national economies, particularly for the Member States that are part of the Eurozone, dealing with the pension challenges that may significantly impact national finances becomes more important.

C The Commission’s Holistic Approach on Pensions

The European Commission has, on various occasions and for a long time, highlighted the need to focus on ensuring adequate, safe, and sustainable pensions.¹⁷ In its White Paper in 2012, following a public consultation launched by a Green Paper,¹⁸ it put forward an agenda towards this aim, bringing together all interrelated aspects that give rise to common concerns around pension provision.

The main rationale for the Commission putting forward a comprehensive EU strategy on pensions was that an EU-level pension framework is needed to support the Member States to ensure adequacy, sustainability, and safety of pensions for their citizens, in the light of the common challenges that Member States share, including the increasing interdependence of public finances that raises the financial sustainability of public pension provision to an issue of common concern. Towards this end, the Commission argued that an EU-integrated approach bringing together economic, social, and financial market policies in order to promote more successful pension policies in the Member States was necessary.¹⁹ In order to ensure a comprehensive policy, all types of the three-pillar pensions’

15 See Casey 2012 and European Commission, Memo/09/99, “The economic crisis and pensions in the EU”.

16 For example, in defined contribution schemes.

17 *Supra* note 6.

18 European Commission, Green Paper, COM(2010)365 final. See also accompanying document to the Green Paper SEC(2010)830 final.

19 This also required to examine ‘whether the current EU framework for pensions is appropriate and used in the best possible manner to bring about results that will further the common EU interest’, SWD7, *supra* note 1, at 2.3. The need for considering pension policies in a comprehensive manner and using all existing ‘EU level policy coordination frameworks’ had already been highlighted in the Council Conclusions, 17 November 2010. This was underpinned by the 2010 Joint Report of the Economic Policy Committee (EPC) and the Social Protection Committee (SPC), ‘Progress and key challenges in the delivery of adequate and sustainable pensions in Europe’.

structure, identified in the Commission's various documents, needed to be covered and all available EU instruments (legislation, financial incentives, and policy coordination) to be utilised and combined.

In line with the Annual Growth Surveys and the Country-Specific Recommendations, two main objectives were identified, where there was room for developing policy guidance at EU level in order to support national policies. These focused around the balancing of time spent in work and retirement and the development of complementary private retirement savings. In addition, the strengthening of monitoring and coordination tools in the area of pensions, available at EU level, was envisaged.²⁰

The prolonging of the working life and higher employment rates of older²¹ workers, as a way of ensuring adequacy and sustainability of pensions, emphasised action required by the Member States towards linking retirement age to gains in life expectancy, restricting access to early retirement, supporting longer working lives, and closing the pension gap between men and women.²²

The second main issue highlighted in the Commission's approach was the advanced role of complementary pension provision. In this context, issues around occupational pension provision, which is of particular interest for the focus of this article as it relates to the portability of supplementary pension rights discussed below, were addressed.

Occupational pensions have been acquiring an increasingly important role in supplementing retirement income, as can be seen in various reforms that indicate a move towards a multi-mix of pension provision.²³ The Commission has for many years emphasised the need to enhance complementary retirement savings to support retirement income for EU citizens and to secure future adequacy of pensions.²⁴

Such pension provision and entitlements can contribute towards adequacy of pensions by allowing EU citizens to build up towards a better pension income, to supplement (or partly replace) state-provided pensions that, in the light of the current restraints of national budgets and of demographic trends, can lead to less generous pension benefits. In addition, occupational provision that shifts some of the burden of the Member States towards private pension schemes can help to lift

20 Relevant policy areas have been identified and promoted through soft-law coordination for a number of years (for example through the open method of coordination). The new policy coordination tools introduced at EU level, as a result of the crisis, reinforced previous policy options identified.

21 This encompasses workers between the age of 55 and 64 (SWD7, *supra* note 1, at 2.1).

22 Such measures would positively impact upon Member States budgets, as pension incomes would be paid out at a later age, while more people would be contributing towards national pension budgets and allow for more pension entitlements to be built up.

23 Natali 2011, *supra* note 5; I. Guardiancich & D. Natali, 'The EU and supplementary pensions. Instruments for integration and the market for occupational pensions in Europe', ETUI, Working Paper 2009.11.

24 *Supra* note 6.

pressures from national finances and to provide for a balance between the sources of pension provision.²⁵

Furthermore, the role that pension funds, including those resulting from occupational schemes, can play as financial actors, towards enhancing economic growth, further supports arguments towards enhancing their development. Nevertheless, given the economic risks that such funds are susceptible to, as demonstrated through the economic crisis, it is necessary to improve their safety and cost-effectiveness and to address current hurdles that makes them less attractive. Such hurdles have been identified to derive from the lack of an adequate legal framework on cross-border portability of supplementary pension rights that the rest of the paper focuses on.

The Commission highlighted various objectives towards supporting Member States in advancing the contribution of complementary private retirement savings to ensure adequacy of pensions.²⁶ These included the need to promote the mobility of supplementary (occupational) pensions. Amongst other objectives, the tabling of a modified proposal for a portability Directive, setting minimum standards for the acquisition and preservation of supplementary²⁷ pension rights that would address impediments to the accumulation of relevant pension entitlements, was entailed. The importance of facilitating cross-border portability of occupational pension rights and the previous attempts as well as progress on this proposal are examined below.

D Portability of Supplementary Pension Rights²⁸: The Margins for the Adoption of EU Measures

The portability of cross-border supplementary occupational pension rights refers to the possibility of workers who move across different Member States for

25 This could also help to combat poverty and social exclusion by either subordinating the basic, often insufficient, state pension income, or by resulting in less expenditure on state pensions and allowing states to use surplus resources to redistribute to people in need.

26 White Paper, *supra* note 1, Annex 1.

27 The term supplementary refers to occupational pensions, within the EU documents.

28 See generally on this topic K. Kalogeropoulou, 'Improving the Portability of Supplementary Pension Rights', *Journal of Social Welfare and Family Law*, 2006, pp. 95-104; 'European Governance after Lisbon and Portability of Supplementary Pension Rights', *Journal of Contemporary European Research*, Vol. 2, 2006, pp. 75-91; 'Climate Change: Effects on Mobility of EU Workers and the Need to Safeguard Supplementary (Occupational) Pension Rights', in S. Farrall, T. Ahmed & D. French (Eds.), *Criminological and Legal Consequences of Climate Change*, Hart Publishing 2012; I. Guardiancich & D. Natali, 'The cross-border portability of supplementary pensions: Lessons from the European Union', *Global Social Policy*, Vol. 12, No. 3, 2012, pp. 300-315; E. Van Doorn, 'Portability of Occupational Pensions in the European Union', *Benefits and Compensation International*, 2006, pp. 10-13; J. Mortensen, 'Cross-border Portability of Pension Rights, An important Condition for an Integrated Market for Pension Provision', *Rapporteur*, No. 45, CEPS Task Force Report, 2003; J. Marshall & S. Butterworth, 'Pensions Reform in the EU: The Unexploded Time Bomb in the Single Market', *Common Market Law Review*, Vol. 37, 2000, pp. 739-762; V. Andrietti, 'Portability of Supplementary Pension Rights in the European Union', *International Social Security Review*, Vol. 54, 2001, pp. 59-83.

employment purposes to acquire and preserve supplementary occupational pension entitlements.²⁹ As outlined above, the European Commission categorises these as pension rights vested through the workers' employment relationship or the exercise of a profession.³⁰ Such supplementary pension income aims to supplement (or partly substitute) state-provided pension income.

Although the portability of the first pillar, state-provided pensions, is facilitated by Regulation 883/2004/EC,³¹ an adequate legal framework has not been in place ensuring that EU workers, who move within different Member States for employment purposes, are not disadvantaged in relation to their supplementary occupational pension entitlements when they reach retirement age, if compared to people who spend their employment careers in one state.³²

The Commission has on various occasions identified main impediments to cross-border portability of supplementary (occupational) pension rights.³³ These referred mainly to the acquisition, preservation, and transferability of such rights. Such impediments result in workers not being able to accumulate occupa-

29 The definition of 'portability' as the possibility for workers to acquire and retain supplementary pension rights when exercising their right to freedom of movement or occupational mobility was adopted in the European Commission's 'Proposal for a Directive on improving the portability of supplementary pension rights', COM(2005)507 final. See also Commission staff working document, annex to the proposal: SEC(2005)1293.

30 Within the meaning of Directive 98/49/EC on safeguarding supplementary pension rights of employed and self-employed persons, a supplementary pension scheme refers to "any occupational pension scheme established in conformity with national legislation and practice, such as a group insurance contract or PAYG scheme agreed by one or more branches or sectors, funded scheme or pension promise backed by book reserves, or any collective or other comparable agreement intended to provide a supplementary pension for employed and self-employed persons". This definition was also adopted in the initial proposal in 2005 for a 'portability Directive' (*supra* note 5). However, the amended proposal for a Directive on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights (COM(2007)603 final) simplified this definition to "any occupational retirement pension scheme established in conformity with national legislation and practice, and linked to an employment relationship, intended to provide a supplementary pension for employed persons".

31 Regulation 883/2004 on the coordination of national social security legislation. Nevertheless, even in such cases workers may be disadvantaged towards their final pension income. For an overview of the effects of freedom of movement on pension rights, see T. Maeyer, P. Bridgen & C. Andow, 'Free movement? The Impact of Legislation, Benefit Generosity and Wages on the Pensions of European Migrants', *Population, Space and Place*, Vol. 19, No. 6, 2013, pp. 714-726.

32 This issue also derives from intrastate mobility (workers who change employers within the same Member State), as the Commission acknowledges and tried to address this in the scope of the proposed directive in 2005. However, in its amended version in 2007, this element was abandoned on the basis of lack of competence to deal with internal affairs. In the recently adopted Directive 2014/50/EU discussed below, Member States are invited to consider using their national competences to apply the standards laid down by the Directive to internal mobility as well.

33 European Commission, 'Supplementary Social Security Schemes: the Role of Occupational Pension Schemes in the Social Protection of Workers and Their Implications for Freedom of Movement', SEC(91)1332 final; Green Paper, 'Supplementary Pensions in the Single European Market', COM(97)283; 'Results of the Consultations on the Green Paper on Supplementary Pensions in the Single Market', COM(1999)134 final; COM(2005)507, *supra* note 5; COM(2007)603, *supra* note 30.

tional pension rights before moving to another Member State,³⁴ preserve them in a fund related to their previous employment their value being decreased, or transfer the capital value that represents the pension entitlements of an employee to another scheme or to a similar financial institution in the new Member State where they move for employment. Taxation practices may also pose obstacles to the portability of supplementary pension rights.³⁵

Up to recently, there has been only one piece of secondary legislation that dealt, albeit in a very limited way, with the safeguarding of relevant pension rights of employed and self-employed persons moving across the Member States; this was Directive 98/49/EC,³⁶ discussed below. Another legislative measure, on the activities and supervision of institutions for occupational retirement provision (Directive 2003/41/EC),³⁷ may to some extent facilitate such portability, albeit for a specific category of workers, as it allows for the set-up of pan-European pension funds.³⁸

Within the scope of developing complimentary retirement savings to support future pension income, as emphasised in the Green and White Papers on safe, adequate, and sustainable pensions, portability has constituted a particular issue that has been on the Commission's agenda for a long time. After many years since the last proposal of the Commission towards the adoption of a directive, agreement on an amended proposal addressing some aspects of portability was reached in December 2013.³⁹ In line with the White Paper's objectives, Directive 2014/50/EU on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights was adopted in April 2014⁴⁰.

34 Such obstacles derive from qualifying conditions entailed before an employee is eligible for participation in such schemes and start vesting pension rights. These may depend on the age of the employee (minimum age requirement), the period of time the employee has been in the particular employment relationship (waiting periods), or the amount of time an employee has been contributing to an occupational scheme before starting accumulation pension rights within that scheme (vesting period). The reason behind these conditions set for eligibility for membership and acquisition of pension rights lies within the concept of rewarding loyal employees who stay with the same employer for many years.

35 See European Commission, 'The Elimination of Tax Obstacles to the Cross-Border Provision of Occupational Pensions', COM(2001)214 final; 'Removing cross-border tax obstacles for EU citizens', COM(2010)769 final.

36 [1998] OJ L209/46.

37 [2003] OJ L235/10.

38 See P. Dejmeck, 'No Flying Start but a Bright Future for EU Directive 2003/41/EC on Occupational Pension Institutions', *European Business Law Review*, Vol. 17, 2006, pp. 1381-1394; I. Guardiancich, 'Pan-European Pension Funds: Current Situation and Future Prospects', *International Social Security Review*, Vol. 64, 2011, pp. 15-36; Guardiancich & Natali 2012. The scope of this Directive is restricted, as it does not apply to all types of occupational pension schemes.

39 See Press Release Council of Employment, Social Policy and Health Ministers, 9-10 December 2013, Brussels, <http://europa.eu/rapid/press-release_MEMO-13-1104_en.htm>.

40 OJ L 128/1, 30.4.2014.

I *Restricted EU Competence*

The main restriction for the limited EU action and intervention in this area so far derived from the general context within which supplementary pension rights are entailed and the restricted competence of the EU in the area of pensions. Pension provision is not an EU responsibility.⁴¹ A concept of a European welfare state, which attributes individual social security benefits to the EU citizens, does not exist.⁴² The EU has limited powers to act in this area, as indicated by the general restrained framework for EU action in the area of social policy and particularly in the organisation of social security provision. Member States have traditionally been reluctant to accept EU intervention in the organisation of their social security schemes and the functioning of pension schemes.

This is also evident in relation to occupational pension provision, and the so-called pillar two,⁴³ that focuses generally on funded pension provision. Occupational pension provision forms part of national social security structures, which are developed according to the historical, economic, cultural, and political standards of each state.⁴⁴ It is for the Member States to decide by what combination of statutory and supplementary schemes the objectives of social protection are to be met, and may adopt national laws that set the conditions for the functioning of complementary schemes. As a result, national social protection systems, including the operation of occupational schemes, can be very divergent and entail great complexity.⁴⁵ This heterogeneity may further impede the portability of supplementary pensions and at the same time make it difficult for uniform rules that could enhance such portability to apply. An EU one-fits-all approach may not be functional or even possible. Moreover, the particularly important role of the social partners in some types of occupational pension schemes further restricts EU interventions in the regulation of relevant schemes.

In addition, any action at EU level needs to respect and comply with the principles of subsidiarity and proportionality (Art. 5 TEU). According to these principles, any Union action in an area that can be regulated by both the EU and the Member States should be taken at the appropriate level and should not go beyond what is necessary to achieve the aimed objective.

41 P. Pochet, 'Pensions: the European Debate', in G. Clark & N. Whiteside (Eds.), *Pension Security in the 21st century*, OUP 2001.

42 See S. Leibfried & P. Pierson, 'Semi-sovereign Welfare States', *European Social Policy, Between Fragmentation and Integration*, The Brookings Institute 1995, p. 44. T. Hervey, (*European Social Law and Policy*, European Law Series, Longman 1998, p. 4.) identifies this as social policy in a narrow sense. As national welfare states operate mainly through redistribution, rather than regulation, the Commission's 'activism' in these areas has been limited (M. Haverland, 'When the welfare state meets the regulatory state: EU occupational pension policy', *Journal of European Public Policy*, Vol. 14, No. 6, 2007, pp. 886-904, at 887).

43 *Supra* note 5.

44 This is a result of their different development, according to social, political, economic, and historical background. See H.-D. Steinmeyer, 'The Variety of Occupational Pension Systems in the EC Member States as an Obstacle for Mobility?', in M. Brennan (Ed.), *1992 and Beyond: An Explosion in Employee Benefits?*, CEBS 1990, and the SPC Study, *supra* note 5.

45 See Haverland 2007.

In the White Paper 2012, the Commission reaffirmed the Member States' prerogatives in designing and organising their pension systems that are part of social security systems, as agreed in the Treaties.⁴⁶

II Interventions at EU Level

Nevertheless, it can be argued that the common concerns that Member States face towards achieving safe, adequate, and sustainable pensions, aggravated by the economic challenges, allow for action at EU level, within the available institutional framework. The recent progress on the adoption of a directive on improving the acquisition and preservation of supplementary pension rights, following the emphasis brought on pension issues by the Commission's holistic approach, supports this.

Despite the restricted competence, the EU has already been engaged in the pensions area and has been expanding its influence.⁴⁷ It can be argued that it now holds a role in promoting pension reforms of national policies and supporting Member States' action.⁴⁸

As has been argued and discussed,⁴⁹ the Member States' sovereignty and autonomy in the field of social policy and welfare has been 'eroded' through the process of European integration⁵⁰ and the growing pressures from the goal of the completion of the internal market, during which, interventions in the 'exclusivity' of Member States in arranging social policy elements have been building up.⁵¹ The internal market building process has had an influence on policy making at

46 See Art. 153 (4) TFEU: [...] the right of Member States to define the fundamental principles of their social security systems [...].

47 D. Natali, 'Reforming Pensions in the EU: National Policy Changes and EU coordination', *European Social Observatory* 2011, p. 13.

48 Pochet 2001, p. 44. See also L. Bovenberg, 'European pension reform: A way forward', *Pensions*, Vol. 16, No. 2, 2010, pp. 75-79 and A. Hennessy, *The Europeanization of Workplace Pensions, Economic Interests, Social Protection and Credible Signalling*, Cambridge University Press 2014.

49 See, for example, G. de Burca, 'Towards European Welfare State?', in G. de Burca (Ed.), *EU Law and the Welfare State, In Search of Solidarity*, OUP 2005; S. Leibfried, 'Social Policy, Left to the Judges and the Markets?', in H. Wallace, W. Wallace & M. Pollack (Eds.), *Policy-making in the European Union*, 5th edn., OUP 2005; F. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', *Journal of Common Market Studies*, Vol. 40, 2002, pp. 645-670; W. Streek, 'From Market Making to State Building? Reflections on the Political Economy of European Social Policy', in Leibfried & Pierson (Eds.), *European Social Policy between Fragmentation and Integration*, The Brookings Institute 1995.

50 The Court has clarified that Member States, even where they have the exclusive competence, like in the organisation of national social security systems, still need to comply with Union law when exercising their powers. See, for example, Case C-157/99, *Geraets-Smits and Peerbooms*, [2001] ECR I-5473.

51 C. Barnard, 'The Charter in time of crisis: a case study of dismissal', in N. Countouris & M. Freedland (Eds.), *Resocialising Europe in a time of crisis*, CUP 2013, p. 251. As a result, national prerogatives have been limited, while a welfare dimension at the EU level has emerged, leading to a 'contested social sovereignty' (M. Ferrera, 'Contested Social Sovereignty: Welfare States Meet the European Union', in M. Ferrera, *The Boundaries of Welfare*, OUP, 2005)

national and EU levels and has allowed for EU interventions in pension-related matters.⁵²

The Court of Justice has also held a central role in this process, through the impact on national rules resulting from an expansive interpretation of the Treaty's provisions and the negative reforms that stem from the Court's jurisprudence on the need for compatibility of national policies to the single market requirements.⁵³

The EU has also been engaged in the area of pensions through the focus placed on the EU social dimension and the European social model. The advancement of social policy aims and objectives and the particular focus on a social agenda and on the coordination of employment policies since the 1990s⁵⁴ have brought pension concerns within the ambit of the EU sphere, through the focus on modernisation of social protection systems, which included reforms of pension systems,⁵⁵ and the focus on growth and jobs,⁵⁶ which aimed to promote employment and that may positively impact upon EU citizens' pension rights.⁵⁷

Such developments were reflected in the Treaty of Lisbon and the focus on a highly competitive social market economy (Art. 3(3)TEU) as well as in the so-called horizontal clause (Art. 9 TFEU) that aims to promote a high level of employment,⁵⁸ the guarantee of adequate social protection, and the fight against social exclusion, amongst other goals.⁵⁹

Where the EU has lacked competence to propose legislative measures, other 'tools' available at EU level have been employed to support and encourage ways for the development of national social policies. The Open Method of Coordination (OMC), introduced at the Lisbon European Council in 2000, provided the EU with an alternative means, through soft coordination, to address 'sensitive' policy

52 Examples of positive integration, which are of particular interest to this article, include measures to facilitate the operation of nonstatutory pension schemes, relying on the internal market freedoms (including the freedom to provide services and freedom of movement of capital) while ensuring adequate protection for the investors (Directive 2003/41/EC) and measures adopted to encourage the freedom of movement of workers, including national rules towards aggregation and exportability of statutory pension rights (Regulation 883/2004) and even towards safeguarding supplementary pension rights, with Directive 98/49/EC.

53 Leibfried 2005, p. 268.

54 Especially with the Treaty of Amsterdam and the inclusion of a new Title on Employment (and the adoption of the European Employment Strategy (EES)) and the incorporation of the Social Policy Agreement. See also European Commission, 'European Social Policy, A Way Forward for the Union, A White Paper', COM(94)333 and 'Concerted strategy for modernizing social protection', COM(1999)347 final. For an introduction on the EES, see J. Kenner, *EU Employment Law, From Rome to Amsterdam and Beyond*, Hart Publishing 2002. See also <<http://ec.europa.eu/social/main.jsp?catId=101>>.

55 *Supra* note 6.

56 See in particular Lisbon European Council Conclusions, 23-24 March 2000 on the Lisbon Strategy and European Commission, 'Working Together for Growth and Jobs, A New Start for the Lisbon Strategy,' COM(2005)24.

57 See section below.

58 See also Art. 145 TFEU.

59 The binding status given to the European Charter of Fundamental Rights that has equal value to the Treaties and contains a wide range of social rights further supports this.

areas. The OMC was also applied to pensions.⁶⁰ The suitability of soft law, in the form of coordination, has been highlighted in the White Paper on pensions.

The Europe 2020 Strategy⁶¹ reinstated the EU goals indicated above, within the context of promoting inclusive growth, as one of three suggested mutually reinforcing priorities, and the flagship initiatives⁶² on an agenda for new skills and jobs, and the European platform against poverty and social exclusion.

Moreover, another source of 'indirect pressure'⁶³ on pension institutions has been provided through the monitoring mechanisms for sustainability of public finances and the requirements for budgetary disciplinary in accordance with the Growth and Stability Pact, following the introduction of the common currency. This became further apparent in the EU response to the economic crisis, through the coordination of economic and fiscal policies in the context of the European Semester and the use of Country-Specific Recommendations and has been made particularly evident in the bailing out of Member States.

The scope for EU intervention is more evident in relation to supplementary funded pension provision, as such pensions entail economic goals as well as market aspects. As Haverland argues, the rising importance of occupational pension provision and the need to address adverse effects on the EU labour market as well as on services and capital markets, resulting from differences in the regulation of occupational pensions within the Member States, potentially allow for EU intervention with national social policies.⁶⁴ This also applies to cross-border portabil-

60 Laeken European Council (2001); European Commission, COM(2001)362, *supra* note 6 and COM(2005)706, *supra* note 5. Although the OMC was not used directly to promote portability of supplementary pensions and rights, it included various points that can be related to some of the aims the OMC sought to achieve in the area of pensions, like, for example, the promotion of the affordability and the security of funded and private schemes to achieve safe and sustainable pensions. See Kalogeropoulou 2006. On the effectiveness of the OMC in pensions, see P. Tinios, 'Pensions and the Lisbon Strategy', in P. Copeland & D. Papadimitriou (Eds.), *The EU's Lisbon Strategy, Evaluating Success, Understanding Failure*, Palgrave 2012.

61 *Supra* note 3. One of the five headline targets of the strategy is to achieve a 75% employment rate of the population aged 20-64. See also Commission's 'Proposal for Guidelines for the Employment Policies of the Member States, Part II of the Europe 2020 Integrated Guidelines', COM(2010)193 final.

62 See <http://ec.europa.eu/europe2020/tools/flagship-initiatives/index_en.htm>. See also European Commission, *Towards a job-rich recovery*: COM(2012)173 final, and the Employment Package put forward towards creating a genuine EU labour market, where the Commission emphasized the "interdependence of EU economies and labour markets" and the need to strengthen coordination of employment and social policies.

63 Leibfried & Pierson 2005 and Guardiancich & Natali 2009.

64 *Supra* note 42, p. 892. For an analysis of the margins and EU involvement in the regulation of the supplementary pension schemes, see Leibfried 2005 and Guardiancich & Natali 2009; D. Mabbett, 'Supplementary Pensions between Social Policy and Social Regulation', *West European Politics*, Vol. 32, No. 4, 2009, pp. 774-791 that refers to the proposed portability directive; Haverland 2007.

ity of occupational pension rights for EU workers as it relates to one of the fundamental freedoms of the internal market, that of the free movement of workers.⁶⁵

III *The Need to Facilitate Portability of Supplementary Pension Rights*

Considering Article 45 TFEU on freedom of movement of workers and its broad interpretation by the Court of Justice, it has been argued that obstacles to such portability that could result in reduced pension entitlements at retirement age, impede workers' mobility and constitute a hindrance to their right to freedom of movement.⁶⁶ The Court in the *Casteels* case⁶⁷ affirmed that conditions concerning a vesting period (which have been identified as one of the obstacles to portability), even where this was based on a collective agreement, should be in accordance with the scope of Article 45 TFEU and the right to free movement of workers.⁶⁸

Further, to the exercise of the right of freedom of movement of workers, the portability of pensions is an important condition for labour mobility, necessary for the proper functioning of the single market towards achieving sustainable growth.⁶⁹ Modern labour markets responsive to economic change require more flexibility and security in order to facilitate mobility for a skilled, trained, and adaptable workforce and to meet the aspirations of mobile workers within the EU and the market's demands.⁷⁰

This objective should be considered in parallel to the modernisation of social security schemes, including pension provision, that would facilitate workers to maintain and improve their standard of living. To this end, pension systems should not result in the penalising of job mobility, as may be the case with regard to the supplementary pension benefits of migrant workers who are suffering losses in their acquired rights.

65 The Commission's initial proposals towards adoption of measures on minimum harmonisation of relevant rules to promote portability aimed to protect the rights of both workers and self-employed persons, according to Arts. 45 TFEU and 49 TFEU, respectively. However, the amended proposals restricted the scope to cover only workers.

66 COM(2005)507, *supra* note 5.

67 Case C-379/09 *Maurits Casteels v. British Airways plc.* [2011] ECR I-1379. For a comment on the case, see Slaughter & May, 'Pensions and employment: Pensions Bulletin', No. 4, 17 March 2011.

68 Para. 29 and 30 of the judgement. In this case, Mr. Casteels had moved to another Member State for employment, but the transfer was within the same company. Although it is not clear how this decision would be applied in a case where an employee moves in another company in another Member State, this judgement, nevertheless, provides for a further incentive for action to be taken at EU level. D. Ghailani, 'Romer, Casteels, Prigge: overview of a number of judgments delivered by the Court of Justice of the European Union in 2011', in D. Natali & B. Vanhercke (Eds.), *Social developments in the European Union 2011*, OSE, ETUI 2012.

69 See Report by M. Monti, 'A New Strategy for the Single Market, At the Service of Europe's Economy and Society', 9 May 2010, where the idea to explore the development of a 28th regime for supplementary pension rights was put forward.

70 See, for example, European Commission, 'Towards Common Principles of Flexicurity: More and Better Jobs Through Flexibility and Security', COM(2007)359 final; 'Action for Stability, Growth and Jobs', COM(2012)299 final; Europe 2020 Strategy, *supra* note 3; Integrated Guidelines, *supra* note 61; COM(2012)173 final, *supra* note 62, where the Commission's intention to "lend a new impetus" towards the Directive on minimum standards for the acquisition and preservation of supplementary pension rights, was stated.

Addressing obstacles to occupational and geographical mobility stemming from existing legislation and administrative practices that impede such mobility is therefore necessary, to achieve the EU goals of full employment and growth and jobs, while improving social protection.⁷¹

As the Commission has identified, progress in this area that would facilitate and safeguard supplementary pension rights is important not only to protect EU workers but to ensure that EU citizens, in general, are allowed to build up adequate pension income and enjoy an adequate standard of living.⁷²

Within the context of the economic crisis, and the particular trends on low employment rates, along with the challenges around job security and the pressures on national pension systems, and the enhanced role envisaged for supplementary pension provision, the need to safeguard pension entitlements and the income for future EU pensioners has acquired further emphasis. In addition, the growing trends on migration,⁷³ as a result of the current employment perspectives in various Member States, where EU citizens move to different Member States for employment, and are likely to move away from traditional patterns of lifelong careers in one employment relationship, also underpin arguments towards facilitating the accumulation and protection of supplementary pension rights. The emphasis in current reforms on longer working lives requires ensuring that people benefit from labour market opportunities and are facilitated in the right to freedom of movement.

It is therefore argued that the common concerns that Member States face around pension provision and the Commission's approach to bring together relevant pension aspects to initiate and promote action where appropriate, using the available tools, have provided for an opportunity for progress to be achieved in areas, where it has previously proved difficult for Member States to agree. Such has been the case for the adoption of legislative measures on cross-border portability of supplementary pension rights.

E Towards Facilitating the Portability of Supplementary Pension Rights

Despite the importance of cross-border portability of supplementary pension rights for EU workers and the future pension entitlements of EU citizens, a complete legal framework has not, so far, been in place. The section below outlines previous attempts towards the adoption of legislation in this area. Highlighting the limitations of relevant measures so far, it indicates recent progress made and

71 Art. 145 TFEU; European Commission, 'New Skills for New Jobs Anticipating and Matching Labour Market and Skills Needs', COM(2008)868 final; 'An Agenda for New Skills and Jobs: A European Contribution Towards Full Employment', COM(2010)682 final.

72 See European Commission, 'Citizenship Report 2010 Dismantling the Obstacles to EU Citizens' Rights', COM(2010)603 final; 'Single Market Act Twelve levers to boost growth and strengthen confidence "Working together to create new growth"', COM(2011)206 final and 'Single Market Act II, Together for new growth', COM(2012)573 final; 'Towards a Single Market Act, for a Highly Competitive Social Market Economy, 50 Proposals for Improving Our Work, Business and Exchanges With One Another', COM(2010)608 final, proposal No. 31.

73 See COM(2013)801, *supra* note 13.

argues that the current circumstances created by the common challenges that Member States face in relation to pension provision, and the scope for action at EU level has and could further facilitate such portability.

The issue of portability of supplementary occupational pension rights and its relation to the freedom of movement and the social protection of workers was first addressed by the Commission in the early 1990s.⁷⁴ The relevant communication aimed to start a discussion at EU level, by engaging all interested actors, on the role of supplementary pension schemes and their impact on free movement of workers. Following various other initiatives,⁷⁵ in 1997 the Commission issued a Green Paper on supplementary pensions in the Single Market that covered all the main issues relating to supplementary pensions, including the free movement of workers.⁷⁶ In it, the Commission announced its intention to present a proposal for a directive concerning aspects to the portability of supplementary pension rights. As a result, in 1998, Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the EU was adopted.

This directive constituted the first step towards EU regulation of second-pillar schemes⁷⁷ and towards removing obstacles to movement of workers and the safeguarding of supplementary pension rights. It did not, however, aim to remove all previously identified obstacles, to portability of supplementary pension rights. Instead, it focused on the equal treatment of domestic and cross-border cases.⁷⁸

Nevertheless, the issue of promoting the portability of supplementary pension rights of workers who move within the EU remained on the Commission's agenda. The new strategic goal set in Lisbon in 2000, for Europe to become "the most competitive and dynamic knowledge based economy in the world, capable of

74 SEC(91)1332 final, *supra* note 33.

75 These included a draft directive on the safeguarding of the supplementary pension rights of workers who make use of their right to free circulation in the internal market, which was not, however, submitted for approval (G. Tamburi, 'The evolution of supplementary protection in the pension sector and the free circulation of individuals within the single market', in L. Paganetto (Ed.), *Social protection and the Single European Market*, CEIS 1997). In 1996, the Commission referred the problems encountered by workers moving from one Member State to another to a High-Level Panel on free movement of persons. In its report (Report of the High-Level Panel on the free movement of persons, chaired by Mrs. Simone Veil, presented to the Commission on 18 March 1997), the disincentives to mobility of workers caused by the possibility of losing their supplementary pension rights and the resultant obstacles to the exercise of the right of free movement were underlined.

76 COM(97)283, *supra* note 33.

77 It covers all pension schemes that are not part of coordination, under (what was) Regulation 1408/71.

78 E. Oliver, 'From Portability to Acquisition and Preservation: The Challenge of Legislating in the Area of Supplementary Pensions', *Journal of Social Welfare and Family Law*, Vol. 31, 2009, pp. 173-183. See also D. Ghailani, 'Review of EU legislation on the coordination of pensions', *Scope of the coordination system in the pension field – Final Report*, OSE 2011. The Directive concerned the preservation of acquired rights in the old pension scheme, the guarantee of cross-border payments, the possibility for posted workers in another Member State to continue contributing to the supplementary pension scheme where they were previously working, and information rights.

sustainable economic growth with more and better jobs and greater social cohesion”,⁷⁹ and the renewed goals of the Union that highlighted the need for a skilled and adaptable labour force and to promote workers’ mobility towards achieving full employment,⁸⁰ further reinforced focus on the issue of portability of supplementary pension rights and called for action to be taken. This was underpinned by the focus on the social character of the EU and the quality of social protection and on the modernisation of the European social model to respond to the changes of the labour market⁸¹ and to guarantee sustainable and adequate pensions.

The relaunch of the Lisbon Strategy and the focus on growth and jobs⁸² again brought attention to the need to promote the portability of supplementary pension rights. In its work programme in 2005, the Commission announced the year 2006 the ‘European Year of Mobility for Workers’, as “a means of promoting geographical mobility within and between Member States and a contribution to improving the efficiency of European labour markets, economic performance, the professional prospects of workers and the quality of living and working conditions”⁸³ and its intention to adopt legislation regulating such portability within 2007.⁸⁴ To this end, the Commission issued a proposal for a Directive on the improvement of portability of supplementary pension rights, aiming to facilitate the exercise of the right to freedom of movement of migrant workers as well of the right to occupational mobility within the same Member State.⁸⁵

This proposal would have provided for the first legislative measure, dealing with the conditions on acquisition, preservation, and transferability of supplementary pension rights.⁸⁶ However, the proposed ‘portability’ Directive did not address the issue of taxation of cross-border pension contributions for workers employed in one country to a pension scheme established in another country. The Commission was, nevertheless, already taking other steps towards addressing the problems arising from taxation practices, through enforcement proceedings against Member States.⁸⁷ Finally, the proposed directive envisaged that the Member States take the necessary measures to ensure that workers are informed,

79 *Supra* note 56.

80 *See*, for example, European Commission, ‘New European Labour Markets, Open to All, with Access for All’, COM(2001)116 final, where the need to eliminate barriers for workers posed by the lack of portability of supplementary pensions was stated.

81 ‘Social Policy Agenda’, COM(2000)379.

82 *Supra* note 56.

83 COM(2005)15 final.

84 SEC(2005)192 final, Central Policy Area 9: Improve the adaptability of workers and enterprises and the flexibility of labour markets.

85 COM(2005)507, *supra* note 5. The legal bases proposed were – then – Arts. 42 and 94 EC (now 48 and 115 TFEU), that both required unanimity in Council.

86 For a comment on this proposal, *see* Kalogeropoulou 2006.

87 *See* <http://ec.europa.eu/taxation_customs/taxation/personal_tax/pensions/index_en.htm>. The Court of Justice was also ruling against related national practices. *See*, for example, Case C-136/00 *Rolf Dieter Danner* [2002] ECR I-8147 Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817 and J. Hanlon, ‘Pensions Integration in the EU and Tax Harmonisation: The ECJ to the rescue?’, *European Business Law Review*, Vol. 14, 2003, pp. 673-687.

within a reasonable period of time, of how the termination of employment affects their supplementary pension rights.

With legislative measures having proven difficult to adopt, in 2007, following the European Parliament's opinion, a revised proposal was put forward by the Commission.⁸⁸ This proposal took more modest steps towards portability, entailing a 'considerable compromise'⁸⁹ compared to the 2005 proposal. The term portability as such was abandoned, as was any scope on transferability. The focus was now put on setting minimum standards on acquisition and preservation only, although the right to information was emphasised. The proposal was renamed as a 'Directive on Minimum Requirements for Enhancing Worker Mobility by Improving the Acquisition and Preservation of Supplementary Pension Rights'.

As it was not possible to reach consensus,⁹⁰ work on this file ceased, although the proposal remained 'live'.⁹¹

In 2010, and the renewed interest on sustainability of pension systems, the Commission undertook a Green Paper consultation on pensions.⁹² In their responses, the stakeholders indicated support for the adoption of EU legislation setting minimum standards on acquisition and preservation, the two aspects to the portability of supplementary pension rights that were included in the amended 2007 Commission proposal. Following the White Paper on pensions in 2012,⁹³ the European Council called for measures to be adopted to facilitate acquisition and preservation of cross-border pension rights of EU workers.⁹⁴ In May 2013, during the Irish Presidency, a revised proposal was tabled and in June 2013, the Council of Employment, Social Policy, Health and Consumer Affairs (EPSO) reached agreement on a general approach on the Commission's amended proposal on pension portability. In December 2013, COREPER endorsed the compromised text agreed and in April 2014, Directive 2014/50/EU was adopted.

According to the Directive, Member States are required to implement minimum requirements for the acquisition and preservation of pension rights for people who go to work in another Member State. In addition, workers should be able to obtain information, on the effects of potential mobility on their supplementary pension rights, and those who have left the schemes, on the value of their dormant rights.⁹⁵ The Directive does not cover the transferability of supplementary pension rights. A compromise has been reached on the points that

88 COM(2007)603 final.

89 Oliver 2009, p. 174. See Oliver (2009) further for a summary of the main points of the revised proposal and for the 'pressure points' towards agreeing to the adoption of a directive.

90 See Mabbett 2009 and D. Ghailani, 'Gaps of EU legislation on the coordination of pensions: key issues in pensions', *Scope of the coordination system in the pension field – Final Report*, 2011.

91 Green Paper, *supra* note 18.

92 *Supra* note 18.

93 In the Impact Assessment, the Commission considered the various options in relation to the scope of the directive to ensure the principles of subsidiarity and proportionality are respected.

94 European Council Conclusions, 28-29 June 2012.

95 The right of information on the value of vested rights is given to 'deferred beneficiaries', former scheme members who have vested rights but are not yet in receipt of a supplementary pension from the relevant scheme (Art 3 (h) of Directive 2014/50/EU).

appeared to provoke tensions, like the vesting period for acquisition of rights.⁹⁶ In accordance with the principle of subsidiarity, and the European Parliament's suggestions, for any action to be balanced against the cost-effectiveness of supplementary pension provision and to consider the nature of national pension schemes,⁹⁷ the Directive puts the responsibility to achieve portability of supplementary pensions mainly with the Member States, while the responsibility for implementation can be granted to national social partners. The Member States are required to implement the Directive by the 21st May 2018.

A particularly interesting point derives from the choice of Article 46 TFEU as the legal basis on which the Directive was adopted⁹⁸, while previous proposals were based on Articles (now) 48 and 115 TFEU.⁹⁹ Following the Treaty of Lisbon, it was thought that the choice of Article 48 TFEU as a legal basis, which no longer requires unanimity in Council, would enhance the possibilities of adopting secondary legislation on this issue.¹⁰⁰ However, the 'emergency break' of the provision, introduced with the Treaty of Lisbon, that allows for a member of Council to request that the matter is referred to the European Council, if the draft legislative act would affect important aspects of its social security system, may have, once again, impeded agreement. It can be argued that Article 46 TFEU provided a 'safer' way to overcome previously identified obstacles, although this is done at the expense of including references to social protection as a justification towards the adoption of the directive.¹⁰¹

Despite the restricted scope of the directive that only addresses some of the identified obstacles to the portability of supplementary pension rights, the adoption of a directive on minimum requirements on acquisition and preservation is

96 As a result, references to specific waiting and vesting periods relating to conditions governing acquisition of pension rights have now been combined to one provision that provides for a maximum of a combined three-year-period requirement, where vesting and/or waiting periods apply. When a minimum age for vesting is stipulated, it should not be exceed 21 years. The definition of 'outgoing workers' is also clarified.

97 The various practices on acquisition and preservation that can be considered to hamper worker's mobility may be used to avoid excessive fragmentation of supplementary pension rights and disproportionately burdensome administration for the funds.

98 According to Art. 46 TFEU, the European Parliament and the Council can, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Art. 45 TFEU.

99 Directive 98/49 was based on Art. 48 TFEU (ex 42 EC) that at the time required unanimity in Council.

100 See Guardiancich & Natali 2012 and 'Proposals for a better coordination of Pension Schemes in the EU: A Synoptic Table', *Scope of the coordination system in the pension field – Final Report*, *supra* note 78. Art. 115 TFEU (which requires unanimity in Council) was initially included to support interstate occupational mobility. With the exclusion of this element from the scope of the directive, this legal basis may have no longer been considered necessary.

101 Already, in the amended proposal in 2007, references to supplementary social protection schemes were amended to supplementary pension schemes. The internal market focus on facilitating the freedom of movement of workers rather than social security rights was also evident in the legal bases proposed in the original 2005 proposal. For a comment on this, see Kalogeropoulos 2006.

an important step forward, after years of discussions on this issue, and can provide an impetus for further action to be taken, mobilising all relevant actors.

Therefore, progress on this issue should be seen in parallel with the other policy areas that the Commission put on the agenda in the White Paper to promote and facilitate the functioning of labour markets and that could help promote the mobility of EU workers and citizens.¹⁰² The extension of Regulation 883/2004 to occupational schemes for public officers, the creation of a pan-European Pension Fund for Researchers as a way of improving cross-border security of occupational pension rights for migrant researchers, and the review of the IORP Directive that can promote cross-border activity of pension funds could also facilitate aspects of the portability of occupational pension rights for these categories.

Taxation hurdles that have been excluded from the scope of the recently directive could be addressed through the Commission's intention to tackle taxation practices to cross-border mobility and investments transfers of occupational pension (and life insurance) capital as contributions to providers in other Member States and from cross-border investments by occupational pension funds.

In addition, the Court of Justice can potentially address certain obstacles to portability deriving from national practices that impede the functioning of the internal market, as recent case law suggests.

Further to the adoption of legislative measures, remaining obstacles to portability can be addressed through other initiatives and tools available. Soft-law regulation, emphasised by the Commission, provides another policy instrument, through the involvement of all relevant actors, exchange of information, promotion of best practice (including a code of good practice for occupational pension schemes), and convergence of national policies, to be used towards achieving progress in this area.¹⁰³

F Conclusion

The adequacy and sustainability of pension provision has been raising concerns within the Member States and at EU level for a number of years. Despite various reforms, the economic and financial crisis has aggravated challenges that Member States were facing, stemming from demographic ageing. This has put national budgets and social security systems under further pressure.

The Commission has taken a comprehensive approach, utilising all available actors and tools and bringing together various related issues where there is room for support at EU level to address the common pension concerns. Despite restrictions stemming from the limited competence for the EU to engage in the pension

102 White Paper, *supra* note 1, Annex 1.

103 Soft law has already been used to raise interest and draw attention to the need to enhance cross-border portability of supplementary pension right. *See*, for example, the National Strategy Reports of 2002 (Portugal, Spain, Italy, and Belgium) and 2005 (Denmark, Netherlands, United Kingdom, and Germany), in the context of the OMC, where reference to measures that may be related to and affect such portability was made (Kalogeropoulou 2012).

area at EU level, the current circumstances provide for an opportunity to act towards addressing and responding to the difficulties around ensuring adequate pension provision of EU citizens that Member States share.

Given the role envisaged for occupational pension provision, towards achieving the EU pension goals, a particular issue, that of facilitating cross-border portability of supplementary pension rights, on which agreement had proven difficult to achieve, has been revived. The importance of promoting and facilitating mobility for EU workers and ensuring an adequate pension income for EU citizens, highlighted by the economic crisis, has allowed for progress to be made towards adopting measures in this area, after lengthy discussions and considerable delays. Such measures will enable the acquisition and preservation of supplementary pension entitlements for EU workers and ensure they are not disadvantaged, in relation to these aspects, towards their future pension income.

The recent directive on this issue does not address all identified obstacles to cross-border portability. The strong national elements that are present and apparent within occupational pension provision restrain EU action towards advancing the legal framework on this matter. Nevertheless, in the current context, and the attention that pension provision has been attracting, there is scope for gradual steps that would further facilitate such portability. To this end, the long-anticipated adoption of the directive is an important step forward.