Portability of Supplementary Pension Rights in Europe: Challenges, Opportunities and Lessons to Be Drawn

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Biography

Igor Guardiancich earned his PhD in Social and Political Sciences at the European University Institute in Florence. His doctoral dissertation and subsequent work are on the political economy of reforms in Central, East and Southeast Europe as well as post-socialist and pan-European social policy. His most recent publications include articles in international peer-reviewed journals, such as Regulation & Governance, West European Politics, Europe-Asia Studies, East European Politics & Societies and International Social Security Review. His book Pension Reforms in Central, Eastern and Southeastern Europe: From Post-Socialist Transition to the Global Financial Crisis was published in 2013 by Routledge.

1. Introduction

In April 2014, after nine years of negotiations, the European Parliament approved the Supplementary Pension Rights Directive, which integrates what Ferrera (2014: 828) calls the EU Social Citizenship Space[1] and bridges a historic 'social deficit' in European legislation (Baugniet, 2014).

The EU's Coordination Regulations[2] are the most advanced system worldwide that guarantees the portability of social security benefits for migrants. However, the regime allows for the coordination of statutory pension schemes only. By excluding supplementary, mainly private, occupational pensions it leaves a regulatory gap in the protection of migrant workers under EU law.

There are both macro and micro reasons why addressing this gap is crucial. From a macro-systemic perspective, unhindered labour mobility underpins healthy economies, allowing mobile workers to fill skill shortages where needed. This supports long-term growth and sustainable labour markets, as recommended in the Europe 2020 strategy. Within the Eurozone, labour mobility reduces the negative effect of asymmetric shocks. From a micro-individual perspective, migrants have the fundamental right to social protection, and this should be portable across countries and professions (Holzmann and Koettl, 2010: 2). The lack of portability of acquired social benefits reduces the efficiency of individual labour mobility decisions. Moreover, family planning and social risk management are impaired.

Despite these obvious advantages, the EU institutions were unable to hammer out a compromise due to: *"the diversity and complexity of occupational schemes within* *and across countries, […] and the political resistance at EU Council level for more coordination and streamlining"* (Holzmann and Koettl, 2010: 30). Consequently, this article explains why the Supplementary Pension Rights Directive became reality in 2014, and elucidates the Directive's likely impact on European occupational pensions.

Veto players theory (Tsebelis, 1995) provides the simplest explanation to its adoption. The Lisbon Treaty relaxed the voting requirements for the Council from unanimity to Qualified Majority Voting (QMV) with respect to the Directive's original legal base, thereby expanding the *winset of the status quo*.[3] The significant *policy distance* between Member States, which prevented unanimity in the first place, became a blessing in disguise. The reluctant countries found their ability to form a blocking minority restricted. Hence, their strategy switched from upholding the status quo to limiting the damage of what was a *fait accompli*.

Even though the new Directive falls short of full portability (there are no physical transfers of capital), its implications are nontrivial. It affects most funds and *de facto* covers all movements of workers, not just cross-border ones. In fact, applying different rules to internal, within-state movements would be impractical and would soon raise eyebrows in the Court of Justice (ECJ). Fair treatment in the preservation of pension rights awards greater protection against inflation to mobile workers. Finally, the most notable breakthrough is the relaxed acquisition rules, which were a tangible drag on mobility. In this sense, the Supplementary Pension Rights Directive bears witness to and reaffirms the enhanced fluidity of traditionally static European labour markets.

The article is structured as follows. Section 2 reviews the rationales underpinning the new Directive and the core disagreements between the Member States. Section 3 traces the laborious policymaking process from first draft in 2005 until final adoption in 2014. Section 4 illustrates the Directive's main provisions and their impact on occupational pensions in Europe. Section 5 concludes.

2. Rationales for a Supplementary Pension Rights Directive

The regulation of the portability of occupational pensions at EU level rests on three rationales. From a legal standpoint, the Lisbon Treaty considers the freedom of movement of workers not just being an economic freedom, but also having a social dimension, of which occupational pension rights are a constitutive element. This underpins the need for more protective EU secondary legislation. Within the realm of economics, EU citizens are ever more inclined towards working abroad, especially when facing worrying employment prospects. Moreover, the growing reliance on occupational pensions as source of individual social security requires measures that facilitate the acquisition and preservation of cross-border pension rights. It is, however, difficult to find a common language among the Member States due to the heterogeneity and complexity of their occupational schemes.

2.1. Social protection basis to the free movement of workers

Baugniet (2014) provides the most comprehensive analysis of EU's competence in the regulation of occupational pensions. Even though social policy is an area of shared competence between the EU and the Member States, it has been rejected as appropriate to regulate occupational pensions, because the distribution of social protection between the pillars is a national affair. Hence, the alternative route of upholding the right to the free movement of workers was chosen.

First, the Treaties consider the freedom of labour mobility as having a social dimension. Articles 45 and 48 TFEU (ex Articles 39 and 42 TEC) on, respectively, the freedom of movement of workers and social security measures for Community migrant workers, justify the protection of migrants' occupational pension rights, which is increasingly being supported by ECJ case law.[4] Then, the Lisbon Treaty relaxed the voting requirements to QMV in the Council for legislation falling under Article 48 TFEU (the Portability Directive's original legal basis). This proved to be crucial as unanimity had been impossible to obtain under co-decision.

Even though choosing as legal basis Article 48 was consistent with the Safeguard Directive[5], which established an equal treatment of the pension rights of a worker changing jobs within and between Member States, and the conception of occupational pensions as social security, it created several headaches to the Commission.[6] The Article's principle of aggregation (present in the Coordination Regulations), that is, the aggregation of all contributory periods for the benefit of the retired migrant worker, creates two sets of problems. First, the mutual recognition between supplementary schemes poses formidable technical challenges due to their heterogeneity. Second, the pension industry adamantly opposes it on grounds of subsidiarity (EAPSPI, 2006) and employers complain that it increases administrative costs, ultimately leading to a reduction in coverage (BusinessEurope, 2007).

Hence, a novel legal basis was needed to convince the Member States. The Commission chose the more generic Article 46 TFEU, which foresees the elimination of those obstacles that hinder the free movement of workers, as stated in Article 45 TFEU. As many of the Directive's provisions aim at reducing these obstacles (and harmonization is minimal), Article 46 represented a rightful legal base, provided that the scope of application be restricted to cross-border movements only. In fact, several

Member States opposed setting the precedent of using an Article on the free movement of workers for the adoption of harmonisation measures in the internal market.

2.2. Increased mobility of workers

In 2013, circa 10.3 million working-age (15-64) European citizens lived in another Member State. This is roughly 3.3 per cent of the total, a 60 per cent increase compared to 2005. According to Eurobarometer surveys, in 2013, one fourth of EU-27 residents would consider working in another EU country in the next 10 years (European Commission, 2014).

Additionally, the Great Recession has led to high levels of unemployment across the EU-28 (almost 10 per cent in December 2014), ranging from below 5 per cent in Germany and Austria to 20-25 per cent in Spain and Greece. Workers have started moving from high unemployment areas to countries with unfilled vacancies (European Commission, 2014)

Consequently, at the height of the crisis, the European Council's Conclusions (2012: 14) called for strengthening *"the acquisition and preservation of cross-border pension rights and other social security rights for EU workers"* to facilitate intra-EU mobility through the regulation of occupational pensions, which had in the meantime grown in coverage and importance.

2.3. Complexity and diversity through multi-pillarization

Originally, European pension systems were publicly managed but differed in their design. Bismarckian countries relied on employment-based, contribution-financed insurance schemes, providing generous benefits aimed at income maintenance. This delayed the emergence of private, funded plans. By contrast, Beveridgean systems provided tax-financed, flat-rate benefits based on residence or citizenship, aimed to alleviate poverty. Here, occupational and individual private pension plans developed early to cater to the well off (Bonoli, 2003).

The occupational crisis of the 1970s and the end to the baby boom led the Western welfare states into an era of ‘permanent austerity’ (Pierson, 2001). The consolidation of public finances, opened more room for private institutions offering hitherto publicly provided services. This is consistent both with the broader narrative of a global neoliberal movement that intensified during the 1990s (Naczyk and Palier, 2014; Streeck, 2014: 73) as well as with its European manifestation as a common shock brought by the 1992 Maastricht criteria to access the Economic and Monetary Union (EMU) (Hennessy, 2013).

In the realm of pensions, the declining generosity of statutory retirement schemes spurred even traditional Bismarckian countries to endorse multi-pillarization. However, the proliferation of occupational pension schemes has been uneven, and the majority of post-socialist new Member States implemented mandatory funded pillars that do not qualify as occupational plans. According to the Social Protection Committee (SPC, 2008: 10), the old Member States can be roughly divided into three groups. In Denmark, the Netherlands and Sweden as much as 75 to 90 per cent of the workforce is insured. Medium coverage countries comprise Belgium, Germany, Ireland and the UK (40-65 per cent). In the rest of EU-15, occupational pension coverage ranges from 4 per cent in Portugal to 17 per cent in Italy.

What is undeniable is the increased share of occupational pension benefits in an individual’s future income. Again, the SPC (2008: 19-20) estimates that it will rise between 2006 and 2046 from circa 10 per cent in Cyprus, Belgium, Germany to 15-25 per cent, in Denmark to over 45 per cent, and from 22 to 32 per cent in the UK. In the Netherlands and in Sweden it will remain roughly constant at 60 and 23 per cent, respectively. Only Ireland will record a decline from 54 to 43 per cent, due to a shift from defined benefit (DB) to defined contribution (DC) schemes. By itself, greater reliance on occupational pension benefits requires measures to guarantee their portability.

Together with their growing importance, multi-pillarization also increased the differences in the institutional design as well as purpose of national occupational pensions, and, hence, the potential for disagreement.

With respect to labour mobility, the main bone of contention is whether to treat occupational pensions as instruments that reward loyal employees and promote the retention of skilled workers or to regard them as deferred income and an essential component of social protection. Occupational pensions are used as staff-retention devices in several Coordinated Market Economies (CMEs), such as Austria, Germany and Luxemburg, where innovation is incremental and carried out by loyal employees (see Estévez-Abe and Heinrich, 2013; Hennessy, 2013; BDA, 2010). In contrast, the Commission dismisses this practice as obsolete and holds that anti-mobility provisions such as long vesting and waiting period are discriminatory against women (Mabbett, 2009: 781).

With respect to financing, the differences run even deeper. Several continental countries, such as Austria, Germany, Luxemburg and partly France rely on supplementary unfunded schemes, so-called book reserves, which help firms with cheap internal financing (see Estévez-Abe and Heinrich, 2013). Pension portability may be problematic: if mobile workers are entitled to the transfer of their accrued rights, this creates unexpected cash flows and generates liquidity problems. The situation, at least in Germany, is slowly changing. Many large firms started to voluntarily fund book reserves through Contractual Trust Arrangements in an effort to get these liabilities off their balance sheets and enjoy better credit ratings (Interview FS).

3. The long road to a Portability Directive

Ensuring the right to the freedom of movement of workers requires active measures, among which the coordination of social security rights is key. Already in 1958, the Council adopted Regulations 3/1958 and 4/1958 on social security for migrant workers. These were designed for the founding Member States, where supplementary private provision was basically absent (apart from in the Netherlands), and whose pension systems represented a rather homogeneous block. The legal basis of the Regulations (the abovementioned Article 42 EC, ex Article 51 EEC) and ECJ case law does not consider other but statutory arrangements (Baugniet, 2014).[7]

Notwithstanding, supplementary pensions have been on the agenda since the Commission recognized that Jacque Delors' White Paper on the single market omitted occupational pensions. In 1991, a discussion started on the social deficit that *"characterized EU law on free movement insofar as migrant workers were not afforded the legal rights necessary to ensure their social protection"* (Baugniet, 2014: 217; Hannessy, 2013: 103). The Green Paper on Supplementary Pensions (European Commission, 1997) acknowledged that the obstacles to portability hamper the correct functioning of the single market. The European Employment Strategy and the Lisbon agenda put emphasis on workers' mobility as a way to fight persistent unemployment (Kalogeroupolou, 2006: 98).

Despite the many recommendations, no tangible approximation of national laws followed. The Member States were reluctant to move beyond the Safeguard Directive of 1998. To end the impasse, the Commission resorted to European Social Dialogue in the early 2000s, but the attempt failed. According to DG Employment Director Jérôme Vignon, a European Collective Agreement was ruled out as *"the water between the social partners has proved to be too deep"* (Brooksbank, 2004; Interview CM). In fact, the Union of Industrial and Employers' Confederations (UNICE) made it clear that portability was not crucial for employers, as multinational companies already found suitable solutions and because more important taxation issues would be excluded. Given that non-binding alternatives, e.g. a code of conduct, were considered as ineffective, the idea of a Portability Directive surfaced (Mabbett, 2009). The Commission decided to employ the community method with a minimal harmonization approach in mind.

This led to the 2005 proposal for a Directive on improving the portability of supplementary pension rights (Portability Directive) and, after the Parliament's first reading in June 2007, to the draft Directive on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights (Supplementary Pension Rights Directive).

The first proposal failed in many respects. It was untimely, as the IORP Directive[8] had already exhausted the Member States' appetite for European pension legislation (Brooksbank, 2006), it required swift and stringent harmonization of acquisition, preservation as well as transfer rules, and it supposedly violated the autonomy of the social partners.

Shortened qualifying periods irritated those countries that use occupational pension plans as staff-retention devices. In particular, Germany had already decreased its mandatory vesting periods from 10 to five years in 2001. Further reduction was unacceptable, as it would increase costs to employer-financed and guaranteed supplementary schemes, according to the German occupational pension fund association (aba, 2006).

The preservation of dormant rights, i.e. the protection against inflation, was equally controversial. Again, aba (2006) warned that such guarantee could drive up costs borne by sponsors by 20-30 per cent. The Dutch Association of Industry-wide Pension Funds (VB) and the Confederation of Netherlands Industry and Employers (VNO-NCW) decried that Dutch occupational funds do not guarantee any automatic adjustment to current fund members. Hence, there is no reason for a preferential treatment of mobile over loyal workers (Preesman, 2005).

Transferability elicited adamant opposition. Those Member States relying on unfunded, mainly book reserve schemes demanded their permanent exemption for reasons of financial sustainability, as transferability generates unexpected cash outflows (Interview FS; BusinessEurope, 2007; EAPSPI, 2006). At the same time, the Dutch Labour Foundation, the national consultative body comprising the peak union federations and employers' associations, deplored precisely this potential exemption, which would create an asymmetric effect to workers moving between funded and unfunded schemes.

An institutional objection came again from UNICE, which stressed not only the Directive's associated costs but also the violation of the subsidiarity principle, that is, the interference with the autonomy of the social partners in occupational pension matters. This had the effect of splitting the European Trade Union Conference (ETUC), which favoured the Directive, as Swedish and Dutch unions joined the employers in their opposition (Mabbett, 2009: 782-4).[9]

Finally, the legal basis required unanimity in the Council. Prophetically, Commissioner Vladimir Špidla argued that: *"there are likely to be relatively few opposed to the new directive, but those few may be quite vital"*. As the Dutch Ministry of Social Affairs and Employment (headed by Aart Jan de Geus until 2007 and Piet-Hein Donner after) threatened to wield an unprecedented veto and given Germany's unwavering opposition, unanimous support was unattainable (Widdershoven, 2006; Mabbett, 2009: 785; Hennessy, 2013: 115-19).

In October 2007, the Commission tabled a new, less ambitious proposal for a Supplementary Pension Rights Directive. This incorporated most of the amendments of the Parliament and technical improvements suggested by the Working Party on Social Questions in the Employment, Social Policy, Health and Consumer Affairs (EPSCO) Council.

As the new name suggests, all references to transferability and portability were removed from the Directive (the recital still encourages Member States to *"improve the transferability of vested pension rights"*), which were the main points that held the opposing European pension fund lobby relatively united.[10, 11] The scope of the Directive had been restricted and the exclusive applicability to schemes linked to an employment relationship clarified. One of the outstanding issues was retroactivity. In early 2007, the German Presidency proposed the exclusion all periods of employment accrued before the Directive's implementation (Oliver, 2009: 178). This was finally included in early 2013 during negotiations in EPSCO.

Similarly, the Commission acknowledged the concerns regarding preservation, eliminating the possibility that dormant members be treated preferentially. Individual Member States have to safeguard dormant rights according to national law and practice rather than to actuarial rules and may take into consideration the nature of the scheme (as administrative costs may be substantial). Several indexation rules are used as examples of fair treatment, which convinced the Dutch to give the green light (Interview SR, AK).

In early 2008, the only remaining opponent was Germany, backed by Luxembourg, and the only issue was acquisition, in particular the implementation of vesting periods shorter than five years (Woolfe, 2008). The Slovenian Presidency attempted a last-minute mediation. The compromise solution envisaged capping vesting periods at two years, but also allowing Member States to delay the implementation and preserve vesting periods of up to five years for old schemes, subject to the Commission's scrutiny. Not only Germany and Luxembourg still objected as the proposal did not encompass newly established schemes, but also other Member States complained that this would authorize differential treatment. As a result, unanimity was again unattainable and, by May 2008, the former Belgian Premier Guy Verhofstadt declared the Supplementary Pension Rights Directive to be dead (Bandel, 2008).

Unperturbed, the Commission did not withdraw the 2007 proposal and launched consultations through the Green Paper on Pensions (European Commission, 2010). Despite several alternative approaches (Guardiancich and Natali, 2012), the majority of responding stakeholders was in favour of resuscitating the Directive (European Commission, 2012a: 18). Consequently, the Commission opted for a stringent time frame by inserting portability among the actions to increase the mobility of citizens within its Single Market Act II, thereby calling the Council and Parliament to fast-track key legislation (Interview NB).

The Parliament and especially the long-standing Dutch rapporteur Ria Oomen-Ruijten[12], acting as a substitute member of the Committee on Employment and Social Affairs (EMPL), were naturally willing to finalize the act. The European Council with its President Herman Von Rompuy issued a Statement towards growth-friendly consolidation and job-friendly growth, where portability of supplementary pensions was key to enhance labour mobility and fight unemployment. The Council's Conclusions (2012) reiterated the message in June 2012, thereby implicitly binding the previously reluctant countries towards finding an acceptable compromise.

The Cypriot Presidency rightly assessed that the political situation became ripe for the resumption of work (Council of the European Union, 2012b). The Directive was revived in late 2012, clearing the way to Parliamentary adoption in April 2014. Hence, the legislative process ended with an early agreement at the Parliament's second reading and was based on an informal compromise of the co-legislators during the trialogues (Reh et al., 2013: 1117).

Given the broad mandate, the Presidency submitted to the Working Party on Social Question a questionnaire covering six themes (legal basis, acquisition, preservation, information, implementation and reporting) to find a way to proceed (Council of the European Union, 2012b). The legal basis and acquisition proved to be crucial points of disagreement (Interviews NA, CB).

Unlike with previous attempts, the Irish Presidency was adamant to push things forward. Under the Lisbon Treaty, the available legal bases required QMV instead of unanimity. Blocking minorities became *de facto* impossible, due to the excessive heterogeneity of interests in supplementary pensions (Interview PR), thereby expanding, in the words of Tsebelis (1995), the *winset of the status quo*. By then most opposing stakeholders, e.g. German pension funds and employer associations, understood they could only limit the damage of a Directive that was inevitable (Interview FS, CS). Consequently, it was important to secure the broadest agreement possible on its most contested parts.

The discussion on the legal basis lasted almost six months, overshadowing more substantial issues. The Commission first proposed the more generic Article 46 TFEU at the meeting of the Working Party on Social Questions in November 2012. As the aims of the Directive were clear – ensuring that mobile workers are not penalized – the debate soon revolved around its geographical application. The crucial issue was settled by June 2013 only, when the scope was restricted to cross-border movements, together with other limitations such as strict non-retroactivity.

A moderate breakthrough on acquisition rules was achieved earlier. Cyprus proposed to merge the separate discussions on the waiting and vesting periods. A maximum combined length would offer more flexibility (Interview NA). The opposing countries (mainly Austria, Germany and Luxembourg) were finally on board. Disagreement remained on the total length, as some Member States suggested shorter periods in line with increased flexibility in the labour markets.[13] In the end, Austria's suggestion to cap the combined period at three years prevailed. Even the most pro-portability MEPs saw this as a gain on the Council, as some Member States would have to substantially adapt. Acquisition was, hence, settled at Council level before the trialogues took place (Interview PR).

Finally, there are clues that a quid-pro-quo cleared the final hurdles. In parallel to portability, discussions were on-going on an updated IORP II Directive. Even though DG Internal Market and Services was in charge, many of the stakeholders were the same. A coalition consisting of Belgium, Germany, Ireland, the Netherlands and the UK opposed the so-called Pillar 1 of the IORP II Directive, which would have applied costly solvency rules designed for insurance companies to occupational pension funds (Sourbès, 2013a).[14] In May 2013, the Commission dropped these additional solvency requirements, which pleased the Member States above.

As *the folly of chance is the logic of fate*, on 20 June, following the favourable opinion of the Committee of Permanent Representatives (COREPER), the EPSCO Council agreed on a general approach. Commissioner László Andor praised the outcome and urged the Parliament to adopt the Directive the elections of May 2014 (Sourbès, 2013b). In line with the literature on informal EU deals, time pressure played a crucial role in hammering out a second reading early agreement (Reh et al. 2012).

As the Parliament's first reading position was still valid, the reappointment of the original rapporteur and of the shadows (same as for the 2012 White Paper) was relatively smooth (Interview PR). However, the position was out-dated and it was obvious that Ria Oomen-Ruijten, who earned a reputation as tough negotiator, could not agree on the whole general approach. Despite a restricted room for manoeuvre, the Lithuanian Presidency asked COREPER for a revised mandate and acted as intermediary between the three institutions (Interview RJ, AM). Consequently, the rapporteur won a number of concessions during the four rounds of trialogues (Woolfe, 2013).

First, although the Parliament knew that neither the legal basis nor the scope could be touched, it wished to maximize the Directive's applicability (Interview AM).

The Council proposed that eligibility ceases two years after the termination of the employment relationship (deemed to be a generous solution), but this was unacceptable for the rapporteur and for worker representatives, such as ETUC (Interview RJ, CM). Consequently, any time restrictions to the definition of outgoing worker have been repealed. Malta condemned this for introducing a high degree of legal uncertainty, which goes against the Directive's restricted scope, as it forces Member States to harmonize the rules for internal movements as well.

Second, some provisions have strengthened workers' rights at the expense of employers. Pension funds that accumulate small vested sums, below a threshold defined by individual Member States, may pay these dormant rights out as a lump sum, so-called commutation, instead of keeping them. However, the worker's informed consent is needed, including as regards applicable charges. This infuriated (in my view, unjustifiably) the Germans, who stated that requiring the employee's agreement without exception represents a costly bureaucratic burden for sponsors (Interview RJ).

Finally, the negotiations over the implementation period – the Parliament wanted it shorter than the five years proposed by the Council as the Directive dragged on for so long – settled on four years without extensions or re-evaluations (Interview AM).

The trialogues produced an agreement on 26 November, soon confirmed by the COREPER and the EMPL Committee. The Council approved the common position in February 2014 (unanimously with Malta abstaining). This was endorsed by the Commission and rubberstamped during Parliament's second reading in April, just before the elections.

4. The 2014 Supplementary Pension Rights Directive

The following sections analyse in detail the challenges, compromises, outcomes and their consequences of the various constituent parts of the Supplementary Pension Rights Directive.

4.1. Scope

The scope of the new Directive has several dimensions. The personal scope excludes self-employed persons (covered in the Safeguard Directive). The rationale is that the principle of non-discrimination between outgoing and remaining workers in the case of self-employed does not apply.

The Directive's material scope encompasses, with few exceptions, all occupational schemes not covered by the Coordination Regulations. Individual agreements, whose conditions are neither defined by the employer nor the social partners are not covered. In a similar fashion, schemes that accept no new members, schemes that are being wound up, insolvency guarantee schemes, compensation schemes, national pension reserve funds, one-off severances, as well as disability and survivor pensions[15] are all excluded.

The issue whether to apply different standards to funds based on their financing method was settled only in 2013. Due to the wide use of internal book reserves, Austria and Luxembourg required their exclusion. Germany was instead more sanguine about the potential costs of applying the Directive, due to the abovementioned Contractual Trust Arrangements. Other Member States, e.g. Denmark and Estonia, were against reducing the scope and the Commission rightly stated that lacking any transferability of assets, unfunded schemes would not face unexpected liquidity outflows (Interviews VZ, FS).

In theory, the Directive's geographical scope is restricted to cross-border movements. In practice, the same rules will apply to all outgoing workers within the EU. According to AEIP officials (Interviews NB, FB), it is a classical compromise between the Commission and the Council. The Member States emphasized that the movements of workers within a state pertain to social legislation and, hence, fall outside EU competence. The Commission and several countries, for whom the Directive does not represent additional costs, frowned upon the restriction of the scope, as only a small share of the Union's population works cross-border. At the same time, it became clear that it is impractical to apply different laws to workers moving within and between Member States. Differential provisions may be technically complex (especially regarding dormant rights, Interview FS) and may also be challenged in court.

Hence, the Commission and the Council issued in June 2013 a Joint Statement (Council of the European Union, 2013), later included in the recital, encouraging Member States to: *"ensure the equal treatment of scheme members who change employment within a single Member State and those who exercise their right to free movement from one Member State to another."* What is more, the definition of outgoing worker has been expanded during the trailogues. Discriminatory rules are *de facto* inapplicable as there are neither prescribed requirements nor guiding general principles for former employees to fall under the Directive (Interview PR).

Hence, during the Pensions Forum (an advisory body that assists the Commission) meeting in October 2014, no Member State openly stated that it would apply different rules for external and internal movements (Interview VZ, FS). The underlying paradox is that the Member States are willing to harmonize their laws as long as the EU does not oblige them to.[16] Knill and Lehmkuhl (2002) call this voluntary adaptation *Europeanization by framing domestic beliefs and expectations*. Here, EU intervention is absent, but the EU template provides a focal point to national policymakers and an advocacy coalition endorses the proposed changes.

Finally, the Member States had diverging opinions on retroactivity (scope in time), some pushing for maximum worker protection. Notwithstanding, the non-retroactive approach prevailed, as the Commission deemed that full retroactivity constitutes an immense burden on employers.

4.2. Acquisition

The new Directive enumerates which rules on acquisition infringe the right to the freedom of movement of workers. In several occupational schemes, pension rights are forfeited if a workers' relationship ends before she completes a minimum period of scheme membership (vesting period) or before she reaches a minimum age (vesting age). Such barriers pertain to the ontology of occupational pensions: are these loyalty schemes or instruments of social protection?

Similarly, lengthy waiting periods before an employee becomes a scheme member prevent mobile workers from acquiring adequate pension rights. The underlying rationale is that younger workers who change jobs frequently shall not build up several tiny pension rights that are administratively costly. Only minimum age requirements for membership do not constitute an obstacle to mobility.

The Commission adopted a technical approach based on minimum requirements for the acquisition of supplementary pension rights (Baugniet, 2014: 261), which can be singled out as the main reason for failed unanimity in the Council. The 2007 amended

Directive set a vesting period of just one year for workers older than 25, which was fiercely contested by the pension fund lobby and employers (see aba, 2010; BDA, 2010).

The final compromise prescribes a combined waiting and vesting period of up to three years and a minimum vesting age of 21. Even though the initial proposal has been watered down to meet some of the concerns of sponsors and providers, these rules weaken the human resource management role played by occupational pensions in several CMEs (Interview FS). The new Directive reinforces the fluidity of European labour markets and testifies to the changing role of occupational schemes, whose financing (i.e. responsibility) is gradually shifting from employers to employees (Interviews CS).

In practice not many countries are dramatically affected. With respect to waiting periods, only Austria, Finland, Luxembourg and Ireland allow for periods longer than two years (European Commission, 2005). The minimum vesting age is 25 or above in Germany, Sweden, Belgium, Luxemburg, Portugal and in the Danish public sector, but several countries (the Netherlands) and especially DC schemes do not apply age requirements any longer.[17]

Hence, vesting periods were the thorniest issue. Some 15 per cent of all DB schemes in Europe still require five or more years and 32 per cent at least two (Hewitt Associates, 2007). Some Portuguese and French[18] final salary plans have no vesting at all, meaning that early leavers lose all their rights, and Spanish non-qualified plans that require 20 years of vesting. These are exceptional cases. Countries that systematically apply 5-year vesting periods and that will have to adapt are Austria (all book reserve schemes), Germany (all employer-sponsored schemes), Denmark (personal contributions vest immediately) and Luxembourg.

Two more issues are worth mentioning. When pension rights are still unvested, the outgoing worker has the right to the reimbursement of her contributions (or investment value in DC schemes). Employer contributions are instead subject to the provisions of national law or collective agreements, so they may or may not be refunded. This was an important point for AEIP, whose members required the possibility to retain employer contributions within the fund to be used as solidarity buffer. Additionally, the social partners are able to derogate from the Directive's rules (both on acquisition and preservation), as long as the collective agreements do not offer less favourable treatment or create further obstacles to mobility.

4.3. Preservation

In the absence of full pension portability, outgoing workers often leave their contributions in the scheme of origin. The Commission has in several occasions argued that mobile workers are at a disadvantage vis-à-vis static ones. Hence, the Safeguard Directive established an equal treatment of the dormant rights of a worker changing jobs within and between Member States. In light of a more comprehensive Portability Directive, this was deemed as insufficient, since there can be non-discriminatory obstacles to mobility, which have to be tackled by the EU through a minimum requirements approach.

There are several ways in which dormant rights may lose out (Hewitt Associates, 2007). In the worst cases they are not indexed against inflation, so their real value deteriorates in time. More often, future benefits do not reflect the potential salary increases of the outgoing worker, possibly leading to insufficient entitlements. DB and hybrid schemes, one fourth of which do not offer any revaluation, fare worse than DC schemes, the vast majority of which let dormant rights participate in the returns with the mass of other contributions.

Belgian and Spanish DB and hybrid as well as German and Italian DB schemes are the worst offenders. DB plans in Ireland and the UK index vested rights to inflation, subject to an annual ceiling. Dutch funds employ a variety of methods and in Poland revaluation is made in line with the adjustment of pension benefits in payment.

Instead of prescribing any specific type of preservation, the new Directive espouses two principles: that of equal treatment and of fairness. The fairness test, however, does not prevent losses to the insured person (or her survivors), but it only ascertains the existence of restrictions upon the freedom of movement for workers that stem from the preservation of dormant rights (Baugniet, 2014: 268). The Member States are, hence, free to apply a range of indexation mechanisms – some examples are provided in the Directive – having regard to the nature of the scheme, provided that the two principles are fulfilled.

Vested sums lower than a nationally defined threshold may be reimbursed, as they generate considerable administrative costs. The Germans' concern regarding the outgoing worker's informed consent may be solved in two ways. Either the number of cases is limited by applying dissimilar rules for internal movements or the problem is solved by requiring the consent to be given already when the initial employment and, hence, insurance contract is stipulated.

4.4. Information

Even though information plays a secondary role relative to the other issues dealt with in this Directive, it became a precondition to the free movement of workers.

Employees have now the right to adequate and timely information (in writing) on how a termination of employment would affect their supplementary pension rights, on ways to invest benefits that are paid out as a lump sum and on the status and value of their dormant pensions. These informational requirements are independent from those arising from the IORP Directive.

4.5. Implementation

As for the Directive's implementation by May 2018, the principle of non-regression applies. Member States may adopt more favourable provisions on acquisition, preservation and information. Moreover, the social partners, at their join request, may be granted the responsibility for implementing the Directive as regards the provisions relating to collective agreements.

5. Conclusions

After half a century, the European Union finally closed the social deficit left open by the Coordination Regulations through a relatively sound, albeit limitedly ambitious portability regime for occupational pensions. Even though the original proposal for a Portability Directive has been substantially watered down, the 2014 Supplementary Pension Rights Directive is a tangible example that even the most intractable deadlock in European decision-making may ultimately be broken. Two main lessons may be drawn.

From a legislative point of view, the procedural changes introduced by the Lisbon Treaty's less exacting voting requirements were a *condition sine qua non* to reach an agreement in the Council. As the legal base on social security measures for migrant workers is not confined to pensions, this may open up additional scope for positive integration in several social policy fields. The extension of QMV to sensitive areas, where national practice is heterogeneous and which required unanimity, will most probably enhance overall harmonization, as blocking minorities become harder to assemble.

Despite the limitations in scope and objectives, the substantive implications of the new Directive are nontrivial. Mobile workers can expect fairer treatment of their dormant pension rights and higher quality information provided before and after terminating an employment relationship. The new acquisition rules will undoubtedly have the greatest impact, as they require significant adaptation in several Member States. In this respect, the Supplementary Pension Rights Directive reflects an on-going shift in the role played by occupational pensions: from being devices that reward loyal employees they became instruments of social protection that should facilitate rather than block workers' mobility.

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[1] This is a membership space coterminous with EU external borders, inside which all the bearers of EU citizenship enjoy a common 'title' bestowed upon them by the Union in order to access the benefits and services of the place in which they freely choose to settle, according to its rules (*lex loci laboris aut domicilii*).

[2] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

[3] The winset of the status quo are all the policy solutions that defeat the status quo, which is no EU legislation in our case.

[4] In *Casteels*, the ECJ gave its first preliminary ruling on non-statutory occupational pensions in a case between private parties, see Case C-379/09 Maurits Casteels v British Airways plc [2011] ECR I-01379.

[5] Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community.

[6] The original legal basis included also Article 115 TFEU, ex Article 94 TEC, on the approximation of rules that directly affect the functioning of the common market. It was later dropped on procedural grounds and due to the amended Directive’s restricted scope (Council of the European Union, 2012a).

[7] For a different interpretation, see Case 61/65 G. Vaassen-Göbbels (a widow) v Management of the Beambtenfondsvoor het Mijnbedrijf [1966] ECR [1966] ECR 00261.

[8] Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (IORP).

[9] The issue resurfaced often during negotiations. The Scandinavian countries and the European Association of Paritarian Institutions (AEIP) demanded that the social partners be able to derogate from the Directive's rules, including on acquisition and preservation (Interview FB, NB). This was finally granted in 2013.

[10] Acquisition and preservation rules are so heterogeneous across Member States that no European-level interest group (e.g. PensionsEurope, BusinessEurope, AEIP) managed to agree on a common position on the 2007 and subsequent Directive drafts (Interview CV, RS, FB)

[11] By the time the Council reached its general approach in June 2013, it was clear for the proponents of capital transfers that these were out of the discussion if the Directive were to be adopted before the end of the legislature in May 2014. However, as it happens with European legislation, an issue that has been shelved may well resurface a number of years later.

[12] The Dutch MEP of the European People's Party group had a personal interest in getting the Directive approved. She is from Limburg, the Dutch region between Germany and Belgium, characterized by lots of workers operating cross-border.

[13] Countries such as Greece, Italy and Spain repeatedly voiced that with respect to vesting periods, the Directive is not ambitious enough. Since none of them has a developed supplementary pension market, they probably simply tried to defend the interests of their citizens working abroad (Mabbett, 2009: 786).

[14] Other occupational pension fund veterans, such as Scandinavian countries, already apply similar rules.

[15] The Directive guarantees preservation and information rights to disability and survivors benefits attached to individual schemes.

[16] According to the Commission, the impossibility to predict whether a worker would one day exercise his right to the freedom of movement generated the need for internal movements to be covered, not from the intention to harmonize, which would infringe subsidiarity, but as unintended consequence of this Directive.

[17] Germany may have to adapt significantly, as it lowered the minimum age requirement from 35 to 30 in 2001.

[18] Excluding AGIRC and ARRCO, which fall under the Coordination Regulations.