The protection of occupational pensions under European Union law on the freedom of movement for workers

William Baugniet

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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Department of Law

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Abstract

Occupational pensions are a key part of the pension system in many EU Member States where they provide workers with social protection in retirement. Their relevance should increase given Europe's old-age pensions crisis. However, occupational pensions are characterised by the complexity and diversity of benefit structures, financing methods and membership rules. This conceptual mosaic has led to different categorisations at national and EU level although solidarity at work and dignity in retirement remain at the heart of European pension systems.

The EU's new legal landscape supports the social vocation of the free movement of workers. Social security rights are already protected under Article 48TFEU and Coordination. This thesis argues that EU law must protect migrant workers' occupational pension rights. Member States are clearly facing common demographic, economic, social and political challenges. Moreover, the notion of occupational pension in EU law supports its characterisation as social protection. The justification of a social rationale to the free movement of workers is based on fundamental rights, the EU's social objectives and values as well as the requirement of 'social protection mainstreaming' under EU law.

The second part of this thesis claims that EU law has historically failed to deliver adequate protection of migrant workers' occupational pension rights, stemming from a longstanding regulatory gap in which the EU's legislative process has been hamstrung by institutional constraints. Positive integration has remained limited but a recent breakthrough in secondary legislation will bring a new social protection dimension to the free movement of workers, albeit one based on minimum requirements. Negative integration has also been limited, especially in horizontal situations despite recognition of the indirect effect of Article 45TFEU. However, fundamental rights are capable of providing a tool for the interpretation of the free movement of workers to ensure a more holistic respect for their social protection.

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Acronyms and abbreviations

AGIRC: Association générale des institutions de retraite des cadres

ARRCO: Association pour le régime de retraite complémentaire des salariés

CMLR: Common Market Law Review

DB: Defined benefit (see definition below)

DC: Defined contribution (see definition below)

DG: Directorate General

DS: Droit Social

EAPSPI: European Association of Public Sector Pension Institutions

EC: European Community

ECJ: Court of Justice of the European Union (European Court of Justice)

ECOSOC: Economic and Social Committee

EFRP: European Federation for Retirement Provision

EIOPA: European Insurance and Occupational Pensions Authority

EJSS: European Journal of Social Security

EU: European Union

ELR: European Law Review

EP: European Parliament

ETUC: European Trade Union Confederation

ILO: International Labour Organisation

OECD: Organisation for Economic Co-operation and Development

PAYG: Pay-As-You-Go (see definition below)

RBSS: Revue belge de sécurité sociale

SERPS: Social Security Earnings-Related Pension Scheme

S2P: Second State Pension

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

Definitions of key terms

Book reserves means: provision for occupational pensions on an employer's balance sheet. These often entail tax breaks for employers. Unlike a 'trust' (see below), pension assets and liabilities are not held separately but are directly retained by the company, against whom employees have a claim for the purpose of enforcing their pension rights and benefits.

Coordination Regulations means: Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the Coordination of social security systems (Official Journal of the European Union, L 166, 30 April 2004) and 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 (OJ L 284, 30.10.2009, p.1), which replaced Regulations 1408/71 and 574/72.

Defined benefit scheme means "any pension plan other than a defined contribution plan, including all plans in which the financial or longevity risk are borne by the plan sponsor. Benefits to members are typically based on a formula linked to member's wages or salaries and length of employment. In some plans the sponsor guarantees only a rate of return."
www.egm.org.tr/OECD/Occupational_Pensions_Core_Principles_and_Methodology_October_2003.pdf

Defined contribution scheme means: "a pension plan by which benefits to members are based solely on the amount contributed to the plan by the sponsor or member plus the investment return thereon. This does not include plans in which the employer that sponsors the plan guarantees a rate of return."
www.egm.org.tr/OECD/Occupational_Pensions_Core_Principles_and_Methodology_October_2003.pdf

Funded Schemes means: schemes in which pension contributions are accumulated in funds that are invested on the financial markets in order to pay for future pension benefits. Some funded schemes have a national reach (as is the case in the Netherlands) whereas others are employer/group specific (which is historically the case in the UK).

Migrant worker means: a worker who moves from one EU Member State to another in order to work.

Negative Integration means: the judgments of the European Court of Justice based on the common market provisions of the Treaties in order to prohibit Member States from applying or permitting unjustified obstacles to the free movement of goods persons, services and capital.

Occupational pension means: "A pension plan that is linked to an employment relationship between the plan member and the entity that establishes the plan (the plan sponsor). Occupational plans may be established by employers or groups of employers (e.g. industry associations), professional and labour associations (e.g. trade unions). Generally, the plan sponsor is responsible for making contributions under the terms of occupational pension plans, but employees may be also required to contribute. Sponsors may also have administrative or oversight responsibilities for these plans." (OECD definition)

Pay-As-You-Go (PAYG) Schemes means schemes in which taxes and pensions contributions by employees and employers are used directly to pay the pension benefits of pensioners. This reflects "inter-generational solidarity": workers' contributions support today's pensioners.

*Pension means "*a periodical payment made by government, company or employer, in consideration of past services.*"*[1]

Positive Integration means: the legislative action by the EU to remove obstacles to free movement caused by the different laws and practices of the Member States.

Safeguard Directive means: Council Directive (EC) No 98/49 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, 29 June 1998, OJ L 209, 25 July 1998, pp. 46-49.

Supplementary pension means a retirement pension provided for by the rules of a supplementary pension scheme established in conformity with national legislation and practice

[1] *Concise Oxford Dictionary, Oxford University Press, 5th edition (1964).* Recent definitions are split: *Pension* means *either* "A regular payment made by the state to people of or above the official retirement age and to some widows and disabled people" *or* "A regular payment made during a person's retirement from an investment fund to which that person or their employer has contributed during their working life" http://www.oxforddictionaries.com/definition/english/pension

Supplementary Pensions Directive means: Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights (Text with EEA relevance) OJ L 128, 30.4.2014, p. 1–7

Supplementary pension scheme means "any occupational pension scheme established in conformity with national legislation and practice such as a group insurance contract or pay-as-you-go scheme agreed by one or more branches or sectors, funded scheme or pension promise backed by book reserves, or any collective or other comparable arrangement intended to provide a supplementary pension for employed or self-employed persons." (Safeguard Directive)

Treaties means: the TEU and TFEU.

Trust means: An occupational pension scheme set up under a 'trust' (as is most common in the UK). The employer is responsible for sponsoring the scheme, which is run by trustees for the benefit of its members. The choice of employers to establish an occupational pension scheme in the form of a trust is usually voluntary although reference may be made to the relevant pension scheme in an employment contract. Once a trust deed has been established, its provisions are legally binding upon the Trustees who ultimately represent the interests of both the employers and the employees, subject to national legislation and case-law on trusts.

Vested pension rights means "any entitlement to the accumulated supplementary pension rights after the fulfilment of any acquisition conditions, under the rules of a supplementary pension scheme and, where applicable, under national law" (Supplementary Pensions Directive).

Vesting period means: "the period of active membership of a scheme, required under national law or the rules of a supplementary pension scheme, in order to trigger entitlement to the accumulated supplementary pension rights." (Supplementary Pensions Directive).

Worker means: an employee or a self-employed person.

Key distinctions regarding occupational pensions

Benefit Structure: Defined Benefit v Defined Contribution

The main distinction with regards to the benefit structure of occupational pensions is between "Defined Benefits" (DB)[2] and "Defined Contributions" (DC)[3]. Notwithstanding the different types of benefits, a key issue for migrant workers is their ability to obtain or retain pension rights under the rules of a scheme.[4]

Financing method: PAYG v Funded schemes

Different pension schemes may rely upon different financing methods. A key distinction is made between Pay-As-You-Go "PAYG"[5] and "Funded schemes".[6] PAYG pension systems are vulnerable to rising costs due to demographic changes relating to Europe's ageing population (see above), particularly in circumstances where the proportion of active workers diminishes in comparison with the proportion of pensioners. In "Funded" schemes, the assets may be held by trustees or by financial institutions ('pension funds') that

[2] See OECD definition above. DB schemes are 'earnings-related' and 'service-related'. DB pension benefits that are determined according to the employee's years of pensionable service (within the pension scheme) and the pensionable salary may either be based on the employees' final salary or on a career average. Members of DB schemes are generally able to calculate the amount of pension they can expect to receive in retirement. The scheme (and its sponsoring employer) takes on the investment risk and the mortality risk of their members (i.e. their life expectancy during which they will draw a pension). This structure therefore retains a degree of solidarity. In some cases, this risk may result in increased levels of contributions by either the participating employers or employees. As DB schemes are backed by the employer's covenant (or guarantee), they offer a degree of certainty of pension provision to their members subject to the employer remaining solvent.

[3] See OECD definition above. DC schemes are also known as "Money-purchase" schemes: a pension pot is accumulated, which is usually used to buy an annuity with an insurance company. The level of benefits provided to workers is dependent on the growth of a pension fund through investment on the financial markets as well as the state of the annuity market.

[4] This requires a member of a pension scheme having a legal right or entitlement to a pension benefit. Such legally enforceable rights may stem from a statute, a contract, a trust deed or a collective agreement between social partners (provided such agreements are legally binding).It is important to clarify the distinction between "enforceable" pension benefits and "mandatory" pension schemes which are established as a result of a statutory obligation. Whether the establishment of a scheme is voluntary or mandatory does not always dictate the enforceability of the rights provided under the scheme. Indeed, a voluntary occupational pension scheme set up on the initiative of a private employer may produce enforceable rights for workers (in particular regarding rights already accrued) just as a mandatory public scheme will also create a legal obligation that workers can enforce. Ultimately, pension benefits are enforceable where they do not constitute discretionary or charitable donations. The validity and the binding legal form of the scheme will dictate the enforceability of pension benefits.

[5] Typically, statutory social security pensions are provided on a PAYG basis although national pension systems are increasingly diversifying their structure with the effect that in some countries, a funded tier has been introduced within the first pillar of statutory social security schemes. Occupational pensions may also operate on a PAYG basis although this is relatively rare. In France, the mandatory occupational pension schemes show a clear preference for PAYG; indeed, this structure is retained by the "AGIRC and ARCCO" regimes. The longevity risk has put pressure on the PAYG financing of schemes where there is an imbalance between the amount that comes in as contributions and the amount that goes out as pension benefits. However, neither are all funded occupational pension schemes immune from such risk. The exposure of schemes to age related risks depends on the nature of the benefits that they provide.

[6] There is a strong tradition of funded occupational pensions in the UK, Denmark and the Netherlands.

manage large amounts of investment portfolios. These assets may subject to financial markets/investment-related risks, which leads to the need for their 'prudential' regulation. Finally, some occupational pension schemes are neither PAYG nor Funded but are accounted for through "book reserves" on the employer's balance sheet (e.g. in Germany). The method of financing adopted by an occupational pension scheme is often connected to the nature of its membership, e.g. PAYG schemes tend to be mandatory.

Membership: mandatory v voluntary schemes

Depending on the law, the culture of industrial relations and the pension system in Member States, membership by workers of occupational pensions may be either mandatory or voluntary. In some countries, either legislation or collective agreements make membership mandatory for employees. [7] Collective agreements may also be used to establish occupational schemes in which membership is not mandatory.[8] Finally, occupational schemes that have been set up either unilaterally by employers or pursuant to contractual arrangements generally offer voluntary membership.[9] There is no automatic link between the voluntary or mandatory nature and the benefit structure.[10]

[7] In addition, participation by employers in 'sector-based' or 'cross-sector' occupational schemes may also be mandatory. Countries with mandatory occupational pension schemes include Belgium, Denmark, Cyprus, Portugal, Netherlands, Sweden, Germany and France.
[8] This is often the case in Belgium, Bulgaria, Cyprus, Germany, Spain, France and Italy.
[9] Such schemes exist mainly in UK, Ireland, Germany, Austria, Greece, Cyprus and Finland.
[10] The Netherlands has mandatory funded schemes (many of which are DB) whereas several EU Member States from central and Eastern Europe have DC schemes that are mandatory by law.

INTRODUCTION

Three concepts: a new legal landscape under EU law, the complexity of occupational pensions and the social vocation of the free movement of workers under EU law

The purpose of this work is to provide an analysis of the protection of migrant workers' occupational pensions under EU law on the free movement of workers. The free movement of workers has itself been for many years a cornerstone of EU law on the internal market. In addition, the establishment and development of an EU legal framework on the 'Coordination' of social security systems has been a jewel in the crown of EU social security law and has been the subject of a vast and sophisticated analysis.[11] In contrast, the protection of migrant workers' occupational pensions under EU law on free movement of workers has for many years been a failure: the neglect, legislative paralysis and lack of a complete legal framework, have characterised an historic social deficit in EU law (explained in this thesis).

EU primary law, secondary law and the jurisprudence of the Court of Justice have all recently evolved, which has specific implications for the protection of migrant workers' occupational pensions. There is thus a *new legal landscape* under EU law that is applicable to this field. However, the *complexity* of occupational pensions in the EU has remained a constant source of difficulty for finding a method that offers genuine solutions to the problem caused by migrant workers seeking to combine on the one hand their right to free movement and on the other hand their social protection where this involves occupational pensions that do not fall within the scope of EU Coordination. In order to deal with the social deficit in this field, this thesis aims to reconstruct the social dimension of Article 45 TFEU through the prism of fundamental rights. In doing so, this thesis argues in favour of a social rationale for the protection of migrant workers' occupational pensions that takes into account their role as a source of social protection underpinned by the values of dignity in retirement and solidarity (between employers and employees and between generations where applicable). It also examines whether the legal tools under the free movement of workers (including those arising in the context of the new legal landscape outlined below) are capable of fulfilling the social vocation of this fundamental freedom in order to protect occupational pensions.

[11] For an overview of EU social security law, see *inter alia* (in English) PENNINGS.F, European social security law, Intersentia , 2010; (in French) KESSLER.F & LHERNOULD.J-PH, Code annoté européen de la protection sociale, Paris, Groupe Revue fiduciaire, 2006, see also MAVRIDIS. P, La sécurité sociale à l'épreuve de l'intégration européenne : étude d'une confrontation entre libertés du marché et droits fondamentaux; préface Antoine Lyon-Caen, Marie-Ange Moreau, Francis Kessler, Bruylant, 2003.

(i) A new legal landscape under EU law

In terms of primary law, the Lisbon Treaty did not change the content of the main provision of the Treaty dealing with the free movement of workers (Article 45TFEU ex Article 39EC). However, it did make some changes to Article 48TFEU (ex 42EC), including its voting conditions. Moreover, the Lisbon Treaty resulted in the values, objectives and principles of the EU being restated in the Treaties (as will be outlined in Chapter III). It also included a horizontal social clause in Article 9TFEU, which is of relevance to occupational pensions as a source of social protection. The other significant development that arose as a result of the Lisbon Treaty was that the Charter of Fundamental rights (the ***Charter***) became a binding source of EU law, thus sitting alongside the Treaties as primary law. These developments are relevant with regards to the rationale for protecting occupational pensions under EU law on free movement; they may also have an impact on the choice of legal tools available to achieve greater protection of workers in future. As such, they are destined to influence the social vocation of the free movement of workers.

The recent developments of EU secondary law in this field are also significant. 2014 was the year a landmark directive on 'supplementary pensions' (the ***Supplementary Pensions Directive***) was adopted despite the fact that it had been virtually dead and buried in 2009.[12] (This new major piece of positive integration will be analysed in Chapter V.)

In terms of significant jurisprudential developments in the field of the free movement of workers, 2011 was the year that the Court of Justice in *Casteels* gave its first preliminary ruling dealing with non-statutory occupational pensions in a case between private parties.[13] Although *Casteels* provided clarity with regards to the legal effects of Article 48TFEU, their remains some ambiguity with regards to the effects of Article 45TFEU and the situations in which the Treaty may bite and to what extent. The more general jurisprudence of the Court dealing with the scope and effects of fundamental of rights and its application in this field is also of interest as it offers an exciting, albeit controversial opportunity to clarify the social dimension of the free movement of workers under EU law.

These developments of secondary legislation and case-law have happened at a time when the free movement of workers is the EU's hottest potato. The debates reflect a wide spectrum of positions and anxieties that are often hard to reconcile as was shown by the

[12] Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights (Text with EEA relevance) OJ L 128, 30.4.2014, p. 1–7.
[13] Case C-379/09 *Maurits Casteels v British Airways* plc [2011] ECR I-01379.

European Parliamentary elections in 2014.[14] Moreover, the future trajectory of the EU has itself to come to a crossroads in terms of its legitimacy and the path of future economic and social integration is likely to be determined.[15] Ironically, the countries who are the most vocal are perhaps the ones who have the least need to complain.[16]In addition, the intertwined nature of the relationship between the free movement of persons and the three other free movements has also been called into question by Member States[17] as well as non-member States who are on the fringe of the EU but wish to enjoy the benefits of the internal market.[18]

The political answers coming from the EU have been both positive and negative. However, the human dimension of European integration remains a key political priority[19] in which the Commission has remained steadfast.[20] The negative warning to those who wish to cherry pick the benefits of the internal market without accepting the obligations that go with it has led to a clear message from the Commission: the free movement of persons is 'non-negotiable'; it is part and parcel of the package that forms the internal market. EU law has a duty to uphold and implement the principles and rights that derive from these fundamental freedoms. As stated by the Commission, the measures taken by national governments will be reviewed and challenged if they are incompatible with EU law.

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[14] In the UK, the largest number of MEPS was won by UKIP whereas in France, the Front National came first. There has been no shortage of political debate both at EU level and at national level on the free movement of persons. The removal of transitional restrictions for the free movement of Bulgarians and Romanians on 1 January 2014 saw tensions between the Commission and the discourse/proposals of British politicians as well as the 2014 debate between Nick Clegg (Leader of UK Liberal Democrats and Nigel Farage (UKIP leader), which illustrated the tension between the positive arguments for EU membership versus the populist scaremongering on the stereotypical myths about migrants. More generally, See FARGUES. Ph (ed), Is what we hear about migration really true? : questioning eight stereotypes, Report published by the European University Institute, Robert Schuman Centre for Advanced Studies, Migration Policy Centre (2014).

[15] http://www.bbc.co.uk/news/uk-politics-21158316 On 23 January 2013, Prime Minister Cameron called for a renegotiation of the EU Treaties and a referendum on British membership of the EU.

[16] According to Commissioner Viviane Reding, the UK is the biggest exporter of people in the EU with 2.2 million individuals leaving its shores to go and live in other EU Member States. BBC Radio 4's "Today" programme on 10 February 2014 in advance of a public debate in London on "The future of Europe". Arguably, the British economy has benefited from the internal market's free movement of workers, services, capital and establishment as much as any other EU Member State. The UK's economic growth is recovering faster than most other EU Member States. The dynamic nature of the British labour market has proven successful in creating jobs despite recent austerity measures. Arguably, the UK provides a model for the integration of different cultures and nationalities. However, will the economic and social benefits of the EU's internal market be recognised by British voters in the event of a referendum on EU membership in 2017 or will the politics of scaremongering prevail? In short, will British citizens choose to also be European citizens?

[17] From 1 March 2014, EU migrants in the UK will have to show they are earning at least £149 a week for three months before they can access a range of benefits. http://www.bbc.co.uk/news/uk-politics-26254735.

[18] The Swiss voted in a referendum in February 2014 for the imposition of quotas on immigrant workers.

[19] "*EU citizenship is the crown jewel of European integration. It is to Political Union what the euro is to our Economic and Monetary Union. Today's Citizenship Report places EU citizens centre stage*" said Vice-President Viviane Reding, the EU's Commissioner for Justice, Fundamental Rights and Citizenship. "*Ever since it was first included in the Treaties in 1993, EU citizenship has been evolving - but it is not yet mature: people still face obstacles exercising their rights in everyday life*."

[20] EUROPEAN COMMISSION EU Citizenship: Commission proposes 12 new actions to boost citizens' rights, PRESS RELEASE, Brussels, 8 May 2013.

However, national governments are not the only parties who flout the free movement of workers. The actions of private parties such as employers and the measures taken by occupational pension schemes may also have an adverse impact on migrant workers' freedom of movement, thus highlighting the importance of EU law in the context of horizontal relationships. A key question for this research is to what extent EU law on the free movement of workers must protect the occupational pension rights of migrant workers? Confronting the nature and vocation of free movement under EU law with the treatment of migrant workers' occupational pensions leads to identifying causes for concern. This thesis argues in favour of a social approach to EU law on free movement (through the prism of fundamental rights), by which it is hoped that the social potential of EU law on free movement for improving the protection of migrant workers' occupational pensions will be better harnessed in future. In the general context of the protection of individuals' legal rights under EU law, one cannot ignore the development of the doctrine of EU citizenship.[21] In *Zambrano*, the Court addressed the issue of the protection of the "substance" of EU citizens' fundamental rights in situations that do not involve any exercise of free movement (i.e. as an exception to the purely internal rule). On that point, it has been argued that "*at least in certain circumstances, the granting of the protection of EU fundamental rights to 'static' Union citizens would be coherent with the current state of evolution of both Union citizenship and Union fundamental rights*."[22] However, the area explored by this thesis does not pose a problem in terms of the legal status of the individuals whose rights are at stake. Indeed, the personal scope of this study specifically concerns *workers* who move between EU Member States, who constitute a category of legal subject that has historically derived many rights under EU law on free movement. There is even an autonomous definition of *worker* under EU law. However, material scope of the juridical infrastructure for the free movement of workers under EU law is neither complete nor fully mature. It requires both general and specific attention by all the EU institutions. Notwithstanding the new legal landscape under EU law on migrant workers' occupational pensions, the main difficulty that affects the articulation of the right of migrant workers to free movement and the protection of their occupational pensions stems from the complexity of this subject matter.

[21] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* (ONem) [2011] ECR I-1177, Opinion of AG Karston. See also GUILD. E (Ed.) The reconceptualization of European Union citizenship / edited by Elspeth GUILD, Cristina J. GORTÁZAR ROTAECHE, Dora KOSTAKOPOULOU, Leiden : Brill Nijhoff, 2014; In French, see MARZO.C La dimension sociale de la citoyenneté européenne, Florence : European University Institute, 2009.

[22] LAZZERINI.N, The scope of the protection of fundamental rights under the EU charter, Florence : European University Institute, 2013.

(ii) The complexity of occupational pensions

Terminology

Before analysing the issues that arise under EU law in relation to the protection of migrant workers' occupational pensions, some clear and precise terminology is needed given the different types of occupational pension schemes in the EU Member States.[23]One may note the common etymology, the linguistic differences and various definitions of occupational pensions at national level. The common Latin origin of the word 'pension' has resulted in similar meanings in English[24] and in French[25]: an old-age pension is essentially a periodical payment in retirement. The word 'occupational' refers to work, employment or profession.

The diversity of expressions in various European languages places highlights many different aspects of occupational pensions and reveals some conceptual similarities or differences. Occupational pensions are sometimes referred to in English as "company pensions", "employment-based pensions" or more recently "workplace pensions".[26] Each of these terms carries a slightly different emphasis. Occupational pension can be translated into French as "*retraite professionnelle*", which stresses its connection to a profession. An occupational pension scheme that is established by a company may be designated as a: "*retraite professionnelle d'entreprise"* or "*retraite collective d' entreprise*", which refers to the business to which it relates and/ or to its membership.[27] French legal and economic analysis tends to point out the "supplementary" or "complementary" nature of occupational pension provision within the French pension system, which has also permeated EU jargon. The terms "*retraite complémentaire*" and "*retraite sur-complémentaire*" are used in France to describe their relative role in terms of providing replacement income in retirement.[28] Other expressions like "*protection sociale complémentaire*" offer a perspective that relates to their

[23] KAUFFMANN.O in HENNION-MOREAU.S & KAUFFMANN.O (Eds), "Les retraites professionnelles en Europe", (Bruylant, 2007) p.6.
[24] "Periodical payment made especially by government, company or employer in consideration of past services." Concise Oxford Dictionary.
[25] "*une somme d'argent versée par un organisme social, par l'Etat à quelqu'un, pour subvenir à ses besoins, rétribuer d'anciens services, l'indemniser, etc.*" Le Petit Larousse, 100ème édition (2005) ; For Dupeyroux, « On désigne généralement par pension ou par rente des prestations périodiques destinées à l'indemnisation d'une perte de revenu supposée définitive : pensions de vieillesse, rentes accidents du travail » p.237.
[26] See http://www.pensionsadvisoryservice.org.uk/Occupational_Pensions/ ; The DWP website currently prefers the term "Workplace pensions" see:www.dwp.gov.uk.
[27] DUPEYROUX, BORGHETTO, LAFORE, RUELLAN (2001) Droit de la Sécurité Sociale, Dalloz, p. 1035.
[28] See DUPEYROUX (2001, Op.cit) ; For a comparative approach, see also: KAUFFMANN, "Retraites complémentaires en Europe", Semaine sociale Lamy, suppl. No. 671 (1993), and "Retraites complémentaires de vieillesse", Semaine sociale Lamy, suppl. No. 601 (1992), & Semaine sociale Lamy, suppl. No. 508 (1990).

broader purpose and extend beyond the field of pensions.[29] In Spanish, the terminology tends to focus on both the supplementary and financial nature of certain types of occupational pension schemes (rather than their link with employment): therefore the terms "*complementos de pensiones*" and "*planes y fondos de pensiones*" are preferred.[30] In Italian, the generic term of "*i fondi pensione*" is commonly used, which again focuses on the economic and financial nature of such schemes.[31] Company pension schemes are specifically referred to as "*fondi pensione negoziali*". A diverse range of expressions exists in German[32] and other European languages. Different pension systems exist in each EU Member State. Moreover a variety of pension schemes exists within each national system. As a result, some diversity in the definitions of occupational pensions under national law is inevitable.

One may also observe a variety of definitions of occupational pensions under national law. Illustrating such diversity leads one to observe contrasting approaches, for example between the UK and France. In the UK, occupational pensions have historically played a key part in providing retirement income alongside the minimum levels of pension provided by the State (as will be outlined below). Two key features of occupational pension schemes emerge from the broad definition provided by Section 1 of the Pension Schemes Act 1993[33]: firstly, the provision of pension benefits in retirement; secondly the connection between the pension scheme and a person's employment. However, these inherent characteristics of occupational pensions in general are not always treated as the defining criteria in other EU Member States. In French law, there is no single definition of occupational pensions under French law. This is because the nature of the French pension system has led to different pension 'régimes' that concern different types of occupational pension. The accepted terminology used in France refers to on the one hand, the "*regimes complémentaires obligatoires*" of the AGIRC and the ARRCO, which are mandatory and supplementary occupational pension schemes; and on the other hand, the "*regimes sur-complémentaires*", that include non-mandatory occupational pension schemes such as the PERCO (Plan d' épargne pour la retraite collectif). The above

[29] Droit Social devoted a special edition to *la protection sociale complémentaire* in April 1986*:* see the articles by LYON-CAEN : « La deuxième jeunesse de la prévoyance sociale » p.290 and TEYSSIE « La mise en place de la protection sociale complémentaire et le droit du travail » p.296.
[30] GARCIA VIÑA.J, Los planes y fondos de pensiones. Elementos clave de previsión social. Ed. Tirant Monografías (2006).
[31] LESCA.A, "I Fondi Pensione in Europa", (2007), Ed. Il Sole 24 Ore, I Libri di Guida al Lavoro.
[32] KAUFFMANN.O, "La place des retraites dans la protection vieillesse" in HENNION-MOREAU.S & KAUFFMANN.O (Eds), "Les retraites professionnelles en Europe", (Bruylant, 2007).
[33] *Occupational pension scheme means any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect in relation to one or more descriptions or categories of employments so as to provide benefits, in the form of pensions or otherwise, payable on termination of service, or on death or retirement, to or in respect of earners with qualifying service in an employment of any such description or category.*

categorisation indicates the voluntary or mandatory nature of membership as well as the extent to which such schemes supplement the State pension in France. Formulating a definition of occupational pensions that encompasses the diversity of pension systems and takes account of its complexity thus represents a major challenge at national and international level.[34] The difficulty in adapting the definition of occupational pensions under EU law and policy to the scope and objectives of European law on the free movement will be addressed in Chapter II. Before doing so, it is important to recognise that the complex and diverse role of occupational pensions is the product of asymmetric evolution of pension systems in the EU Member States.

The origins of occupational pensions in the EU welfare states

In Europe, mechanisms of solidarity between workers go back to Greek and Roman times. In the Middle-Ages, families, corporations, guilds, the church and the monarch provided various forms of charity and social assistance. Social protection against invalidity was visible in the armed forces of countries such as France and Britain.[35] Old-age pensions came into existence for the French and British navies at the end of the 17th century.[36] The need for protection against poverty in old-age has thus been tied to certain professions for several hundred years! However, it took a long time for the responsibilities of both the State and employers for providing social protection for workers (including pensions) to be recognised. For most of the 19th century, provision for old-age was seen as a matter of personal responsibility.[37]

Given the diversity of social security systems[38], the main Welfare States in the EU have been categorised in order to depict the "families" of pension systems, which they

[34] The OECD has sought to define occupational pension plans as follows: "A pension plan that is linked to an employment relationship between the plan member and the entity that establishes the plan (the plan sponsor). Occupational plans may be established by employers or groups of employers (e.g. industry associations), professional and labour associations (e.g. trade unions). Generally, the plan sponsor is responsible for making contributions under the terms of occupational pension plans, but employees may be also required to contribute. Sponsors may also have administrative or oversight responsibilities for these plans."

[35] Care of French soldiers who had been wounded and become invalid became the responsibility of the King with the establishment in Paris of the "*Invalides*" by Louis XIV built from 1670.

[36] In France, Colbert used the *règlement royal* of 23 September 1673 to order a deduction from the pay of all naval officers to be directed to a retirement fund. In England, naval pensions were instituted by William III in 1693 and established by an order in council of Queen Anne in 1700. Encyclopædia Britannica 11thEd.

[37] During the Victorian era in Britain, the motto was "self-help" and state intervention was kept to a minimum through a succession of "Poor Laws" designed to make recourse to such assistance a matter of last resort. Charles Dickens depicted the harsh conditions in the workhouses to which able-bodied workers were subjected in order to receive such assistance. The pension situation evolved with the industrial revolution at the end of the 19th century.

[38] G. and A. LYON-CAEN, Droit social international et europeen, Dalloz 1993, p.236.

encompass. Academic studies have compared welfare regimes according to their institutional characteristics as well as taking into account the political, social and economic goals of national systems: a famous typology refers to three different conceptions of the role of the State in providing social security.[39] There has been on-going debate regarding how many types of welfare states are present in Europe.[40] In addition, the EU Welfare States are evolving, given the demographic, economic and social constraints, which they face. These challenges are discussed in Chapter I.

Traditionally, scholars have described "pension models" and "pension clusters" in order to contrast national pension systems according to whether they are of "Bismarckian" or "Beveridgean" inspiration[41], which may also be described respectively as "Social insurance" or "Multi-pillar" systems.[42] Some authors distinguish an additional Scandinavian or "Nordic" model, whether for general social security purposes[43] or for specific pension purposes[44].

The breakthrough in pensions and more generally in social security matters came in Germany, during the 1880s, with the introduction of the first system of "social insurance" by Bismarck.[45] Its historic success influenced the social security systems and pension regimes in Austria, Sweden, Norway, Italy, France and the Benelux countries. Today, the legacy of relatively generous earnings- related old-age pensions in these countries is still visible in "Bismarckian" pension systems based on mandatory social insurance in which solidarity between generations is the value that underpins sharing the cost of social protection.

In other countries, old-age pensions emerged and evolved differently. For example in Denmark, a universal flat-rate pension scheme was set up in 1891.[46] In the UK, the Old Age Pension Act of 1908 provided means-tested flat-rate old-age pensions from age 70 that were not subject to worker contributions.[47] The flat-rate nature of state pension benefits left scope

[39] ESPING-ANDERSEN, G. Three Worlds of Welfare Capitalism, Princeton University Press (1990). 3 groups of Welfare state are determined by reference to stable social institutional arrangements between State, family and market: the *Liberal* regime, *Corporatist-conservative* regime and *Social democratic* regime.
[40] A fourth cluster of Mediterranean countries under the banner of a *"Latin familialistic"* regime may be added to differentiate the role played by the family in ensuring solidarity and social protection: see FERREIRA (1996), The southern model of welfare in social Europe, Journal of European Social Policy 6, 1: 17-37.
[41] On the contrast between Bismarckian vs Beveridgean models, see MYLES.J and QUADAGNO.J (1997) Recent trends in public pension reform: a comparative overview in BANTING.K. and BOARDWAY.R (eds) Reform of retirement income policy: International and Canadian perspectives, School of public study, Queens University, Kingston, Ontario p.247-271.
[42] BONOLI, Two Worlds of Pension Reform in Western Europe", Comparative politics, Vol.35, N.4.p399-416.
[43] See DUPEYROUX (2001) Op.cit p.60-61.
[44] For Lesca, the Nordic model does not include Denmark, which is deemed part of the Multi-pillar family.
[45] Bismarck introduced these systems in his famous speech to the Reichstag on 17 November 1881. In 1889, the German law on old-age insurance required contributions to be made by both workers and employers and provided rights to a pension from age 70, with the state providing a minimum amount. LESCA (2007) Op.cit
[46] ARZA.C & KOHLI.M (eds.), Pension Reform in Europe - Politics, policies and outcomes, (2008).
[47] Flat rate benefits were a pre-cursor to the approach of Beveridge in: "Social Insurance and Allied Services".

for businesses to supplement workers' income in retirement. Subsequently, many occupational pension schemes were established in the UK where they were to become a major part of the overall pensions system.[48] After the Second World War, a modern welfare state was instituted by the British Parliament through the National Insurance Act 1946. Workers were entitled to build up a right to flat rate basic State Pension, which provided a relatively low level of old-age benefits. Under Beveridge's approach to social security, the State only provided a 'safety net' hence retirement income needed to be supplemented by private initiative. Occupational pensions were thus encouraged in Britain's pension system.[49]

A combination of low State pensions and a shortage of manpower meant that occupational pensions grew rapidly in a number of European countries following the Second World War, as peace was followed by economic growth, relative prosperity[50] and the need to attract and retain the work-force. In the UK, occupational pensions in the public sector and nationalised industries have had high coverage levels since the 1950s: "There was an estimated 5.3 million active members in 2011, compared with 4.2 million in 1991 and 5.5 million at the peak in 1979)".[51] In the private sector, coverage grew from 1953 to 1970, which was linked to the high level of unionisation in the manufacturing industry although the causes were deemed "multi-factorial".[52] However, the subsequent decline of manufacturing in the UK has been accompanied by decreasing trade union membership in the private sector. Moreover, the coverage of private sector employees by occupational pension schemes has also diminished over time. "In 2011, there were 2.9 million active members in private sector schemes, compared with 6.5 million in 1991 and 8.1 million at the peak in 1967.[53] In terms of coverage, it is hoped that this trend will be bucked and reversed with the advent of 'auto-enrolment' in the UK (see below).

The evolution in industrial relations has also had an impact on the development of occupational pensions in countries whose pensions are mainly based on social insurance. In France, workers were required to join supplementary occupational pension schemes in

[48] "*By the early 20th century, some of Britain's largest employers, including railways and manufacturing companies had established pensions institutions based upon the inherited common law trust institution*." See CLARK.G, Pension Fund Capitalism, Oxford University Press, (2000).
[49] Occupational pensions have for a long time been deemed "an essential ingredient of UK retirement income." See BLACKBURN.R, (2002). Banking on Death or Investing in Life: The History and Future of Pensions.
[50] In French see FOURASTIÉ.J, Les Trente Glorieuses, ou la révolution invisible de 1946 à 1975,Paris, Fayard, 1979, (Rééd. Hachette Pluriel n° 8363).
[51] Office for National Statistics: Statistical bulletin: Occupational Pension Schemes Survey, 2011, released 19 September 2011 available on www.ons.org.uk.
[52] According to Clark: a "*set of inter-related forces together raised levels of coverage rates through to about 1970 to just about 50% of working people*." See CLARK.G (2000), Op.cit.
[53] Office for National Statistics (2011) Op.cit

addition to the general social security State pension.[54] Membership of these "regimes complémentaires obligatoires" was made mandatory as their name suggests. Consequently the coverage of the workforce in France by these occupational pension schemes is very high, which is why they are deemed akin to social security. The AGIRC and ARRCO are key features of the French pension system and symbolise the 'inter-generational contract'. [55]

European social security systems were born from the common need to ensure social protection but were organized according to different philosophies. The larger Member States followed the Bismarckian approach. Occupational pensions thus evolved in separate ways and at a different pace within those pension systems. Hence, the importance of occupational pensions as a source of social protection varies between Member States.

The relative importance of occupational pensions in terms of coverage

According to the Social Protection Committee, the levels of coverage of pensions in different Member States may "*vary greatly depending on the type of scheme: statutory funded, occupational or voluntary pension provision*." Historically, the statistics have not always been clear in this field.[56] Still, the "*heterogenous*" coverage of occupational pension schemes in the EU Member States is categorised by the Social Protection Committee as follows:[57]

High coverage (over 75%)	Medium coverage (between 40 and 70%)	Low coverage (under 20%)
e.g. Denmark, Netherlands and Sweden	e.g. Belgium, Germany, Ireland, UK and Cyprus	e.g. Italy, Austria, Spain, Finland, Luxembourg, France (schemes other than the AGIRC and ARRCO)

[54] For private sector workers, the source of occupational schemes originated from collective agreements between the social partners. The AGIRC supplementary pension regime for management staff ("cadres") was set up following the "Convention Collective Nationale" signed on 14 March 1947.The National collective agreement for management staff of 14 March 1947 provided for a supplementary pension scheme for management staff ("cadres") It was then extended by law to all members of that professional category. Another occupational pension scheme for all other salaried employees (ARRCO) was established by the National inter-professional agreement of 8 December 1961 (sur la "retraite complémentaire des salariés").

[55] The fact they are financed on a PAYG basis makes them akin to the notion of social security insofar as the PAYG method of financing is deemed to constitute a hallmark of solidarity between generations. However, they are clearly occupational schemes, not least because they were established by collective agreements between social partners, which highlight their origin in the working relationship.

[56] "*a lack of agreed measures, combining with contrasting systems and the possibility of double counting means that there are not readily comparable international data sets in this field. In particular, a significant cause for potential bias is the occurrence of double counting, when coverage from various sources are added.*" The Social Protection Committee: "Privately Managed Funded Pension Provision and their contribution to adequate and sustainable pensions" (2008).

[57] The Social Protection Committee (2008) Op.cit

The Commission also used the following national figures to indicate the coverage of workers by occupational pension schemes in some Member States in 2005:[58]

Member State	Coverage of workers by occupational pensions
Netherlands	Around 94% of the employees aged between 25 and 65 years old are covered by a second pillar pension
Sweden	Around 75% of the working population and around 90% of the Swedish employed population.
Denmark	Around73% of the active population is covered by an employer-managed scheme or civil service pension scheme.
Germany	In March 2003, supplementary pension schemes covered 57% of employees that participate in the first pillar (including public and private schemes).
Slovenia	In summer 2004, about 53% of the active population was covered by supplementary schemes and levels were expected to increase to 60% of the workforce.
UK	The coverage of supplementary schemes in 2005 was of around 33% of the population of working age and 43% of the employed population.
Ireland	43% of employees are members of supplementary pension schemes.
Belgium	About 40% of employees are covered by supplementary pension schemes, (of which 10% are covered by branch provisions and 22.5% by group insurance). About 10 % of self-employed are also covered by supplementary schemes.
France	About 15% of the active population is covered by non-mandatory occupational pension schemes although virtually all the employed population is covered by mandatory supplementary pension schemes organised by the AGIRC & ARCCO.

Occupational pensions are particularly important in countries where the State pension is low (e.g. Beveridgean systems). As a result, they have historically covered large numbers of the workforce (and constitute a vital source of replacement income). Nevertheless, a clear downward trend can be observed in relation to coverage by occupational pension schemes in the UK and Ireland, which was a concern for those governments. [59] In Bismarckian pension systems, occupational pensions "top up" the retirement income of many workers.

Further variations in coverage may exist according to the age of workers, their gender and the section of the labour market in which they work (e.g. low wage employment). For example, low coverage by occupational pensions particularly affects young people under the age of 29 in the UK (26%) and Ireland (27.5%) compared to Germany (55%).[60] In addition, "young women and the less well-off are least likely to be covered by a non-State pension and most likely to have varied contributions" as a result of a broken contribution history due to childcare, caring, illness etc. Contribution rates will also differ depending on the nature of the benefits provided under the scheme (DB or DC). The above variations in contributions may also impact on the amount of income provided to pensioners upon retirement.

[58] COMMISSION Staff Working Document, Annex to the "Proposal for a Directive of the European Parliament and the Council on the improvement of portability of supplementary pension rights." (COM) 507 final.
[59] Indeed, the 2005 figures regarding were down from about 50% of employees in 1991. However, coverage levels within each pension system are evolving all the time. Government initiatives such as auto-enrolment in the UK are designed to boost the number of workers covered by occupational pensions.
[60] The Social Protection Committee: Privately Managed Funded Pension Provision and their contribution to adequate and sustainable pensions (2008) p. 14. NB/ Percentages include coverage by individual schemes.

Coverage by an occupational pension scheme does not guarantee adequate social protection in old age. Many existing occupational schemes are changing their benefit structure for future accrual (e.g. from final salary to career average or defined contributions) which is likely to affect replacement income levels. In addition, many schemes are winding up or closing to new members. This affects coverage rates and the quality of pension provision.[61] The NAPF Annual Survey of 2012 points out that just under half of private sector DB pension schemes currently still open to all staff are considering closing access to membership for new staff and provide access to a DC pension scheme instead." The share of replacement income provided by occupational pensions varies between Member States.

Countries where occupational pensions provide a large slice of replacement income

The first pillar of pension provision (i.e. social security) still plays a vital role in most pension systems: "*In the vast majority of Member States, unfunded statutory pension schemes provide the dominant proportion of pensioners' incomes*." However, levels of replacement income provided in retirement by occupational pensions may vary a great deal in Europe. This is particularly true in the private sector: "*current contribution of private pensions to pensioners' incomes is diverse between Member States and generally uneven within Member States*". The amount and proportion of replacement income provided by occupational pensions depends on the coverage of schemes, the level of contributions, their maturity (the level of pensioners with a full career) and their overall place within the pension system. According to the Social Protection Committee, "*the contribution of privately managed schemes remains modest in most Member States and represents up to a third of the total income of retired people in certain Member States*".

Historically, the proportion of replacement income provided by private occupational pension schemes has been limited in countries with generous statutory pension schemes (or mandatory 'quasi-public' PAYG occupational pension schemes) that already provide relatively high level of earnings related pension benefits in retirement. Hence, the overall contribution of private pensions is viewed as "modest" in countries such as France, Luxembourg, Italy, Spain, Greece, Malta, Bulgaria, Czech Republic, Estonia, Latvia, Lithuania, Poland, Austria, Slovenia, Slovakia and Romania. In contrast, private pensions

[61] In the UK, according to the NAPF, "just 13% of final salary pensions were open to new joiners in 2012, a drop of a third from 19% in 2011 and the steepest fall since comparable data began in 2005, when 43% were open." The NAPF Annual Survey revealed that 'defined benefit' pension funds are increasingly closing to the workers who are already in them. The number that shut their doors to existing staff climbed to 31% in 2012, a hike of over a third from 23% in 2011." See NAPF Annual Survey 2012, available on www.napf.co.uk; See also NAPF Press release on "Final salary pensions shut at record rate in the private sector (28 January 2013).

represent a greater share of retirement income (between 5% and 20%) in Belgium, Germany and Sweden. In Germany, there is a strong tradition of occupational pension schemes (although these often apply to well-paid workers).[62]

In other countries, such as Denmark, Netherlands, UK and Ireland, statutory pension schemes have mostly provided flat-rate benefits. Earnings-related benefits are either limited or no longer present within the framework of statutory provision. [63] Therefore, occupational pensions have consistently played a greater role in providing income replacement (between 20% and 30% of income) in these Member States.[64]

However, the levels of income replacement are likely to evolve over time due to certain trends, including both positive aspects (e.g. the greater provision by occupational pensions through auto-enrolment in the UK) as well as negative trends from a worker's perspective (e.g. the shift from DB to DC), which may entail lower income replacement levels. The picture even among the overall workforce is very uneven with regards to the place of occupational pensions: according to the OECD, employees earning higher wages tend to have occupational pensions that provide a bigger share of income in retirement; in contrast lower earners tend to rely to a greater extent on statutory provision.[65]

According to the Social Protection Committee: "*international comparison is difficult due to a lack of comparable information*." Nevertheless, the SPC has provided current and projected estimated proportions of pension income provided by supplementary pensions.[66] The following figures have been used by the SPC to reflect the contribution of supplementary pensions (including occupational pension schemes and individual third pillar pensions) to theoretical replacement rates (base case). The first figure is for new pensioners retiring in 2006 and the second figure is for future pensioners retiring in 2046:

[62] In 1993, supplementary pensions represented 11% of total pensions in Germany. Source: European Federation for Retirement Provision (EFRP) – European Pension Funds 1996 – based on World Bank Report. In 2003, about 14% of pensioners' income derived from supplementary pensions (7% from occupational schemes and 7% from individual schemes).

[63] See for example, the removal of the Second State Pension (S2P) in the UK.

[64] The Social Protection Committee study (2005). (Op.cit).
These figures have remained consistent over the past twenty years. NB/ In 1993, supplementary pensions represented the following percentages of total pensions: 32% in the Netherlands, 28% in UK; 18% in Denmark and Ireland. Source: European Federation for Retirement Provision (EFRP) – European Pension Funds 1996 – based on World Bank Report.

[65] FORSTER. M & D' ERCOLE M. Income distribution and poverty in OECD countries in the second half of the 1990s, OECD Social, Employment and Migration Working Papers No. 22 (2005).

[66] The Social Protection Committee: Privately Managed Funded Pension Provision and their contribution to adequate and sustainable pensions (2008) (Op.cit) p. 19.

Member States	Theoretical replacement rates (base case) for pensioners retiring in 2006	Theoretical replacement rates (base case) for pensioners retiring in 2046
Belgium	9%	20%
Denmark	10%	45%
Germany	10%	25%
Ireland	54%	43%
Cyprus	10%	15%
Netherlands	60%	60%
Sweden	22%	23%
UK	22%	32%

Occupational pensions matter to a large number of workers in the EU, in particular in Denmark, Netherlands, UK, Ireland and Germany. Despite asymmetries of coverage and replacement income between Member States, the common challenges affecting the welfare states of many Member States suggests that supplementary pensions will grow in importance as governments restrict the levels of statutory pensions. A key uniting factor is their common purpose as a source of social protection even though the level of this function of occupational pensions may vary between Member States.[67] This justifies the need for appropriate protection of workers' occupational pensions under EU law on free movement.

In the past, the levels of coverage and income replacement provided by occupational pensions in the EU have been a difficult issue to quantify due to a shortage of statistics. Nevertheless, one must verify whether the notion of occupational pension under EU law supports their characterisation as a form of social protection (which will be done in Chapter II). From a worker's perspective many occupational pensions are a source of social protection given that they provide a significant source of retirement income for many workers in the EU. Therefore, the main questions that arise from this complex situation are: 'Why and how must EU law on free movement of workers deal with the protection of their occupational pensions?' This entails identifying the purpose of EU law on the free movement of workers and to explore the function of the legal tools available within the EU legal order. Calls for the EU to provide a social market economy require the EU's internal market to benefit workers.[68] The new legal landscape justifies a social approach to the free movement of workers.

[67] Occupational pensions have historically been considered at national level as source of social protection (the importance of which may vary). The complexity and diversity of the pension systems in the EU member states must be taken into account when seeking to address the notion of occupational pension at EU level.
[68] JOERGES.C, The "Social Market Economy" as Europe's Social Model? in Magnusson.L and Stråth.B (eds), A European Social Citizenship? Preconditions for Future Policies in Historical Light, Lang 125-158 (2005).

(iii) The social vocation of the free movement of workers under EU law

Distinguished economists highlight the importance of the keeping in mind the social objectives of old-age pensions.[69] At national level, politicians have also placed emphasis on the social dimension of pensions.[70] Academic literature on labour law often calls for greater social justice at European at transnational level. But to what extent are workers' rights to social protection relevant in the protection offered under EU law to migrant workers' occupational pensions? The 'ideological neutrality' and evolution of the EU's approach to the internal market has been commented upon.[71] Furthermore, the "*reconceptualisation of the internal market*" entails the need for all citizens to benefit from market integration insofar as the fundamental freedoms have "*social as well as economic objectives*."[72]

This thesis starts from the premise that the free movement is particularly necessary in relation to the free movement of workers, to whom social rights may attach in the context of their exercise of their fundamental freedoms. Clearly the free movement of workers needs to ensure their social protection rights are upheld. EU law currently offers legal protection of workers' social security rights through Article 48 TFEU and the Coordination Regulations, which has enabled a mature body of EU case-law to develop. However, the void created by the exclusion of 'supplementary' occupational pensions from the scope of the Coordination Regulations shows the limitations of the legal protection of such pensions under EU law on free movement. One is drawn to criticize the limitations of the internal market rationale and to argue for a social approach.

The political and legal challenge at EU level is to consider the social protection aspects of the notion of occupational pensions as the basis for determining the nature of legal protection required under EU law. In order to determine the scope and effects of the relevant legal provisions on free movement, one must first explore the function of the Treaty articles and the role of the Charter. As will be argued in more detail in Chapter III, the Treaty articles on the free movement of workers suggest that they are not just an economic freedom but have a clear social dimension. The Treaties provide through Articles 45 and 48TFEU the material competence that justifies the protection of migrant workers' occupational pensions by the EU

[69] ORSZAG.P & STIGLITZ.J (1999) "Rethinking Pension Reform: Ten Myths About Social Security Systems", article presented during the conference: "New Ideas About Old Age Security", World Bank.
[70] VANDENBROECKE.F, La Qualité de nos régimes de pensions, RBSS 4th term (2001).
[71] "*A successful single market requires widespread harmonisation of standards and environmental protection, as well as the social package of employees. This need for a successful market not only accentuates the pressure for uniformity, but also manifests a social (and hence ideological) choice which prizes market efficiency and European wide neutrality of competition above other competing values.*"J. WEILER The Transformation of Europe (1991) 100 Yale LJ 2403, 2476 – 2478.
[72] CRAIG & DE BURCA EU Law Text Cases and Materials (5th edition).

legislator (although the internal market rationale has its limitations that will be discussed in Chapter III while the choice of legal basis is discussed in Chapter IV). The social dimension of the freedom of movement is supported by the Court of Justice's prominent body of case-law on the protection of workers' (and citizens') social security rights.

In addition, the protection of migrant workers in horizontal situations against discrimination on grounds of nationality (in *Angonese*) and against obstacles to free movement (in *Bosman*) show the willingness of the Court to place the protection of workers at the heart of the Treaty provisions.[73] However, the social vocation of the free movement of workers stems from the articulation of the Treaties and the Charter. This argument is consistent with the analysis that "the paradigm of fundamental rights as values of the EU legal order, connected to the dignity of individuals qua human beings has progressively found its way into the Treaties."[74] Therefore, a social approach to the free movement of workers entails interpreting the Articles 45 and 48TFEU in line with the Charter. This leads to the argument that the free movement of workers should involve protection of workers' fundamental (social) rights that are contained in the Charter.

The role of fundamental rights as "constitutive values" of the EU legal order, combined with the horizontal social clause in Article 9 TFEU underpins the social rationale for more protective EU secondary legislation (Chapter III). From a worker's perspective, fundamental rights justify criticism of the regulatory gap in this field (Chapter IV). In addition, it raises a question mark over the current method and content of positive integration (Chapter V) whereby the recent achievements in terms of new content of the Supplementary Pensions Directive can be put into context. Moreover, there remains a great deal of ambiguity with regards to the role that the free movement of workers may play in horizontal situations in terms of the creation of directly effective rights in non-discriminatory situations. This is potentially controversial, especially given the debate on the legal effects of the Charter. The current state of negative integration thus reveals crucial limitations in terms of justiciable rights under EU law, which will be discussed in Chapter VI.

[73] Case C 281/98 *Angonese* [2000] ECR I-04139; Case C-415/93 Union royale belge des sociétés de football association and Others v Bosman and Others [1995] ECR I-04921

[74] Lazzerini observes that their role within the EU legal order justifies their protection within the scope of EU law and argues that "the Court must ground its reconstruction of the function of EU fundamental rights on the interpretation of – first of all –the Treaties." See LAZZERINI.N (2013) Op.cit p.19.

(iv) Scope of the thesis, methodological approach and overview

Scope of the analysis

The scope of this thesis is limited to the freedom of movement of workers and the protection of their occupational pension rights under EU law. Legitimate concerns may arise for migrant workers who enter or leave the EU from/to a third country. However, such issues are not addressed herein as they bring into play the external relations of the EU although they too raise important considerations from a transnational labour law perspective.[75]

This research concerns 'migrant workers' in the broader sense. This includes both employees and self-employed workers; relevant differences in treatment between the two will be highlighted where appropriate. The discussion also affects migrant workers who are not EU citizens but who nevertheless have a legal status that allows them to legitimately exercise rights to move from one EU Member State to another. For those individuals, their occupational pension rights are derived from their status as workers, like EU citizens.

Some occupational pension rights may also be considered as akin to social security pensions whereas other occupational pensions are deemed 'supplementary' under EU law. The leading idea of this thesis is that EU law on free movement should uphold the rights of migrant workers in relation to occupational pensions insofar as they constitute a form of social protection whose existence derives from their connection with the workplace.[76] Much criticism will be made in the discussion of the division under EU law between statutory 'social security' pensions (which includes occupational pensions with a statutory underpin) and non-statutory 'supplementary' occupational pensions. Indeed, this has clear implications (and adverse effects) on the free movement of workers. Basic and key references are made to the protection afforded to statutory pensions under the Coordination Regulations but this thesis does not analyse the substantive protection offered to workers' pensions under the Coordination Regulations, which has already been the subject of a great deal of academic literature and research in this field.[77] This work deals with the legal analysis of positive EU law on the free movement of workers and the protection of their occupational pensions. Its main focus thus concerns non-statutory 'supplementary' occupational pensions, which have been excluded from the main body of EU social security law.

[75] Workers entering or leaving the EU may face similar or even greater challenges to their social protection in terms of the effect of their mobility on their occupational pensions. Studying this would involve venturing into the field of the external relations of the EU Member States with third countries.

[76] Some occupational pensions provided by public sector employers may be treated like social security and therefore receive a different level of legal protection compared to private occupational schemes.

[77] See PENNINGS.F (2010) Op. cit and in French KESSLER.F & LHERNOULD.J-PH (2006) Op.cit and MAVRIDIS.P (2003) Op.cit.

Methodological approach

Before addressing the issues that will be analysed, the methodological approach of this thesis will be briefly set out. The basic premise is that all workers (and citizens) should share the same aspiration to social protection in old age. Although the nature and levels of retirement income provided by occupational pensions may vary between EU Member States (who remain competent to determine their pension systems), there are two key questions: the first is whether migrant workers should be entitled to equivalent levels of legal protection of their old-age pensions, notwithstanding the different forms that these may take? The second is whether the legal protection afforded to migrant workers' occupational pensions under EU law should be equivalent to the treatment of 'static' workers' occupational pensions? The working hypothesis is that EU law on the free movement of workers needs to offer adequate legal protection to migrant workers' occupational pensions but has so far fallen short in terms of method and outcome. The justification for legal protection is based on three arguments: firstly, the EU Member States are facing an old-age pensions crisis in respect of which occupational pensions are expected to play a growing role; secondly, occupational pensions must be considered as a form of social protection; and thirdly, the free movement of workers under EU law includes a social protection rationale. Together, these constitute the '*foundations for the protection of occupational pensions under EU law on the free movement of workers'*. However, EU law on the free movement of workers has historically suffered from a *social deficit* (and still continues to do so) insofar as it has failed to adequately protect migrant workers' occupational pension rights. Indeed, institutional and political difficulties left a regulatory gap in the protection of migrant workers' occupational pension rights that persisted under EU law until the adoption of the Supplementary Pensions Directive. In addition, positive integration has followed a technical approach. Finally, negative integration varies between cases against Member State and those between private parties.

Overview

The main idea of this thesis is that EU law on free movement of workers is a fundamental freedom and right, which must uphold the occupational pension rights of migrant workers. The longstanding nature of EU legislation and case-law in the field of social security provides a legal benchmark that supports the argument that an appropriate EU legal framework is required to uphold the social protection rights of migrant workers.

Part I sets out the *foundations* for the protection of occupational pensions under EU law on the free movement of workers. To put in context the role that EU law has to play in

the field of occupational pensions, the *challenges* affecting occupational pensions in Europe are outlined in *Chapter I*. The *notion* of occupational pensions under EU law on the free movement of workers is assessed in *Chapter II* in two regards: in terms of its coherence with other areas of EU social/economic integration; and in order to determine the need for EU law to articulate the free movement of workers with the principle of social protection in this field. The limitations of the internal market rationale and the social rationale for improving the protection of workers in this field (through fundamental rights) are evoked in *Chapter III*.

Part II deals with the *social deficit* in the protection of occupational pensions under EU law on the free movement of workers.

An evaluation of the causes of the *regulatory gap*, including the *substantive limitations* and the *procedural/institutional constraints* affecting EU law up to the Supplementary Pensions Directive is provided in *Chapter IV*.

The treatment of occupational pensions in terms of *positive integration* on the protection of migrant workers' occupational pensions is analysed in *Chapter V*, which highlights issues of labour law that arise in the context of secondary EU legislation on the internal market.[78] Positive integration is dealt with first and separately from Negative integration for chronological and substantive reasons. Firstly, the EU legislator has been a decisive cause of the lack of protection for migrant workers' occupational pensions arising from their exclusion from the Coordination Regulations as well as the source of subjective rights through secondary legislation adopted in 1998 and 2014 following intense political negotiation. Secondly, the Court's role has been limited given the level of judicial constraint and historic shortage of case-law in this field. More recently however, some progress has been made in its jurisprudence concerning private parties and that prospect may have had some leverage (especially given its timing) on the EU legislator to provide clarification (and substantive protection) due to the potential for an expansion of references to the ECJ on the basis of primary law.

The advances and limitations of EU law on the free movement of workers in the context of *negative integration* regarding both 'vertical' litigation (on tax) and 'horizontal' situations between workers and their employers are discussed in *Chapter VI*.

[78] Kilpatrick has suggested that "*investigating how internal market architecture affects the accommodation of labour rights helps us to better understand internal market-labour rights conflicts and how they might be resolved*." See KILPATRICK.C Internal Market Architecture and the Accommodation of Labour Rights: As Good as it Gets? EUI Working Papers LAW No. 2011/04.

PART I. THE FOUNDATIONS FOR THE PROTECTION OF OCCUPATIONAL PENSIONS UNDER EU LAW ON THE FREE MOVEMENT OF WORKERS

In relation to occupational pensions, the free movement of workers presents weaknesses in terms of its articulation with workers' social protection. Adequate social protection and social security are recognised as fundamental rights in Article 10 of the 1989 Community Charter[79] but this does not provide workers with an enforceable right under EU law and remains the competence of Member States. Nevertheless, the social ramifications of the free movement of workers are relevant in terms of positive and negative integration. The Coordination Regulations provide a legal framework for the treatment of migrant workers' social security rights but the chink in the armour concerns occupational pensions.

EU law needs to fulfil the social protection dimension of the free movement of workers in order to be consistent with the fundamental social rights, principles, objectives and values of the EU legal order. Failure to do so would result in a *social deficit* under EU law which would cast a shadow over European integration and its social model. The makers and shakers of EU law have a duty to avoid a disjointed and uneven playing field for migrant workers. To do so they must breathe confidence into the compatibility between workers' social protection and the pursuit of job opportunities across the internal market when exercising freedom of movement. Although social security pensions remain the backbone of social protection in old age, occupational pensions are a key source of social protection in many EU Member States. Notwithstanding their complexity and diversity, their role is set to grow. The logic that EU law is required to protect the occupational pensions of migrant workers is based on the following key contextual, conceptual and vocational issues: first of all, Chapter I reviews the on-going demographic, economic and social challenges that make it necessary to protect migrant workers' occupational pensions under EU law on free movement; it also asks whether political prioritisation and different approaches have translated into effective EU policies? Chapter II verifies the coherence of the notion of occupational pensions under EU law on free movement, in particular, the consistency of its relationship with the principle of social protection. Chapter III determines the limitations of the internal market rationale in this field; it also explores whether the social rationale for EU law to protect the occupational pensions of migrant workers offers a valid alternative?

[79] "*Every worker of the European Community shall have the right to adequate social protection and shall, whatever his status and whatever the size of the undertaking in which he is employed, enjoy an adequate level of social security benefits*". (Article 10 of The Community Charter of Fundamental Social Rights of Workers).

CHAPTER I. THE CHALLENGES AFFECTING PENSION PROVISION IN THE EU

Section 1. The demographic, economic and social challenges

A. The demographic context

a. Europe's ageing population

b. The increased rate of dependence of older people

B. The economic context

a. The influence of globalisation on occupational pensions

b. The interaction with financial markets

c. The economic and financial crisis (2008- 2012)

d. The sovereign debt and monetary crisis (2010- 2012)

C. The social context

a. Current trends affecting the EU labour market

b. Current trends affecting occupational pension provision

Section 2. The political challenges for the EU

A. The drive to increase worker mobility

a. The historic legacy of worker mobility in EU integration

b. The evolving nature of worker mobility and its effects

c. The prioritisation of worker mobility at EU level

B. The EU's choice of approach and the methods of EU integration

a. The choice of objectives and approach

b. The choice of regulatory technique

c. Towards a holistic approach for pensions in the EU?

Conclusive remarks

Introductory remarks

The need for EU law on the free movement of workers to engage with the protection of migrant workers' occupational pensions and social protection hinges upon the common demographic, economic and social challenges affecting the EU Member States (Section 1). These challenges translate into political priorities for the EU, which illustrate the extent to which occupational pensions are recognised as a key source of social protection (Section 2).

Section 1.The contextual challenges facing the EU Member States

A. The demographic context

European demographics show an ageing population and an increased rate of dependence.

a. Europe's ageing population

Europe's population is getting older.[80] This has a cost for social security and pension systems across the EU Member States. The population considered in age to work (15-64) is expected to drop by 20.8 million between 2005 and 2030.[81] The effects of these changes have called into question the sustainability of social security systems.[82] Most EU Member States have been affected by the need for pension reform.[83] Among the solutions debated at national level, the diversification of pension sources would suggest an increase in the role of occupational pensions and private pensions in particular.

The demographic causes of Europe's ageing population are twofold: lower birth rates and an increase in life expectancy.[84]The causes of lower birth rates are often social and economic.[85]The increase in the number of women with a professional activity, which is seen as part of the solution to Europe's ageing population and is encouraged by most Member States, does not appear to have an adverse effect on the birth rate as witnessed in the Scandinavian countries.[86]

The second reason behind Europe's ageing population is an increase in life expectancy in Europe: better health is resulting from better food, better living conditions, better safety, less poverty and improved medical treatment. However, human longevity has economic and social implications when it is not matched by an increase of birth rates and of

[80] According to Eurostat, the EU population as at 1 January 2012 was 506 million. It is projected to increase to 521 million by 2035 as a result of immigration. However, a decrease in numbers is expected to follow, which suggests the population will return to its current size (506 million) in 2060. The effect of the demographic changes affecting Europe's population is that there will be increasingly fewer young people and more middle-aged, old and very old people. This trend began in 2006 when the "baby boom" generation started to retire.

[81] UN World Population prospects (2002 Revision) & Eurostat 2004 Demographic Projection.

[82] In countries whose pension systems are financed through PAY-AS-YOU-GO, which are based on the principle of solidarity between generations, there will be a decrease in the number of active workers who pay for the pensions of retired workers. Pensioners are also living longer, which means a greater financial burden for the above PAYG pension systems as they have to pay pensions for longer.

[83] NATALI, D. (2008), Pensions in Europe, European Pensions. Brussels, PIE-Peter Lang.

[84] From 2015, the total number of deaths is expected to exceed the number of births. This will create a demographic imbalance that may be hard to correctas the birth rate required for each generation to renew itself is 2.1. The average birth rate has declined from 2.6 children per woman in 1960 to a current EU average of 1.5.

[85] Causes include later access to the labour market, the precarious nature of employment, the cost of living, the attitude of today's young people towards relationships and having children and the absence of pro-family policies backed up by social and economic incentives.In particular, the lack of a comprehensive "*social infrastructure*" for childcare directly affects the birth rate in many EU Member States.

[86] OECD 2004, Employment Outlook (2005), Society at a Glance: OECD Social Indicators: Table comparing birth rates and the employment rate of women aged 25-54.

the workforce. On the economic front, studies have suggested that the economic growth in the EU Member States may be stifled by an ageing population.[87] This is likely to result in less tax revenue for governments who fund statutory social security pensions. The long-term financial viability and sustainability of national pension systems is at stake as Europe's ageing population has resulted in an increase in the rate of dependence of retired people on the current working population. This causes increased public spending on social protection (not to mention the challenges for healthcare systems in the EU).[88]The cost of an ageing population also affects occupational pensions (e.g. defined benefit schemes are affected by increased longevity), which are still seen as a useful tool for dealing with the greater dependence of older people on the working population by adding to their social protection.

b. The increased rate of dependence of older people

The increase in life expectancy is followed by an increase in the rate of dependence of older people (over 65) on the population in age to work (15-64).[89]The risk for social protection in old-age and the matter of old-age provision has come to the fore across the EU and has shone the spotlight on the choice of instruments to provide retirement benefits.[90] There is a tendency for governments to promote occupational and/or personal pensions, in particular by encouraging private saving for pensions.[91]

Where greater reliance is expected to be placed on occupational pensions, there remains the question of who will bear the longevity risk and related costs?[92] As a consequence of the ageing population, many employers and occupational pension schemes

[87] EUROPEAN COMMISSION – Report by the working group presided by Wim Kok (2005).
[88] EUROPEAN COMMISSION (SEC 2006) forecasts an increase in spending on pensions of 2.2% of the Gross Domestic Product (GDP) of the EU at 25 during the period 2004-2050.
[89] In 2008, the rate of dependence was 25%: in other words, there were 4 people in age to work for every person over 65. This trend is set to deepen over the next 30 years and beyond. Projections suggest that in 2060, the rate will be 53%, in other words only 2 people in age to work for every person over 65. Such projections are averages and mean that in some countries in Eastern and Central Europe (such as the Czech Republic, Slovakia, Slovenia, Poland, Bulgaria and Romania), rates of dependence may hit 60% whereas in Denmark, UK, Ireland, Luxembourg and France, rates of dependence are expected to be closer to 45%. The increased rate of dependence has led to a general concern that pension systems will find it hard to sustain the financial burden and to provide adequate retirement income to pensioners in the future.UN World Population prospects 2002; EU 25: Eurostat 2004 Demographic Projection.
[90] Governments have aimed to introduce employment-related measures such as prolonging working life (by delaying retirement) and increasing the proportion of female workers. Other policy solutions have also been considered. Many social security regimes (especially those offering generous pensions and those financed on a PAYG basis) have been deemed too expensive and subjected to reforms.
[91] The introduction of auto-enrolment in the UK reflects the projected importance of occupational pensions.
[92] In defined benefit (DB) schemes, this risk will fall on the scheme (and indirectly on the employer) whereas in defined contribution (DC) schemes (money-purchase schemes), the risk will fall on the workers who are individual members of the scheme.

have sought to reduce their exposure to risk.[93] The result is that occupational pension benefits are becoming less generous in terms of their structure (e.g. a move from DB to DC), which has a knock on effect on workers' levels of income in retirement. Moreover, the split between income provided by state pensions on the one hand and occupational pensions on the other raises the question of the role of occupational pensions as part of workers' social protection.

Dealing with the budgetary pressures of social protection expenditure represents a challenge for each Member State of the EU as it affects the pensions systems that are currently in place at national level.[94] The fact that many issues are common to the Member States has meant that Europe's ageing population has thus become the focus of political attention at EU level in recent years.[95] Indeed, there is an overarching concern regarding the adequacy and sustainability of pensions in Europe, which has led to calls for the EU to adopt a holistic approach to pensions. The above demographic challenge and the stakes of reform have led to the *values* associated with social protection and pension systems coming to the fore. The European Parliament passed a Resolution of 11 November 2010 on the demographic challenge and solidarity between generations.[96] European policy initiatives to raise awareness of the need to work for longer include the 2012 "European Year for Active Ageing and Solidarity between Generations". Extending working lives is seen by Member States as a key response to the demographic evolution.[97]

Poverty in old-age might result from failure to address increased dependency, which highlights the social roles of the different stakeholders affected.[98] The responsibility of employers to bear some cost of workers' social protection in retirement is crucial in terms of organising, participating in and developing occupational pensions. The role of occupational

[93] For example, in October 2013, following the threat of its owner to close the INEOS oil refinery in Grangemouth (Scotland), workers agreed to a deal under which their final salary pension scheme will be replaced by a defined contribution scheme under which Ineos will contribute between 9 and 11 per cent and employees will contribute 6 per cent (Reference The Scotsman, Wednesday 30 October 2013).

[94] For an overview of national pension reforms, see NATALI. D. (2008) Op.cit.

[95] Commission Green Paper (2005): "A new solidarity between generations to face demographic change"; See also Commission Communication of 29 April 2009 on "Dealing with the impact of an ageing population in the EU (2009 Ageing Report) COM (2009) 0180.

[96] Resolution of 11 November 2010 on the demographic challenge and solidarity between generations: Texts Adopted P7_TA (2010) 0400.

[97] BBC website 5 December 2013: 'Autumn Statement: Wait longer for your state pension' "*So the state pension age (SPA) is going to be raised even more quickly than previously planned. In his Autumn Statement, the Chancellor, George Osborne, announced that it would now go up to 68 sometime in the mid-2030s, rather than between 2044 and 2046*.

[98] LESCA.A (2007) Op.cit p.8; At the general level, Lesca mentions the need to harness the contribution of older people to achieve economic growth by improving the transfer of competence and experience to younger generations. In addition he advocates developing new forms of solidarity between generations and modernizing programs of social protection. He identifies the family as having a fundamental role to play in increasing birth rates and achieving a work-life balance. This is relevant given the increase in the numbers of women working in the labour market.

pensions is likely to grow in future. This needs to be borne in mind when dealing with the treatment of occupational pension rights of migrant workers under EU law in the future. The common nature of the demographic challenge affecting social protection systems of the Member States together with the common values shared by the EU underpin the contextual relevance of occupational pensions in EU law and policy.

B. The economic challenge for occupational pensions

Occupational pensions are not immune to the common economic challenges affecting the EU Member States. The impact of globalization in the field of work and employment relations needs to be measured "globally and locally" (at EU, national and regional level).[99] Moreover, the interaction between occupational pensions and financial markets as well as the impact of successive crises (financial, economic, sovereign debt and monetary) all form part of the economic context surrounding occupational pensions.

a. The influence of globalisation on occupational pensions

Globalisation is described by the ILO as "*an economic phenomenon with social consequences*".[100] It is defined as "*the removal of barriers to free trade and the closer integration of national economies*".[101] Since the 1990s and as a result of their interdependence, economic events tend to have global repercussions on the decisions of financial markets, economic actors and governments.[102] This has both positive and negative implications for pension systems as a whole.[103] Through the employment relationship,

[99] MOREAU. M-A, (2006), Normes sociales, droit du travail et mondialisation, Ed.Dalloz.
[100] ILO Report on the social dimension of globalisation (2004).
[101] It reflects the development of international trade, the increase of foreign investment, the development of multinational corporations, the regionalization of economic activities, the development of new technologies/means of communication and the central importance of financial markets. See STIGLITZ.J, Globalization and its discontents (2002), p.IX, Ed. Penguin.
[102] MICHALET. C.A, Qu'est-ce que la mondialisation? (2002).
[103] Stiglitz starts from the premise that globalization can be a "force for good with the potential to enrich everyone in the world, particularly the poor". However, he warns against the imperfect nature of the market and its inability to resolve certain social issues including in the field of social protection. He also highlights the shortcomings of sticking too rigidly to economic dogma and warns against the assumption that "markets arise quickly to meet every need". He mentions that at the time when many social security systems in Europe were created, there were no private firms that would sell insurance against risks such as unemployment and disability. He refers to the negative effects of a dogmatic approach to liberal economics. In particular, certain negative consequences of globalization can be attributed to the way it has been managed by the institutions and players responsible.He describes the "devastating effect that globalization can have on developing countries, and especially the poor within those countries". See STIGLITZ (2002) Op.Cit.

occupational pensions are connected to the businesses that sponsor/ participate in such pension schemes. They have thus become inseparable from a company's financial health.[104]

Globalisation has led to an increase of international transactions (share sales, business sales and mergers), in particular over the past twenty years. Occupational pension liabilities are frequently a key concern for the parties to a corporate transaction, especially when Defined Benefit schemes are in place.[105] Such transactions often raise a question mark over the legal treatment of occupational pensions in their aftermath.[106] Indeed, corporate behaviour all too frequently betrays a negative approach to how occupational pensions are considered as a burden by potential buyers and by some employers. This contributes to the on-going reduction in the quality of occupational pensions.

Greater worker mobility is also a feature of globalisation. This renders all the more relevant the risk that migrant workers' occupational pension benefits may be affected by the behaviour of their employer. Less scrupulous employers may discriminate or impose obstacles that may devalue the role of occupational pensions as instruments of social protection and pose a threat to the freedom of movement for workers. Another issue with an impact upon occupational pensions is the relationship between pension funds and the financial markets.

b. The interaction between occupational pensions and financial markets

Pension funds are vehicles for raising capital and constitute key investors in the financial markets.[107]At the same time, funded pension schemes provide retirement benefits to

[104] The economic environment in which these businesses operate has a bearing on occupational pension schemes. Notwithstanding the ups and downs of economic cycles, certain global factors have an economic impact on the development and treatment of occupational pensions, particularly in the private sector. The nature, level and management of occupational pension liabilities by sponsoring employers is often taken into account by analysts and will frequently have an impact on its share price on the financial markets.

[105] In the event of a take-over, the strategic perspective of the new employer regarding occupational pension provision may not coincide with existing practice or with the expectations of the workforce. Potential buyers, such as private equity funds often shy away from entering into a transaction where a defined benefit scheme is involved. Alternatively, some purchasers may seek to buy a business, which has undergone a reorganization that either leaves the pensions scheme in the seller group or changes its benefit structure. An unfortunate consequence has been the trend for DB schemes to close to new members, with companies preferring to offer DC schemes instead. Sellers often seek means of avoiding triggering statutory pension liabilities, which may reduce the financial viability of a scheme. For example, occupational pensions were a big issue in the British Airways and Iberia merger. BBC News, May 2010.

[106] Employer contribution towards occupational pension regimes may vary from being mandatory or voluntary. Employers and schemes have to respect their contractual obligations and legislation may even trigger a statutory payment on behalf of the employer upon the occurrence of certain events.

[107] Their investments play an important role in promoting growth and through their medium to long-term approach, they also help to provide stability in the markets. As shareholders, with large stakes in some companies, they also help the development of corporate governance. The privatisation of Royal Mail in October 2013 targeted institutional long-term investors such as pension funds rather than major speculators.

their members, thus fulfilling an important social protection function that entails its own financial and regulatory challenges.[108] Nevertheless, exposure to collapsing stock markets together with the global financial crisis and the recent economic recession in Europe took its toll on the financial investments of many funded occupational pension schemes as well as on the economic performance of businesses that sponsor and participate in such schemes.

c. The impact of the economic and financial crisis (2008- 2012)

The significant amount of capital held by pension funds has led to them being heavyweights in the financial services sector. In the autumn of 2008, the biggest financial and economic crisis since the Great Depression of 1929 first hit the United States[109]and then turned into a global economic downturn.[110] Volatile oil prices[111] had adverse repercussions on stock markets around the World thus reflecting the lack of confidence. In response, central banks (e.g. the Federal Reserve, the European Central Bank and the Bank of England) cut interest rates to record lows. Pension funds invest heavily in stocks, shares and bonds so many suffered losses with consequences for companies, pension schemes and workers.[112] Political leaders tried to rethink the regulation of financial services and capitalism in general as witnessed at the G20 summit in London in April 2009 where the express goals of the

[108] Good investment may produce healthy dividends or returns, which will boost the financial health of a pension scheme. However, failed investments may cause a loss of value of the assets of occupational pension schemes and in some cases will result in substantial deficits. These affect the funding levels of some occupational pension schemes to a point that may jeopardize their long term viability. In the case of defined benefit schemes, the investment risk is shouldered by the sponsoring employer, who must bridge any shortfall to meet its pension promise. However, in the case of defined contribution schemes, the member's portfolio diminishes and reduces the amount that a worker will receive as a pension on retirement.

[109] The loss of confidence in the housing sector in the US led to a lack of credit being provided by banks to households and small and medium sized businesses.The sub-prime crisis in the US mortgage industry led to the bail-out of Fannie Mae and Freddy Mac. The biggest single event in the banking sector was the collapse of Lehman Brothers. The ripple effect throughout the financial industry led to bail-out packages being offered by governments in the EU and the United States. A number of banks were restructured (e.g RBS) and/or nationalised either in full (Northern Rock) or in part (Lloyds TSB).

[110] The consequences remain to be measured in full but most EU countries have suffered from low growth and/or dipped in and out of recession, thus confirming the saying that: "when America catches a cold, Europe gets pneumonia." Even Chinese growth has been stinted compared to the record levels China had been achieving from the 1990s to 2008, showing just how intertwined the global economy has become.

[111] The cost of crude oil soared to around US$145 per barrel during the summer of 2008 before plummeting back down to less than US$50 in December 2008. This had an impact on the transport and tourism sectors.

[112] In the case of Defined Contribution schemes where the investment risk is borne by the worker, the loss of share value will in some cases have had a negative knock on effect on the amount of capital built up in the scheme and consequently on the amount received as a pension annuity. In the case of Defined Benefit schemes, the investment risk would have been borne by the schemes themselves with the sponsoring and participating employers footing the bill. This may have further encouraged some companies to cut down their pension exposure even more than they were already doing. Some pension funds did well out of the crisis as they were able to buy shares at low prices, e.g. the state pension fund in Norway.

summit were "*to start the process of reform so as to manage globalisation as a force for good in the medium term*" with a focus on "*Stability, Growth and Jobs*".[113]

The economic crisis had a knock on effect on jobs in certain parts of the economy in both the United States and Europe.[114] Understandably, employment became the immediate social priority leading to governments propping up their banks and some key businesses. Nevertheless, many pension reforms that were planned in both the public and private sectors before the financial crisis remained on the agenda. The lack of growth also affected the financial health of many businesses, with an indirect impact on occupational pension schemes.[115]

The financial and economic crises have undoubtedly had an adverse effect on occupational pensions, especially in the private sector.[116] However, the recession and lack of economic growth that ensued had a far-reaching impact beyond the private sector as it shone the spotlight on the budget deficits of many governments, including those who had themselves stepped in to prop up their banks, only to themselves suffer from issues of sovereign debt (e.g. Ireland and Spain). Public sector occupational pensions in several Member States had already been affected by reforms and spending cuts, which began as a result of the EU's demographic challenge. These reforms continued as a result of the global economic downturn and the sovereign debt crisis that followed.[117] The issues at stake for the EU became that of the '*adequacy*' and '*sustainability*' of pension systems as a whole.

[113] Western political leaders have advocated a different kind of "capitalism" based on enterprise, not speculation. There have also been calls from the WTO for countries not to engage in protectionist practices.
[114] Jobs in the financial sector were the first to go. The construction industry was heavily affected too, particularly in Spain. Furthermore, the crisis in the steel industry involved redundancies on a large scale. The automobile industry was also affected although governments stepped in with support for large companies (e.g. General Motors in the United States).
[115] In particular, defined benefit schemes are seen as the most likely to be affected as they rely on the strength of the employer's financial covenant to fund a given scheme. Economic and financial pressures on companies have thus affected the financial position of many occupational pension schemes. In 2009, the trustees of a British Airways pension scheme agreed to waive a guarantee in order to improve the financial health of the company. When a company becomes insolvent, it is no longer able to make future contributions to its occupational pension scheme. Members of an occupational scheme that is being wound up rely heavily on the legal protection a Member State has put in place to guarantee a certain level of benefits. Unfortunately, the number of DB schemes winding up in EU Member States has risen over the past decade.
[116] Financial difficulties have plagued businesses and occupational pension schemes, with reciprocal impacts on employers' financial health as well as the continuity, nature and membership of occupational pension schemes.
[117] For example, there was a review of public sector pensions in the UK, conducted by the Independent Public Service Pensions Commission, chaired by Lord Hutton, whose final report was published on 10 March 2011.

d. The sovereign debt and monetary crisis (2010- 2012)

In the aftermath of the financial crisis, the dire financial situation of certain countries took centre stage.[118] In 2010, the "government debt" crisis affected many countries in the Euro-zone and indirectly most EU Member States.[119] In principle, the rules of monetary union already required Member States in the Euro-zone to keep a grip of their public deficits. However, certain budgetary rules had been flouted for many years until the crisis. Unsustainable national budget deficits were compounded by high unemployment in Spain and Greece, which suffered from years of recession. Since 2010, the Euro which has been the common currency of the EU Member States who opted for monetary union has come under a great deal of strain.[120] The sovereign debt crisis led to the announcement by many EU Member States of austerity measures and budgetary cuts, for example in the UK, France, Spain, Italy and Greece.[121] This led to further reductions in public spending on pensions and additional pension reform (which had already started for demographic reasons as mentioned above).[122] In the long run, a likely consequence of the reduction of statutory benefits is that it will either lead to a lack of pension saving or result in greater reliance on occupational pensions. EU Member States have not been affected equally by the recent economic challenges. Globalisation and the economic/financial crises are also relevant to the evolution of social protection, occupational pensions and the increase of worker mobility in the EU.

C. The social context

The freedom of movement for workers affords the right to search for employment opportunities across the EU. This is a particularly valuable legal right given the high levels of unemployment in some Member States and is likely to result in an increase of worker mobility, as will be outlined below. Although there is clear consensus at EU level on the need to boost employment, this has not translated into a common social policy with Member States

[118] Pakistan, Turkey, Hungary and Iceland all applied to the IMF for a loan or sought alternative solutions.Iceland entered into a loan agreement with Russia and devalued its currency.
[119] The 2010 government debt crisis started in Greece, which was on the verge of bankruptcy as it was unable to service its debts without a bail-out. The government debts of Greece, Spain and Portugal were all downgraded by debt-rating agencies. This led to a run on the Euro, which sank to record lows against the US dollar. The result was a support package for Greece by the EU Members of the Euro-zone.
[120] The risk of default of countries such as Greece made the markets worry about the risk of contagion to other Member States that are part of the Eurozone and beyond. Certain Member States have been more vulnerable than others to market forces. The cost of borrowing has increased for the governments of Greece, Ireland, Spain and Italy, whereas the cost of government borrowing has fallen for Germany and UK.
[121] The case for greater budgetary rigour also prompted the need for action at EU level, which led to 25 EU Member States (minus the UK and the Czech Republic) to agree on the terms of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the ***Fiscal Compact***) which was signed on 2 March 2012 and entered into force on 1 January 2013.
[122] This trend deepened in Ireland, Greece and Hungary, where the IMF stepped in with financial support.

guarding their social sovereignty very closely and limiting the tools of social integration to policy coordination. However, the prospect of greater worker mobility should prompt a re-think of the social dimension of the EU's internal market: existing tools under EU law need to offer sufficient protection to the occupational pensions of migrant workers. Two key areas that together constitute a social challenge for the EU are jobs and social protection.

a. The EU labour market and the prospect of greater worker mobility

The European labour market is characterised by poles of employment and unemployment. Moreover, the changing nature of working patterns reveals issues of precariousness affecting large amounts of the workforce in the EU. As for the reform of national pension systems, in particular statutory pensions, it is combined with the risk of deterioration regarding the quality of occupational pension provision. Overall social protection outcomes are becoming less favourable and a source of concern for many workers.

The polarisation of employment in the EU is the result of the high levels of unemployment that have affected many European Member States for the past thirty years. As observed by Schmid, "*a substantial part of this unemployment is 'structural', reflected in the high proportion of long-term unemployment or in a socially selective incidence of unemployment*."[123]Greater numbers of migrant workers in the EU are leaving countries with high unemployment such as Spain and Greece in order to go to Member States offering better prospects of finding work such as Germany and the UK. The current imbalance between poles of employment and unemployment is set to deepen the trend for greater worker mobility in the years ahead.[124]EU law and policy on the free movement of workers are thus required to keep up to speed with these developments.

The common challenge of reducing unemployment in the EU has prompted a re-think in terms of European employment strategies. The Commission's Communication known as Europe 2020[125] offers "A strategy for smart, sustainable and inclusive growth". [126]Among the

[123] SCHMID, G. (2002), Transitional Labour Markets and the European Social Model: Towards a New Employment Pact, in: G. Schmid and B. Gazier (eds.): The Dynamics of Full Employment. Social Integration through Transitional Labour Markets, Cheltenham, UK and Northampton, MA, Edward Elgar, 393-435.
[124] For example, mass unemployment in Spain (which currently stands at approximately 45% of the workforce) is still a serious problem in 2012 although it is not a new phenomenon. In contrast, the increase in the employment figures in UK in 2012 was encouraging (although fairly surprising given the lack of economic growth). In addition, the German economy has resisted particularly well to the economic downturn. As a consequence, many Spanish citizens have moved to the UK, Germany and France in the search for work as well as beyond European borders to emerging markets such as Brazil.
[125] COMMUNICATION FROM THE COMMISSION: EUROPE 2020 A strategy for smart, sustainable and inclusive growth, Brussels, 3.3.2010, COM (2010) 2020.

"Flagship initiatives" of Europe 2020 that are relevant to the mobility of workers, one may identify: "Youth on the move"[127] and "An Agenda for new skills and jobs".[128] The Commission has confirmed the need to adapt the legislative framework, in line with 'smart' regulation principles, to evolving work patterns (e.g. working time, posting of workers). It has also identified the need to strengthen the capacity of social partners for social dialogue at all levels. The Commission undertook to define and implement the second phase of the "flexicurity" agenda. Arguably, pension provision may be deemed to be an element of "security" within the EU's broader "flexicurity" approach, which was part of the Lisbon Strategy's goal of "sustainable growth with more and better jobs". The Commission advocated "*new forms of flexibility and security for individuals and companies as well as for Member States and the EU*".[129] The renewed Lisbon Strategy for Growth and Jobs thus called for an "*integrated flexicurity approach*" to enhance flexibility and security in the labour market.[130] However, it was not clear to what extent the goal of increasing cross-border employment opportunities actively took into account the protection of occupational pension rights accrued through employment. In theory, flexicurity reinforces the notion of different tiers of social responsibility with regards to pension provision.[131] Arguably, improving the employment situation is a pre-condition to incentivising employers and employees to develop the provision of occupational pension benefits. Indeed, the provision of social protection through occupational pensions is linked to the existence of better employment opportunities.

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[126] It aims to offer a vision of a "*social market economy for the 21st century*", which can deliver "*high levels of employment, productivity and social cohesion*". Its social priority is one of "*Inclusive growth: fostering a high-employment economy delivering social and territorial cohesion*".

[127] This aims to "*enhance the performance and international attractiveness of Europe's higher education institutions and raise the overall quality of all levels of education and training in the EU, combining both excellence and equity, by promoting student mobility and trainees' mobility, and improve the employment situation of young people.*" Young people represent an important the target constituency for worker mobility.

[128] This aims to "create conditions for modernising labour markets with a view to raising employment levels and ensuring the sustainability of our social models." In particular, the Commission has committed itself to "*facilitate and promote intra-EU labour mobility and better match labour supply with demand with appropriate financial support from the structural funds, notably the European Social Fund (ESF), and to promote a forward-looking and comprehensive labour migration policy which would respond in a flexible way to the priorities and needs of labour markets.*"

[129] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Towards Common Principles of Flexicurity: More and better jobs through flexibility and security COM (2007).

[130] A policy component of flexicurity is the modernization of social security systems in order to "*provide adequate income support, encourage employment and facilitate labour market mobility*." This needs to be squared in practice with regards to occupational pension rights. A key focus of flexicurity involves providing an *adequate* level of unemployment benefits. However, the acquisition of occupational pensions is conditional upon employment, which raises the question of the interaction between flexicurity and occupational pensions.

[131] There is no doubt that employers and employees must play a part through participation in occupational pension schemes in order to enhance the security of workers in terms of retirement income. However, for individuals who are not employed, the responsibility for pension provision remains with the social security system and the individual.

However, flexicurity has not been criticised for its lack of materialisation in the aftermath of economic and financial crisis as well as for its theoretical shortcomings.[132] Although greater worker mobility may constitute part of the solution to deal with unemployment, the key social priority for the EU must be to ensure that the exercise of freedom of movement does not in turn create a problem by resulting in diminished levels of social protection in retirement (particularly where non-statutory occupational pensions are at stake as these are not covered by the Coordination Regulations). The protection of migrant workers' occupational pensions therefore depends first and foremost on the body of EU law upholding their right to freedom of movement.

Another significant social phenomenon in the EU is the expansion of different working patterns and the risk of precariousness in the EU labour market. Within Member States, part time work, fixed term work, temporary agency work, and other "non-standard forms of employment" have become increasingly frequent within Member States[133]. Such working patterns may affect the position of migrant workers with regards to their occupational pension rights. The nature of the traditional labour market has undoubtedly changed and EU law is still in the process of finding ways to adapt to these new trends.[134] New policy strategies for improving employment prospects in the EU labour market have for obvious reasons of competence been particularly timid with regards to addressing the need to ensure both the quality of occupational pension provision and minimise the risk of social exclusion across the Member States as a whole.

The EU clearly has a limited policy role in matters of social protection. Nevertheless, the Flagship Initiative: "European Platform against Poverty" reflects the importance of this risk in the EU.[135] Moreover, the Commission has undertaken to assess the adequacy and sustainability of social protection and pension systems. In so doing, it has encouraged Member States to "*fully deploy their social security and pension systems to ensure adequate*

[132] See VIELLE.P, Flexicurity: Redefining The Security Of European Citizens (Observatoire Social Europeen), No.1, October 2007;

[133] See the research on "The Employment Status of Individuals in Non-Standard Employment", by B. BURCHILL, S.DEAKIN, S.HONEY, UK Department of Trade and Industry (1999).

[134] See Commission Green Paper "Modernising labour law to meet the challenges of the 21st century", COM (2006) 708 final, Brussels, 22/11/2006. There are potential issues, in particular with regard to the acquisition of occupational pension rights, which may have a knock on effect on workers' social protection. A specific example is the position of researchers who may have extremely mobile and fragmented careers. See FEDERATION OF DUTCH PENSION FUNDS (2011), Supplementary Pensions for Researchers Pragmatic Solutions to Remove the Obstacles. Amsterdam: mimeo.

[135] It aims to "*ensure economic, social and territorial cohesion, building on the current European year for combating poverty and social exclusion so as to raise awareness and recognise the fundamental rights of people experiencing poverty and social exclusion, enabling them to live in dignity and take an active part in society.*"

income support". Poverty in old-age raises the issue of the methods to deliver income in retirement, among which occupational pensions are a relevant tool.

Finding the tools to achieve 'full employment, labour productivity and social cohesion' remains a key priority for the EU.[136] However, the Commission is limited in this context to a minor role involving mainly policy coordination and soft law. Indeed, the constraints affecting EU involvement in issues related to social protection means that effective action at EU level is only possible in matters where there is a clear EU competence. The free movement of workers (and persons) provides such a field. The Commission once argued that "*portability of social security entitlements would be improved*" through a path that involves "*improving opportunities for benefit recipients and informally employed employees*." At the European level, there is already protection of social security entitlements of migrant workers as a result of the Coordination system.[137] However, occupational pensions constitute a field in which there has historically not been a comprehensive body of law providing an equivalent level of protection (see Chapter IV below), which highlights the difficult nature of the social (and political) challenge that faces the EU as well as the need for such a challenge to be taken on!

Meanwhile, the modernization of social protection systems that is currently taking place across the Member States has led the Commission to adopt a more holistic approach to its policy outlook that brings all the sources of pension provision into the equation. Nevertheless, it remains clear that the effectiveness of any body of protection under EU law depends on the outcomes of national processes within the Member States that are themselves not always characterised by social progress, given budgetary constraints and the reform of traditional methods of pension provision.

b. The evolution of occupational pensions in the Member States

Alongside dealing with unemployment and encouraging worker mobility, many governments have continuously reformed and 'modernised' national pension systems. The

[136] Over the past decade, the Commission has identified the modernization of labour law as "*a key element for the success of the adaptability" of workers and enterprises*." In the same optic, the challenge of developing a more flexible and inclusive labour market clearly has a bearing on the mobility of workers. It raises an important question: "*how can the employment rights of workers operating in a transnational context, including in particular frontier workers, be assured through the EU*?" See Commission Green Paper "Modernising labour law to meet the challenges of the 21st century", COM (2006) 708 final, Brussels, 22/11/2006.

[137] Indeed, the Coordination Regime (and the existing case-law of the ECJ) already seek to ensure that the free movement of workers is not hindered by any discrimination based on nationality in the field of social security. Moreover, the benefits of an anti-discrimination approach have been extended from workers to the broader category of European Citizens in the aftermath of Case C-85/96 *Martinez Sala* [1998] ECR I-2696.

extent of such reforms and trends varies between Member States. Although one effect has been to seek to extend the coverage of occupational pensions, there has been an actual or potential deterioration in the quality of private occupational pension provision.

The reforms of national pension systems

Social security pensions account for a significant amount of public spending in EU Member States.[138] Given the demographic and budgetary challenges, many governments have been reforming social security pensions to reduce and manage their cost.[139] This process began before spending cuts and austerity measures were adopted by national governments in the aftermath of the economic and financial crisis. Several key trends must be acknowledged:

The first is the general increase in retirement age in Member States.[140] This move to a longer working life has often had a knock on effect on occupational pensions given that the normal retirement age in occupational pension schemes tends to follow the retirement age for drawing a state pension.[141] What is hard to accept for workers is the requirement of working longer to receive less retirement income, which raises issues of intergenerational fairness.[142]

The second trend is that the level, structure and financing of pension benefits are changing in different ways throughout the EU.[143] For example, there may be a simplification of pension provision at the level of the State, which gives workers a clearer picture of what to expect from the State in terms of pension and how to supplement their retirement income where possible, including through occupational pensions. In some countries, there has also been an attempt to 'level out' the benefits and conditions attached to different kinds of

[138] For the period between 2004 and 2050, the Commission forecasts an average increase of public spending on pensions from 10.8% to 12.8% (as a gross percentage of GDP) for the EU25 (excluding Greece as well as the two newest Member States, i.e. Bulgaria and Romania). See Economic Policy Committee (2006), "Age-related public expenditure projections for the EU25".
[139] For a comparative analysis of ongoing reforms of European pension systems, see NATALI.D (2008) Op.cit.
[140] This is gradually being phased in by most EU Member States. Indeed, working longer is seen as a necessary step to deal with the demographic challenge.
[141] Working longer is a tough pill to swallow for many workers, though the increase in the pensionable service should in theory enable a better pension in countries where the amount of statutory pension depends on service.
[142] Should the baby boomers retire earlier yet receive better pensions than the next generations which include their children and grand-children? This is moral dilemma is unfortunately subject to circumstantial reality.
[143] For example, in the UK, the government's proposals of 2013 involve scrapping the State Second Pension (S2P) for future pension accrual and increasing the flat-rate amount paid under the Basic State Pension.The "Basic State Pension" is a mandatory statutory scheme, which covers all employed and self-employed persons who have paid sufficient contributions for a required number of years. A second 'earnings-related' tier of social security pensions was introduced in 1975 (SERPS) and reformed in 2002 with the introduction of the State Second Pension in order to "provide a better additional State Pension for low and moderate earners, and extend provision to certain carers and long term disabled people." The UK has returned to its purely Beveridgean approach to social security.

pension.[144] Elsewhere, the financing method of pension systems has sometimes shifted from PAYG to funded statutory schemes.[145]

The third trend is that many EU Member States are encouraging the development of occupational pensions (and personal pensions) as part of social and economic policy.[146] This outsources some of the expense and risk of providing pensions for retirement and old-age. Transferring costs to the private sector may lighten the burden in budgetary terms but as Myles argues, it may offer few solutions to the issues of justice and equity between generations.[147] The conception of pensions in social and economic terms impacts on how policies and laws are shaped. A holistic approach to social protection entails the need to spend more on pensions (whether or not the cost is accounted for in public spending) on the basis that pensions are not a "financial challenge with social aspects" but a "social challenge with financial aspects".[148] In the context of pensions reform and the debate between PAYG statutory regimes and funded private regimes, emphasis has been placed on the importance of "keeping in mind our ultimate objectives.[149]

The risk of deterioration in the quality of occupational pensions

Just as governments have been reforming social security pensions, many occupational pension schemes have also been tightening their belts for a number of years to the detriment of their members. This is part of a broader social trend relating to the deterioration of the standard employment relationship, which includes occupational pension provision.[150] One

[144] For example, in France there has been a push to reduce the differences between the general pension regime and certain 'special' pension regimes. In the UK, the reforms of public sector pensions have been accompanied by a comparison between public and private sector pensions, the effect of which is to level down pension benefits, which led to strike action in 2013 (for example by teachers). The British Government argued that public pensions remain "among the best available"; unions have denounced a 'race to the bottom'.
[145] For example in Sweden, this has been accompanied by a move towards "Notional Defined Contributions" which seeks to combine the objective of social protection with the tools offered by capital markets.
[146] In the UK, the advent of "auto-enrolment", makes saving into a workplace pension the default option, it is clear that occupational pensions are still seen as playing a vital part in sharing the pension burden.
[147] Myles also observes that it is the overall amount of social expenditure on pension provision (both public and private) that must be taken into account. See ESPING ANDERSEN.G, GALLIE.D, HEMERICK.A & MYLES.J "A New Welfare Architecture for Europe." (September 2001).
[148] VANDENBROECKE.F, La Qualité de nos régimes de pensions, RBSS 4th term (2001).
[149] ORSZAG.P and STIGLITZ.J (1999) "Rethinking Pension Reform: Ten Myths About Social Security Systems", article presented during the conference: "New Ideas About Old Age Security", World Bank.
[150] See FUDGE.J, Beyond Vulnerable Workers: Towards a New Standard Employment Relationship, Canadian Labour and Employment Law Journal (2005) Available on www.Heinonline.org ; See also STRAUSS, K. (2013) "Flexible work, flexible pensions: The evolution of retirement (in)security." in Arthurs, H. and Stone, K. (eds.), Rethinking Workplace Regulation : Beyond the Standard Contract of Employment. New York: Russell Sage. For a normative perspective, see also BORELLI.S & VIELLE. P (2012), Introduction. Legal and Normative Perspectives on Quality of Employment in Europe. In: Vielle.P & Borelli.S, Quality of Employment in Europe Legal and Normative Perspectives (Work & Society; 74), Peter Lang, 2012, p. 9-32.

historic cause is the decline in unionisation and the weakness of trade unions in collective labour relations, which has been visible in relation to occupational pensions in the private sector. In the public sector, occupational pension schemes have been reformed to manage the old-age risk in order to be sustainable, which has led to lower levels of occupational pension benefits.[151] In addition, the behaviour of many multinational corporations and financial investors in relation to occupational pensions, has demonstrated a constant focus on risk management combined with a never-ending search for greater profitability.[152] The risk of inadequate pension provision is a greater likelihood of poverty in old-age, which the Commission has highlighted.[153]

Historically, DB schemes have represented the gold standard of occupational pensions although they have been in steady decline in the UK for over two decades.[154]Given the cost of an ageing workforce, the financial health of many funded DB schemes cannot always be taken for granted. Moreover in the UK, DB schemes with surpluses were taxed in the past and some DB schemes have gone from having a "surplus" to having a "deficit" when measuring the difference between their assets and liabilities.[155] Increasingly, employers have threatened to close DB (defined benefit) schemes to new entrants or more drastically, employers may also involve seek to wind up or cease to participate in a defined benefit pension schemes, (which may have legal consequences under national law and the rules of that scheme).[156]

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[151] A number of proposed changes have proven controversial in the recent times, for example, the reform of teachers' pensions in the UK. The argument made by ministers to justify making public sector pensions less generous has been to describe them as "among the best available" in the private sector. Such reforms have not been strictly driven by the financial health of schemes as determined by actuarial valuations, since certain schemes had already been reformed in previous years.

[152] Multinationals are often keen to reduce their exposure to pensions' liabilities and will not hesitate to change the structure of occupational pension provision. This allows them to achieve greater certainty on their balance sheets and further boost their profits although it may be to the detriment of employees' social protection. Sponsoring employers may seek to reduce the amount of employer contributions, raise the level of member contributions and/or amend the level or nature of benefit provision. Some financial investors such as hedge funds/ private equity funds avoid investing in companies with DB schemes.

[153] The Commission's initiatives include the 2010 European Year for Combating Poverty and Social Exclusion.

[154] 'Final salary and the death of pensions the world envied' by DYSON.R, 10 Nov 2013"*Generous company pensions where workers' retirement income is linked to their last wage are "dead and gone" - and the Government's dramatic proposals to reform the pensions system, announced last week, sounded their death knell.*" The article refers to a controversial consultation document published on Thursday under the title "Reshaping workplace pensions for future generations."

[155] These calculations are typically carried out by actuaries and are known as "actuarial valuations."

[156] The nuclear option presented by INEOS in Grangemouth (Scotland) was to close the business altogether if the changes to the pension scheme were not accepted. Market solutions have also meant that in the last ten years, some companies have sought to remove their pensions risk altogether through "buy-out", which involves the sale of the liabilities of a pension scheme to an insurance company, who promises to pay out the pension benefits under the scheme. Where the cost of pensions (in addition to other social costs) is deemed too onerous, companies may prefer to relocate.

A common trend is thus for companies to seek to move away from DB (defined benefit) towards DC (defined contribution).[157] By doing so, they reduce their exposure to financial markets (i.e. the investment risk) and to the inherent liabilities of a DB scheme (including the old-age longevity risk)[158]. The shift from DB to DC is in evidence in the seven countries with the largest occupational pension systems in the world (USA, Canada, Switzerland, Japan, Netherlands, UK and Australia): the percentage of total pension fund assets held in DC schemes is estimated to have grown from 34% in 1997 to 42% in 2006.[159] In Europe, the biggest contrast is in the UK with a jump from 4% in 1997 to 33% in 2006. [160]

Ironically, the decrease in public spending on social security pensions means that occupational pensions are now needed more than ever as a component of social protection. However, all too often the quality of the occupational pension arrangements available is also being eroded in voluntary schemes. The connection of occupational pensions with paid employment does not offer a safeguard against the "downward spiral" of the reduction in occupational pension benefits though this is not automatic.[161]

The financial institutions who manage pension funds have a strong voice when influencing the legal and policy debates on pensions. They tend to support an increasing role of DC schemes.[162] It is important in the context of the on-going debate both at national and EU levels that the voices of workers and their representatives are heard and their interests borne against the need to ensure the competitiveness of businesses and the long term adequacy and sustainability of pensions in Europe.

In terms of the deterioration in the quality of pension benefits offered by many funded schemes, there is no doubt that the financial value and economic strength of occupational

[157] OECD (2007) confirms that an increasing number of employers have closed DB plans and increased the offering of DC plans.
[158] By old-age longevity risk, we mean the fact that pensioners may live longer than expected and will therefore require benefits for a longer period of time, hence the need for DB schemes to have regular actuarial valuations.
[159] Watson Wyatt Worldwide Report (2007).
[160] OECD (2006) confirms that the number of DB occupational pension schemes in the OECD area is on the decline, whereas this fall has generally been accompanied by an increase in DC plans.
[161] Many occupational pension schemes in countries such as UK are witnessing a reduction in the quality of the structure and level of benefits, notwithstanding the move to extend the coverage of occupational pensions in the UK through auto-enrolment). In contrast, mandatory occupational pensions in both the Netherlands and France have been more successful at maintaining the level and/or structure of benefits. Indeed, in both of these countries, there remains a strong presence of DB pensions in their system, thus proving the decline of DB pensions is not inevitable in these countries. Germany's strong culture of industrial relations has also safeguarded its occupational pensions to a greater extent than in the UK.
[162] In a press-release on 23/01/2008 by Mathias Bauer, President of the European Fund and Asset Management Association (***EFAMA***) called upon the European Commission to "develop an appropriate regulatory framework that could support the creation of DC-type pension products, fully portable and mutually recognised within the EU". EFAMA' s main underlying argument was that "Given the strengths of DC schemes, and the ease with which they could be offered on a cross-border basis, EFAMA believes that DC schemes are the single most appropriate arrangements around which to build a single market for occupational pension products."

pensions may be diminished by either poor returns of the scheme's investments on the financial markets or by hefty administrative charges or poor choices by individual members.[163] This will impact on either employers or scheme members depending on who bears the investment risk, which is a concern for governments who need occupational pensions to provide a greater share of social protection in retirement.[164]

The demographic, economic and social context means there are common circumstantial challenges (that affect both workers and Member States)in response to which EU law needs to adapt to the evolving role of occupational pensions if it wishes to avoid a "social deficit" in its treatment of migrant workers. Many issues are common to the Member States although there are also some differences, which heighten the complexity of dealing with the protection of occupational pensions at EU level. Dealing with these challenges will need to be shaped by current and future EU law and policy on occupational pensions.

[163] BBC website (10 December 2013): 'Watchdog criticises pension annuities' "*Some insurance companies and pension providers have been heavily criticised in a report on the sale of annuities to people when they retire. The Financial Services Consumer Panel accused firms of charging high commissions and confusing customers*".
[164] BBC website (19 September 2013) "The Office of Fair Trading (OFT) has ordered a crackdown on pension schemes that offer poor value to millions of savers." BBC website 28 November 2013 "Pensions minister wants 'value for money' on fees. Pensions Minister Steve Webb told the BBC that he wanted to ensure customers got "value for money" by capping management charges at 0.75%. "The pensions industry has "for too long got away with high charges", the pensions minister has said." But leading pensions' provider Legal and General accused him of being "too timid" and said the cap should be lowered to 0.5%.

Section 2. The EU's political challenge beyond the economic merits of free movement

Occupational pensions raise issues for EU law and policy on both economic and social fronts. Given its historic role in furthering economic integration, the Commission has prioritised free movement of workers and services in the internal market.[165] Each has become a hallmark of the EU's political approach to dealing with occupational pensions insofar as the internal market has traditionally been viewed as the natural field for the development of EU law. The drive towards greater worker mobility in the EU has created a clear political dynamic at EU level (A). Yet it is arguable that such an approach ignores the calls for greater social legitimacy in the formulation of EU policy and law on the free movement of workers, the implications of which require sufficient protection of migrant workers' occupational pensions by taking their social protection purpose into account.[166]

Pensions and social protection are clearly recognised as a vital component in the future development of the European social model.[167] The Commission has thus responded to calls for a more holistic approach from the EU in determining its political challenges and its choice of method by which it should aim to improve the free movement of workers (B).[168]As regards the need for greater empirical information on social outcomes in retirement for migrant workers, EU institutions have thus begun to pave the way for the collection of data and statistics dealing with supplementary pensions (including private pensions).[169] This approach shows that a social dimension is a necessary component (both in theory and in practical terms) of the political challenge to increase worker mobility.

[165] The Commission aspires to the creation of an internal market in the field of financial services by facilitating pension provision on a cross-border basis. The current instrument is the IORP Directive 2003/41 (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 OJ L 235, 23.9.2003, p. 10–21) and note also the Commission's (controversial) proposal of 27 March 2014 to enact a subsequent directive in this field, namely the Proposal For A Directive Of The European Parliament And Of The Council on the activities and supervision of institutions for occupational retirement provision (recast) /* COM/2014/0167 final - 2014/0091 (COD).
[166] BERCUSSON.B, 'The Conceptualisation of European Labour Law', Industrial Law Journal, Vol.24.No.1. March 1995, p.7-9.
[167] See COMMISSION OF THE EUROPEAN COMMUNITIES, Communication From The Commission on the Social Agenda, Brussels, 9.2.2005 COM(2005) 33 final.
[168] See EUROPEAN COMMISSION GREEN PAPER "towards adequate, sustainable and safe European pension systems COM(2010)365 final, Brussels, 7.7.2010SEC(2010) 830 and EUROPEAN COMMISSION WHITE PAPER "An Agenda for Adequate, Safe and Sustainable Pensions" COM(2012) 55 final (Text with EEA relevance) Brussels, 16.2.2012.
[169] See the Report by the Social Protection Committee on "Privately managed funded pension provision and their contribution to adequate and sustainable pensions." (2008).

A. The drive to increase worker mobility and economic integration in the EU

The overall success of the internal market "*has turned the free movement of people, goods, services and capital into a tangible reality, delivering real benefits to Europeans*."[170] However, in comparison with the free movement of goods, the free movement of workers remains under-developed in terms of the numbers of migrant workers as well as the legal infrastructure in EU law. Historically, worker mobility has constituted a key component of EU economic integration. Its legacy has been to shape EU law on free movement, yet it remains subject to political and legal constraints. Surprisingly, past and current trends show that despite the opportunities presented of living and working in 28 Member States, the level of worker mobility is still relatively low even though it is predicted to increase and evolve. The need to develop worker mobility stems from the perceived economic, social and cultural benefits to the EU. Mobility remains a key challenge for the EU in which dealing with the occupational pension rights of migrant workers is vital.

a. The historic legacy of worker mobility in EU integration

Increasing worker mobility has been a key objective of the internal market and part of the rationale for protecting the free movement of workers under EU law for the past 60 years.[171] Today, the internal market remains at the heart of the EU's *raison d'être*. The Treaties reflect these objectives and provide the legal base for economic and social integration under EU law. Moreover, to encourage worker mobility, specific Treaty provisions were included and secondary EU legislation was adopted to protect the pensions and social security rights of migrant workers against some of the negative consequences that might arise from a worker exercising his or her mobility.[172] However, legislating in this field remains both a sensitive and complex task as was shown when updating the Coordination Regulations, which proved a particularly arduous process. From a political perspective, this

[170] EUROPEAN COMMISSION The single market: review of achievements. Commission staff working document accompanying the communication on a single market for the 21st century. SEC (2007) 1521 final, 20 November 2007.

[171] After the European Coal and Steel Community was founded by six Member States in 1951, large flows of migrant workers started to take place: unemployed Italian workers emigrated to the Rhine valley where there was a strong demand for workers in Germany's industrial heartland. When the Treaty of Rome (the EEC Treaty) was signed in 1957, establishing a common market, the fundamental freedoms of movement for goods, workers, establishment/services and capital were seen as vital catalysts for economic growth.

[172] Both Article 51 EEC (now Article 48TFEU) as well as the Coordination Regulations were designed to enable cross-border worker mobility on the basis of the fundamental freedom of movement of workers. Social security coordination is today widely regarded as a successful body of EU law with a large amount of case-law. This has enabled migrant workers to enjoy legal protection of their social security rights (including their pensions).

was not made easier by the fact that unanimity in the Council was required throughout this period until the Lisbon Treaty came into force. Nevertheless, the importance of reaching an agreement at EU level (given the common goal of worker mobility) is as relevant today as it was 60 years ago. Free movement of workers is still subject to similar political and legal constraints; meanwhile, the nature of worker mobility in the EU has not stood still!

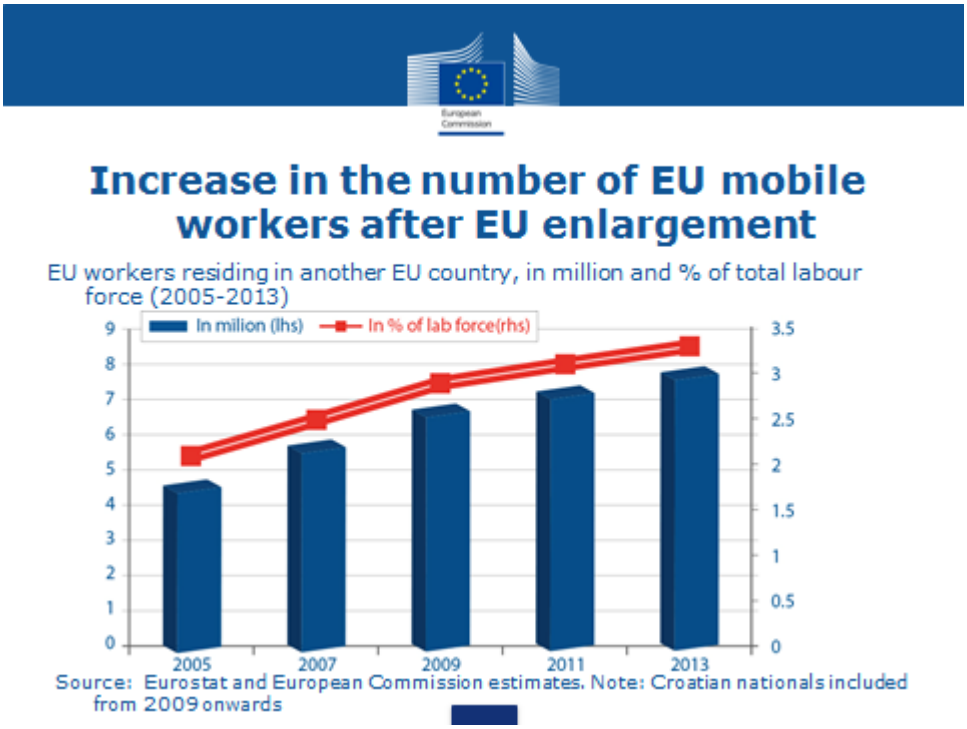
b. The evolving nature of worker mobility in the EU

There are various types of worker mobility in the EU, which may concern occupational mobility and/or cross-border mobility. First of all, worker mobility may concern the professional mobility of a worker changing employer ("*occupational mobility*").[173] Secondly, worker mobility may relate to the geographic mobility of a worker moving from one country to another ("*Cross-border mobility*").[174] One may also distinguish between workers who migrate within the EU ("*intra-EU mobility*") and those who are either coming from or going to a third country ("*extra-EU mobility*"). The main focus of EU law has been on "Cross-border intra-EU mobility".[175]

Despite legal provisions under the Treaty and in the form of the Coordination Regulations, the levels of geographical and occupational mobility within the European Union have historically remained relatively low.[176] For the Commission: "*this low level of geographical mobility is particularly serious when it restricts the occupational mobility of the less advanced regions*", which led to the effects of a lack of mobility becoming a source of concern.[177] Nevertheless, worker mobility in Europe is an evolving phenomenon that is

[173] Workers who change jobs often remain in the same professional sector although it is becoming frequent to see workers changing field, which may impact on their pensions, where pension schemes are sector-based.
[174] Within this category, there are workers whose cross-border movement is with the same employer (e.g. posted workers) and those who change employer and thus combine both occupational and geographic mobility.
[175] Issues relating to occupational mobility within just one Member State are seen as 'purely internal'. Although many of the issues that affect workers migrating or seeking to migrate between EU Member States arise (and are likely to be even more acute) in the case of workers migrating to or from a third country, such issues are left to bilateral relations between Member States and third countries. Moreover, the internal market rationale is constrained by issues of competence as will be discussed below in Chapter 3.
[176] Figures provided by the Commission in its Communication of 2002 showed that *"only 1.2% moved to another region to live in 1999*" and "*only 0.1% of the European population had established their official residence in another country in 2000."* A Eurostat labour force survey of 2003 showed that only 1.5% of EU citizens lived and worked in a Member State that was different from their country of origin. In 2007, the Commission revealed that "*Around 2% of working-age citizens from one of the 27 EU Member States currently live and work in another Member State. By comparison, the respective share of third country citizens residing in the EU is almost twice as high*."
[177] See the Communication from the Commission to the Council, the European Parliament , the European Economic and Social Committee and the Committee of the Regions: "Mobility, an instrument for more and better jobs: The European Job Mobility Action Plan (2007-2010) COM (2007) 773 final, Brussels, 6.12.2007.

gradually starting to increase in terms of its numbers.[178] More recently, significant numbers of EU workers have migrated within the EU during the last 10 years following enlargement of the EU although the phenomenon still remains relatively low both as a proportion of overall migration and of the workforce as shown below.[179] With regard to the indicators used to measure worker mobility, the Commission has been working to address its initial diagnostic that "*statistics on mobility flows or on the underlying motivations need improvement*." [180]



The profile of the EU Member States also varies a great deal in terms of occupational mobility. Studies have grouped the EU Member States into clusters according to the mobility

[178] A European Labour Force survey of 2000 reported the number of mobile workers in the EU-15 as 470,000 persons. Five years later in 2005, the numbers had already grown to 610,000. There is no doubt that the enlargement of the EU to include the central and Eastern European Member States has had an impact increasing the levels of worker mobility from those countries. The results have been particularly visible in Member States who did not put in place any transitional arrangements. A forecast of that impact was provided in the Commission's "Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004 – 30 April 2006)" COM (2006) 48 of 8.2.2006.

[179] The number rose from 4.7 million in 2005 to 8 million in 2013.

[180] On the flows, historically, the number of seasonal workers and cross-border workers (including summer jobs for young people) have often not been included in national figures. These figures may be significant and according to the Commission they would "*increase further the overall percentage of EU migrant workers*." On the motivations Commissioner Andor stated to the European Parliament on 22 October 2013; "We now have a huge amount of statistics which help us to understand what exactly is happening in the Member States. This supports the Commission's position that there is no widespread or systematic benefit tourism in the EU".

profile of their workers.[181] The relevant factors are job tenure[182], expected job mobility and the duration of workers' entire careers. The trend of occupational mobility is also expected to rise: on average 41% of European workers expected to change jobs within 5 years.[183] Greater geographical mobility in the EU should accompany worker mobility, which is set to grow.[184]

The challenges of expanding occupational mobility, improving information and transparency of job opportunities and facilitating geographical mobility have become on-going 'Priority areas for action' for the Commission.[185] The year 2006 was thus designated by the Commission as the "*European Year of Workers' Mobility*". Among the priorities mentioned was the treatment of the occupational pension rights of migrant workers.

The conditions affecting workers mobility are complex and vary according to the countries from which workers emigrate and the countries to which they immigrate. The decision to work in another Member State is often influenced by a number of relevant factors, which may be either subjective or objective: for example the existence (and transparency) of job opportunities, the nature of the housing market, the legal and administrative treatment of migrants, languages and cultural factors, environmental, social and family issues. In the past, the Commission has identified factors that boost occupational mobility and help to create a European labour market.[186] These factors are mostly economic by nature (with the exception of the increase in the number of female workers). They explain to some extent the low levels of worker mobility to date. The treatment of occupational pensions is thus a relevant factor but one that is not considered in isolation in terms of formulating EU policy. In addition, boosting worker mobility is not an end in itself but a means to an end, which involves bringing about the economic and social benefits of freedom of movement.

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[181] See COPPIN.L & VANDENBRANDE.T "The mobility profile of 25 EU Member States" on the Commission website. See also the Analysis of 2005 by COPPIN.L& VANDENBRANDE.T for the European Foundation For The Improvement Of Living And Working Conditions.

[182] In 2005, the average job tenure of workers in the EU was 10 years.The figures for the Member States varied from 7 years in Latvia to 12 years in Belgium.

[183] According to a 'Eurobarometer' of 2005 the countries with the highest level of expected job mobility were the Scandinavian and Baltic countries and the UK. A high proportion of expected job mobility was voluntary.

[184] The empirical data used to support the Commission's Impact Assessment for legislation on Supplementary Pensions revealed that "*the attitude of young people (15-24 years) in Germany, France and the UK suggest that there is a considerable potential for increased labour mobility in the future.*" This should have wider benefits.

[185] Indeed, the assumption made by the Commission is that "*the European labour market can only function correctly if workers are free to move between jobs, between occupations and between countries and regions*". The Commission is intent on meeting its "*responsibility to ensure that the freedom of movement of workers between Member States, as enshrined in the Treaties, is guaranteed and operates in reality.*"

[186] These include: (i) the strengthening of the single market through achievement of economic and monetary union; (ii) the increased demand by employers for workers from other Member States, given the growing importance of intra-Community trade; (iii) the greater number of women on the labour market; and (iv) the globalisation of technological skills.See the Communication providing for an Action plan for the free movement of workers" - COM/97/0586 final.

c. The underlying public policy goals of worker mobility: reducing unemployment and encouraging growth

Encouraging worker mobility both at national level and between Member States has led to worker mobility being considered as a key component of the Lisbon Strategy's goal to strengthen employment and economic growth.[187] Worker mobility was recognised as one of the main objectives of EU labour market policy and as "*an essential factor in a smoothly-functioning European employment market*".

The Commission's Memorandum of 20 October 2005 referred to the connection between the protection of pension rights and worker mobility.[188] It also stated specific economic benefits of worker mobility.[189] The broad economic advantages of enhancing worker mobility have also been repeatedly mentioned by the European Parliament.[190]As mentioned above, the need for EU law and policy to embrace and promote worker mobility has again come to the fore as a result of the unemployment crisis affecting certain areas of the EU.[191] The potential benefits that come from greater worker mobility have prompted a re-think of some of the methods envisaged at the level of EU policy to achieve that purpose.

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[187] On the need for improving the adaptability of workers and enterprises and the flexibility of labour markets, see the revised Lisbon strategy: "Working together for growth and jobs. A new start for the Lisbon Strategy", COM (2005) 24, Brussels, 2 February 2005. See also the Commission Communication on the Social Agenda, COM (2005) 33 final, Brussels, 9 February 2005. In addition, the Lisbon Action Plan incorporates the EU Lisbon Programme and sets out recommendations for actions to Member States for inclusion in their national programmes – SEC (2005) 192.

[188] "*Mobility is hindered without protection for the social security rights of migrant workers and their families. Eliminating these barriers to mobility is part of the EU's plans to raise growth and employment. If people believe that changing jobs and moving will entail costs – in terms of their social security rights - this will act as a disincentive to using their right of free movement.*"(Memo/05/384) Explanatory memorandum of 20 October 2005 accompanying the proposal for a directive on improving the portability of supplementary pension rights 2005/0214 (COD) SEC (2005) 1293, which preceded the Supplementary Pension Rights Directive.

[189]"*Labour mobility helps labour markets by making it possible to put the right skills with the right jobs as well as increasing workers' career and development opportunities*." In particular, mobility is credited with "*improving the adaptability of workers and the business sector and increasing labour market flexibility*".

[190] In its resolution on the Supplementary Pensions Directive, the European Parliament stressed that: "*labour-market mobility in the EU will be crucial in the coming years for job creation and economic growth;* in particular, it considers that "*citizens' confidence will be improved when obstacles to internal and cross-border mobility are removed*."

[191] For example, in 2012, a quarter of the workforce in Spain was unemployed (and the figures approached 46% in the case of young persons under 30). The figures are just as alarming in Portugal and Greece. A new wave of cross-border migration is taking place in Europe and beyond. Migrant workers are mainly heading for Germany, Britain and France in the search for work. Many are also crossing the Atlantic to developing economies such as Brazil. For an overview, see the Commission website's Press release database containing a lecture by Commissioner László ANDOR, European Commissioner responsible for Employment, Social Affairs and Inclusion Labour Mobility in the European Union – The Inconvenient Truth Lecture at University of Bristol Bristol, 10 February 2014: http://europa.eu/rapid/press-release_SPEECH-14-115_en.htm .

B. The EU's choice of approach and the methods of European integration

In traditional fields such as the internal market, the 'classic method' of EU integration prevails through a combination of 'positive' and 'negative integration'.[192]However, the broader social protection dimension of pension systems is increasingly being approached at EU level through new types of governance such as policy coordination[193] as well as other methods of 'soft law'[194]. Indeed, the development of the 'Open Method of Coordination' has diversified the methods of European integration available in the field of pensions. The choice of the appropriate method still largely depends on the principles of the attribution of competence, subsidiarity and proportionality, which may vary according to the substantive field in question (see Chapter IV below). It thus carries procedural constraints and entails institutional challenges, which have been particularly acute in the field of occupational pensions. The crux of the matter is that the protection of migrant workers' occupational pension rights is at the intersection of the free movement of workers in the internal market and the right to social protection, which depends upon the national traditions of each Member State. On the choice of method, the EU has to decide whether an economic or a social approach to this issue is more appropriate in this field given its role as set out in the Treaties. On the choice of instrument, one may question whether traditional forms of law-making are more appropriate than new forms of governance at EU level in the field of occupational pensions and the protection of migrant workers?

a. The internal market approach and the 'classic' method of EU integration

i. A worker-centred approach based on the free movement of workers

For the past twenty years, the EU has consistently acknowledged its responsibility to regulate the treatment of migrant workers' occupational pensions. To do so, the Commission has envisaged a social 'worker-oriented' approach based on the free movement of workers. The situation of posted workers' pension rights in particular has been a priority ever since it

[192] On the one hand, the Commission initiates policy and legislative proposals, then the Council and the European Parliament adopt EU legislation (i.e. Positive integration).On the other hand, the European Court of Justice ensures the rule of EU law is respected by sanctioning any unlawful activity (Negative integration). Positive integration entails common regulation at EU level, which must bridge any gaps or loopholes that subsist, notwithstanding the case-law of the ECJ. Negative integration is about eliminating barriers to European integration that exist at national level, especially where these compromise the EU's objectives and values.
[193] See Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee "Supporting national strategies for safe and sustainable pensions through an integrated approach" COM (2001) 362 final of 3 July 2001.
[194] Communication COM (1999) 347 final of 14 July 1999 "Une stratégie concertée pour moderniser la protection sociale".

was identified in the report of the High level panel on the free movement of workers.[195] As a result, legal provisions were made by the Safeguard Directive to deal with posted workers' occupational pension rights (namely by allowing them to remain members of their home scheme). Since then, the professional landscape has also changed in an overarching manner that extends well beyond posted workers.[196] In addition, some specific types of professionals who exercise their right to free movement are particularly affected with regards to their occupational pension rights.[197] Examples of the types of worker identified as requiring special attention include artists and employees working in international transport.[198]

Putting the migrant worker at the centre of legislation is potentially controversial insofar as it may create tensions with other interested parties. The Commission's initial legislative proposal for a Portability Directive (in October 2005), which sought to give workers a right to transfer their pensions, was thus heavily criticised by many pension funds and Member States, which led to its stagnation and subsequent amendments. Nevertheless, the on-going relevance of occupational pensions in the complex decision-making process of exercising a worker's right to free movement was highlighted in the explanatory memorandum to the Commission's amended proposal of 9 October 2007 for the proposed Supplementary Pension Rights Directive.[199] Moreover, recent case-law has confirmed that the risk of losing occupational pension rights may have a deterrent effect on worker mobility.[200] Obviously, this will depend on the relative importance of occupational pensions in each case. Nevertheless, as observed above, the growing importance of occupational pension schemes

[195] EUROPEAN COMMISSION - 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 http://europa.eu.int (available as a download file:///C:/Users/wrb/Downloads/C10597349ENC_001.pdf (ISBN 92-828-0409-7).

[196] The treatment of posted workers' pensions is not only an issue within the borders of the EU but also affects the migration of posted workers to/from other countries in Europe such as Switzerland as well as countries further afield (E.g. Japan and Korea) with whom bilateral agreements have been reached.

[197] The Commission has recognised that "*Economic integration and the setting up of bi-national or multinational companies mean increased mobility for men and women throughout the European Union. This trend, which is already quite clear among young graduates and senior management, must be encouraged and facilitated, particularly for teachers, researchers and trainees. This demand must be duly taken into account in the context of national education and training systems. Moreover, it is necessary to modernise and improve the Community rules for the protection of the social rights of workers who exercise their right to mobility.* See EUROPEAN COMMISSION GREEN PAPER "towards adequate, sustainable and safe European pension systems COM (2010)365 final, Brussels, 7.7.2010SEC(2010) 830.

[198] CLEISS ('Centre des liaisons européennes et internationales de sécurité sociale).

[199] "*Even if there are many factors which can determine the choice of any individual to be more mobile, the possibility of losing supplementary pension rights may make an individual think seriously about changing jobs.*"

[200] In her opinion in C-379/09 *Casteels* of 11 November 2010, AG Kokott highlighted the adverse impact on mobility stemming from an unfavourable financial treatment of occupational pension rights: "*Such financial losses, coupled with losses in terms of private old-age pension provision, are capable of deterring a worker from moving to another establishment situated abroad*".

should mean that the effects on worker mobility will increase on the whole.[201] Therefore the need to protect occupational pensions of migrant workers in a systematic way through the classic method of EU integration is may be seen as vital to ensure mobility (as well as social protection). However, a technical approach has been adopted by the Commission which initiated the legislative process in this field by targeting the rules that apply to occupational pension schemes.[202] Moreover, the specific relationship between occupational pensions and mobility was also recognised in the European Parliament's Procedure File on the proposed Supplementary Pension Rights Directive.[203]

Increasing worker mobility is undoubtedly a political challenge that arises in the context of the application of EU law on free movement. However, one may argue that the EU is also required as a matter of law (i.e. in 'constitutional' terms in light of the Treaties) to ensure that the legal protection of migrant workers is sufficiently adapted to deal with economic and social realities, which may limit its discretion and enhance its focus with regards to the implementation of its objectives? Chapter III will indeed seek to address the legal rationales for the protection of migrant workers' occupational pensions; in theory these should determine the extent of the EU's own obligations in this field, though there is no doubting that the political differences of approach in terms of policy have shaped the outcome in terms of positive integration in this field. Arguably, the main emphasis until now has been on the goal of enhancing workers' mobility by reference to the broader economic benefits brought by mobility in terms of public policy. The objective of mobility is thus used to justify protecting migrant workers' occupational pensions. In that light, safeguarding workers' social protection is viewed as a means to achieving mobility. However, from a migrant worker's perspective, failure to ensure sufficient protection of his or her occupational pension rights would result in a reduction of social protection for that individual. One may

[201] Arguably, some workers may prefer not to change employer or at least to remain in the same Member State, either in fear or anticipation of a financial loss in terms of their occupational pension rights. The challenge for worker mobility presented by an ageing population has also started to materialise. For the Commission: *"Older workers tend to be more attentive to the building up of an adequate pension and will therefore be even more reluctant to change jobs when they face a potential loss in pension rights due to mobility.*" See the Commission's Impact Assessment: Commission staff working document, 20 October 2005 (accompanying the Commission's proposal of a draft directive on improving the portability of supplementary pension rights COM (2005) 507 2005/0214/COD).

[202] "*It is thus urgent to ensure that the rules governing the operation of these schemes do not hamper the freedom of movement of workers across Member States or mobility within any Member State, therefore reducing the opportunities for mobile workers to build up sufficient pension rights by the end of their careers. Failure to achieve this will reduce the flexibility and effectiveness of the labour market.* See the Commission's Impact Assessment (2005) (Op.cit supra).

[203] "*Considering the increasing importance of supplementary pension schemes to cover the risks of old-age, it is thus particularly important to reduce the obstacles to mobility which stem from these schemes.*" See the Commission's Impact Assessment (2005) (Op.cit supra).

argue that a worker's retirement income ultimately matters as much as their mobility (though some workers may not realise this until their retirement). The point of EU law on free movement is that one should not have to choose between one and the other. To do so would constitute a 'social deficit' in EU law on occupational pensions and the free movement of workers. This risk justifies its presence on the agenda of EU law and policy in this field.

The changing nature of today's labour market has been taken into account in order to justify the protection of mobile workers through EU secondary legislation.[204] The arguments in favour of improving workers' mobility thus played a significant part in making the case for the adoption of Directive 2014/50/EU of 16 April 2014 on "minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights" (*the Supplementary Pension Rights Directive*). There has also been an evolution of the issues relating to workers' mobility and their occupational pensions. In the past, the matter of the payment of occupational pension benefits was made a key priority given the numbers of retired workers who moved to another Member State over the past three decades (e.g. British and Dutch retirees moving to France and Spain). However, new issues such as the number of workers carrying out temporary work as well as the short periods of worker mobility with a cross-border dimension raise new challenges relating to the acquisition of pensions in both the Member State of departure as well as the Member State of arrival. This has broader implications for their social protection. Arguably, the body of EU secondary law and the case-law of the ECJ on the free movement of workers is required to adapt to face the social challenges that go 'hand in hand' with worker mobility.

A purely economic "mobility based" approach is not satisfactory in both political and legal terms if it does not contain certain legal (and social) safeguards of migrant workers' occupational pension rights.[205] This would not constitute 'genuine' free movement. Therefore it should be dealt with through the recognition of legally enforceable rights that derive from the implementation of EU primary and secondary law on the free movement of workers.

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[204] Indeed, the European Parliament's rapporteur to the proposed Supplementary Pension Rights Directive stated that: "*The present age requires a flexible, mobile approach from employees. Mobility must therefore be rewarded instead of being penalised.*" Explanatory statement by Rita Oomen-Ruijten of the Employment and Social Affairs committee, accompanying the European Parliament's report of 27 March 2007 on the proposed Supplementary Pension Rights Directive.

[205] Mobility should not be seen as an end in itself given that free movement of workers constitutes both a fundamental right and fundamental freedom which carries a social dimension. The concern for migrant workers' social protection must therefore be considered as an important component of freedom of movement. A worker who decides to change jobs by moving to another EU Member State would still tick the mobility box even if he/she incurred a loss of pension rights as a result. Yet such a position should be seen as a failure on the social protection front if he loses a significant amount of income.

Mobility is a crucial ingredient of free movement as well as an economic objective for the EU. However, it is insufficient on its own. It is just one half of the equation, in which upholding the social protection of migrant workers is the other half. In pursuing the objective of 'genuine' free movement of workers, EU law must ensure the legal protection of migrant workers' occupational pension rights is of sufficient quality and is adapted to deal with the new challenges mentioned above. This may entail certain tensions between the interests of migrant workers and those of their employers and/or the occupational pension schemes to which they belong. Admittedly, other 'non-binding' legal tools may be available. However, if they are not legally enforceable, it is questionable whether they would guarantee the effectiveness of workers' right to freedom of movement. EU law is ultimately required to arbitrate between the social partners and take into account the views of other interested parties when implementing the free movement of workers. As such, there is no doubt that the EU has a political responsibility to take into account the important role of employers in providing occupational pension schemes. However, this does not and should not dilute the fundamental legal status of the free movement of workers either in theory or in practice. Nor does it limit the scope of the political challenges facing the EU in this field. It should be noted that the EU's economic approach to dealing with occupational pensions has not been restricted to the free movement of workers. A parallel initiative of the Commission pursued a market-based approach focusing on the freedom to provide services in the internal market.

ii. Towards an internal market for supplementary pensions?

The second economic objective of the EU has been the goal of creating an internal market in the field of occupational pensions. In 2003, the Directive on Institutions for Occupational Retirement Provision (The ***IORP Directive***) was adopted in order to reduce obstacles to the freedom of occupational pension funds to provide services on a cross-border basis in the EU.[206] Its internal market rationale was clearly visible in Recital 1: "*a genuine internal market for financial services is crucial for economic growth and job creation in the Community*". The IORP Directive clearly deals with the overlap between the position of workers as members of occupational pensions and their role as consumers of financial

[206] 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, OJ L 235 , 23/09/2003.

services, who are intended to be the beneficiaries of an internal market for pensions.[207] The IORP Directive could be described as an attempt to find a market solution to deal with a social problem. It also reflected the need for the EU to recognise the fact that pension funds had become major players in financial markets and financial services. However, the IORP Directive has been heavily scrutinized and a significant part of the proposed reform of the IORP Directive has been criticized by the pensions industry in terms of the perceived additional "red tape" it involves, which for many of the pension funds has failed to take their specificity into account. This prompted attempts by the Commission to reform the IORP Directive while pursuing the proposal for the Supplementary Pensions Directive.

The Green Paper of 2010 continued to view worker mobility in the context of its economic role in the internal market.[208] Mobility enables flexibility and opportunity, both of which are viewed as important for reducing unemployment and promoting growth.[209] The Green Paper re-iterated the association between worker mobility and other free movements of the internal market such as capital and services.[210] The Commission thus considered a dual approach to improving worker mobility: the first task consisted of "***Strengthening the internal market for pensions***". This entailed reviewing the IORP Directive.[211] Other issues that needed addressing in order to pursue an internal market in the field of occupational pensions included the development of appropriate and comparable accounting standards to improve transparency about pension liabilities. In addition, the Green Paper mentioned that the free movement of capital was facilitated by the prevention of 'tax discrimination'.

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[207] "*Major achievements have already been made in the establishment of this internal market, allowing financial institutions to operate in other Member States and ensuring a high level of protection for the consumers of financial services*." See the Commission's Impact Assessment (2005) (Op.cit supra).

[208] This is referred to in Paragraph 3.3. "*Policies and regulation need to facilitate the Free movement of production factors, notably labour and capital, so as to use resources efficiently and create favourable conditions to maximise incomes*."

[209] "*Greater flexibility in job mobility supports the adjustment capacity of the economy and strengthens the European social model*." Arguably the goal of occupational 'job' mobility includes internal and cross-border mobility. The Green Paper of 2010 acknowledged that in the 2005 proposed Portability Directive, "*internal mobility was included because a separation of internal and external mobility was impractical.*" See EUROPEAN COMMISSION GREEN PAPER "towards adequate, sustainable and safe European pension systems COM (2010)365 final, Brussels, 7.7.2010SEC (2010)830 p12. However, political expediency led to a U-turn: the scope of the Supplementary Pensions Directive now focuses on cross-border mobility.

[210] The Commission's assessment was that: "*Unleashing the full potential of the single market could bring significant benefits for all citizens.*" Changes to the nature of worker mobility have not deterred the Commission from seeking to reconcile the needs of workers and employers by enhancing mobility. "*In today's labour market, with the added challenges from the financial and economic crisis, people need to be able to change jobs easily throughout their working life and employers should be able to recruit the right person with the right skills*." See EUROPEAN COMMISSION GREEN PAPER "towards adequate, sustainable and safe European pension systems COM(2010)365 final, Brussels, 7.7.2010SEC(2010)830 p12.

[211] As the Commission noted, **"***First experience has shown that there are still considerable barriers to cross-border activity. They prevent the full realisation of efficiency gains arising from scale economies and competition, thereby raising the cost of pensions and restricting consumer choice.***"**

Finally, it identified the benefits of "*extending access to additional sources of retirement income beyond pensions, such as reverse mortgages*" which led to calls for the creation of an EU regulatory framework for an EU-wide private pension regime that would exist alongside national pension regimes.[212] The second task of removing obstacles to mobility in the EU, as envisaged by the Green Paper of 2010, was headed "***Mobility of pensions***".[213] One argument defended by this thesis is that the EU has remained shy of seeking to offer ambitious solutions to address 'social protection' obstacles to free movement. Instead of setting out to enhance the protection of the occupational pension rights of mobile workers, EU law in this field has often shown a tendency to adapt to the above challenges through pragmatic compromise and trade-offs, while remaining true to its historic goals.

Nevertheless, both the objective of greater mobility and the drive for an internal market in the field of occupational pensions have been caught up by the need for the EU to see the bigger picture of pensions in general, which has fuelled an holistic approach.

b. Towards an holistic approach for pensions in the EU?

Supplementary pensions are often viewed from an economic perspective as "*market instruments governed by market values*".[214] In this context, the EU is seen as offering "*a policy domain in which the logic of market oriented regulatory reform dominates.*" An assessment of the Commission's ability and suitability to regulate supplementary pensions[215], has led to note the EU's capacity to operate as a "*regulatory state immunized from distributional pressures and able to pursue efficiency enhancing measures.*"[216] An important hypothesis is that the conflict between social partners is a key obstacle to social regulation in the EU although in terms of social dialogue, it has been found that the conflict between social

[212] See EUROPEAN COMMISSIONGREEN PAPER "towards adequate, sustainable and safe European pension systems COM (2010) 365 final, Brussels, 7.7.2010 SEC (2010) 830 p.P.11& 12 including the reference to the 'Monti' Report to the President of the European Commission 9 May 2010, p.58.

[213]The terminology is really a misnomer, given the removal of the transferability element in the proposed secondary EU legislation designed to protect the occupational pension rights of migrant workers. Ironically, the Commission acknowledged and queried this development on page 13 of the Green Paper: Should the EU look again at the issue of transfers or would minimum standards on acquisition and preservation plus a tracking service for all types of solution be a better solution?

[214] MABBETT.D, (2009) Supplementary Pensions between social policy and social regulation, West European Politics, Volume 32, No.4, p774-791, July 2009, Routledge.

[215] MAJONE.G (1993), The European Community between Social Policy and Social Regulation, Journal of Common Market Studies Vol 31. No.2, p 153-70.

[216] See MABBETT. D (2009) (Op.cit) She argues that the Commission's approach to regulating supplementary pensions is one that "*segments the allocative aspects of the policy from wider distributional issues about pensions*" while relying upon the pillar analysis of pension systems, as illustrated by the adoption of both the Safeguard Directive and the IORP Directive.

partners at supranational level was not necessarily present at national level.[217] This has led to the verification of whether there was a possible use of the EU by Member States in order to push through reforms opposed by social partners at a national level: in relation to the proposal for a Supplementary Pensions Directive, Mabbett found that "*not all states want or need supranational policy resources*", which has also led to them criticizing EU initiatives; she also concluded that the potential technical difficulties meant "*the EU did not provide an appropriate venue for addressing complex and system-specific problems*."[218]

The new challenge for the EU is for the role of the fundamental freedoms of workers and services on issues relating to occupational pensions to be seen in the context of the re-balancing of the EU's economic and social objectives. In the last ten years, the EU's political approach towards occupational pensions has been part of a broader move to deal with pensions in a more holistic manner. Indeed, EU policy has moved towards overarching policy objectives. The European Social Agenda approved by the European Council at Nice in 2000 thus emphasised the need for Member States to pursue cooperation and exchanges in order to deliver "safe and sustainable pensions".[219] This reflected a holistic approach with regards to the economic and social issues related to pensions in the EU. The need to increase employment levels was thus seen not only as a means of promoting economic growth but also as a tool to modernise and improve the European social model: the Orientations for Social Policy of the European Social Agenda made the connection between the need to "Facilitate mobility for European citizens" in order to attain the objective of "More and better jobs".[220] At the Laeken summit in 2001, the European Council focused on 3 major objectives in the field of pensions and the methods of achieving them: **adequacy** (by preserving solidarity and maintaining social cohesion), **sustainability** (by ensuring the financial viability of private pensions), and finally the **modernisation** of pension systems (which entails adapting pension systems to the evolving labour market, reviewing pension systems in light of gender equality and increasing their transparency). Notwithstanding consensus on the above objectives, the practicalities of implementing them at EU level in relation to occupational pensions have

[217] See MABBETT.D (2009) Op.cit.
[218] See MABBETT.D (2009) Op.cit. Mabbett points to the wider implication that "*it is the deep institutionalization of national welfare states, rather than the distributional conflicts found in social policy, which defeats EU-level social initiatives*."
[219] Communication COM (2000) 622 final of 11 October 2000 "The future evolution of social protection from a long-term point of view: safe and sustainable pensions". See also Communication COM (2003) Joint report on adequate and sustainable pensions.
[220] Point I (h) on "More and better jobs" and Mobility mentioned "ensuring that migrant workers retain their rights to social security; by improving the application of legislation on this matter" as well as "strengthening the arrangements for safeguarding additional pension rights before the end of 2002 for workers moving with the European Union."

often proved controversial. EU policy on pensions has been at the forefront of much criticism, as for example, a communication by the Commission on an internal market for pension funds, which was challenged by the Member States as it was seen as venturing beyond the EU's competence was annulled by the Court.[221] The difficulty for the EU of identifying the legitimate nature and purpose of its role in the field of pensions led to many years of political stalemate.

On 7 July 2010, EU pensions policy was given a much needed boost and a greater sense of direction as a result of the Commission's Green paper: "towards adequate, sustainable and safe European pension systems" (the ***Green Paper***).[222] In the Green Paper, the Commission developed the EU's key priorities for modernizing pensions policy in the EU. These reiterated the overarching objectives of adequacy and sustainability. In addition, three specific goals were set out, including "***removing obstacles to mobility in the EU***", which reflects the EU's historic rationale for dealing with obstacles relating to occupational pensions in the context of the freedom of movement of workers. Indeed, the freedom of movement of workers needs completing in this field in the context of other social goals.[223]

The Commission's White Paper of 16 February 2012: "An Agenda for Adequate, Safe and Sustainable Pensions" (the ***White Paper***)[224] identifies in particular the need for pension reform for "Developing complementary private retirement savings", which includes occupational pensions. A combined reading of the Green Paper and the White Paper raises the issue of whether removing obstacles to mobility (in relation to occupational pensions) can be reconciled with the political objective of developing occupational pensions. If so, how can both tasks be articulated under EU law and policy? Annex 1 to the White Paper envisages a number of relevant EU initiatives through a combination of EU legislation and policy coordination as well as the ability to bring legal proceedings before the ECJ.

The White Paper also touched upon the limitations of scope of the Coordination Regulations combined with the inadequacy of the existing legislative framework dealing with occupational pensions. Its assumption is that higher levels of worker mobility depend on

[221] Case C-57/95 *French Republic v Commission of the European Communities* [1997] ECR I-01627.
[222] EUROPEAN COMMISSION GREEN PAPER "towards adequate, sustainable and safe European pension systems COM (2010)365 final, Brussels, 7.7.2010 SEC(2010)830.
[223] The other goals of the Green Paper are: "achieving a sustainable balance between time spent in work and in retirement", and ensuring "safer, more transparent pensions with better awareness and information." In addition, the Green Paper also raised the need for improving EU statistics on pensions and for enhancing governance of pension policy at EU level. Given the connection between worker mobility and the freedom of movement for workers, it is relevant to assess whether the role of mobility, which is a key EU priority has evolved?
[224] EUROPEAN COMMISSION WHITE PAPER "An Agenda for Adequate, Safe and Sustainable Pensions" COM (2012) 55 final (Text with EEA relevance) Brussels, 16.2.2012.

better protection of their rights under EU law, which also raises the issue of the current scope of EU law.[225] For the Commission, the nature of its overall approach in relation to occupational pensions has evolved from a mainly technical approach to a holistic perspective running across the fundamental freedoms, which clearly encompasses social as well as economic factors. Moreover, the European Parliament has emphasised the interaction between worker mobility and pensions in general, by stressing "*the positive impact which a more dynamic labour market could have on the pension systems*" in the EU.[226] However, the political challenge at EU level depends as much upon bridging ideological clashes (and vested interests) as it does on resolving technical matters (see Chapter V) and complying with constitutional requirements of EU law (see Chapter III).

c. The EU's political process: resolving the clash of perspectives?

The EU institutions play a key role in the EU's political debate on pensions. According to Pochet and Math, they act as "*arbiters*" in the EU's political process.[227] The Commission has been particularly active at the formulation of policy and secondary legislation in the field of occupational pensions and in dealing with social security matters affecting the free movements of the internal market. It has also brought infringement proceedings before the ECJ (see Chapter VI). It has also embraced its role in policy coordination in this field although that process still requires much improvement, not least in terms of its transparency.[228] At the legislative level, the Council of Ministers has played its part in representing the governments of the Member States, in which there have been a number of political disagreements on the matter of how far EU secondary legislation should go in protecting the occupational pension rights of migrant workers, which arguably led to the Supplementary Pensions Directive remaining dead in the sand for a long time. Moreover,

[225] The Commission thus noted that "*recent national reforms... may require an extension of the coordination regulations and minimum standards to improve mobile workers' access to supplementary pension rights within and between Member States*." The Commission also questioned what sort of EU level action is required to remove obstacles to mobility? Amongst the other projects envisaged, it was mentioned that "*an EU level tracking system could help mobile individuals keep track of their pension rights*" given the "*growing degree of labour mobility and reliance on a broader set of public and private sources of retirement income.*" Another project mentioned is the establishment of a cross-border EU pension fund for highly mobile researchers. See EUROPEAN COMMISSION WHITE PAPER "An Agenda for Adequate, Safe and Sustainable Pensions" COM (2012) 55 final (Text with EEA relevance) Brussels, 16.2.2012.

[226] European Parliament resolution of 16 February 2011 on 'Towards adequate, sustainable and safe European pension systems' (2010/2239 (INI)).

[227] MATH.A & POCHET.P, Les pensions en Europe: Débats, Acteurs et Méthode in RBSS 2/2001; Vol.2 p.345-363.

[228] DE LA ROSA.S. La méthode ouverte de coordination dans le système juridique communautaire, Bruylant (2007).

in the same context, the European Parliament has played its part in representing the citizens of the EU: indeed a broad spectrum of political opinion was brought to bear on the Supplementary Pensions Directive. Finally, at the judicial level the European Court of Justice, has been required to adjudicate in cases in which the freedom of movement for workers has been at stake (although this will be the specific object of Chapter VI).

There are many social, economic and financial interests at stake in the field of European pensions. Hence, it is not surprising that there is a range of actors within the EU's institutional framework who represent different constituencies.[229] Corporate lobby groups have for a long time voiced their opinions on occupational pensions.[230] The huge financial weight of pension funds gives them considerable 'clout'. In contrast, for a long time, the voice of social partners in the field of pensions was not heard as clearly at EU level as at the national level. The strong voice of economic actors in the field of pensions thus led to a call for a social counter-balance: "*It is important that the 'social experts' should make their voice heard in this context, so as not to leave the field open to those who view social protection from an exclusively financial angle*."[231] The need for experts and stakeholders (including representatives of the Member States, the Social Partners and Pension Funds) to work together in the field of pensions was suggested by the report of the High level Panel on Free Movement of Persons of November 1996. The Commission considered the usefulness of establishing a "Pensions Forum":[232] The idea was followed up by the Commission in 1999.[233] Finally, it was established in 2001.[234] Subsequently, other regulatory/ advisory bodies have been established (e.g. EIOPA). However, key differences between the social partners have not been bridged. Consequently the evolution of EU instruments in this field has been a mix of progress, paralysis and controversy in both EU legislation and new forms of governance.

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[229] At the political level, the distinction has been made between on the one hand, the "*group of economists*", which includes the Economic Policy Committee, the Ecofin Council and the European Central Bank; and on the other hand, the "*social group*" , which includes the Employment and Social Affairs Council as well as the Social Protection Committee. See POCHET AND MATH (Op.Cit Supra Footnote 226).

[230] In the last decade a growing number of studies have been carried out by pension funds, their advisers and other organisations that are active in this field (e.g. EFRP, EAPSPI etc).

[231] Y. CHASSARD European Integration and Social Protection: From the Spaak Report to the Open Method of Coordination" in I. BEGG & D.MAYES (eds), Social Exclusion and European Policy, Edward Elgar (2001).

[232] "*Its purpose would be to explore the possibilities for solving the outstanding problems for mobility in the context of occupational pensions. For instance, by bringing together the different interest groups, it could serve to find solutions to the problem of non-recognition of pension schemes as between the Member States. In general, its task would be to advise the Commission on the best way to overcome the remaining obstacles to free movement.*" Commission Green Paper of 1997: "Supplementary Pensions in the Single Market."

[233] COMMISSION Communication "Towards a single market for supplementary pensions." 11 May 1999 COM (1999) 134 final.

[234] Commission Decision of 9 July 2001 on the setting up of a committee in the area of supplementary pensions 2001/548/EC, (notified under document number C (2001)1775.

Conclusive remarks to Chapter I.

The demographic, economic and social challenges facing the EU Member States justify the need for EU involvement in the field of free movement of workers to take on board the protection of migrant workers' occupational pensions as a matter of policy. The context of an ageing population and a greater level of dependence means that the role of occupational pensions as a form of social protection in retirement is set to increase. The stakes remain high, namely the need to avoid poverty in old-age. The influence of globalisation is omni-present in the field of occupational pensions. In particular, the significant interaction between occupational pension schemes and financial markets has led to pension funds having a powerful voice on the political stage. Another important factor has been the impact of the economic crisis, which has shown the both the threats to economic growth and stability as well as the limits to a neo-liberal approach of de-regulation. On the social side, the high levels of unemployment in some Member States and polarisation of employment hubs has increased the current and future prospects of increased levels of worker migration. The social challenges in terms of long-term unemployment and precarious jobs have pushed the EU's decision-makers to find new employment strategies, including that of increasing worker mobility, which has potential implications for the protection of migrant workers' occupational pensions.

The difficulty of identifying the appropriate 'political' response to the issues affecting the protection of the occupational pensions of migrant workers stems from the fact that the matter is at the crossroads of social protection and free movement of workers, which raises issues of competence. On the one hand, the organisation of social protection has traditionally remained the preserve of Member States, and on the other hand, the free movement of workers is an area of natural competence for the EU. The choice of the EU's political response thus hinges largely upon these legal and constitutional considerations under EU law. An additional source of difficulty when determining how assertive the EU's role should be in this field stems from the fact that many occupational pensions are private sector schemes, which may be either mandatory or voluntary (depending on the national pension system in question) and which carry some economic clout in terms of the significant level of funds that they represent. Consequently, both Member States and pension funds have not hesitated to challenge any attempt by EU law to regulate the protection of migrant workers occupational pensions wherever they deem such intervention as being overly intrusive. However, the fact

that the freedom of movement of workers is at stake has not diminished the 'legal' justification for driving the reform of EU law in this field.

The key political challenge for the EU requires looking beyond its economic objectives in the field of the internal market and occupational pensions. In theoretical terms, how far should the EU go to re-conceptualise the link between the free movement of workers and the broader objectives of the European labour market. There have been theoretical proposals to redefine the EU's institutional framework: for example, Schmid's hypothesis that "*transitional labour markets would be an essential part of the solution in complementing the required economic growth based on technological innovations and new commodity or service markets*" [235] However, numerous practical difficulties abound, such as the challenge of squaring the circle between "*optimising people's lifetime social participation*" on the one hand and the inherent nature of occupational pensions on the other hand, which are based on the existence of an employment relationship.[236] In reality, this theory has not translated into concrete proposals to review the EU's policy with regards to shaping the EU labour market. Nor has it impacted on the classic community method of regulating the free movement of workers under EU law.

The drive to increase worker mobility as the main 'concretisation' of free movement of workers has been the main priority for EU legislative action in the field of occupational pensions. Positive integration in this field contains two strands: a 'financial services/market approach' to dealing with occupational pensions and a worker-oriented dimension based on the free movement of workers. EU 'coordination' legislation has been the method viewed as most suited to dealing with the protection of migrant workers' pension rights insofar as these fall within the scope of statutory social security. In the case of non-statutory occupational pensions, the method adopted has been one of "minimum requirements", which has

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[235] SCHMID, G. (2002), Transitional Labour Markets and the European Social Model: Towards a New Employment Pact, in: G. Schmid and B. Gazier (eds.): The Dynamics of Full Employment. Social Integration through Transitional Labour Markets, Cheltenham, UK and Northampton, MA, Edward Elgar, 393-435. See also GAZIER, B. (2002), Transitional Labour Markets: From Positive Analysis to Policy Proposals, in: G. Schmid and B. Gazier (eds.), Op.Cit, 196- 232.

[236] For a transitional labour market to appear *"the borders between the labour market and other social systems have to become more open for transitory states between paid work and gainful non-market activities which preserve and enhance future employability."* The premise for the institutionalisation of transitional labour markets is that they *"would encourage mobility ("transitions") across the border of social systems without inducing downward spirals of social exclusion by optimising people's lifetime social participation.*" However, this theory raises the risk of a 'square peg in a round hole' given the connection between occupational pensions and paid employment. Although some social security systems recognize periods spent outside the workplace (e.g. training, university study) as relevant to the calculation of pension rights, the same will tend not to apply in many occupational pension schemes, (with the exception of the rights of women and men to continue accruing pension rights during periods of parental leave on the basis of anti-discrimination laws).

historically been both the cause and the solution of the regulatory gap affecting EU law in this field (see Chapter IV).

Ultimately, the political challenge for the EU is to find a trans-national method of regulating the occupational pensions of migrant workers that encourages worker mobility in the EU, while protecting their social protection. The sensitive nature of this field arguably requires the politics to be driven by a legal dynamic based on the freedom of movement of workers. However, adopting a legal approach also shows differences as to the very notion of occupational pensions under EU law!

CHAPTER II. THE NOTION OF OCCUPATIONAL PENSIONS IN EU LAW: CAN OCCUPATIONAL PENSIONS BE CHARACTERISED AS SOCIAL PROTECTION?

Section 1. Defining the notion of occupational pension under EU law and policy

Section 2. The traits of the notion of occupational pensions under EU law

A. EU law on the internal market

a. The free movement of workers

b. The free movement of services

B. EU equality law

C. EU competition law

D. Occupational pensions and specific areas of EU labour law

a. The risk of employer insolvency

b. The protection of workers in business transfers

c. Atypical workers and occupational pensions

Conclusive remarks

Introductory remarks on the diversity and complexity of occupational pensions

The varied role of occupational pensions in national pension systems and its demarcation from other types of pension has resulted in a categorisation of pension provision. In addition, occupational pension schemes also reveal diverse characteristics both within and between Member States.

The categorisation of pension provision into pillars

Each of the 28 EU Member States has its social protection traditions, which have shaped the evolution of social policy in the field of pensions. The institutional design of pension systems in Europe have been described as constituting a "*complex system of programmes providing protection for the elderly*."[237] Classifying and analysing pension systems has traditionally been done by breaking down the components of pension systems into three 'pillars' of retirement income according to the nature of the source, through which they are established, administered and provided. [238] The first pillar represents statutory

[237] NATALI.D, Pensions in Europe, European Pensions: The Evolution of Pension Policy at National and Supranational level, ed. Peter Lang (2008) p.64.

[238] First pillar pensions are provided under the statutory social security regime. They are mandatory, established by law and are managed by a public body. They are normally financed on a PAYG basis and provide either flat-rate "minimum" benefits (e.g. in the UK or Denmark) or income-related benefits (e.g. in Germany or Belgium). Second pillar pensions relate to occupational pension schemes, which are schemes linked to the employment relationship. Membership is usually collective and such schemes can be either mandatory or voluntary. They are

pension schemes, the second pillar concerns occupational pension schemes and the third pillar is made up of individual retirement plans (personal pensions) and life assurance contracts. The pillar classification serves an explanatory purpose.[239] However, it is "an imperfect typology".[240] Indeed, "*the boundaries between them are not always clear and do not accurately describe the mix of public and private institutions*"; moreover pension reforms in the Member States have led to greater complexity when elements of privatisation/ out-sourcing have been introduced in mandatory first pillar schemes, leading to further sub-categorisations into "tiers."[241] The Commission has acknowledged the "three pillars of retirement income" when considering the place of 'supplementary pension schemes' in the social protection of workers.[242] In addition, it has consistently recognised the diversity of pension systems in the Member States. Occupational pensions mainly emerge in EU policy under the second pillar of pension provision: i.e. "work – based pensions".

Other "normative" classifications seek to promote a given form of pension system.[243] International organisations have thus presented models for pension system design, such as the World Bank[244] and the ILO.[245] The OECD determines *Occupational pension plans* as falling within the broader category of *Private pension plans*, which are administered by an

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normally funded and the pension benefit structure may be either Defined Benefits or Defined Contributions. Third pillar pensions consist of personal pension plans. These are individual contracts with insurance companies and other financial institutions). They tend to be voluntary by nature.

[239] These classifications can be a useful tool for measuring the importance of occupational pensions in a given system, backed up by the relevant statistics of *coverage* (the percentage of workers covered) and the level of *income replacement* (the ratio comparing the pension income with a worker's previous income).

[240] On the shortcomings of the traditional three pillar typology, see the Report by the Social Protection Committee on "Privately managed funded pension provision and their contribution to adequate and sustainable pensions." (2008), p.7.

[241] Under the influence of the World Bank, "many countries have introduced new measures that have represented a kind of compromise between new ideas and old institutions." See the description of the internal structure of the first pillar in NATALI Pensions in Europe, European Pensions: The Evolution of Pension Policy at National and Supranational level, ed. Peter Lang (2008) p.65-66.

[242] It did so in its Communication of 1991. The Commission's Green Paper of 1997: "Supplementary Pensions in the Single Market" also reflects pillar categorisation. In it, the Commission referred to "Supplementary Pensions" and relied upon the broad categorization of pensions into "pillars". The term 'supplementary pension' is deemed to include schemes that fall within Pillars 2 & 3. It is broader than 'occupational pension' as it is not conditional upon the relationship between pensions and work.

[243] See the classifications referred to in the Report by the Social Protection Committee on "Privately managed funded pension provision and their contribution to adequate and sustainable pensions." (2008).

[244] For the World Bank, the 3 pillars of a pension system are: (i) a relatively modest, publicly managed, PAYG, defined benefit pillar, (ii) a privately managed mandatory defined contribution pillar; and (iii) voluntary, privately managed schemes based on individual accounts. WORLD BANK (1994) Averting the old age crisis

[245] In the ILO classification, there are three broad categories of pension: (i) minimum pension guarantees that are universally available, means tested and financed directly from the general budget; (ii) a mandatory public PAYG social insurance scheme subject to a ceiling; and (iii) fully funded defined contribution schemes which may be privately managed and includes both occupational schemes and individual schemes.

institution other than general government.[246] However, the public-private nature of pensions has become increasingly blurred, which therefore limits its usefulness as a potential legal criterion. As the OECD recognises, the use of the word *private* can be misleading as in some countries, private pension plans may include plans for public sector workers.[247]

It should be noted that neither the classification of pensions into different pillars, nor any of the alternative categorisations have been formally integrated into EU law, which has instead chosen to focus on the criterion of the statutory or non-statutory nature of pensions as a factor upon which to determine the scope of its legal provisions (see Chapter IV).

The diverse nature of occupational pensions in the EU Member States

Within each national pension system, the nature of occupational pensions is characterised primarily by the benefit structure that they provide, their financing method and their membership. A broad outline of the key distinctions that are used to explain each of these features is provided after the Definitions that precedes the Introduction above. These differences show the complexity of occupational pension schemes in the EU, which has a bearing on the notion of occupational pensions under EU law. Notwithstanding structural and technical differences, the categorisation of pensions may enable a better understanding of the different types of pension systems but it does not necessarily improve the clarity and coherence of the notion of occupational pensions under EU law. Given such technical differences, one may ask whether it is satisfactory for the nature of protection afforded to migrant workers' occupational pensions to vary under EU law? Arguably it should not affect the ability of a migrant worker to enjoy his or her fundamental freedom of movement notwithstanding the source of their pension. Most occupational pensions fall within the 2nd pillar but some statutory or mandatory occupational pensions are considered as akin to social security/first pillar pensions (as mentioned below).

This Chapter asks whether the legal relationship between the free movement of workers and the protection of their occupational pensions can (and should) be determined by reference to the existence of a legal notion of occupational pensions under EU law? A further

[246] "Private pension plans may be administered directly by a private sector employer acting as the plan sponsor, a private pension fund or a private sector provider. Private pension plans may complement or substitute for public pension plans." See the classification in Private Pensions: OECD Classification and Glossary – ISBN 92-64-01699-6 – © OECD 2005.

[247] In that context, the word *private* is used to distinguish such plans from *Public pension plans* (i.e. social security and similar statutory programs administered by general government). Another choice of terminology might be "non-statutory social security plans", although such a description has its own deficiencies in that its formulation is negative and its connotations regarding the purpose of private pension plans may overlook the social objectives of the latter.

question involves ascertaining whether the notion of occupational pension is treated as constituting a form of social protection for the purpose of EU law?

The notion of occupational pensions will first be examined by reference to some relevant definitions in EU law and policy: Section 1 explores whether these definitions support the characterisation of occupational pensions as a form of social protection? Secondly, in terms of the overall coherence of EU law, Section 2 looks at how occupational pensions are construed as a notion (and articulated with social protection) in different substantive fields, beginning with the internal market (A), equality law (B), competition law (C) and additional areas of EU labour law (D).

Section 1. Defining the notion of occupational pension under EU law and policy

The term "occupational pension" refers only to schemes that are connected to employment or the exercise of a profession. In contrast, supplementary pensions, depending on the context, may include schemes that are arranged through individual contracts with a financial services provider where participation is not related to employment or the exercise of a profession (i.e. "third pillar" schemes). Throughout this thesis, the expression 'occupational pension' is preferred to 'supplementary pension' though the frequent use of the term "supplementary pension" in EU legislation, policy and case-law means that references will also be made to "supplementary pensions" where appropriate.

EU institutions have long had the task of producing definitions that take account of the complexity and diversity of occupational pensions in the EU. They are also required to specify the material scope targeted by the relevant law or policy. As a result the terms chosen to define occupational pensions vary according to the nature and ambition of each instrument as well as the field to which it applies, which thus shapes the notion of occupational pensions.

A. Relevant definitions under EU policy

In 1991, the Commission issued a Communication to the Council with the title: "Supplementary social security schemes: the role of occupational pension schemes in the social protection of workers and their implications for freedom of movement."[248] The 1991 Communication also specified the meaning of 'supplementary' and 'occupational' pensions.[249] Its definition focused on: (i) the connection between occupational pensions and income derived from work; (ii) the origin of occupational pensions in the workplace (with specific mention of the private sector); and (iii) their supplementary role in providing retirement benefits, which brought them within the scope of national systems of social protection. Such specificity of occupational pensions supports the argument that EU law on free movement must respect and uphold their social purpose (as is discussed in Chapter III on the social rationale).

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[248] Communication from the Commission to the Council "Supplementary social security schemes: the role of occupational pension schemes in the social protection of workers and their implications for freedom of movement," 22 July 1991 SEC (91) 1332 final.

[249] "*In the present communication and as far as pension schemes are concerned, the words 'supplementary' and 'occupational' are being considered as synonymous, as pensions are normally related to income from work and hence to a professional occupation. All these schemes have in common that they originated from initiatives of the private sector rather than being established by government legislation as are statutory social security schemes. Nonetheless, supplementary schemes are considered as part of a national security system to the extent that they provide benefits which either replace or supplement benefits provided by statutory social security schemes."*

The Commission's Green Paper of 2010 (the *Green Paper 2010*)[250] took a holistic approach to pensions in general while specifically defining occupational pensions.[251] It identified the following key features of occupational pensions: *access, establishment* and *administration.* Access to an occupational pension is conditional upon work in the form of: "*an employment or professional relationship".*[252] The definition also identifies the parties that are responsible for the establishment of occupational pension schemes, for example '*employers or groups of employers (e.g. industry associations)'* or by *'labour or professional associations, jointly or separately'.*[253] One should also note the recognition that occupational pensions may be established by *self-employed persons,* which is consistent with the fact that occupational pension schemes extend beyond the employment relationship and relate to the much broader notion of work.[254] The third element relates to the administration of occupational pension schemes, which conveys the nature of occupational pensions as financial institutions tasked with the management of scheme assets and pension contributions for the purpose of providing pensions.[255] However, the legal form of occupational pension schemes was not specified in the above definition.[256]

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[250] EUROPEAN COMMISSION, GREEN PAPER towards adequate, sustainable and safe European pension systems, Brussels, 7.7.2010, COM (2010) 365 final, SEC (2010)830.

[251] It defines 'occupational pension scheme' as: "*A pension plan where access is linked to an employment or professional relationship between the plan member and the entity that sets up the plan (the plan sponsor). Occupational pension schemes may be established by employers or groups of employers (e.g. industry associations) or labour or professional associations, jointly or separately, or by self-employed persons. The scheme may be administered directly by the sponsor or by an independent entity (a pension fund or a financial institution acting as pension provider). In the latter case, the sponsor may still have responsibility for overseeing the operation of the scheme.*" This is similar to the OECD's definition.

[252] This connects the worker (as a "*member of a scheme*" with his employer "*the plan sponsor*" as partners from the perspective of social protection. It is significant in that it emphasises the link between work and a workers' ability to build up pension rights through an occupational pension scheme. In that respect, occupational pensions embrace a similar logic to that of social insurance (in the context of social security) as they enable a worker to accrue pension rights on the basis of contributions having been made during their working lives. However, the definition provided by the Green Paper extends beyond employment. Indeed, by referring to the notion of a "professional relationship", the definition of occupational pension encompasses the self-employed as well as those whose pension schemes have been set up by entities other than employers. One must also point out that in this regard there is a difference between access and participation. Whereas access (through work) constitutes a key component of the above definition, participation can in some cases be mandatory and in others be voluntary. The breadth of the definition in terms of access is relevant to determine whether the applicable secondary EU law is in line (or not) with this holistic approach. The risk of fragmented labour markets is relevant in the EU and within Member States insofar as it determines who has access to occupational pension schemes.

[253] In doing so, it reflects employer paternalism/corporate social responsibility as well as the role of industrial sectors in establishing occupational schemes. In addition, it recognises that occupational pensions may also be established by trade unions or other specific associations.

[254] Such a broad spectrum in terms of access and establishment of occupational pensions are without a doubt designed to reflect the diversity of schemes that exist both within Member States and across the EU as means of providing social protection in old-age. As with access, the establishment of an occupational pension scheme may be mandatory or voluntary. In other words, setting up a scheme may be entirely at the employer's discretion or he may be obliged to do so by law. However, the Green Paper definition does not expand on this.

[255] Two options are envisaged: on the one hand the administration of the scheme may be performed *"directly by the sponsor";* on the other hand, it may be entrusted to "*an independent entity*". The definition in the Green

The Commission's White Paper of 2012 set out the EU's Agenda on pensions. It mentions the need to develop the private provision of "*complementary retirement savings*".[257] This broad notion incorporates occupational pensions (second pillar) and personal (third pillar) pension schemes, which are generally referred to by EU law/policy as 'supplementary schemes'. The use of the word "savings" reflects the current trend towards the individualization of pension provision. Moreover, the purpose of "complementary retirement savings is to allow people to "*maintain living standards after retirement*" which can be related to the basic matter of dignity in old age (see Chapter III on the discourse of fundamental rights).[258] In essence, the notion of occupational pensions is only indirectly referred to by the White Paper, which focuses on the broader issue of care for the elderly, which is a ticking time-bomb.[259] Rather than advocate specific measures, the White Paper 'holistically' encourages the development of all forms of provision for retirement.

B. The social protection objective of occupational pensions.

Despite their complexity, diversity and the common challenges that face the EU, occupational pensions already have a significant social protection role in some Member

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Paper provides two examples of independent entities: the first being a "*pension fund"* and the second being a *"financial institution acting as pension provider"*.

[256] This is understandable given the variety of forms that these may take, the most obvious one (from a common law perspective) being a "trust". Moreover, there is no clear distinction within the above definition between the public and private nature of the bodies administering occupational pension schemes which leads to the recognition that occupational pension schemes may invariably operate within the public sector or the private sector, something that appears entirely evident on its face (as there are public sector and private sector jobs in all countries) but which does present an interesting situation when workers belonging to one sector or the other fall into different legal regimes as regards the substantive treatment of their rights under EU law (such as is the case on free movement and anti-discrimination).

[257] This term is not formally defined but a footnote confirms that it includes "*occupational and personal pensions, life insurance and other forms of asset accumulation that can be used to maintain living standards after retirement. In addition, there are instruments (e.g. reverse mortgages) which enable people to convert assets (in general their home) into an additional retirement income.*"

[258] EUROPEAN COMMISSION WHITE PAPER "An Agenda for Adequate, Safe and Sustainable Pensions" COM (2012) 55 final (Text with EEA relevance) Brussels, 16.2.2012. The White Paper implies that without such savings, living standards will not be maintained. However, outcomes may vary between Member States according to the design of their pension systems. The White Paper appears to put occupational pensions into the same bracket as property (e.g. a family home), just another form of "*asset accumulation*", rather than a mechanism of work-based social protection. This may be worrying for those who are lucky enough to own their own home but cannot count on a decent pension in future. Indeed, the prospect of having to sell one's home to maintain a decent standard of living in retirement seems to be at odds with the principle of dignity in old age, which should not be equated to poverty. For those who do not own their own home, the lack of a decent pension may put them in an even bleaker position.

[259] The social repercussions of poor social protection provision may result in hardship and a lack of dignity in old-age. Conversely, ensuring workers have a decent pension would be a significant factor in enabling them to afford to pay for care in old age without necessarily having to sell their home.

States. EU policy has recognised that role is set to increase as governments seek to place a greater responsibility on workers and their employers to provide income in retirement.

Since the 1990s, the Commission produced a number of policy documents, which identify key challenges that form the backdrop to EU legislation on occupational pensions in relation to the free movement of workers. These documents have also addressed the social protection role played by 'supplementary' and private pensions with a view to facilitating policy coordination on reform in the field of pensions.[260] The following policy documents illustrate the recognition in EU policy of occupational pensions as part of social protection:

The implications of occupational pensions for the free movement of workers were the subject of a Communication from the Commission to the Council on 22 July 1991 that recognised the role of occupational pensions as a form of social protection within the Member States.[261] The recognition of occupational pensions as part of social protection arguably led to the dynamic for EU law to seek to reconcile occupational pensions with the free movement of workers.[262] The Commission also produced a Communication in addition to its report of 1995 on social protection in Europe, which stated that: "*social protection must be understood to cover not only social security, i.e. collectively provided social security but also social protection provided by government as well as schemes resulting from collective bargaining and private contributions.*"[263] The Commission also stated that its aim was to "*provide a secure environment for supplementary pension schemes*" in a subsequent Communication of 12 March 1997.[264] It acknowledged that the development of supplementary pensions was one of the key issues for modernisation of social protection. However, such recognition by the Commission of the role of occupational pensions as a source of social protection was controversial for reasons linked to the rules on competence.

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[260] On the open method of coordination and pensions, see NATALI D. AND DE LA PORTE C. (2004) OMC Pensions: What role for Europe in Co-ordinating the reform of different pension systems? in E.Gabaglio and R. Hoffmann (eds.), in European Trade Union Yearbook 2003, ETUI; On the objectives of the OMC on pensions, see DE LA ROSA p.105 and p.512 on its relationship with national pension reform.

[261] It stated that: "*Supplementary social security schemes usually form an important element of the overall social protection of workers, and it is up to the member states to decide by what combination of statutory and supplementary schemes the objectives of social protection are to be met*." Communication from the Commission to the Council of 22 July 1991 SEC(91) 1332 final: "Supplementary social security schemes: the role of occupational pension schemes in the social protection of workers and their implications for freedom of movement.

[262] In Council Recommendation 92/442/EEC of 27 July 1992 on the convergence of social protection objectives and policies (OJ L245), the Council recommended that Member States should "*promote, where necessary, changes to the conditions governing the acquisition of pension and especially, supplementary pension rights with a view to eliminating obstacles to the mobility of workers*". Two objectives are thus required to converge: social protection and free movement.

[263] COM (95) 457 Final 31.10.1995: "The future of Social Protection: A framework for a European Debate"

[264] Communication from the Commission of 12 March 1997 COM(97) 102 final: "Modernising and improving social protection in the European Union".

Indeed, the Court annulled Commission Communication 94/C 360/08 on an internal market for pension funds, hence the caveat frequently repeated by the Commission, that: "*The Community does not have the power to require Member States to undertake 'the early development of supplementary pension schemes'.*"[265]

In its Green Paper of 10 June 1997[266], the Commission began with a general statement indicating "*the provision of pensions is a fundamental aspect of social protection in the EU.*" Moreover, it recognised that the main source of pension provision in most countries still comes from statutory social security (the first pillar).[267] Given the growing importance of occupational pensions, the Commission also pointed out "*the need to maintain income levels in retirement is likely to result in greater reliance being placed on the other main sources of supplementary retirement income: pension schemes linked to employment (i.e. occupational pension schemes) and pension schemes taken out by individuals (third pillar schemes).*"

At the EU policy level, considering occupational pensions as a form of social protection has a dual relevance. First of all, it aims to overcome the diversity of pension systems in the Member States by focusing on the purpose of occupational pensions in order to facilitate the development of occupational pensions through the "*cognitive tool*" of policy coordination.[268]A holistic approach highlights the growing importance of occupational pensions in the Member States while reflecting their diversity, which is characterised by the fact that "*coverage of occupational pensions is more heterogeneous between member states*."[269] Secondly, recognition at the policy level of the social protection purpose of occupational pensions should in theory be reflected in those areas falling within EU legislative competence that affect occupational pensions, such as free movement of workers. However, the abovementioned complexity (as well as the principle of subsidiarity, whose impact regarding the role of the EU in social security and social policy is discussed in Chapter IV) has limited the extent of such recognition in the definitions under EU law.

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[265] Case C-57/95 *France v Commission* [1997] ECR I-1627; See also the explanatory memorandum to the "Amended proposal for a Directive of the European Parliament and of the Council on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights. COM (2007) 603 final/2.

[266] Commission Green Paper: "Supplementary Pensions in the Single Market." COM (97) 283 final.

[267] However, the proportion of replacement income provided by statutory pensions is in decline (and is projected to decline further), whereas an increase in private provision is expected to compensate for some of the decrease of the public sector. In 2005, the income replacement rate represented by statutory provision across the EU member states amounted to 55%. In the year 2050, this is projected to decline to 40%. Source: Social Protection and Social Inclusion in Europe – Key facts and figures, Commission MEMO/08/625 of 16 October 2008, p.6

[268] VANDENBROUCKE.F "Open Coordination on pensions and the future of Europe's Social Model" RBSS 2002 p.533-543.

[269] See the Report by the Social Protection Committee on "Privately managed funded pension provision and their contribution to adequate and sustainable pensions." (2008), p.10.

C. The functional definitions used under EU law

In the context of EU law on the internal market, the responsibility for defining occupational pensions has fallen upon the EU legislator: indeed the terms "supplementary pension" and "occupational pension" are used in the Safeguard Directive, the IORP Directive and the Supplementary Pension Rights Directive. The definitions adopted by EU secondary legislation are undoubtedly broad enough to encompass the variety of pension schemes while acknowledging the differences in the design of pension provision in EU Member States.

Article 3 of the Safeguard Directive defines *'supplementary pension scheme'*.[270] It highlights both the complexity of occupational pensions in terms of their legal form and the nature of their financing. It also refers to the intended purpose of the scheme, which is to provide a 'supplementary pension'. Moreover, it envisages a broad membership of such schemes encompassing employed or self-employed persons.

The IORP Directive regulates funded institutions that provide retirement pensions with an EU (cross-border) dimension. It defines an "*institution for occupational retirement provision*".[271] The focus is on funded occupational pension schemes that are separate from the sponsoring employer. Its scope is broad as it ranges from large financial institutions to small independent pension schemes set up by employers in the form of a trust. The recognition of the purpose of such schemes and their connection with employment/ occupation is important given the 'market' nature of this EU directive.

Article 3 of the Supplementary Pension Rights Directive defines "*supplementary pension"* and *"supplementary pension scheme*".[272] Reference is made to the national laws of Member States under which pension schemes exist. As with the IORP Directive, the connection between supplementary pensions and the employment relationship is emphasized; the purpose of the scheme is also mentioned.

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[270] "*any occupational pension scheme established in conformity with national legislation and practice such as a group insurance contract or pay-as-you-go scheme agreed by one or more branches or sectors, funded scheme or pension promise backed by book reserves, or any collective or other comparable arrangement intended to provide a supplementary pension for employed or self-employed persons*."

[271] "*an institution, irrespective of its legal form, operating on a funded basis, established separately from any sponsoring undertaking or trade for the purpose of providing retirement benefits in the context of an occupational activity on the basis of an agreement or a contract agreed: — individually or collectively between the employer(s) and the employee(s) or their respective representatives, or — with self-employed persons, in compliance with the legislation of the home and host Member States, and which carries out activities directly arising therefrom.*"

[272] "*Supplementary pension means a retirement pension provided for by the rules of a supplementary pension scheme established in conformity with national legislation and practice."*
"Supplementary pension scheme means 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."

There is some overlap between the definitions of the terms ‘supplementary pension’ and ‘occupational pension’ under EU law. Indeed, they are often used interchangeably sometimes treated as equivalent in EU policy. The risk is that of blurring the lines between occupational pension schemes and third pillar schemes (which do not have the same connection with the workplace). Though EU law seeks to protect migrant workers’ rights in respect of both types of pension, the lack of differentiation at the conceptual level can be viewed as leading to a dilution of the recognition of occupational pensions as a source of social protection. However, the need to define occupational pensions under EU secondary law has a functional role, which must be coherent in terms of its articulation with EU primary law as well as other instruments of other pieces of secondary legislation. The notion of occupational pensions therefore needs clarity not only as regards the material scope of EU law on free movement but also in terms of its recognition as a form of social protection. This has a bearing on rationale for the protection of migrant workers’ occupational pensions (Chapter III) as well as on the substantive tools available for legal protection of migrant workers’ occupational pensions under EU law (see the analysis in Part II).The institutions that fulfil the policy, legislative and judicial functions of the EU, namely the Commission, the European legislature (especially the European Parliament) and the European Court of Justice have all played a part in determining the relationship between occupational pensions and social security/social protection.

Section 2. The traits of occupational pensions in EU law

The notion of occupational pensions under EU law on the internal market is fragmented. It does not feature in the Treaty, which focuses on the notion of social security. Instead, occupational pensions have been dealt with in secondary legislation where they are subject to a distinction between statutory and non-statutory pensions. Nonetheless, they have also been recognised as a source of social protection. Does this instrumental approach affect the coherence of the notion of occupational pensions under EU law? What is the impact of the limited recognition of social protection on the need for EU law to offer adequate legal protection to the treatment of migrant workers' occupational pensions?

The notion of occupational pensions under EU law on the internal market (A) is followed by the consideration of its traits in the fields of equality law (B), competition law (C) and other fields of labour law (D)

A. EU law on the internal market

The notion of occupational pensions under EU law on the internal market shows some common characteristics and some differences with regards to the free movement of workers (a) and the freedom to provide services (b).

a. The Free movement of workers

Under EU law on the freedom of movement for workers, occupational pensions began as an 'invisible' notion. It then evolved into a divided notion (based on the statutory/non-statutory distinction). Nevertheless, some recognition of occupational pensions as social protection may also be determined in assessing the purpose of this notion under EU law.

i. From an invisible notion to a divided notion in EU law

Article 51 EEC (now Article 48 TFEU, ex Article 42 EC) referred in very broad terms to the general field of "*social security*". Moreover, in its initial wording, Regulation 1408/71 (the predecessor to Regulation 883/2004) neither referred to occupational pensions, nor did it expressly exclude them from its material scope. This 'broad-brush' approach in both the Treaties and what is today Regulation 883/2004 and Regulation 987/2009 (the ***Coordination Regulations***), in which the notion of occupational pensions began as 'invisible' may be

explained in light of the nature of the founding Member States' pension systems.[273] The welfare states of the founding Member States was of "*Bismarckian*" influence.[274] Accordingly, their pension systems were essentially based on the logic of mandatory social insurance.[275] Under those systems, employers and employees were required by law to pay contributions for pensions. [276] Given the mandatory nature of social insurance, it was important for migrant workers in those countries to know that the protection of their rights under state pension schemes was guaranteed by EU law.[277] Subsequently, other ways of increasing the level of replacement income in retirement were encouraged in addition to state pensions. These became a second tier of pension provision.[278] In Germany, voluntary occupational pensions were also encouraged to develop in their own separate way.[279] In the Netherlands, there was a burgeoning culture of funded occupational pensions as the Dutch government had already taken measures from 1949 with a view to making these mandatory.[280] In France, the process of giving mandatory status to the 'régimes complémentaires' took place in 1972, some twenty years later after the Netherlands.[281] Mandatory occupational pension schemes are often deemed akin to statutory social security

[273] Following the end of World War II and during the 1950s and 1960s, much of the focus of the pension systems in the founding Member States was on extending the coverage of social insurance to various categories of citizens. When the ECSC was created in 1951, the pension provision in the six founding Member States stemmed mainly from their national social security systems. Six years later in 1957, the same six Member States established the EEC.

[274] POCHET, P (2005) "The Open Method of Coordination and the Construction of Social Europe. A Historical Perspective." (Chapter 1) in Zeitlin, J and Pochet, P. (eds) The Open Method of Coordination in Action. The European Employment and Social Inclusion Strategies, PIE-Peter Lang, Brussels.

[275] A summary description of the main characteristics of the Bismarckian Welfare State is provided by POCHET, P: The Influence of European Integration on National Social Policy Reforms, Paper prepared for the Conference "A long goodbye to Bismarck? The Politics of Welfare Reforms in Continental Europe." Minda de Gunzburg Centre for European Studies, Harvard University, 16/17 June 2006.

[276] These provided retirement income designed to replace wages previously earned by a worker through employment. In France, Italy, Belgium and Luxembourg, many workers saw the State as having a duty to meet their retirement income needs; relatively generous earnings-related pension benefits were thus put in place by successive governments.

[277] Unsurprisingly, the Treaties dealt with the protection of migrant workers' social security rights, which led to Member States and the public bodies administering social insurance pensions becoming the main entities affected by the EU law on free movement of workers under Article 51 EEC (now 48TFEU) and the Coordination Regulations.

[278] In France, the social partners negotiated collective agreements in order to create additional occupational pension rights known as 'régimes complémentaires' (unfunded PAYG schemes managed by the social partners). The national agreement of 14 March 1947 set up a pension scheme for engineers and managerial staff (cadres) of industrial and commercial enterprises: the Association générale des institutions de retraite des cadres (AGIRC). This multi-employer scheme became the model for subsequent schemes.

[279] In Germany, where large industrial companies had a history of providing occupational pensions on a voluntary basis, this practice was encouraged to continue through tax policies.

[280] "In 1949, the Dutch Law on occupational pension sector funds came into force, making it possible to oblige employers and employees to participate in these funds." See VAN HET KAAR, R. Questionnaire for the European Industrial Relations Observatory comparative study on occupational pensions (Netherlands).

[281] French legislation in 1972 established that the 'régimes complémentaires' were henceforth compulsory for the majority of employees in the private sector.

pensions in terms of coverage and outcome, notwithstanding their categorization.[282]In contrast, voluntary and independent occupational pensions were less important in the pension systems of the founding Member States. It is therefore unsurprising that EU law did not specifically identify occupational pensions in the original Treaties, nor in the first wave of secondary legislation on the protection migrant workers' social security.

When the first phase of enlargement of the EEC took place in 1973, the United Kingdom, Ireland and Denmark, (three countries with established traditions of voluntary occupational pensions), became Member States.[283]However, the approach adopted by the EEC to deal with the old-age pension rights of migrant workers still did not change the focus of EU law, which remained on the Coordination of the 'social security rights' of migrant workers.[284] Given that neither the Treaty nor the Coordination Regulations included a reference to occupational pensions, this left open the question as to whether occupational pensions were to be considered under EU law as a source of social security rights.

The choice made by the EU legislator to adopt an instrumental approach to determine the scope of the Coordination Regulations, based on a distinction between statutory and non-statutory pensions, proved a decisive factor in determining that the Coordination Regulations should in principle exclude non-statutory occupational pensions. The effect of this approach was to put Member States at the centre of the legislation rather than the individual worker. It should be noted that the material scope of the Coordination Regulations was initially addressed by the ECJ, which had offered a relatively broad interpretation of the scope of the Coordination Regulations that included non-statutory benefits stemming from the employment relationship. In the *Vaassen Goebbels* case[285], the ECJ focused on the

[282] Privately managed funded occupational pensions in the Netherlands have become a vast source of retirement income. This has prompted some commentators to describing the Netherlands as having shifted from having an essentially Bismarckian pension system to having a multi-pillar system. See LESCA. A Op.Cit; For a short overview of "The Netherlands: An Example of a Multi-Pillar Pension Model, see also NATALI, D. Pensions OMC's influence on national reforms, NEWGOV, New Modes of Governance Project, Observatoire social europeen, 27 February 2007.

[283] The enactment of the Coordination Regulations in 1971 and 1972 was close in time to the accession of those three countries. There would have been some overlap between the period during which the UK, Ireland and Denmark were negotiating their membership and the period during which the Coordination Regulations were going through the European legislative process. Did those countries raise the question of the occupational pension rights of migrant workers or was it not deemed a priority at the time?

[284] How much influence did the design of the pension systems of the founding Member States have on the precise shape of EU law protecting the pension rights of migrant workers? Did business lobby and sponsoring employers/fund managers oppose a move to include such occupational schemes within the scope of the Coordination regime? Indeed they may have been concerned on grounds of the cost and so called '*red tape*' that would have resulted from applying the Coordination Regulations (which were specifically designed to protect migrant workers) to their occupational pension schemes.

[285] Case 61/65 *G. Vaassen-Göbbels (a widow) v Management of the Beambtenfondsvoor het Mijnbedrijf* [1966] ECR [1966] ECR 00261, "*Rules governing sickness insurance for workers and their survivors, laid down and*

enforceable nature of the scheme and the purpose of the benefit provided. This ruling would have brought many occupational pension schemes within the scope of the Coordination regime.[286]

However, the ECJ's approach was swiftly rebutted by the European legislator by means of a legislative amendment to the Coordination Regulations, which resulted in a categorisation of social security pension schemes for the purposes of EU law based on the statutory source of such schemes. This narrower material scope of the Coordination regime was subsequently acknowledged by the ECJ in *Commission v France*[287] in a case about 'early retirement' where the ECJ held that the Coordination Regulations did not apply to non-statutory occupational pensions. By its actions, the European legislator chose to exclude a significant number of occupational pension schemes from the material scope of the Coordination Regulations, namely all those that were deemed 'supplementary' insofar as they had a non-statutory source and were contractual by nature. The decision by the Council of Ministers thus created two separate categories of occupational pension schemes under European law: on the one hand, statutory occupational pension schemes, which are subject to the Coordination Regulations and on the other hand non-statutory "supplementary" occupational pension schemes, which are excluded from the material scope of the Coordination Regulations. The 'legislative' or statutory source of occupational pension scheme thus constitutes the key criterion to determine the scope of the Coordination Regulations.[288] For the avoidance of doubt, it was expressly stated that *"contractual provisions*" fell outside the scope of the Coordination Regulations.[289]

Despite the general exclusion of supplementary occupational pensions from the scope of the Coordination Regulations, there remains the option for Member States to make a

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operated by an institution established under private law, since they are 'enforceable provisions', fall within 'legislation' within the meaning of articles 1(b) and 4 of regulation no 3 when the said provisions supplement or are a substitute for laws and regulations establishing a general or special social security scheme".

[286] For example schemes previously known as "contracted out schemes" in the UK would have been caught. The potential inclusion by the ECJ of enforceable social security benefits arising in the context of the employment relationship was of particular relevance to occupational pensions are by their nature connected to work. However, the case had broader implications given that the material scope of the Coordination Regulations affects a broader range of benefits beyond pensions (such as benefits covering ill-health, invalidity or early retirement). The effects on these areas would have been significant.

[287] Case C-35/97 *Commission v France* [1998] ECR I – 5325, paras 34-35.

[288] The current wording used by Article 3 (1) (d) of Regulation 883/2004 (replacing Regulation 1408/71) states that the coordination regime applies to *legislation* on social security old-age benefits: "*This Regulation shall apply to all <u>legislation</u> concerning the following branches of social security: (…) (d) old-age benefits (…)*". Article 1(l) defines *legislation* as meaning in respect of each Member State, "*laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3 (1) …*".(emphasis added).

[289] This went further than the previous language in Article 1(j) of Regulation 1408/71, which referred to "existing or future industrial agreements."

declaration requesting that the Coordination Regulations should apply to a given occupational pension scheme subject to certain conditions.[290] The exclusion of non-statutory occupational pensions from the material scope of the Coordination Regulations left a gap in the protection of migrant workers under EU law, which is potentially the source of 'social deficit' afflicting their social protection. It is arguable that the statutory/non-statutory distinction is too blunt as it does not take into account the nature or the purpose of occupational pensions.[291]

ii. Recognition under EU law of the role of occupational pensions as a source of social protection

Implied recognition through the choice of legal base of secondary EU legislation

The recognition of occupational pensions as a source of social protection in the field of the freedom of movement of workers may be inferred from the original choice of legal basis for secondary legislation. It is also visible in the recitals of the relevant secondary legislation and there is some limited recognition in the case-law of the ECJ.

Initially, there was a dual role for Article 48 TFEU and its predecessor (Article 51EEC).[292] It was the primary legal basis for the EU Coordination Regulations, which deals with the coordination of migrant workers' social security pensions, including those occupational pensions that have a statutory underpin. In addition, Article 51EEC also provided part of the legal basis for the Safeguard Directive[293], which deals specifically with occupational pensions and worker's right of free movement. Recognition by the EU legislator of occupational pensions as a form of social protection could thus be implied due to the choice of Article 51 EEC (now 48TFEU) as the legal basis under the Treaty for any secondary legislation under EU law. Indeed, the logical argument was that occupational pensions that fell within the scope of Article 51 EEC could be considered to form part of social security for the purposes of EU law.

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[290] This currently constitutes the only exception to the exclusion of supplementary occupational pensions from the material scope of the Coordination Regulations and has been used in one instance by France to bring the AGIRC & ARCCO pension schemes within the scope of the Coordination Regulations.

[291] One may debate whether the rationale behind the choice of scope was to placate vested interests in private sector (and in some Member States) or whether it is justified by the need for different pieces of secondary legislation to reflect the diversity and complexity of occupational pensions.

[292] Article 48 TFEU (ex 42 EC, ex 51 EEC) deals with the protection of the social security rights of migrant workers: "*The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers.*"

[293] The other legal base of the Safeguard Directive is Article 235 EEC (ex 308EC now 352 TFEU).

The successor to Article 51EEC, namely Article 42 EC (now Article 48 TFEU) was also used as part of the legal basis in the first draft and in the amended draft of the proposed "Supplementary Pension Rights Directive." However, the legal basis for the Supplementary Pension Rights Directive was subsequently reviewed by the Commission and the Legal Service of the Council, with the result that it was eventually replaced by Article 46TFEU.[294] This was significant as Article 46TFEU is not specific to measures concerning social security, but allows more generally for the adoption, by ordinary legislative procedure, of "*measures required to bring about freedom of movement of workers as defined in Article 45*" of the TFEU. Notwithstanding the impact on the legislative procedure (namely the change to Qualified majority voting), it is arguable that this change of legal basis has eroded the notion of occupational pensions under EU law in terms of its relationship with social security, although it should not in theory affect the legal rationale for their protection under EU law on free movement.

From a historical perspective, occupational pensions have been consistently recognised by the EU legislator as a component of social security, albeit one subject to a statutory/non-statutory divide. The characterisation of occupational pensions as social protection is explicit in the recitals of secondary EU legislation.

The recitals of the Safeguard Directive and the Supplementary Pension Rights Directive

The first two recitals to the Safeguard directive refer to supplementary occupational pensions as a form of 'social security'.[295] However, the distinction between "*statutory social security schemes"* and *"supplementary social security schemes"* is still reflected in the material scope of the Safeguard Directive although both types of schemes are referred to as "*social security*" with the latter being described as a 'complementary' source of social protection for workers.

In the proposed Supplementary Pension Rights Directive, the reference to free movement and social security in the first recital is broadly the same as in the Safeguard Directive. However, in the second recital of the amended legislative proposal of the

[294] "*the Commission representative indicated during the meeting of the Working Party on Social Questions on 5 November 2012 that Article 46 TFEU is the correct legal basis for the proposed Supplementary Pension Rights Directive"* (even though the legal basis of the proposal remained Articles 48 and 115 TFEU until the Council adopted its common position in 2013).The other legal base mentioned is Article 94 EC (now Article 115 TFEU).
[295] "*(1) Whereas one of the fundamental freedoms of the Community is the free movement of persons; whereas the Treaty provides that the Council shall, acting unanimously, adopt such measures in the field of social security as are necessary to provide freedom of movement of workers; (2) Whereas the social protection of workers is ensured by statutory social security schemes complemented by supplementary social security schemes."*

Supplementary Pension Rights Directive, the wording "*supplementary **social security** schemes*" has been deleted and replaced with the wording "*supplementary **pension** schemes*".[296]The remainder of the second recital still retains the recognition that occupational pensions are a component of social protection.[297] It is debatable whether the EU legislator was seeking to project the view that the notion of social protection is broader than that of social security, with the inference that occupational pensions are part of social protection but not social security, in contrast with the language previously used.

Limited recognition of the social protection objective of supplementary occupational pensions in the case-law of the ECJ

The role of occupational pensions and their relationship with the objective of social protection was referred to by AG Kokott in her opinion in the case of *Casteels*[298] which concerned the application of the Treaty provisions on free movement of workers (namely Articles 45 and 48 TFEU) with regards to non-statutory occupational pensions of migrant workers. [299] The importance of the workplace as a source of occupational pensions and social protection is thus implied. However, in its decision in *Casteels*[300], the ECJ simply dealt with the restrictions posed to the freedom of movement for workers by focusing on the employment relationship and any related obstacles to worker mobility. It refrained from expressing any link between the purpose of occupational pensions and social protection. The reasons and the implications of the ECJ's ruling will be explained in Chapter VI.[301]

b. **The free movement of services and occupational pensions**

[296] Emphasis added. Should one read anything into this change of terminology? Through this amendment, was the EU legislator seeking to create any distance between non-statutory occupational pension schemes and the concept of social security by removing the very wording 'social security' that hitherto expressly connected both notions. Given the change of legal basis from Article 48TFEU to Article 46TFEU, this is plausible.
[297] "*The social protection of workers with regard to pensions is guaranteed by statutory social security schemes, together with supplementary pension schemes linked to the employment contract, which are becoming increasingly common in the Member States."*
[298] Case C-379/09 *Maurits Casteels v British Airways plc* [2011] ECR I-01379, Opinion of AG Kokott.
[299] "*in view of the demographic change in Europe and the associated challenges posed to State old-age insurance schemes, the creation of supplementary private pension provision is becoming increasingly important for Union citizens. Occupational old-age pension schemes play an invaluable role in this context.*"
[300] Case C-379/09 *Maurits Casteels v British Airways plc* [2011] ECR I-01379.
[301] In the field of free movement of workers, the scope for the ECJ to recognise the social protection purpose of occupational pensions depends on the nature and content of the instruments of EU law, which it has the authority and the duty to interpret. Arguably, the ECJ's recognition of occupational pensions as having an objective of social protection has been limited in the field of free movement, partly as a result of constitutional constraints under EU law such as subsidiarity and partly because of the focus on the legal distinction under EU law between statutory and non-statutory schemes, which focuses on their source rather than their purpose.

While seeking to enact secondary legislation covering the protection of migrant workers' non-statutory occupational pensions, the Commission has also adopted a market approach to dealing with occupational pensions through the prism of financial services. The Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision (the IORP Directive) was adopted in 2003.[302]It was designed to create an internal market in the field of supplementary pensions by enabling pension funds to exploit the free movement of capital and freedom to provide services in the EU.[303] In addition, it also has a prudential dimension which is akin to consumer protection and goes beyond a mere implementation of the fundamental freedoms of the internal market.[304]Such prudential regulation of occupational pension schemes at EU level has been subject to a great deal of involvement (and lobbying) coming from the pensions industry to make a case for the specificity of pensions. The role of pensions as a key element of social protection is often invoked in that context. The Commission has thus been faced with an uphill task of trying to facilitate an internal market in the field of supplementary pensions. Arguably, this has also made it all the more relevant not to lose focus on the free movement of workers mentioned above.[305] EU secondary legislation in this field, for example the directives on life assurance undertakings[306] or the "UCITS Directive"[307] has often proven particularly controversial, especially with regards to the Solvency II Directive[308] and the process to amend and replace

[302] 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, OJ L 235 , 23/09/2003. The Treaty Articles providing the legal basis for the IORP Directive were Article 47(2) EC, Article 55EC, Article 95(1) EC. The legislative procedure used was the Co-decision procedure laid out in Article 251EC. Although the first two provisions broadly fell within the Treaty structure on the freedom of establishment and freedom to provide/receive services, the essential legal basis was Article 95 (1) now Article 114 TFEU which concerns the approximation of laws which have as their object the establishment and functioning of the internal market.

[303] By using minimum harmonisation and relying upon mutual recognition, the IORP Directive allows pension funds to manage occupational pension schemes for companies that are established in another Member State and allows European-wide companies to have only one pension fund for all subsidiaries in Europe.

[304] The IORP Directive "*establishes prudential standards to ensure that members and beneficiaries are properly protected, as well as requirements concerning the disclosure of information*." The prudential regulation of institutions providing occupational pension schemes (on a cross-border basis) offers direct or indirect protection to workers and citizens in their capacity as consumers.

[305] Although financial services are very important, an internal market based on people must also be achieved by ensuring that workers can continue to enjoy the occupational pension provision that currently exists in each Member State without being penalised if they are mobile within the EU.

[306] The prudential rules applicable to life assurance undertakings were recast in 2002 into a single text (Directive 2002/83/EC10). There followed a substantial overhaul in 2009 with the adoption of the Solvency II Directive (Directive 2009/138/EC11).

[307] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L 302, 17.11.2009, p. 32–96.

[308] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (Text with EEA relevance), OJ L 335, 17.12.2009, p. 1–155.

the provisions of the IORP Directive, which has proven to be a legislative minefield during the past 10 years since its enactment in 2003.

The IORP Directive: objectives, scope and the statutory/non-statutory distinction

The distinction between statutory and non-statutory pensions also applies insofar as the IORP Directive does not cover occupational pension schemes that fall within the scope of the Coordination Regulations. Other forms of occupational pension provision are not covered either, namely book reserve schemes and PAYG schemes, which are excluded from its scope. As a result a number of workers who are members of schemes falling outside its scope will obviously not be protected to the same extent. It has been proven impossible to enact a 'one-size fits all' piece of legislation on occupational pensions, not only because there has simply not been the political consensus to do so but also due to the need for the IORP Directive to cater for the diversity and complexity of occupational pensions. Notwithstanding its economic focus, the IORP Directive has also recognised the role of occupational pensions in social protection.

Recognition of social protection in the Recitals of IORP Directive

Recital 5 of the IORP Directive focuses on occupational pensions as a source of social protection.[309] Moreover, Recital 13 connects the financial nature of occupational pensions with social protection by referring to the nature of the benefit provided, which is normally an annuity.[310] While specifying that the preferred form of pension is for a lifelong pension, the EU legislator is nevertheless allowing for flexibility, even though, in practice, commuting pension benefits into lump sums tends to favour the pension institution and not the individual. Recital 14 focuses on the risks that occupational pensions must cover and considers the need for an adequate level of benefit in order to achieve the objective of social protection.[311]

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[309] "*Since social security systems are coming under increasing pressure, occupational retirement pensions will increasingly be relied on as a complement in future. Occupational retirement pensions should therefore be developed, without, however calling into question the importance of social security pensions in terms of secure, durable and effective social protection, which should guarantee a decent standard of living in old age and should therefore be at the centre of the objective of strengthening the European social model*".

[310] "*When aiming at ensuring financial security in retirement, the benefits paid by institutions for occupational retirement provision should generally provide for the payment of a lifelong pension. Payments for a temporary period or a lump sum should also be possible*."

[311] "*It is important to ensure that older and disabled people are not placed at risk of poverty and can enjoy a decent standard of living. Appropriate cover for biometrical risks in occupational pension arrangements is an important aspect of the fight against poverty and insecurity among elderly people. When setting up a pension scheme, employers and employees, or their respective representatives, should consider the possibility of the pension scheme including provisions for the coverage of the longevity risk and occupational disability risks as well as provision for surviving dependants.*"

Observations on the notion of occupational pensions under EU law on the internal market

The notion of occupational pensions began as largely invisible in the first phase of EU integration, which covered the field of social security through the Coordination Regulations. Moreover, the division of occupational pensions under the scope of EU secondary legislation on the basis of the statutory criterion has led to a regulatory gap for non-statutory occupational pensions (to be discussed in Chapter IV). In the second phase of EU integration dealing with the regulation of occupational pension providers in the internal market, EU law addressed the notion of occupational pensions as an economic phenomenon but failed to fully recognise its social importance. The third phase of EU integration acknowledged the role of occupational pensions in social protection while seeking to detach it from the notion of social security as witnessed by the choice of Article 45TFEU as the legal base for the Supplementary Pensions Directive. This functional approach has treated the notion of occupational pensions as a tool for mobility rather than an area requiring protection in its own right. Amazingly though, the parallel existence of both the social protection dimension and the market dimension led to a trade-off and compromise in terms of the adoption of the Supplementary Pension Rights Directive (see Chapter V).

It is arguable that the prevalence of instrumental criteria has led to a situation where the substance and purpose of occupational pensions have been superseded by their statutory or non-statutory source. In addition, the absence of case-law of the ECJ dealing the non-statutory occupational pensions of migrant workers is indicative of a lower level of protection compared to social security pensions, which has also led to discrepancies in terms of negative integration between the position of migrant workers depending on the nature of the pension systems of the Member States in which they have worked or sought work (see Chapter VI).

The presence of some recognition of occupational pensions as a source of social protection will contribute towards the rationale for protecting migrant workers' social protection rights under EU law on the free movement of workers (See Chapter III). Nevertheless, the gap between social rhetoric and legal protection supports the claim that the notion of occupational pensions under EU law on the internal market is divided, sometimes inconsistent and possibly inadequate from the perspective of protecting workers' freedom of movement and their social protection. Unsurprisingly, such flaws and criticisms are not limited to EU law on the internal market but can also be found in EU equality law.

B. The notion of occupational pensions under EU equality law.

The notion of occupational pensions has a common characteristic under EU equality law insofar as it has been recognised as a form of social protection in the directives on the principle of equal treatment between men and women (a). The defining trait of occupational pensions in this field is the association of non-statutory occupational pensions with "pay" (b). One may also point to the presence of the same distinction between statutory/non-statutory occupational pensions (c). Finally, the anti-discrimination dynamic of the Court's jurisprudence has had a pervasive influence on the articulation between EU law and the notion of occupational pensions (d).

a. The recognition of occupational pensions as social protection

The relevance of occupational pensions as a component of social security was referred to in the title of former Directive 86/378/EEC of 24 July 1986 on "the implementation of the principle of equal treatment for men and women in occupational social security schemes". The applicable provisions are now contained in Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (the ***Recast Directive***). The same language is retained in the title of Chapter 2 of the Recast Directive, which is headed "Equal treatment in occupational social security schemes". Article 2(f) of the Recast Directive also defines occupational pensions by reference to their social purpose.[312]This positive definition of occupational pensions recognizes their role in terms of social protection but remains divided due to the statutory/non-statutory distinction.[313]

The recognition of occupational pensions as a form of social security and social protection was visible in the underlying rhetoric of EU secondary legislation. However, such unity of purpose is again counter-balanced by the distinction between statutory and non-statutory pension schemes, which reveals a parallel between EU law on the free movement of

[312] This is "*to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional*."

[313] Although an initial effort was made to provide a holistic approach to gender equality in the field of EU pensions legislation (i.e. one regime applicable to both social security and occupational pensions), such attempts ultimately ran aground through lack of political agreement in the EU legislative process.This was further illustrated by the failure of the proposed directive of 27 October 1987, JOCE C-176 of 5/7/87, which had set out to amend the directives on gender equality in social security (79/7) as well as on occupational pensions (86/378).

workers and EU equality law. The scope and effect of EU equality law on occupational pensions was marked by the important role of the ECJ in seeking to protect the rights of workers. This arose as a result of the association of occupational pensions with pay.

b. The association of non-statutory occupational pensions with 'pay'

The case-law of the ECJ has for many years been a source of protection of the rights of workers to equal pay and equal treatment with regards to their occupational pensions. Indeed, the impact of landmark rulings in *Defrenne II, Bilka and Barber* has been significant in the development of a more effective body of EU equality law with a broad material scope through the association of non-statutory occupational pensions with pay.[314] However, one may also argue that this process has had a conceptual cost in terms of the potential loss of recognition of the role of occupational pensions as a source of social protection in this field. Nevertheless it has benefited workers in terms of greater effectiveness of EU equality law.

The application of EU law on equal pay to non-statutory occupational pension schemes

Occupational pension schemes usually require workers to pay contributions (which are deducted at source from their pay) in addition to contributions by their employers. Upon a worker's retirement, occupational pension scheme pay out (or arrange for the payment of) a pension benefit, usually in the form of an annuity until the member dies. The above process explains the logic that occupational pensions constitute a source of deferred income or 'pay'.

In the *Worringham* case[315], the Court gave a preliminary ruling on the application of the principle of equal pay in relation to employer contributions to an occupational pension scheme.[316] In a bold move, the Court applied the horizontal direct effect of Article 119 EEC (determined in *Defrenne II*) in relation to occupational pensions. The ECJ later addressed the material scope of the protection afforded by the Treaty in respect of occupational pensions.

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[314] Case 43/75 *Defrenne v. Sabena (No. 2)* [1976] ECR 455; Case 170/84 *Bilka-Kaufhaus Gmbh v. Karin Weber von Hartz* [1986] ECR 01607; Case 262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

[315] C 69/80 *Worringham v Lloyds Bank* [1981] ECR 767.

[316] The ECJ ruled that Article 119 EEC applied in relation to "amounts paid by the employer as an addition to the gross salary in a context where these amounts were then used as contributions paid to the pension fund on behalf of the employee".The pension scheme in question was established by Lloyds Bank for its staff. It had different contribution rates for men and for women under the age of 26. The female workers under the age of 26 were paid at the "national rate" whereas male workers received an extra 5% on top of their gross salaries. The latter amount was deducted at source and paid as contributions to trustees of the pension fund.

The extensive material scope of Article 157TFEU

The concept of pay usually arises in relation to monies paid as consideration for work provided. A whole spectrum of occupational pension rights was subsequently shown by the ECJ as falling within the material scope of Article 119EEC. This included rights of access to an occupational pension scheme in the case of *Bilka*.[317] In the *Barber* judgment[318], the ECJ determined that all forms of occupational pension constituted 'pay' within the meaning of Article 119EEC.[319] However, a statutory social security benefit such as a State pension was not categorized as pay (see *Defrenne*). The statutory/non-statutory nature of occupational pension schemes has been superseded by the importance of the employment relationship.

The importance of combating discrimination in the employment relationship

The ECJ's approach to occupational pensions in this field is driven by the importance of the anti-discrimination dynamic in the context of the employment relationship, which has led to the equation with 'pay' of the benefits provided under an occupational pension scheme. For the purposes ofArticle157TFEU, abroad meaning has been given to the employment relationship in two regards: firstly it has applied to mandatory occupational pension schemes in the private sector and secondly it has been extended in relation to its public sector occupational pensions. The *Podesta* case concerned the pension rights of survivors whose partners were a member of the part of the AGIRC or ARRCO pension schemes[320]. The ECJ found that these schemes fell within the scope of EU law on gender equality on the basis of their connection with the employment relationship. In the *Beune* case[321], the ECJ ruled on the application of Article 119EEC to a statutory pension scheme for civil servants (which resembled a private sector occupational pension scheme). AG Jacobs clarified the criteria for assimilation between occupational pensions and pay by drawing up a list of relevant factors which could bring a public sector occupational pension scheme within the scope of Article

[317] Case 170/84 *Bilka-Kaufhaus Gmbh v. Karin Weber von Hartz* [1986] ECR 01607.
[318] Case 262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.
[319] As stated by the ECJ: "*Article [141EC] (now 157TFEU) provides that 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker received directly or indirectly, in respect of his employment, from his employer.*"
[320] The legal treatment under EU law of migrant workers' rights under the AGIRC and ARRCO schemes is similar to statutory social security schemes as they fall within the scope of the Coordination Regulations. At issue in *Podesta* was the rule under the AGIRC & ARRCO schemes that widowers had to wait until 65 in order to claim a survivor's pension whereas widows could claim a survivor's pension from age 60. This was found to be contrary to EU law on gender equality. Case C-50/99 *Jean-Marie Podesta and Caisse de Retraite par répartition des Ingénieurs Cadres & Assimilés (CRICA) and Others* [2000] ECR I-04039.
[321] Case C-7/93 *Bestuur van HetAlgemeen Burgerlijle Pensioenjbnds v Beune* [1994] ECR I—4471.

119EEC (now 157TFEU).[322] The ECJ's broad ruling in *Beune* is reflected in Recital 14 of the Recast Directive.[323]

In the course of its case-law on equal pay, the ECJ has never questioned the social protection purpose of occupational pensions but neither has it excluded its social role. Is the characterisation of occupational pensions as pay compatible with the notion that occupational pensions are a form of social protection? One might argue that it creates a perception that non-statutory occupational pensions fall outside the sphere of social protection. On the one hand, a two tier system in the legal treatment of occupational pensions may constitute a valid form of legal differentiation but on the other hand, it leads to a risk of confusion with regards to the very purpose of occupational pensions.[324]

Arguably, the public/private divide was narrowed by the application of EU equality law to public sector statutory occupational pensions, through the ECJ's ruling in *Beune*.[325] The connection of occupational pensions with the workplace proved a key ingredient in enabling the ECJ to assimilate occupational pensions with pay. It has thus been observed that the ECJ has "*gradually broadened the concept of pay, eroding the distinction between pay and occupational social security, and creating a distinction between the latter and state social security*."[326] Nevertheless, the distinction between statutory and non-statutory occupational pensions remains a key feature of EU law on equal pay.

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[322] These factors include: (i) The degree to which schemes are governed by statute. Private occupational schemes that operate in a statutory framework may be subject to the application of Article 119EEC, as long as those schemes are governed by their own rules. However, social security benefits governed by legislation do not as a rule constitute pay.(ii) The existence of an agreement between employers and workers within the undertaking or the occupational branch, or a unilateral decision by the employer. (iii) The financing of the scheme. A scheme wholly financed by the employer, or by the employer and the worker, points to the pension benefit constituting pay. However, public authority contributions suggest that a scheme is part of social policy. (iv) The personal scope of the scheme. If the scheme applies to "general categories of workers", that will normally indicate it is part of general social policy. (v) The function of the scheme. If it is designed to supplement general social benefits paid under national legislation, then scheme benefits will tend to fall within the scope of Article 119EEC meaning that the benefits provided can be regarded as pay.

[323] "*Although the concept of pay within the meaning of Article 141EC does not encompass social security benefits, it is now clearly established that a pension scheme for public servants falls within the scope of the principle of equal pay if the benefits payable under the scheme are paid to the worker by reason of his/her employment relationship with the public employer, notwithstanding the fact that such scheme forms part of a general statutory scheme*." The above condition will be satisfied if the pension scheme concerns a particular category of workers and its benefits are directly related to the period of service and calculated by reference to the public servant's final salary.

[324] Some employers and interest groups claim that occupational pensions do not themselves constitute social security and are purely "loyalty benefits". However, there is a legitimate counter-argument that occupational pensions have a social protection function in providing workers with dignity in retirement.

[325] Case C-7/93 *Bestuur van HetAlgemeen Burgerlijle Pensioenjbnds v Beune* [1994] ECR I-4471.

[326] CRAIG & DE BURCA EU Law Text Cases and Materials (5th edition).

c. The distinction between statutory/non-statutory occupational pensions

The ECJ held in *Defrenne*[327] that a statutory social security benefit such as a State pension could not be categorized as pay under Article 119EEC (now 157 TFEU). However, the ECJ had sown the seeds for legal protection of occupational pensions with regards to Article 119 EEC. As seen above, the ECJ subsequently held that non-statutory occupational pensions represent deferred pay. Notwithstanding the importance of the employment relationship as a key element in affording legal protection to workers under Article 157 TFEU, the Court has maintained the distinction between statutory and non-statutory occupational pension schemes to determine the material scope of EU law on equal pay. This is visible in the ECJ's rulings on the scope of Article 157 TFEU (ex 141EC ex 119EEC) and was subsequently reflected in EU secondary legislation.

The scope of Article 157TFEU

The distinction under EU equality law between statutory occupational pension schemes and non-statutory occupational pension schemes and its impact on the scope of Article 157TFEU was first made by the ECJ in the *Defrenne* case. The ECJ ruled that statutory social security benefits were not considered as remuneration and would therefore not be subjected to scrutiny under Article 119 EEC (which is now Article 157 TFEU (ex 141EC)).[328]The fact that the ECJ excluded statutory social security from the scope of Article 119EEC was based on a reading, which in terms of the breadth of its judicial interpretation, is respectful of the literal meaning of 'pay' and requirements of EU constitutional law.[329]

[327] Mrs Defrenne, an air hostess working for SABENA (the former Belgian national airline) had made a claim for the application of equal treatment in respect of her statutory social security pension rights. C-80/70 *Defrenne v Belgium*, [1971] ECR 445.

[328] The ECJ stated in *Defrenne* (supra): *"there cannot be brought within this concept [pay], as defined in Article 119, social security schemes or benefits, in particular retirement pensions, directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are obligatorily applicable to general categories of workers. These schemes assure for workers the benefit of a [statutory] scheme, [to] the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship between the employer and the worker than by considerations of social policy."*

[329] The need to respect the separation of powers between EU institutions and the division of competences between the EU and Member States underpin the context in which the ECJ interpreted the EEC Treaty fairly restrictively in terms of determining the material scope of Article 119 EEC in the early days of its case-law on equality in the field of pensions. Indeed, the Member States' competence in social policy in general and social security in particular meant it would have been natural for the ECJ to show some judicial restraint in this sensitive field. Moreover, the ECJ would have been mindful of the burgeoning secondary EU legislation.

EU secondary legislation

In 1976, Directive 76/207 was adopted in the field of equal treatment and employment. However, discussions on social security matters proved to be a stumbling block, so the application of the principle of equal treatment to social security was deferred until Directive 79/7 was agreed.[330] Directive 79/7 only covers the field of statutory social security schemes. This left a legislative gap in relation to the protection of gender equality in the field of non-statutory occupational pensions, which was initially left to be filled with by the ECJ. It was not until 1986 that Directive 86/378 "*on the principle of equal treatment in occupational social security schemes*" was adopted, which eventually led to Directive 2006/54/EC (the ***Recast directive***)[331] to replace and repeal Directive 86/378/EC (amended by Directive 96/97/EC). The Recast Directive covers non-statutory "*occupational social security schemes*". Article 2(f) of the Recast Directive ensures that its material scope does not overlap with that of Directive 79/7: hence it excludes statutory social security schemes from its application. [332] The distinction between statutory and non-statutory occupational pension schemes in the field of EU equality law has on occasion been superseded by the ECJ's case-law in this field (e.g. *Beune* extends EU law on equal pay to statutory occupational pension schemes for civil servants). Indeed, pension benefits that are paid by reason of the employment relationship with an employer from the public sector are considered as pay for the purposes of the Treaty provisions on equal pay.

The distinction between *non-statutory* "supplementary" occupational pensions and statutory social security pensions reflects a trend in the scope of secondary legislation, whereby there are two instruments of legislative protection (as is also the case in EU law on free movement of workers). This in turn entails different levels of legal protection under EU

[330] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. The wording in the title of Directive 79/7 on "*the progressive implementation of the principle of equal treatment*" shows how social security was not an area where change was expected to take place overnight. The negotiations between the Member States on secondary legislation regarding the application of the principle of equal treatment of men and women in social security were sensitive and achieving consensus proved a difficult task. Indeed, evidence of the difficulty in obtaining agreement between the Member States in relation to the application of equal treatment of men and women to social security still be seen in some of the derogations that are contained in Article 7 of Directive 79/7, for example, the exception relating to the determination of different pensionable ages for men and women in old-age pensions and retirement pensions.

[331] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast - OJ L 204 of 26.07.2006).

[332] This continues the previous EU legislative approach, as set out in Article 2 of Directive 86/378, which stated that occupational social security schemes were "schemes not covered by Directive 79/7".Article 3of the Recast Directive (read in conjunction with Recital 13 of the preamble to the Directive) provides that it does not apply to payments made by state schemes or similar, including state social security or social protection schemes.

law. This distinction has arguably hindered legal protection of workers' non-statutory occupational pensions in the field of free movement by creating a regulatory gap (as will be discussed in Chapter IV). Ironically the opposite is true in the field of EU law on equal pay, where the ECJ has developed a mature body of case-law dealing with non-statutory occupational pensions by relying on the Treaty provisions on equal pay.

Clearly, the division between non-statutory occupational pensions and statutory social security pensions has not stood in the way of the protection of worker's rights on equal pay with regards to non-statutory occupational pensions. The combination of direct effect and the ECJ's broad view as to the material scope of the Treaty has extended the protection of workers' right to equal treatment in relation to occupational pensions and influenced EU secondary legislation. This shows that the relevance of the instrumental criteria varies as it has either been used by the ECJ in *Defrenne* or ignored in *Beune* in order to enhance the effectiveness of equal treatment in the workplace, which also points to the important role of the Court in developing the equal treatment paradigm underpinning EU social law.

In this field, statutory pensions arguably receive less protection than non-statutory pensions. Directive 79/7/EEC is meant to afford equal treatment between men and women in relation to statutory social security pensions though some exceptions to the principle of equal treatment have been allowed.[333] At the theoretical level, the statutory/non-statutory distinction is potentially problematic insofar as it affects the broader conceptual relationship between occupational pensions and social protection, which may affect the rationale for the protection of the occupational pension rights of migrant workers (see Chapter III below).

Insofar as the Treaties require the protection of social security/social protection under EU law on free movement of workers, one must ask whether this broader notion should be considered as including non-statutory occupational pensions? An affirmative answer would suggest that the distinction between statutory and non-statutory occupational pensions is only relevant as regards the instrument/method of ensuring such protection of workers under EU law by determining its scope of EU law. Given the purpose of occupational pensions as a source of social protection, the equation between occupational pensions and pay must be seen in the context of the anti-discrimination dynamic of EU law, which has pushed for a more effective application of workers' rights to equal treatment in the workplace.

[333] For example Member States have historically retained different retirement ages for men and women in statutory schemes. This is not permitted in relation to supplementary occupational pension schemes following the ECJ's case-law in *Barber*. Nevertheless, there is a trend towards equalisation of pensionable ages for men and women as regards statutory social security pensions although the reason for this is primarily financial and it tends to accompany wider reforms aimed at increasing the retirement age for such schemes.

d. The anti-discrimination dynamic and the consequences of the ECJ's case-law on equal pay in relation to occupational pensions

The direct effect of Article 157TFEU and the anti-discrimination dynamic of EU law

The ECJ's rulings, which have associated occupational pensions with pay have had a clear impact not just on the scope of EU equality law but also on its effectiveness, thus increasing the protection of workers' rights to equal pay, notably through the technique of the direct effect of primary EU law. Indeed, the cases of *Worringham, Bilka and Barber* all illustrate the value to workers of the direct effect of Article 119 EEC, now Article 157TFEU. This bold approach reflects the anti-discrimination dynamic in EU law, which has pushed to extend the protection of workers' rights to equal treatment with regards to their occupational pensions. The application of EU law on equal pay has reduced the capacity for occupational pensions to be a source of sex discrimination following the active stance of the ECJ, including in cases that were controversial (e.g. by requiring legal protection of transsexual partners' right to a survivor's pension[334]). Moreover, the ECJ is no longer solely concerned with just sex discrimination in the field of occupational pensions. The material scope of EU equality law has become much broader in relation to occupational pensions in the context of other forms of discrimination such as sexual orientation (*Maruko*) and more controversially age discrimination (see *Mangold* and *Bartsch, Age Concern*).[335] Occupational pensions have certainly become a fertile area for the development of equality as a general principle and effective source of EU law, as determined by the ECJ in its case-law. However, the predominant focus has been on a drive for formal equality as was visible in relation to the use of 'sex-based actuarial factors'.[336] However, in the *Test Achats* case[337], the ECJ ruled that

[334] Case C-117/01 *K.B. v NHS Pensions Agency* [2004] ECR I-00541.
[335] Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR (2008) I-01757; Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-09981; Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR I-07245; Case C‑388/07 *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-01569; Case C‑555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG* [2010] IRLR 346.
[336] Indeed, until *Test Achats*, Member States were allowed to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data (Article 5 (2)). This 'financial exception' to the application of the principle of equal pay to occupational pensions had previously been allowed by the ECJ to affect the scope of the principle of equal treatment in the cases, which dealt with the calculation of employer contributions adjusted using sex-based actuarial factors, for which the ECJ ruled that this fell outside Article 141 EC.(Case C-152/91 Neath v Hugh Steeper Ltd 1993 ECR I-6935) (C-200/91;Coloroll Pension Trustees Ltd v James Richard Russell [1994] ECR I-4389).
[337] Case C-236/09 *Association Belge des Consommateurs Test-Achats and Others* [2011] ECR I-00773.

such an exception was contrary to EU law and the principle of equality. The provision in the Recast Directive, which allowed sex-based actuarial factors, was against Article 157TFEU.

Moreover, a focus on formal equality can also be seen in the case-law of the ECJ on the remedies available in situations of discrimination. Indeed, the Court's reasoning has followed a process driven approach whereby the rules applicable to men and women in the context of occupational pensions must provide for identical treatment, even where this results in less generous provision for workers as employers are entitled to 'level down' (see *Smith v Avdel*).[338] Formal equality may not lead to substantive equality; paradoxically an increase in formal equality could in theory lead to a deterioration of social protection!

Despite the pro-active nature of the anti-discrimination dynamic, which has been visible in the case-law of the ECJ, any accusations of judicial activism are easily rebutted given its impact on secondary EU legislation, which has reinforced EU law in this regard.[339]

The anti-discrimination dynamic in EU secondary legislation

In addition to the Recast Directive mentioned above, the EU has also exercised its legislative competence to prohibit sex discrimination in relation to private/individual pension schemes, which are covered by Directive 2004/113/EC on the access to and supply of goods and services.[340] The legal basis was Article 13EC (now Article 19TFEU), which provides a key provision combating several common forms of discrimination (sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation).

Moreover, Article 13 EC also provides the legal basis for "Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation". Among the key sources of discrimination that have been relevant to occupational pensions, one may pick out "Age discrimination" and "Sexual Orientation discrimination".

In addition to the reference to the Treaty provisions on discrimination (Article 13 EC), each of the above Directives mentions in its recitals, the importance of the EU Charter provisions against sex-discrimination. This reinforces EU competence in this field and has also limited the EU legislator's ability to allow derogations where these are not be in line with the EU's obligations to comply with EU fundamental rights. The dynamic of gender

[338] Case C-408/92 *Smith v Avdel Systems* [1994] ECR I-4435
[339] MOREAU. M-A., Les justifications des discriminations, Droit Social No.12 Décembre 2002.
[340] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373 of 21.12.2004).

equality has been further supported by the push for greater recognition of fundamental rights in EU law, which has targeted certain practices of pension schemes that were discriminatory.

The assimilation by the ECJ of occupational pensions as pay has led to a reinforcement of EU equality law protecting workers in this field. In doing so, it has largely ignored the premise that occupational pensions are a source of social protection. Moreover, the division of occupational pensions under the scope of EU legislation may have weakened the recognition in EU law of the social role of occupational pensions. However, strengthening the protection of workers' right to equal treatment (with regards to their non-statutory occupational pensions) may be considered a positive judicial trade-off in labour terms if the only matter at stake is(in theory) a potential loss of recognition under EU law as to whether the notion of occupational pension should be included in that of social security, something which may have a possible knock on effect on the general perception of the occupational pensions under EU law. Arguably, the push for a more effective protection of equality law embraces equal treatment as a value of the EU. However, the role of occupational pensions in social protection may also be seen through their association with key values recognised in other fields of EU law, namely solidarity.

C. Occupational pensions and EU competition law

EU competition law has provided some insight with regardto the extent that values that are inherent to many occupational pensions (such as solidarity) are also to be considered as key features of this notion under EU law (a). However, the statutory/non-statutory distinction remains ever present (b) and the nature of the instrument establishing an occupational pension scheme (and its relationship with industrial relations) has also been an important feature (c).

a. Solidarity is relevant to the application of EU competition law

The scope of EU competition law applicable to occupational pensions has seen the ECJ focus on the relevance of solidarity as a method and a value underpinning different forms of social protection as well as an important component of the European pension systems. The presence of inter-generational solidarity is often visible in the financial mechanics and benefit structure of many occupational pension schemes as well as in the social security pension schemes with which solidarity is traditionally associated.

Consequently, the criterion of solidarity has been used to ascertain whether an occupational pension scheme falls within the notion of social security/social protection for the purpose of its treatment under EU competition law.

The question of the application of EU competition law in relation to statutory pension schemes arose in *Poucet* and *Pistre*[341] in which the Court assessed several relevant factors as relevant to solidarity: the financing method; the proportionate nature of contributions compared to income; the equal nature of benefits; and the mandatory nature of membership.[342] However, no single criterion of solidarity was conclusive on its own in order for the body managing an occupational pension scheme to constitute a social security scheme. It was the combination of those factors that marked a scheme out as a social security scheme in order to gain exemption from the application of EU competition rules. Conversely, a lack of solidarity would usually entail that such a scheme (or the institution administering a scheme) would fall within the scope of EU competition law.

b. The instrumental approach of the ECJ's determination of solidarity: the distinction between statutory and non-statutory pension schemes

When determining the existence of a solidarity-based structure for the purposes of EU competition law, the statutory source of occupational pension schemes has nevertheless come to the fore. Indeed, the ECJ's approach has reflected the same 'legislative' distinction between statutory and non-statutory occupational pension schemes that exists in both EU equality law and EU law on free movement of workers. Thus, a formalistic approach persists as not all occupational pension schemes receive the same legal treatment under EU law.

The notion of solidarity was considered in relation to non-statutory supplementary occupational pension schemes in the *Coreva* case.[343] A body operating as a "mutual society" on behalf of French farmers that managed a voluntary occupational pension scheme was deemed by the ECJ to constitute an undertaking subject to EU competition law. The ECJ acknowledged the presence of elements of solidarity in relation to the payment of contributions and the fact the scheme was run on a "not-for-profit" basis. However, the lack of mandatory membership led the ECJ to rule that there was no "solidarity-based" exemption

[341] C-159/91 and 160/91 *Poucet* and *Pistre* [1993] ECR I-00637.
[342] In *Poucet* and *Pistre*, the ECJ held solidarity could be found where the scheme used the PAYG method (i.e. the contributions of members paid for the benefits of retired workers) and external resources (including funds from other schemes) were available in order to finance the benefits. Another factor used to indicate solidarity is where benefits are the same for workers in the same position (including the existence of "solidarity" benefits that are not related to contributions e.g. recognition of childcare for the calculation of benefits).
[343] Case C-244/94 *Coreva* [1995] ECR 1995 I-04013.

from EU competition law. Therefore, the body administering the Coreva scheme was treated as being in competition with a company selling life insurance products. In this respect, the ECJ's reasoning has been challenged by Laigre.[344]Such an approach has also been criticised by Lenoir as the social protection role of occupational pensions may be threatened by competition from insurance companies.[345]

These two different outcomes show that under EU competition law, the recognition of a scheme as part of social security can be determined to a large extent by the statutory source of a scheme, which has been used to supersede the presence of solidarity. In *Poucet* and *Pistre*, the ECJ referred to the relevance of solidarity in determining the notion of social security in order to legitimise its decision. However, the statutory underpin establishing an institution to manage a mandatory social security regime arguably played a key part in the ECJ's decision to remove it from the ambit of EU competition law (by not treating such an institution as an undertaking). By contrast, in *Coreva*, the absence of a statutory underpin combined with the lack of mandatory scheme membership meant for the ECJ that such a scheme did not gain exemption from EU competition law.

c. Solidarity in occupational pension schemes set up by collective agreements

As well as emphasising the relevance of solidarity, in *Albany*, the Court recognised the special nature of occupational pensions whose source derives from mandatory collective agreements given their nature and purpose. It ruled that where the source of an occupational pension schemes is a mandatory collective agreement, it is exempt from the application of EU competition law.[346] *Albany* thus recognised the fact that occupational pension schemes are social instruments whose source may stem from a collective agreement as a result of the negotiations between social partners. This highlighted the relationship between occupational pension schemes, employment and industrial relations. Indeed, the source of an occupational

[344] Although the scheme in *Coreva* was funded, the nature of the benefits provided was not strictly calculated on the basis of defined contributions but instead it followed a "points system". The Coreva scheme therefore revealed an element of solidarity between active members and retired pensioners, thus highlighting the presence of inter-generational solidarity, which has often been considered as the "key element of solidarity." See LAIGRE.P, L'intrusion du droit de la concurrence dans le champ de la protection sociale Droit Social 1996 p.82
[345] LENOIR, Protection complémentaire: les dangers du développement concurrentiel, Droit social 1995 p.753.
[346] The ECJ held that the parties to a collective agreement were not undertakings for the purposes of Article 81EC ex 85EEC (now 101TFEU) on the basis that social policy objectives pursued in collective agreements would be seriously undermined if management and labour were subject to the competition law provisions of the EC Treaty when seeking jointly to improve conditions of work and employment. Case C-67/96 *Albany International BV v. StichtingBedrijfspensioenfondsTextielindustrie* [1999] ECR I – 691.

pension lies not only in the instrument that has been used to formalise its rules but stems from the workplace.

However, a different approach was taken by the Court in *Pavlov* where the monopoly of a similar Dutch sector-based pension scheme for specialist doctors was challenged before the ECJ on the basis of EU competition law. In that case, a body had been set up to manage a mandatory occupational pension scheme that had been established by a professional association of specialist doctors. As there was no collective agreement, the pension scheme was deemed by the ECJ to constitute an undertaking that was subject to EU competition law. Arguably, the broader objectives of social protection and solidarity were disregarded in order to apply European competition law. Rather than focusing on the occupational pension scheme's social objective and its solidarity-based structure, the ECJ focused on the nature of the instrument used to establish the scheme. The 'technical' distinction boiled down to the fact that specialist doctors in the Netherlands were independent workers and not employees so they could not establish a collective agreement. The decision in *Pavlov* has been criticised as an overly formalistic rationale for differentiation and for not recognising as relevant the genuine similarities with *Albany* in terms of the presence of solidarity and the mandatory statutory basis of both schemes.[347] The broader conclusion drawn by Mavridis in his study of the above cases was that "Solidarity" needed to be enshrined in the Treaty in order for EU law on social security to be reconciled with EU internal market/competition law through the prism of fundamental rights. Solidarity is thus a value that may be used to determine the limits to the notion of occupational pensions including its relevance in vertical situations (subject to the statutory criterion) as well as in certain horizontal situations where there is a collective agreement. However, the broader social protection vocation of occupational pensions is also relevant to the protection of workers in other specific areas of EU labour law.

[347] LHERNOULD. J.P., Nouvelles dérives libérales de la CJCE en matière de retraite complémentaire. Droit social 2000 p.1114.

D. Occupational pensions and specific areas of EU labour law

EU labour law has dealt with occupational pensions in relation to specific areas, though with varying success as far as the level of protection of workers is concerned.

a. The risk of employer insolvency causing a loss of social protection

The notion of occupational pensions is visible under EU law dealing with the risk of insolvency of a sponsoring employer. This represents a significant concern for the members of an occupational pension scheme, given their role in the funding of benefits. Where a sponsoring employer becomes insolvent, the Insolvency Directive 2008/94/EC offers a degree of protection of employees' rights to supplementary occupational pensions. Member States are required to take necessary measures to protect supplementary occupational pensions under Article 8 of the Insolvency Directive. However, the Directive does not oblige Member States to fund the rights to old-age benefits themselves, as confirmed by the ECJ in the case of *Robins and others v Secretary of State for Work and Pensions.*[348] Nor does the Directive require a full guarantee of the rights in question. It merely calls for measures to be adopted, which are needed to "protect the interests" of the persons concerned. The Court also set out a legal benchmark insofar as it considered that "*a system which may, in certain cases, lead to a guarantee of benefits of less than half of that entitlement, cannot be deemed to fall within the definition of "protect" as applied in the Directive*". The potential losers are the individual workers who may not receive the full amount of accrued pension rights in the event their employer becomes insolvent. Indeed, the Court showed it was prepared to accept some losses of social protection for workers. According to a Commission Staff Working, this judgment gave the Member States "*considerable latitude as regards the level of protection*".[349] The Green Paper of 2010 therefore asked the question "*Should the protection provided by EU legislation in the case of the insolvency of pension sponsoring employers be enhanced and if so how?*" The limited competence of the EU to improve the protection of workers by bolstering the security of social protection mechanisms (such as occupational pensions) is balanced against the need not to impose strong financial commitments upon Member States (given the principle of subsidiarity) but arguably falls short in terms of

[348] C-278/05 *Carol Marilyn Robins and others v Secretary of State for Work and Pensions* [2007] ECR I-01053.
[349] COMMISSION STAFF WORKING DOCUMENT: Accompanying document to the GREEN PAPER towards adequate, sustainable and safe European pension systems COM(2010) 365 final EUROPEAN COMMISSION Brussels, 7.7.2010 SEC(2010) 830 final.

providing legal protection to workers.[350] The notion of occupational pensions is thus important in the context of workplace relations in which workers require protection but remains subject to the EU's institutional challenges. This has resulted in a legislative approach that aims to safeguarding minimum requirements without offering levels of protection of occupational pensions that are commensurate with their importance as source of social protection in retirement.

b. The protection of workers' pensions in business transfers

Workers employment rights in the context of a business transfer are covered at EU level under Directive 2001/23/EC (the ***Acquired Rights Directive***).[351] Although occupational pensions clearly arise from an employment relationship, the Acquired Rights Directive contains an exception in Article 3.4 (a) to the general rule in Article 3.1, which provides for the transfer of an employee's acquired rights to his new employer. Indeed, "*Unless Member States provide otherwise, paragraphs 1 and 3 shall not apply in relation to employees' rights to old-age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes outside the statutory social security schemes in Member States*." This exception clearly gave the acquirers of a business the freedom to do away with existing arrangements, including generous occupational pension schemes. It put back onto Member States the onus to provide for the protection of workers' occupational pension rights, which was undoubtedly a victory for the business lobby. [352]

A minimum safeguard was provided in Article 3.4 (b) of the Acquired Rights Directive, which required Member States who did not provide for the transfer of benefits under occupational pension schemes to "*adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer*." However, this was a minor consolation for the employees of some businesses

[350] Member States, the pensions industry and the representatives of business interests are clearly among the voices seeking to avoid additional EU regulation that would offer higher levels of protection for workers' occupational pensions in EU labour law.

[351] See Directive 2001/23/EC on the approximation of laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings or businesses consolidated the initial Council Directive 77/187/EEC which had been amended by Council Directive 1998/50/EC. Its aim is to protect employees' rights when the business in which they work changes hands between employers through a legal transfer or merger. As a rule, it transfers from the seller of a business to the buyer, the rights and obligations arising from a contract of employment or from an employment relationship.

[352] The UK chose not to include the right to an occupational pension scheme as a right which transferred. The ECJ's judgments in the *Beckmann* and *Martin* cases interpreted the requirements of the Acquired Rights Directive but provided limited protection to workers' occupational pensions. Case C-164/00 *Katia Beckmann v Dynamco Whicheloe Macfarlane Ltd* [2002] ECR I-4921; Case C-4/01 *Martin and others v South Bank University* [2003] All ER (D) 85.

whose occupational schemes providing Defined Benefits were replaced by DC schemes. [353] The dynamic of social protection has historically been weak as a rationale for the protection of workers' occupational pensions under EU labour law, unlike the anti-discrimination dynamic, which has proved more successful in protecting certain categories of workers.

c. Atypical workers and occupational pensions

i. Part time workers

Access to occupational pensions for part-time workers is a matter that has to some extent been covered by the ECJ in the context of its case-law on gender equality (see the above mentioned case of *Bilka*). In terms of legislation, the protection of part time workers in EU law is the subject of Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC. The key rule is non-discrimination between part-time and full-time workers without any objective justification. The connection between occupational pensions and matters of social security is present in the preamble to the Framework Agreement, which is annexed to the Directive.[354] However, the key focus is on equal treatment

ii. Fixed Term Workers

EU law improves the protection of fixed term workers through Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. As with part-time workers, the overarching principle is non-discrimination. In addition, the preamble of the framework agreement refers to the Employment Declaration of the Dublin European Council of December 1996, with regards to the need to adapt social protection to new patterns of work. Furthermore, it was also recognised in the preamble that "*innovations in occupational social protection systems are necessary in order to adapt them to current conditions, and in particular to provide for*

[353] The UK government's interpretation of the necessary level of protection for transferring employees is that the buyer of a business may offer a DC scheme with matching contributions of at least 6%. In most cases, such schemes are not as popular with workers as the DB schemes they tend to replace.

[354] It states that "*This Agreement relates to employment conditions of part-time workers recognizing that matters concerning statutory social security are for decision by the Member States. In the context of the principle of non-discrimination, the parties to this Agreement have noted the Employment Declaration of the Dublin European Council of December 1996, wherein the Council inter alia emphasized the need to make social security systems more employment-friendly by 'developing social protection systems capable of adapting to new patterns of work and of providing appropriate protection to people engaged in such work'. The parties to this Agreement consider that effect should be given to this Declaration."*

the transferability of rights." This shows the link between the protection of fixed term workers and the effects of mobility on their occupational pension rights.

iii. Temporary Agency Workers

The basic rule that applies under the Directive is again the principle of equal treatment, which is measured against the treatment of workers directly employed by the business they work for. This is set out in Article 5.1 of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work. However, Article 5.4 allows derogations from this principle to be made by Member States, which makes it possible for them to set out a qualifying period for equal treatment subject to agreement between the social partners and provided that "an adequate level of protection is provided for temporary agency workers". In such cases, Member States are required to specify, in application of Article 3(2), whether occupational social security schemes, including pension, sick pay or financial participation schemes are included in the basic working and employment conditions subject to equal treatment.

Conclusive remarks on Chapter II

Determining the notion of occupational pensions in legal terms under EU law on the free movement of workers is a complex and difficult task. Unlike other legal notions, e.g. that of 'worker', there is no autonomous notion of occupational pension under EU law. The complexity and diversity of the pension systems in the EU member states is partly responsible for the heterogeneous conceptualisation of occupational pensions under EU law. The EU legislator has thus sought to find overarching definitions encompassing the different forms of occupational pensions. Interestingly, the approach taken by the EU legislator has also sought to adapt the definition of occupational pensions to suit the scope and objectives of European law at stake in a number of different substantive fields of EU law. Such an approach results from the principle of subsidiarity and the need for political realism in this sensitive field, in which any attempt by the Commission to 'appropriate' a notion of occupational pensions under EU law would probably hit a brick wall given the rules on the attribution of competence (see Chapter IV below). Arguably, the emphasis on different characteristics of occupational pensions has led to a fragmented notion: different substantive fields have developed their own approach to characterising occupational pensions.

The notion of occupational pensions under EU law on the free movement of workers has thus been assessed above in two regards: first in terms of its coherence with other areas of EU social/economic integration; and secondly in order to determine whether the notion of occupational pension under EU law supports their characterisation as a form of social protection. Indeed, this is a vital part of any argument justifying the need for EU law to articulate the free movement of workers with the principle of social protection in this field (see Chapter III below).

The scope of EU law and its treatment of the notion of occupational pensions has been characterised by an instrumental approach disconnected from its social purpose

The rights of workers with regards to their occupational pensions are often at stake in a number of different and specific areas of EU labour law. There is no doubt that the definitions that are provided seek to ensure coherence with regards to the scope of EU law as well as some degree of consistency between different substantive fields. The scope of the protection offered by EU law to workers' occupational pensions ultimately determines certain parameters of the notion of occupational pension within the EU legal order. The presence of a statutory/non-statutory distinction applies in the fields of free movement, equality law and competition law and is effectively the key factor that divides the notion of occupational

pensions in two. This determines the legal rules applicable to occupational pensions, thus resulting in different levels of treatment afforded to migrant workers' pension rights.[355]

In the field of free movement of workers, non-statutory occupational pensions have been side-lined from the historic protection of migrant workers through the Coordination Regime (see the Regulatory Gap discussed in Chapter IV). Moreover, they have been progressively excluded from the notion of social security. The division of the notion has arguably led to a weaker level of protection of migrant workers' non-statutory occupational pensions insofar as such as formalistic/'instrumental' approach has sought to straddle the divide between public and private law and its relationship with EU law; the explanation is based on the tradition view that Member States are the prime subjects of the legal obligations under the Treaty and it is therefore deemed logical for EU law to have a greater effect in terms of vertical integration compared to horizontal integration.

However, in the field of EU equality law, (and notwithstanding the same statutory/non-statutory distinction), the anti-discrimination dynamic has seen greater protection afforded to workers' non-statutory occupational pensions, which have been equated to pay. This has shown the importance for the ECJ of rendering effective workers' rights in this field when interpreting EU law in areas where fundamental rights are at stake. Although this approach could potentially be transposed to other fields of EU law such as the free movement of workers in which fundamental rights are also at stake, the trade-off for increasing the protection of workers has again been the gradual detachment under EU law of occupational pensions from their purpose of a source of social protection. In the field of EU competition law, the underlying value of solidarity has come to the fore as a key constituent of social protection, which one may consider as significant in determining whether occupational pensions are deserving of an exemption to EU competition rules based on their social nature. However, the ECJ has reiterated the importance of formal requirements (such as the presence of a collective agreement) and has also aimed to retain a basic divide according to the vertical/horizontal nature of the relationship that is regulated by EU law. While such an approach has the advantage of providing a framework that undoubtedly offers legal certainty in the technical sense, it lacks a degree of coherence with regards to the social

[355] In the field of freedom of movement, the Coordination Regime provides a more comprehensive protection of the rights of workers than Directive 98/49 on non-statutory schemes. However, in the field of EU equality law, the Direct effect of Article 157 TFEU together with the Recast Directive provide a greater degree of equal treatment (at least in terms of formal equality) than Directive 79/7, which still allows certain derogations (to formal equality) in relation to retirement age.

purpose of occupational pension schemes. It also reduces in some cases the effectiveness of the protection afforded to workers who fall on the wrong side of the divide.

The above legal fragmentation of the notion of occupational pensions (which has been drawn in different substantive fields) creates some doubt over whether EU law supports its characterisation as a form of social protection.

The notion of occupational pensions is recognised as social protection under EU law.

The position argued by this thesis is that in order to determine the notion of occupational pensions in a coherent manner, EU law must acknowledge both the social protection objective of occupational pensions as well as the relevance of solidarity as a value underpinning many occupational pensions.

Recognition under EU law of the role of occupational pensions as a source of social protection and/or social security can be expressly found in EU secondary legislation dealing with occupational pensions in a number of areas. [356] Despite such recognition, the rhetoric has not been matched by adequate levels of protection of the occupational pension rights of migrant workers in the context of their right to freedom of movement (see below in Part II). This discrepancy may be linked to the choice of method to achieve the objectives of EU law. Moreover, the role of the ECJ has remained modest in the context of labour law relations between private parties in terms of recognizing the social protection purpose of non-statutory occupational pensions. Chapter VI will discuss the treatment afforded to migrant workers' occupational pension rights and ask whether the limited recognition of their social purpose has led to diminished levels of protection by the ECJ of the rights of workers under EU law on free movement. However, the Court has relied on solidarity in EU competition law.

The recognition of occupational pensions as a form of social protection reflects a purposive approach, which takes into account the objectives of occupational pensions as well as the values that underpin them. Among the arguments for occupational pensions to be viewed under EU law as part of social security/protection are the following three reasons:

Firstly, notwithstanding the complexity and diversity of occupational pensions in the Member States, the common purpose of occupational pensions supports the argument that they should be taken into account as a genuine form of social protection requiring adequate legal protection under EU law. In particular, the old-age risk that occupational pensions cover

[356] This is the case in the EU directives on the free movement of workers, namely the Safeguard Directive and the Supplementary Pension Rights Directive. One may also find such recognition in the IORP directive dealing with institutions providing occupational pension schemes. Furthermore, such recognition is also visible in EU Directives on equal treatment between men and women.

for the benefit of workers, together with the fact that the source of occupational pensions stems from the workplace all justify the inclusion of occupational pensions within the ambit of EU law on free movement and the social security/social protection rights of workers.

Secondly, it is important that the scope of each EU legal instrument is coherent and consistent in its articulation of the notion of occupational pensions. This is all the more important given that the legal concepts of occupational pensions and social security/social protection are not exclusively defined by any one provision of EU legal instrument on its own, be it a Treaty Article, a Regulation or a Directive. Therefore, a purposive approach to characterising the notion of occupational pensions, which recognises as compatible the objectives of each relevant instrument of EU law and the social protection goal of occupational pensions, will ensure a more coherent system of protection of workers in each relevant field.[357] While it is possible to have differentiation according to the substantive field of EU law, the legal protection of workers' rights should override any technical or formalistic features stemming from the definition of occupational pensions of any one instrument.

Thirdly, an approach designed to ensure the effectiveness of the fundamental rights provided under EU law should lead to broadly equivalent levels of protection of workers, notwithstanding any formalistic distinction. It is not satisfactory for a worker with an occupational pension to receive better or worse protection simply because his or her pension is either statutory or non-statutory. Under EU equality law, one may deduce that it is preferable for a worker to have a non-statutory occupational pension for the purpose of enforcing his or her rights to equal pay.[358] It is reasonable to deduce that the opposite is true in the field of EU law on the free movement of workers. Discrepancies in the level of treatment between statutory/non-statutory occupational pension schemes create a gap in the protection of workers (See Chapter IV). There are also implications in terms of the effectiveness of workers' rights, which vary according to the substantive area at stake under

[357] One such example is that the AGIRC/ARRCO schemes are treated as non-statutory occupational pensions for the purposes of EU equality law while at the same time being subject to the Coordination Regulations.

[358] Different methods and techniques may be appropriate but the key is to avoid a notion of first class citizen and second class citizen in terms of the legal protection afforded by EU law to workers' occupational pensions, whether they are statutory or non-statutory. However, the relevant instrument of EU equality law, which applies to statutory social security pensions, namely Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, which does not offer the same level of protection as Article 157TFEU, whether in terms of scope or effectiveness. For example, being a Directive, a worker will need to rely on the Member State's implementing legislation; furthermore historically, certain derogations have been admitted such as different retirement ages for men and women.

EU law.[359] This damages the legitimacy of EU law from a worker's perspective unless it is addressed by both the ECJ (and the EU legislator) using the legal tools available.

The relationship between the notion of occupational pensions under EU law and the protection of migrant workers: how to manage the conceptual risk?

Legal certainty in EU law depends on clear legal criteria. However, there are limits to the benefits of formalistic criteria such as the statutory/non-statutory divide. Arguably, the presence of solidarity in occupational pension schemes ought to bring them within the notion of social security/protection for the purposes of EU law on freedom of movement for workers. Moreover, the connection of occupational schemes with the workplace cannot be ignored. As mentioned, a purposive approach to the social protection objective of occupational pensions (with recognition of its underlying value of solidarity) should ensure that workers receive adequate protection under EU law. In EU competition law, a values based approach, which takes solidarity into account, has reflected the social specificity of occupational pensions despite being affected by the limitations of an instrumental approach.

The recognition of the role of occupational pensions as a source of social protection hinges upon the allocation of social responsibilities between the State and the private sector. Notwithstanding the acknowledgement under EU law of the role played by occupational pensions in social protection, EU law has enshrined an instrumental distinction between statutory and non-statutory schemes, which does not fully reflect the role of occupational pensions as a source of social protection in the context of EU law on free movement.

At the conceptual level, the main risk for workers is the trend that their occupational pension rights may become disconnected from the notion of social security and/or social protection. This in turn may lead to and/or justify a regulatory gap (see Chapter IV) resulting in a lack of protection of migrant workers who may suffer from a loss of occupational pension rights as a result of exercising their right to freedom of movement.

Notwithstanding the nature, function and the broader role of occupational pensions in the social protection of workers, the determination of the notion of occupational pensions under EU law must respect core rights, principles and values of EU law.
Certain issues must be addressed by EU law in order to improve its approach to dealing with the notion of occupational pensions under EU law on free movement of workers.

[359] Hypothetically, in the case of non-statutory pensions, the outcome for workers might be 'better' in relation to equal pay and 'worse' in relation to free movement or in the case of statutory pensions 'better' in relation to free movement and 'worse' in relation to equality law.

Firstly, there is a need to reconcile the statutory/non statutory distinction with the recognition that occupational pensions form part of social protection. The above distinction looks entrenched in EU law and is thus likely to remain in the long term and it may result in different types of legal treatment but it should not be used to justify a regulatory gap in the protection of migrant workers' occupational pension rights. A purposive approach to occupational pensions should be borne in mind when analysing the role of EU law in the field of occupational pensions and free movement of migrant workers. The EU legislator must indeed grasp the purpose and function of occupational pensions as a constituent of the European social model when legislating to protect migrant workers.

Secondly, there is a need for the occupational pension rights and the rights of workers to free movement to receive effective protection. Lessons of effectiveness can undoubtedly be learned from EU equality law, in which the same statutory/non-statutory distinction persists but where the ECJ has sought to provide workers with effective rights to equal pay under the Treaty, which are now backed up by secondary legislation. One of the unintended consequences of the characterisation of occupational pensions with pay has been the trend not to acknowledge the role of consider occupational pensions as a source of social protection.

Thirdly, the underlying values and principles such as solidarity and social protection need to be brought to the fore of the notion of occupational pensions in EU legislation and case-law dealing with the free movement of workers. Only by drawing upon the social protection attributes of occupational pensions and articulating these with the fundamental principles of EU law can migrant workers receive better protection of their occupational pension rights in this field. Just as the ECJ adopted a 'values based' approach in the field of EU competition law when dealing with occupational pensions, the approach taken in the field of freedom of movement of workers must also search for its 'social rationale'.

CHAPTER III. THE RATIONALES FOR PROTECTING MIGRANT WORKERS' OCCUPATIONAL PENSIONS UNDER EU LAW

Section 1. The limitations of the internal market rationale

A. The principle of non-discrimination on grounds of nationality

B. Removing obstacles to free movement

Section 2. The social rationale for protecting occupational pension rights

D. The social constituents of the Treaties

a. Social values, principles and objectives

b. The horizontal social clause

E. The development of a fundamental rights discourse

a. The fundamental status of the Treaties

b. The Charter of Fundamental Rights of the European Union

c. Non-binding sources of fundamental rights

F. Towards a new paradigm for European social integration?

Conclusive remarks

Introductory remarks

The demographic, economic and social difficulties that face the majority of EU Member States point towards the need for shared challenges to be dealt with at EU level. The historic role of EU law in the field of free movement of workers and the protection of their social security rights provides the starting point for assessing the EU's approach. Moreover, the recognition of occupational pensions as a form of social protection brings to the fore the rationale underpinning the EU's role in the protection of migrant workers.

The origins of the protection under EU law of migrant workers' social security rights

Legal protection of the social security rights of migrant workers can be found in the foundations of EU law. Historically, the task of ensuring that workers migrating within the Member States should not be penalized with regards to their social security rights goes back to 1951.[360] Member States were thus required from the early stages of European integration, to prevent their social security rules from discriminating against migrant workers. The

[360] At that time, the European Coal and Steel Community Treaty sowed the seeds for the legal protection of migrant workers. Article 69 paragraph 4 ECSC imposed a general obligation on Member States to prohibit discrimination between national and migrant workers. This was later extended to non-discrimination between EU nationals, which is embodied by Article 18TFEU (ex Article 12EC).

extension of the common market to the whole economy through the creation of the European Economic Community (***EEC***) led to the general need to avoid obstacles to the free movement of workers as well as the specific need to protect migrant workers' social security rights.[361]In addition to their substantive content, the Treaty provisions on the free movement of workers provide a legal rationale for EU intervention. Notwithstanding its economic purpose (of enabling worker mobility to meet demand for labour), the free movement of workers also had from the very beginning an individual and social dimension: according to G. & A. Lyon-Caen, in 1957 the free movement of workers appeared to be an "*individual liberty*" as well as a means of improving the general level of employment within the Community.[362]The need to implement the objectives of the Treaty prompted secondary legislation in this field.

The establishment of a social security "Coordination" regime under EU law

Article 51 EEC provided the Council with a mandate to adopt European secondary legislation to 'coordinate' national social security systems.[363] The implementation of Article 51 EEC resulted in binding legal instruments being adopted in the field of social security. The process began with the early Regulations 3 and 4 of 1958[364]. These were subsequently replaced by Regulation 1408/71 and its implementing Regulation 574/72/EEC.[365] Following the last reform, both of these regulations have now been respectively replaced by Regulation 883/2004 and Regulation 987/2009 (the ***Coordination Regulations***). They have become a vital tool of EU social law to deal with the EU dimension of social security benefits in general and old-age pension rights in particular. The Coordination Regulations represented an ambitious social development in EU law as they went beyond the principle of non-discrimination, for example by creating for migrant workers the fiction of a 'unified career'.[366] In addition, the personal scope of social security coordination was gradually

[361] When the Treaty of Rome was signed on 25 March 1957, the general provision on the free movement of workers was set out in Article 48 of the EEC Treaty, which is today contained in Article 45 TFEU (ex 39 EC). In addition, the Treaty of Rome also contained Article 51 EEC (now Article 48 TFEU ex 42EC), dealing specifically with the social security rights of migrant workers and setting out the key legal principles designed to ensure their protection.
[362] G. and A. LYON-CAEN, Droit social international et europeen, Dalloz 1993 p.164.
[363] The technique of "Coordination" was designed to protect migrant workers with regards to the acquisition, preservation and calculation of social security benefits. It was also deemed necessary to ensure that migrant workers would be able to receive payment of certain benefits when they resided in another Member State.
[364] Regulations 3 of 25/09/1958 and 4 of 3/12/1958 used as a template the existing ECSC convention on the social security rights of migrant workers signed on 09/12/1957.
[365] Regulation 1408/71 of 14/06/1971.
[366] This required the aggregation of all periods of work taken into account under the law of the Member States.

broadened. This evolution saw several legislative amendments.[367] Moreover, the material scope of the Coordination Regulations was also broadened following judgments by the ECJ.[368] However, non-statutory "supplementary" occupational pension rights were subsequently excluded from scope of the Coordination Regulations. Notwithstanding the social dimension of the rationale behind the Coordination Regulations, the EU's traditional economic approach to internal market legislation has remained ever-present in this field.

The importance of protecting migrant workers' occupational pensions under EU law

Given the connection between occupational pensions and the workplace, the protection of workers under EU law on free movement of workers raises both issues affecting private law as well as the action of Member States. The legality as well as the legitimacy of EU law depends on its rationale. The internal market has consistently been used to justify the protection under EU law of migrant workers' occupational pensions. Two key legal principles of EU law have been at the heart of the development of EU law in this field: first the principle of non-discrimination on grounds of nationality; and secondly, the fundamental freedom of movement for workers, which entails the need to remove non-discriminatory obstacles. To what extent do these principles offer a satisfactory basis for the protection of the occupational pension rights of migrant workers? Section 1 will question the on-going relevance and limitations of the internal market rationale for the protection of migrant workers' occupational pensions. Section 2 will argue in favour of a social rationale for the protection of migrant workers' occupational pensions based on fundamental rights.

[367] The wording of Regulation 1408/71 also adopted a more human tone: instead of referring to "*migrant workers*", it applied to "*employed persons and their families moving within the Community*." This was the precursor to substantial changes: the personal scope of the Coordination Regulations was amended in 1981 to cover self-employed workers. European citizenship also led the application of social security coordination to be extended beyond workers.

[368] MAVRIDIS.P, (2003), La Sécurité sociale à l'Epreuve de l'Intégration Européenne. Etude d'une confrontation entre libertés du marché et droits fondamentaux, Brussels, Bruylant.

Section 1.The limitations of the internal market rationale for the protection of workers' occupational pensions.

The internal market rationale for the protection of migrant workers' occupational pensions relies upon the principles underpinning the free movement of workers. Two dynamics that have for a long time been the driving force behind the application of EU law on free movement of workers are: first the prohibition of discrimination based on nationality (A); and secondly the need to deal with obstacles to market access (B). To what extent do these two approaches take account of the social protection purpose of occupational pensions? Both branches of the internal market dynamic contain social flaws that will be addressed below when assessing whether they offer a satisfactory rationale for the protection of migrant workers' occupational pensions under EU law.

A. The principle of non-discrimination on grounds of nationality

Non-discrimination on grounds of nationality is central to the principle of free movement of workers under EU primary law, secondary law and case-law.[369]

a. Primary law

The anti - discrimination philosophy of EU law is today embedded in the notion of European citizenship as provided under Article 18TFEU (which prohibits discrimination on grounds of nationality). It emerged historically as a key component of the freedom of movement of persons under Article 45 TFEU. Indeed, the second paragraph of Article 45 TFEU specifically renders illegal any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.[370] Given the connection between occupational pension schemes and the workplace, it is logical that the prohibition of discrimination based on nationality should also encompass (in theory) measures affecting a migrant worker's rights in relation to an occupational pension scheme. However, the problem arises in theory where such measures entail a loss of social protection. Indeed, non-discrimination is limited to the requirement for

[369] RAVELLI. F, The ECJ and Supplementary Pensions Discrimination, European Journal of Social Law, No.1 March 2012.

[370] *"Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment."*

a worker to show less favourable treatment than that afforded to a comparator of a different nationality. An internal market rationale approach to Article 45 TFEU that focuses on discrimination does not provide a "qualitative" safeguard designed to protect migrant workers against a loss of the social protection in relation to their occupational pension rights. Moreover, in practice it may be hard to categorise a loss of social protection as having been caused by a form of discrimination on the grounds of nationality. Unsurprisingly, the issue of discrimination on grounds of nationality did not arise in the one case in which Article 45TFEU has been invoked by a worker (see *Casteels* below in Chapter VI) with regards to his occupational pensions. If discrimination is less likely to be an issue in this field, it is arguable that an internal market rationale for the free movement of workers that is based on non-discrimination is not adapted to deal with the protection of migrant workers' occupational pensions or at the very least that it is insufficient on its own.

For its part, Article 48 TFEU (ex 42EC), constitutes a specific provision on the free movement of workers and the protection of their social security rights. Although the prohibition of discrimination is not specifically mentioned by Article 48 TFEU, this article is again implicitly driven by the same anti-discrimination rationale, which is relevant to occupational pensions. Indeed, its predecessor (Article 51 EEC) provided a legal base for the Safeguard Directive and was also chosen as the initial legal base for the first draft proposal for a Portability Directive as well the amended draft directive of 2007 prior to the 2013 change of legal basis to Article 45TFEU as will be discussed below. Given its specificity, Article 48TFEU takes into account the social protection dimension of the schemes it seeks to protect but does not target social protection as a substantive rationale requiring 'qualitative protection' against losses caused by free movement.

The anti-discrimination rationale for protecting the occupational pension rights of migrant workers is present regardless of which of Article 45TFEU or Article 48 TFEU is chosen as a relevant legal base for secondary EU legislation in this field. The principle of non-discrimination has taken centre-stage in the relevant secondary EU legislation although it does not *per se* offer migrant workers a guarantee of upholding the level of (and entitlement to) their occupational pension rights from the perspective of social protection.

b. Secondary legislation

The Treaty provisions on the free movement of workers under EU law apply to both statutory and non-statutory occupational pensions. It is therefore logical for the prohibition of discrimination to be reflected in secondary EU legislation covering non-statutory

occupational pensions. The anti-discrimination role of the Coordination Regulations provides a relevant basis for comparing the rationales underpinning the protection of statutory and non-statutory occupational pensions (even though the latter are excluded from their scope). The prohibition of discrimination on grounds of nationality was strengthened by Regulation 883/2004 and has been described as non-discrimination as a "*key principle of European social security coordination*".[371]

Non-discrimination is required under Recital 7 of the Safeguard Directive.[372] Interestingly, the legal criterion for comparison to assess the presence of discrimination is not specifically nationality but is mobility itself (cross-border versus within the same Member State). Equal treatment was clearly a driving force behind the Safeguard Directive: in substance, this is visible in particular with regards to the preservation of supplementary pension rights provided for under Article 4. However, Recital 13 of the Safeguard Directive also seems to indirectly suggest that non-discrimination is not enough in itself to achieve genuine free movement.[373]

Non-discrimination is still part of the underlying rationale for the Supplementary Pensions Directive (given that Article 45 TFEU is its legal base). In addition, the broader principle of equal treatment remains particularly relevant with regards to the issue of membership, as highlighted by Recital 20 of the Supplementary Directive, which states that: "*This Directive does not create any obligation to establish more favourable conditions for dormant rights than for the rights of active scheme members*." Equal treatment in this context is no longer specific to nationality insofar as the rationale for legislative intervention in this field has shifted towards the removal of non-discriminatory obstacles to the free movement of workers. This change of focus reflects the fact that the prohibition of discrimination on grounds of nationality is not sufficiently adapted to the needs of migrant workers for protection of their occupational pension rights. Nevertheless, a rationale based on discrimination on grounds of nationality is not irrelevant given that examples of discrimination may still occur. Legal protection against discrimination on grounds of nationality is provided under a number of sources of EU law, from the Treaty to the Charter

[371] GHAILANI, D. (2011), Gaps of EU Legislation on the Coordination of pensions: Key issues, 6th Deliverable for the project 'Scope of coordination in the pension field', DG Employment and Social Affairs.
[372] Recital 7: "*workers who move or whose place of employment moves from one Member State to another are guaranteed equal treatment as regards the protection of their supplementary pension rights with workers who remain or whose place of employment changes but remains within the same Member State*".
[373] Recital 13: "*the Treaty requires not only the abolition of any discrimination based on nationality between workers of the Member States but also the elimination of any national measure likely to impede or render less attractive for those workers the exercise of the fundamental freedoms guaranteed by the Treaty as interpreted by the Court of Justice of the European Communities in successive judgments*".

to secondary legislation in this field with the result that it constitutes a cornerstone of EU law, which has been used by the ECJ to uphold non-discrimination as a flagship principle of European integration and an "*acquis*" of EU law.

c. The case law of the ECJ

The strength of the non-discrimination rationale has ensured its effectiveness in the jurisprudence of the ECJ. Not only are Member States required to uphold and apply the principle of non-discrimination but so too are employers. The *Angonese* case recognised the horizontal direct effect of Article 45(2) TFEU, which protects the rights of migrant workers against employers, when they are subjected to discrimination on grounds of nationality. In the context of pensions, Ghailani describes anti-discrimination as "*a precious guarantee*" in the Coordination system. Indeed, the ECJ has given a broad interpretation to this principle in relation to social security.[374] The above jurisprudence should in theory not be restricted to protecting migrant workers against discrimination in relation to their statutory occupational pensions; it should also extend to their non-statutory occupational pensions.

The anti-discrimination dynamic within the ECJ's case-law on occupational pensions concerns not only nationality but extends more generally to the principle of equal treatment in the work place. It has been the driving force behind EU law in relation to equal pay, sex discrimination and other forms of discrimination. Together, these embody the importance of the principle of equality under EU law in this field.[375] However, anti –discrimination remedies have their own limitations, as can be witnessed in matters of equal pay: EU law allows employers to "level down" provided they offer all those in a similar position, the same level of remuneration.[376] This is not satisfactory from a worker's perspective as it may result in a loss of social protection and a race to the bottom. Notwithstanding its other benefits, the anti-discrimination dimension of the internal market rationale is socially deficient.

The drive against discrimination does not guarantee the mobility of workers and the effectiveness of free movement of workers in the EU. Indeed, ever since the *Bosman* case, the ECJ has pointed to the importance of dealing with non-discriminatory obstacles to the free movement of workers. This second limb of the EU's internal market rationale certainly comes into play in relation to occupational pensions.

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[374] See for example the ruling of the ECJ in Case C-227/03 *Van Pommeren-Bourgondiën* [2005] ECRI-06101.
[375] RAVELLI. F, The ECJ and Supplementary Pensions Discrimination, European Journal of Social Law, No.1 March 2012.
[376] Case C-408/92 *Smith v Avdel Systems* [1994] ECR I-4435.

B. Removing obstacles to free movement.

There is no doubt that EU law must seek to remove obstacles to market access that affect occupational pensions and either place migrant workers at a disadvantage or simply inhibit their exercise of their freedom of movement under EU law. The question is whether as a rationale it is sufficient to justify migrant workers not suffering a loss of social protection in relation to their occupational pensions? The merits and limitations of the obstacle component of the internal market rationale are addressed by reference to the primary and secondary EU law as well as the case-law of the ECJ.

a. Primary EU law

Article 3 TEU (ex Article 2TEU) makes the commitment that the EU "*shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured...*" Article 45 TFEU underpins the need to remove obstacles to the free movement of workers. In addition, the free movement of workers is reiterated as a fundamental right in Article 15 of the EU Charter. However, as seen above, Articles 45 and 48 TFEU do not prevent less favourable outcomes for migrant workers. Neither article stipulates that workers who migrate within the EU should be put in the same position as non-mobile workers from the countries in which they have worked. The focus of EU law on free movement is on preventing unjustified treatment, be it discriminatory or non-discriminatory where it constitutes an obstacle to workers' right of free movement. This approach requires assessing the fairness and legitimacy of the process to which migrant workers' award of pension benefits is subjected. It does not determine the level of pension benefits. The principle of aggregation contained in Article 48TFEU (and implemented by the Coordination Regulations) is designed to ensure that all periods of work are taken into account. [377]

The economic rationale for removing obstacles to free movement was visible in the Single European Act, which was signed on 17 February 1986. This provided the legal and political momentum for the removal of obstacles to the internal market. Article 14 of the SEA stated the obligation of the EEC "*to adopt measures with the aim of progressively establishing the internal market by 31 December 1992*". Consequently, the Commission

[377] The principle of aggregation is designed to enable migrant workers to get the benefit of a theoretically 'unified career' when it comes to the method of determining their pension benefits. However, it does not guarantee that migrant workers will receive the same overall pension as if they had remained throughout their career in just one Member State. In practice, the outcomes of individual calculations will reflect the diversity of EU Member States in which workers have worked. Mobility, complexity and diversity thus go hand in hand.

embarked on a mission seeking the removal of physical, technical and fiscal barriers to the internal market. For the purposes of secondary legislation implementing the free movement of workers, this has led the Commission to seek to identify the specific obstacles that are related to occupational pensions.

b. Secondary EU legislation.

Enabling the mobility of workers has been at the heart of the EU's Coordination Regulations for over 50 years. As mentioned, these are now embodied in Regulation 883/2004 and its implementing regulation 987/2009 which enable migrant workers to receive protection in relation to their statutory pensions (including statutory occupational pension schemes, where these are based on national legislation). The internal market rationale of removing obstacles to worker mobility has remained a constant presence in the Coordination Regulations. Worker mobility is listed as a specific rationale, as referred to in the Recital 32 of Regulation 883/2004.[378] The more general reference to the free movement of persons arguably denotes the social protection component that accompanies the internal market rationale to the Coordination Regulations.[379]However, the social protection purpose of non-statutory occupational pensions does not appear as an overarching consideration in the context of EU secondary legislation dealing with obstacles to free movement of workers.

In the early days, the Commission's Communication of 1991 identified three specific areas presenting obstacles to free movement in the field of occupational pensions: (i) the conditions for the acquisition of supplementary pension rights; (ii) the treatment of deferred (also referred to as "dormant") pension rights (i.e. the rules and practice on the preservation and/or transfer of rights); and (iii) the taxation (of cross-border contributions and transfers). The relevance of these three areas was re-iterated by the Commission's Green Paper of 1997 "Supplementary pensions in the Single Market."[380]In addition, a fourth area identified as important for worker mobility is the provision of adequate information to scheme members (in particular to those workers who leave their pension schemes early). These specific areas all remain relevant and with the exception of taxation, they have been the focus of the EU's

[378] "*In order to foster mobility of workers, it is particularly appropriate to facilitate the search for employment in the various Member States; it is therefore necessary to ensure closer and more effective coordination between the unemployment insurance schemes and the employment services of all the Member States*."
[379] Regulation 883/2004 thus stated that "*the provisions for coordination of national social security systems fall within the framework of freedom of movement of persons and should contribute towards the improvement of their standard of living and conditions of employment.*"
[380] COMMISSION GREEN PAPER Supplementary pensions in the Single Market (COM (97) 283.

action in this field, thus highlighting the importance of removing obstacles within the internal market rationale.

National measures such as taxation or regulation of occupational pensions can be described as "vertical obstacles" to free movement[381]. Alternatively, the actions of private actors (such as employers, occupational pension schemes, trustees or fund managers) may constitute "horizontal" obstacles to free movement. The cross-border effect of obstacles to free movement is assessed by reference to the criterion of mobility or "*migration*". The internal market rationale in the Safeguard Directive is highlighted as the need to "*effectively protect the rights of the many people enrolled in pension funds who move across different Member States. The Directive is mainly focused on preventing cross-border workers from being discriminated against on grounds of nationality and 'migration'*".[382] In that context, migrant workers are the category requiring protection under EU law secondary legislation. The need for equal treatment and the removal of obstacles to mobility are considered as complementary methods and objectives under EU law as evidenced by Recital 7 of the Safeguard Directive.[383] The same logic under EU law that prohibits discrimination based on nationality also extends to situations in which migrant workers are put at a disadvantage notwithstanding their nationality. Ravelli thus refers to '*discrimination based on migration*' as capable of restricting the free movement of workers where the treatment in question affects "*irrespective of citizenship, migrant workers who are subject to different social security regimes."* However, the determination of obstacles to free movement remains linked to the criterion of discrimination, which is limited in terms of its social outcome. EU law needs to protect migrant workers against losses of social protection as part of its rationale for legislating on the free movement of workers and their occupational pensions.

The Safeguard Directive's rationale for dealing with the occupational rights of posted workers is primarily "*in order to facilitate the exercise of the right of free movement*". A

[381] An example of a vertical obstacle can be found in the field of taxation: for example, Mavridis points out that the free movement of persons has been hindered where Member States have required persons receiving an occupational pension (including an early retirement pension) to pay health and maternity contributions (levied at source) where this results in double contributions (because the pensioner also pays health contributions in the Member State where he resides).

[382] RAVELLI, The ECJ and Supplementary Pensions Discrimination, European Journal of Social Law, No.1 March 2012.

[383] This states that "*a contribution to this objective (i.e. eliminating obstacles to the mobility of employed workers) can be made if workers who move or whose place of employment moves from one Member State to another are guaranteed equal treatment as regards the protection of their supplementary pension rights with workers who remain or whose place of employment changes but remains in the same Member State*."

number of practical steps are required for the purpose of enabling free movement of workers. The Safeguard Directive thus took measures to deal with retired workers by encompassing issues such as the payment of pensions. This was arguably as much about the free movement of capital as it was about the free movement of persons in the EU given that retired workers usually cease being workers (although increasing number of workers carry on in employment after they start drawing a pension). In addition, the internal market rationale justifies the need for workers to have sufficient information regarding their rights not to be subjected to adverse treatment when their pension rights become pensions in payment. This might dissuade them from taking up employment in another Member State in the first place. However, the Safeguard Directive lacked the social rationale and the teeth to prevent adverse treatment by private employers of migrant workers occupational pensions, which was left for the Supplementary Pensions Directive. However, Recital 13did refer to the ECJ's efforts to tackle 'vertical' obstacles to free movement of workers (as well as discrimination).[384]

c. **The ECJ's case-law**

Non-discriminatory measures can be regarded as unlawful obstacles to the free movement of workers under EU law where the exercise of a worker's mobility may result in a form of prejudice that cannot reasonably be justified.[385] In *Bosman***,** the issue of protecting workers' access to the employment market was at stake.[386] The principle that Article 45TFEU catches rules that impede access of workers to the employment market of another Member State justifies the removal of non-discriminatory obstacles to mobility, where these stem from measures taken by Member States. Moreover, in *Terhoeve*, national rules on the payment of social contributions were scrutinized to see whether they could prevent or discourage a

[384] "*Whereas in this regard, the Treaty requires not only the abolition of any discrimination based on nationality between workers of the Member States but also the elimination of any national measure likely to impede or render less attractive for those workers the exercise of the fundamental freedoms guaranteed by the Treaty as interpreted by the Court of Justice of the European Communities in successive judgments.*"

[385] The opinion of AG Fennelly in *Graf* stated that "*the guarantee of freedom of movement for workers within the Community in Article 39EC* (now Article 45TFEU) *also entails the prohibition of national measures which distinguish, not according to nationality but according to whether a person engages in uninterrupted economic activity in his country of origin, on the one hand, or on the other, either moves to another country to work in an employed or self-employed capacity or works in more than one country at a time, to the prejudice of those who thereby exercise their right of free movement.*" (Case C-190/98 *Volker Graf v Filzmoser Maschinenbau GmbH* [2000] I-00493, Opinion of AG Fennelly, para 21.

[386] In *Bosman*, the rules on the transfer of football players between clubs from different football associations were held to "*directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers*" (although the same rules were applicable to internal transfers within the same Member State), Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others* [1995] ECR I-04921.

worker from exercising their right to free movement.[387] There is a justification for removing obstacles to free movement in vertical situations (including against public or regulatory bodies whose actions are deemed akin to those of a Member State). A trickier matter is whether a rationale based on removing obstacles to free movement should lead to private employers and pension schemes being subject to similar scrutiny under EU law?

From a worker's perspective, EU law must seek to remove obstacles to workers' freedom of movement that stem from measures taken by employers and/or occupational pension schemes. Any opposition to this rationale can only come from the argument by employers that EU law should not meddle in private law, notwithstanding the debate over the horizontal effectiveness of the free movement of workers (See below in Chapter VI). Ultimately, there is a source of tension between on the one hand the rights of workers to freedom of movement and on the other hand the freedom of contract, which employers will seek to uphold. The judicial principle of 'impartiality' requires the level of protection afforded to workers' freedom of movement to be consistent with that afforded by the ECJ to employers' internal market freedoms. However, does this require the operation of occupational pension schemes to be 'mobility neutral' in both economic and social terms? The imbalance of legal treatment of social and economic rights has been criticised in respect of the famous *Viking* and *Laval* cases.[388] Arguably, the internal market rationale justifies the protection of workers as well as employers. Indeed, the ECJ's decision in *Casteels* is largely based on an internal market rationale for the protection of the occupational pensions of migrant workers; it is notable that the ECJ made no reference to social protection in its reasons for upholding a worker's right to freedom of movement. The limitations of the internal market rationale stem from the need for competing interests need to be articulated under EU law by taking into account the social protection dimension of the freedom of movement of workers, which so far has been lacking in the field of occupational pensions.

The free movement of workers provides a rationale for the protection of the occupational pension rights of migrant workers which is guided by specific and overarching principles of EU law. Non-discrimination has clearly proven particularly effective and led to the development of EU citizenship. In addition, the removal of obstacles constitutes a market-

[387] Case C-18/95 *F.C. Terhoeve* [1999] ECR 1999 I – 00345.
[388] C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779; C-341/05 *Laval un Partneri* [2007] ECR I-11767.

based approach, which is sometimes seen as more of a challenge rather than a principle. Such a weakness in the rationale, in particular in terms of its application to private law relationships has led to a weakness in the effectiveness of EU law in dealing with the need to address obstacles in horizontal relationships. This leads one to question whether the combination of non-discriminatory and an obstacle based approach to free movement is sufficient to protect migrant workers against losses of social protection? The complexity of EU law in dealing with the free movement of workers and their occupational pensions, which straddles both the internal market and social protection, has suffered in terms of the incompleteness of its rationale. This has delayed and weakened the protection afforded to migrant workers under EU law.

Given the renewed force of the fundamental rights discourse under EU law, one must debate whether the time has come to invoke a social rationale based on fundamental rights as necessary for the improvement of the protection of migrant workers' occupational pensions in order to achieve genuine freedom of movement.

Section 2. The social rationale for protecting migrant workers' occupational pensions

The case for a social rationale for the protection of migrant workers' occupational pensions and their right to freedom of movement under EU law is based on the social constituents of the Treaties (A) and the development of a fundamental rights discourse (B). This leads to asking whether a new paradigm for social integration should apply to the protection of occupational pensions under EU law on the free movement of workers (C).

A. The renewed social vocation of the Treaties

The social constituents of the EU Treaties hinge (a) upon the values, principles and objectives embedded therein and (b) require a legal mechanism for ensuring their implementation in EU law.

a. The values, principles and objectives of the Treaties

The Treaty of Lisbon signed in 2007 resulted in the consolidated versions of the TEU and the TFEU being adopted by the Member States. The consolidated treaties re-stated the values and objectives of the EU as follows: Article 2 TEU sets out the values of the EU: "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality* ....".The reference to 'dignity' has particular social resonance in relation to occupational pensions as does the 'freedom' of workers in the EU. Article 3 (ex-Article 2 TEU) sets out the general objectives of the EU: "*to promote peace, its values and the well-being of its peoples*." From a social perspective, the notion of "well-being" is important as it also provides a qualitative benchmark for achieving dignity in old age. The social objectives of the internal market are mentioned in the same article.[389] The promotion of social justice and social protection are important social objectives which EU law must pursue when dealing with occupational pensions and free movement. The risk of social exclusion justifies the need for social protection as a component of the rationale for the protection of migrant workers.

The diversity of social protection systems and of occupational pensions in the Member States renders less likely the prospect of a homogenous European social model. EU law does not seek to offer workers a standalone guarantee of adequate social protection as the design of pension systems remains the competence of the Member States. Indeed, the issue of

[389] "It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress ...The Union shall combat social exclusion and discrimination, and shall promote social justice and protection." A previous version of Article 2 EC contained ambitious wording whereby the aim of the Community was to promote "a high level of employment and of social protection."

competence and its exercise are discussed in Chapter IV. The issue of relevance to this study is whether and to what extent EU law on the free movement of workers entails guaranteeing adequate legal protection of workers on matters affecting their social protection such as the freedom of movement for workers)? Social protection remains a specific objective of the EU (and its Member States) in terms of social policy as provided under Article 151 TFEU.[390] In addition, Article 2 TEU and Article 3 TEU require the EU to promote "*solidarity between generations*", which is directly relevant to the protection of both social security and occupational pensions. However, the effectiveness of the above social objectives, values and principles depends upon the existence of a legal mechanism through which EU law has a duty to implement measures that take into account human dignity and social protection.

b. The relevance of the horizontal social clause: Article 9 TFEU

Having established and consolidated its social goals at the heart of the Treaties, the next important social constituent of the Treaties, which followed the Treaty of Lisbon is the horizontal social clause contained in Article 9 TFEU: "*In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.*" For Vielle, "What the Horizontal Social Clause actually asserts is the primacy to be accorded to social goals in EU activities and policy-making, and this includes those fields where 'hard' economic considerations appear to reign supreme."[391] This social logic should be applied to the freedom of movement for workers. Given the connection between occupational pensions and social protection, Article 9 TFEU not only supports a social rationale for the protection of migrant workers' occupational pension rights, it justifies a social interpretation of internal market principles such as the free movement of workers.

[390] This states that: "The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions…, proper social protection…and the combating of exclusion." One notes that the adjective "adequate" has been replaced by "proper", which could lead to an interesting debate on terminology regarding whether the aspiration of the EU in terms of social protection is marginally greater than the principle, which it must take into account.

[391] Vielle advocates that "in the field of hard law, the new clause protects from annexation by the laws of economics several fields of social action of quintessential significance in relation to what might be called the 'European social model'...it could even entail subjecting the various economic fields to the test of their compatibility with the social purposes of the Treaty as enshrined in the new clause." See P.VIELLE "How the Horizontal Social Clause can be made to work: the lessons of Gender Mainstreaming" in The Lisbon Treaty and Social Europe (edited by N.BRUUN, K LÖRCHER & I.SCHÖMANN), Hart (2012).

Article 9 applies to all the EU institutions (Commission, Parliament, Council, Court of Justice) and the Member States, hence "*Each of these actors is henceforth required to ensure that the clause is appropriately implemented within the sphere of its own responsibilities*".[392] Article 9 TFEU thus constitutes a social provision that is designed to make the guarantee of adequate social protection an overarching (and effective) consideration of EU law, in particular within secondary EU legislation and its interpretation by the Court. The practical impact of Article 9TFEU will no doubt depend upon its reception by the EU institutions and social actors who need to "recall and draw attention to the demands stemming from the new provision and to propose appropriate institutional mechanisms that will ensure its effectiveness."[393] In terms of legislative procedure, the Commission, EU Committees, Council and Parliament need to show that they have endeavoured to take the social protection of migrant workers into account. Of course, these institutions still have to operate within their constitutional constraints (in particular those based on competence) while retaining discretion in terms of their ambitions for EU integration in the field of social protection. However, the legal point is that EU institutions cannot (and should not) ignore the impact of their mandate when legislating in a field that brings into play matters of social protection.[394] This offers a new and welcome boost for the protection of workers (and migrant workers) occupational pensions under EU law.

The technique of 'Impact Assessment' has become a key tool in the preparation for secondary legislation in order to implement the requirement of social protection mainstreaming contained in Article 9TFEU.[395] In the field of occupational pensions and freedom of movement for workers, one may note that the Commission produced an Impact Assessment attached to the original draft for a Portability Directive.[396] The recognition of the importance of protecting the occupational pensions of migrant workers is not phrased specifically in terms of social protection but is subsumed by the Commission's duty to ensure the respect of the freedom of movement of workers. However, it does acknowledge that

[392] VIELLE.P, How the Horizontal Social Clause can be made to Work: The lessons of Gender Mainstreaming in The Lisbon Treaty and Social Europe, edited by N. Bruun, K. Lörcher and I. Schömann, Hart (2012) p.107
[393] VIELLE.P, (2012) Op.cit.
[394] Cornelissen has suggested that failure to act by the EU legislator could lead (in theory) to legal liability of the EU. CORNELISSEN.R, 50 years of European Social Security Coordination, European Journal of Social Security, (2009) Vol.11, Nos.1 – 2.
[395] VIELLE.P, In The Lisbon Treaty and Social Europe (2012) Op.cit p.106.
[396] This impact assessment produced on 20 October 2005 reflected the Commission's 'intelligent regulation' approach, which it has followed since 2002. In its Impact Assessment, the Commission considered its policy options: it concluded that doing nothing would probably increase obstacles to free movement; it also envisaged a European Collective Agreement as an option but recognised that the social partners did not agree on the EU instruments; a non-binding alternative such as a code of conduct was considered as unlikely and insufficiently effective; consequently, legislative action was deemed necessary in the form of a directive.

"True free movement ... is not possible without protecting the social security rights of migrant workers and their families." As discussed above, a principled approach has been taken by the Coordination Regulations in the field of social security.[397] The impact assessment identified the role of supplementary pensions as "an increasingly important element of the social protection system" as well as its place "as part of the remuneration package agreed at national, sector or company level by social partners or directly between employer and employee." The Impact Assessment identified technical 'sub-options' to be addressed by secondary legislation. Despite the technical approach adopted by the Supplementary Pensions Directive, one may suggest that it indirectly recognises its social protection dimension in its second recital.[398] However, the promotion of "adequate social protection" is neither a standalone objective of the directive nor is it reflected as an overarching principle with substantive effects in the directive. On the one hand, one may argue that the directive offers a pragmatic approach to social protection mainstreaming that seeks to reconcile its role as a social constituent in the Treaties that contributes to the social rationale for the protection of migrant workers' occupational pensions with other constitutional requirements such as balancing the competence divide. On the other hand, if one considers the requirement of social protection mainstreaming as providing a benchmark against which one may assess the measures adopted by the Supplementary Pensions Directive, then arguably the substance of the directive has a duty to reflect a social rationale. This will be assessed in Chapter V on positive integration.

In terms of the impact of the horizontal social clause on existing judicial mechanisms, the Court is required to uphold Article 9TFEU by verifying the compliance of EU secondary legislation. It should do so not just as a 'ticking the box' exercise (in terms of procedural implementation) but also by ascertaining whether the substantive requirement of guaranteeing adequate social protection has actually been reflected in the relevant measure of EU law. In relation to occupational pensions, this means that Article 9TFEU should be used to 'test' that the Supplementary Pensions Directive takes into account requirements linked to the guarantee of adequate social protection both in the directive's objectives as well as in its

[397] The principle of aggregation provides a way for EU law to coordinate social security pension rights to ensure that free movement does not adversely result in a loss of pension rights for migrant workers. Although the technique of aggregation used in the Coordination Regulations may not be suited to occupational pensions, a similar 'principled' approach based on adequate social protection would surely benefit migrant workers.
[398] "*The social protection of workers with regard to pensions is guaranteed by statutory social security schemes, together with supplementary pension schemes linked to the employment contract which are becoming increasingly common in the Member States.*"

substantive measures.[399] In addition, the argument that the Court should take social protection into account when interpreting Article 45TFEU would be a significant step that would go beyond the "anti-discrimination" and "obstacle-based" approaches to the freedom of movement of workers.

Lessons have been drawn from the gender mainstreaming provision, which has been part of the anti-discrimination dynamic and the drive for greater gender equality in EU law.[400] The reference to "***adequate*** *social protection*" suggests there is a qualitative dimension to the nature of the horizontal social clause. This is in line with the EU's broader policy objective of enabling workers to receive *adequate pensions*. The issue that must be addressed by EU secondary legislation in light of social protection mainstreaming concerns the impact of the exercise of a worker's right to free movement on the 'adequacy' of social protection. In practical terms, how does the principle of adequate social protection translate in terms of legal measures? As a legal criterion, "adequacy" is sufficiently broad for EU law to adapt to the reality of a number of possible implementations in different Member States: the diversity and complexity of pension systems determine the place of occupational pensions in terms of the overall adequacy of social protection provision. Ultimately, there is a need for EU secondary law to ensure that its "minimum requirements" approach is compatible with "adequate social protection". While "minimum requirements" may suggest a floor of rights, it should not reflect the lowest common denominator in social terms.

Moreover, in pragmatic legal terms, from a migrant worker's perspective, it is only worth receiving protection under EU law on free movement if the target (i.e. the occupational pension rights designed to provide social protection in retirement) are worth protecting! Given the on-going erosion of the value of occupational pensions in certain Member States such as the UK (notwithstanding extended coverage through auto-enrolment), this trend could render additional protection of migrant workers' occupational pensions under EU legislation entirely pointless. Therefore, the social protection mainstreaming provision in Article 9TFEU is not sufficient on its own. It requires a commitment by the Member States and all the stakeholders involved to strive to meet "adequate" levels of social protection regardless of

[399] In theory, the horizontal social clause should have a beneficial impact not just in relation to the wording of the Supplementary Pensions Directive but one that extends in practice to a better outcome in the legal protection afforded under EU law to migrant workers. However, one should note that the "minimum requirements" approach taken by the Directive lends itself to the argument that the social protection mainstreaming approach needs to be furthered by national measures implementing the Supplementary Pensions Directive.

[400] VIELLE.P How the Horizontal Social Clause can be made to Work: The lessons of Gender Mainstreaming in The Lisbon Treaty and Social Europe, edited by N. Bruun, K. Lörcher and I. Schömann, Hart (2012).There has been much debate over the focus of EU law on formal equality rather than the search for more substantive equality, which includes greater parity in terms of outcomes.

free movement.[401] It would be wrong to blame the EU for an erosion of the value of occupational pensions as a result of an attempt to protect the free movement of workers. Yet this very argument has been invoked by some lobby groups in their attempt to thwart the protection of migrant workers' occupational pensions through a directive!

The horizontal social clause does not require EU secondary legislation to ensure that the exercise by migrant workers of their right of free movement does not result in a loss of actual or potential occupational pension rights. Arguably any loss of pension rights could affect the adequacy of their social protection. The horizontal social clause in Article 9TFEU thus constitutes a lever for social protection.

Nevertheless, there are limits to the effectiveness of the horizontal social clause.[402] As will be discussed in Chapter IV below, EU legislation must respect subsidiarity and proportionality in this field. The previous requirement of unanimity has also required the EU legislator to walk on a tightrope, which goes some way to explaining the "minimal requirements" approach to positive integration in this field and why the whole project of adopting a second directive to follow the Safeguard Directive nearly failed. In theoretical terms of legislative method and approach in the field of free movement and occupational pensions, one might suggest that the EU legislator had two normative options: on the one hand, the EU legislator could adopt a race to the top; on the other hand, it could provide a safety net.[403] In the Supplementary Pensions Directive, the EU legislator has taken the latter approach. Chapter V will assess the extent to which the measures taken are likely to be sufficient to uphold the adequacy of migrant workers' social protection while protecting their right to free movement.

[401] Some Member States (e.g. Netherlands) continue to offer generous occupational pensions on a widespread basis. Moreover, trade unions are still very militant at seeking to preserve the value and coverage of occupational pensions although their action remains limited at EU level. Ultimately, the relevance of EU law on the protection of workers' free movement in relation to occupational pensions is contingent upon the actual value of occupational pensions being maintained and improved at national level. Given the 'employment-based' nature of occupational pensions, this is the responsibility not just of Member States but also of social partners and employers in particular.

[402] DE WITTE, TRECHSEL, DAMJANOVIC, ELQVIST, HIEN and PONZANO "Legislating After Lisbon, New Opportunities for the European Parliament." EUDO observatory on Institutional changes and reforms 2010.

[403] The former would require a principled stance that would make it compulsory for employers and occupational pension schemes to remove unlawful obstacles to free movement that cause an actual or potential loss of occupational pension rights, on the basis that these would reduce the adequacy of a worker's social protection. The latter would entail the EU legislator adopting specific and technical measures designed to improve the protection of migrant workers' occupational pension rights against the risks caused by mobility.

In order to combat the risk of social dumping, Lörcher mentions the need for an EU labour policy that includes certain "*minimum and specific legal policies*".[404] Both the Safeguard Directive and the Supplementary Pensions Directive provide minimum legislative protection to migrant workers. However, their legal base for EU competence derives primarily from the Treaty provisions on free movement. It is possible that the lack of a specific social competence may have had an impact insofar as both directives are limited in terms of their ambition, scope and substantive content. However, the horizontal vocation of Article 9TFEU is designed to compensate for a lack of a specific social competence by permeating other existing competences. Arguably, there may be a constitutional tension that comes from seeking to reconcile the horizontal nature of Article 9TFEU with the national competence of Member States in the design of social protection systems.

Article 9TFEU constitutes in theory a procedural requirement with substantive social protection implications for secondary EU legislation(subject to competence constraints).Though a broad reference is made to social protection in the recitals of the Supplementary Pensions Directive, the legal foundation provided by Article 9TFEU has not specifically been reflected in its wording, objectives or design. There is also a potential mismatch between the promotion of "adequate Social protection" and the "minimum requirements" approach of the Supplementary Pensions Directive, which will depend on its implementation by Member States. Notwithstanding its social vocation, the horizontal social clause is arguably insufficient on its own to justify the protection of migrant workers' occupational pensions. For Vielle "the social clause is rooted in a fundamentally progressive vision of the purpose of public policies". Therefore although there is in theory a tension between the pervasive social vocation of Article 9TFEU and the private law nature of many occupational pension schemes (with the potential for any resulting EU policies to be considered by some as an unwarranted interference in private law), such a complaint is not wholly convincing provided the sphere of EU action is limited to free movement of workers. Moreover, it has been pointed out that the narrative of social impact assessment in the context of the Horizontal Social Clause is "couched in a technocratic register inspired by private

[404] Lorcher argues "the Union needs sufficient competences in the social policy area" and must exercise them "*in order to achieve the social values (Article 2) and objectives embodied in Article 3(3) TEU, Article 9 TEU and Article 151 TFEU.*" He advocates 'a most favourable labour standards clause' in EU law, common binding labour standards and "*transnational regulation of multinational enterprises; including through collective bargaining, rights with regard to collective action and free movement of labour in a transnational labour market.*" In The Lisbon Treaty and Social Europe, edited by N. Bruun, K. Lörcher and I. Schömann p.167-168.

management practices"[405] – hence it should be adapted to occupational pensions and indeed the Commission has been at pains to take into account the impact on employers, not least by making the Supplementary Pensions Directive entirely forward looking in terms of its scope in time (see below in Chapter V).

Article 9 TFEU provides a mandatory legal mechanism, (i.e. a stepping stone through which the EU legislator must pass when adopting secondary legislation). However, in practice, its effectiveness depends upon the political will of the Commission, the Council and the European Parliament in the context of the legislative process. In terms of its relationship with other sources of EU law that contribute to the social rationale for the effective protection of occupational pension rights of migrant workers, the horizontal social clause must be combined with fundamental rights: Vielle points to the need for " a common articulated structure which, in these fields, establishes a link between the law – a formal guarantee of fundamental rights and public policies for the achievement of substantive goals (genuine equality, social justice).

B. The development of a fundamental rights discourse

The changes made by the Lisbon Treaty have affected the EU's legal system in terms of its protection of fundamental rights, in particular under the EU Charter.[406] However, is this new landscape of EU primary law capable of ensuring that the level of protection granted under EU law to migrant workers in respect of their occupational pension rights is greater and more effective than before? The substantive treatment afforded under EU secondary legislation and by the ECJ will be assessed in Part II. Before doing so, one may question whether the system of fundamental rights in EU law provides a theoretical underpin for a social rationale in relation to the protection of workers' rights to free movement. Such a rationale hinges not only upon the social objectives and values contained in the Treaty. Indeed, the EU also has a duty to "respect, protect and promote the entitlements granted by the Charter". The Charter thus provides a source of fundamental rights that justify a social rationale for the protection of migrant workers' occupational pensions under EU law. In this context, one should also mention the debate regarding the distinction between 'rights' and

[405] VIELLE.P In The Lisbon Treaty and Social Europe (Op.cit) (2012) p.107.
[406] N. LAZZERINI, The Scope of the Protection of Fundamental Rights under the EU Charter, EUI Thesis, 2013.

'principles' under the Charter, which is referred to in relation to "the scope, substance and enforceability" of the Charter's provisions.[407]

The first port of call in terms of fundamental rights underpinning a social rationale is the free movement of workers, which is a Charter right in addition to its traditional status as a Treaty article and historic cornerstone of EU law **(a)**. Does the free movement of workers (in its capacity as a fundamental right) justify the need to protect migrant workers' occupational pension rights as adequately as it protects their statutory social security pensions?

A social rationale for the protection of occupational pensions and the free movement of workers based on fundamental rights may be considered as depending upon whether the notion of social protection is deemed to include occupational pensions. If one accepts that it does, as addressed in Chapter II, then the next issue is whether social protection (construed to include occupational pensions) constitutes a fundamental right under EU law, justifying the need to protect migrant workers' in this field? Bercusson describes an autonomous set of objectives and doctrines thus highlighting the relevance of fundamental rights in the context of EU law on free movement.[408] A labour law approach supports the argument that the entitlement to social security/protection must be protected accordingly under EU law **(b)**.

a. The fundamental rights dimension of the Treaty articles on free movement

The process of extracting the fundamental social rights rationale for the protection of migrant workers' occupational pensions starts with the status of free movement of workers as a fundamental freedom under the Treaty provisions and the "*acquis*" under EU law in this field, which makes it a cornerstone of EU law.As discussed in Section 1 above, Articles 45 and 46TFEU are completed by Article 48TFEU (with regards to the protection of social security rights). The Treaty has been implemented through secondary EU legislation and protected by the ECJ in its case-law, including through the technique of direct effect (see Chapter VI regarding both vertical and horizontal integration). There is no doubt that the legal protection afforded to migrant workers has dealt primarily with issues of discrimination on grounds of nationality and obstacles to mobility as discussed above. However, the social

[407] N. LAZZERINI (2013) Op.cit.

[408] B. BERCUSSON, The Conceptualization of European Labour Law in Industrial Law Journal Volume 24 No.1. March 1995. For Bercusson, "the importance of social security entitlements and their mobility to the free movement of workers in the EC is undeniable. But social security has an autonomous set of objectives and doctrines which goes far beyond assisting free movement. It would be unfortunate if the impression were given that social security is subordinated in EC law to the exigencies of assisting free movement. This distorts both the broader scope of social security, and also those potential links between labour and social security law which go beyond labour mobility."

dimension of the free movement of workers, has become visible within the judicial trend of seeking to place individuals (both workers and citizens) at the heart of EU law.

The first argument supporting the social dimension of the free movement of workers under EU law concerns is visible in the substance of Article 48TFEU which requires the protection of migrant workers' social security rights through the principle of aggregation. On the one hand, the specific presence of a Treaty article is designed to protect migrant workers against losses of social protection caused by worker mobility. On the other hand, it does not guarantee that migrant workers will be in exactly the same position as 'static' workers. However, Article 48TFEU does seek to remove and reduce the potential tension between the exercise of free movement and workers' social protection. Its basic premise is that free movement should not adversely affect social security/ social protection. It is notable that the predecessor to Article 48TFEU initially provided the legal basis justifying EU competence for the protection of migrant workers' occupational pensions. The choice of legal basis for the Supplementary Pensions Directive was changed to Article 45TFEU (as discussed below in Chapter IV). Although one might argue that this weakens the social rationale for the protection of migrant workers' occupational pensions, the counter argument is that both Treaty articles on free movement contain a social protection dimension: Article 45TFEU is the general provision whereas Article 48TFEU relates specifically to social security.

Secondly, secondary legislation in the field of free movement has illustrated the need for substantial protection of migrant workers in the workplace. The status of free movement as a fundamental right is illustrated by Recital 4 of Regulation 492/2011: "Freedom of movement constitutes a *fundamental right of workers and their families*. Mobility of labour within the Union is considered as one of the means by which workers are guaranteed the possibility of *improving their living and working conditions and promoting their social advancement*, while helping to satisfy the requirements of the economies of the Member States."[409] There have also been judicial rulings in which employers have been recognised by the ECJ and by national courts as having positive obligations to afford equal treatment to workers (and their family members) with regards not only to benefits connected with employment but also in terms of recognising the seniority at work of migrant workers (which may stem from their previous career in another Member State).[410] The fact that migrant workers may suffer a loss of occupational pension rights *caused* by the exercise of their free

[409] Emphasis added. See Regulation (EU) No 492/2011 Of The European Parliament and of The Council of 5 April 2011 on freedom of movement for workers within the Union, which replaced 1612/68.
[410] Cass.Soc. 11 Mars 2009 Pourvoi N. 08-40381. See the case-note by LHERNOULD: "La SNCF est tenue de prendre en compte la carriere accomplie en Belgique." Liaisons sociales Europe N.224 (16-29 April 2009) p.2.

movement is therefore a problem that concerns EU law on the free movement of workers even where this is the result of 'non-discriminatory' treatment.

Thirdly, the *personalisation* of the right to free movement, which is attached to persons in their capacity as 'citizens' has led to a body of case-law of the ECJ. This important trend has relied predominantly upon the anti-discrimination dynamic. The personal scope of EU law has shown the importance of a 'cross-border' dimension to trigger protection under its provisions of free movement. Issues of less favourable treatment by Member States against their own nationals who have remained 'static' have traditionally fallen outside the scope of EU law on free movement. An approach based on citizenship was considered by AG Sharpston in *Zambrano*.[411] However, given that citizenship involves first and foremost rights that may be invoked against a Member State, such an approach may not be suited (on its own) to dealing with occupational pension schemes that involve private law relationships. Member States may design their pension systems and regulate the treatment afforded to occupational pensions but the responsibility for providing occupational pensions may lie with employers in the case of voluntary schemes. Nevertheless, there is a need for worker-centred solutions to deal with problems affecting worker-centred social protection (such as occupational pensions) where these fall within the scope of EU law and competence.

The status of the free movement of workers as a fundamental right justifies the need to afford an adequate level of protection to migrant workers' occupational pension rights. Indeed, a worker's right to free movement and his or her right to social protection must go hand in hand in order to be consistent with the objectives, values and entitlements recognised under both the Treaty and the Charter.

b. The Charter of Fundamental Rights of the European Union (the *EU Charter*)

The Charter of Fundamental Rights of the European Union was first proclaimed at the European Council in Nice on 7 December 2000 and again at Strasbourg on 12 December 2007 by the European Parliament, the Council and the Commission.[412]As a result of the Treaty of Lisbon, Article 6(1) of the Treaty on European Union states that the EU Charter has the same legal value as the Treaties, the effects of which are discussed below. The text of the EU Charter is indeed annexed to the consolidated version of the Treaties.[413]

[411] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* (ONem) [2011] ECR I-1177, Opinion of AG Sharpston.
[412] (OJ C 303, 14.12.2007, p. 1).
[413] EN C 83/402 Official Journal of the European Union 30.3.2010.

The Charter contributes towards the social values-based approach to EU law mentioned above in (A), which underlines its role as an instrument for social progress.[414]It provides a framework of objectives and principles that EU law must respect, including for this purpose in the field of occupational pensions. However, the EU Charter does not contain an article stipulating a general right for workers to social protection unlike the 1989 Charter (see below). Nor does it refer to social protection as a corollary to the free movement of persons.[415] Instead, the EU Charter contains a mosaic of specific fundamental social rights whose connection with occupational pensions is discussed below given their inherent connection to the right to dignity in old-age. Given that the role of occupational pensions as a form of social protection is set to grow, to what extent do the provisions of the Charter that fall under the heading "*Solidarity*" justify the need for their protection under EU law?

The rights of the elderly to dignity and independence

Article 25 of the EU Charter proclaims that: "*The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.*" The reference to "*dignity and independence*" entails a social, ethical, cultural, political dimension as mentioned above, given that the main point is the need to avoid poverty in old-age. In terms of its wording, Article 25 has been referred to as "*vague and imprecise*", which may have implications on the potential effectiveness of this fundamental right.[416] However, it should not diminish its worth as the part of the social rationale for the protection under EU law of migrant workers' occupational pension rights insofar as they provide income to the elderly to live a life of dignity and independence in their retirement.[417]

[414] Indeed, the Preamble of the EU Charter states that: "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice."

[415] Article 15(2) of the EU Charter refers to the freedom of movement for persons: "*Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State*."

[416] see EWING.K, The EU Charter of Fundamental rights: Waste of time or wasted opportunity, Institute of Employment Rights, (2002) p.15.

[417] This is particularly true when the amount of replacement income from the basic State pension is inadequate on its own and needs to be supplemented with a pension arising from a different source such as an occupational pension. Article 25 thus constitutes a relevant legal reference for EU law to take into account in circumstances where migrant workers' occupational pension rights are at risk of being reduced.

The rights of workers to fair and just working conditions

Article 31 (1) of the EU Charter proclaims that: "*Every worker has the right to working conditions which respect his or her health, safety and dignity*." According to Blanke, "the right to fair and just working conditions in Article 31 of the EU Charter underlies all the other individual and collective fundamental social rights of workers and elevates this subjective right to the status of a fundamental social right".[418] As such one may extend the relevance to occupational pensions of the reference to "dignity" in Article 31, which reflects a running theme that can be linked back to Article 1 of the Charter. This states: "*Human dignity is inviolable. It must be respected and protected*". A link can also be made with Article 25 on the rights of the elderly to dignity discussed above.[419]

As occupational pensions arise in connection with the workplace, they stem either from the employment relationship, or in the case of self-employed workers, from the existence of a professional activity. Article 31 is potentially relevant when employers make changes that reduce the occupational pensions benefits of migrant workers.[420]It also provides an important underpin to EU secondary legislation dealing with freedom of movement.[421]The requirement for non-discrimination to benefit nationals of third countries authorized to work in the Member States can also be found under Article 15: such workers are "*entitled to working conditions equivalent to those of citizens of the Union*." They should be able to accrue occupational pension rights where colleagues who are EU citizens are able to do so.

Cherednychenko notes that: "*the labour law of the EC Member States may in particular be affected substantially as a result of the inclusion of a rich set of economic and social rights in the Charter of Fundamental Rights of the EU, which have not been taken into account before in this field of law.*"[422]Article 31 also highlights the relevance of fundamental

[418] BLANKE.T in European labour law and the EU Charter of Fundamental Rights – edited by BERCUSSON.B – summary version, ETUI (2002), p. 69.

[419] For Blanke: "*dignity must be considered a new social right of the individual worker, and one of ever greater relevance*", which entails "*far reaching*" protection affecting "*the amount of remuneration, and other concerns of traditional labour law.*"Blanke justifies the social legitimacy of Article 31 on the basis of "*a growing awareness of the need to protect the whole personality of the worker in the context of unequal power in determining conditions of employment*".

[420] Many changes have been made to the contribution rates and benefit structure of schemes in both the public sector and the private sector. (in the UK amendments to pension contributions for public servants have been made with effect from 2015, e.g. Teachers Pensions Scheme).

[421] Recital 6 of Regulation 492/2011 thus provides: "The right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers be eliminated, in particular as regards the conditions for the integration of the worker's family into the host country."

[422] CHEREDNYCHENKO.O, Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or towards Walking in Circles?, in GRUNDMANN.S, (ed.) Constitutional Values and European Contract Law (Private Law in European Context Series, 13 (2008) p 51.

rights in private law relationships.[423] There is no doubt that fundamental rights will have a greater impact on private law relationships when there is an internal market dimension.[424]

The right to social security and social assistance

Fundamental rights have great resonance in the context of public services and services of general interest to social cohesion. Article 34 of the Charter recognises the right to social security and social assistance.[425] The wording of Article 34 uses the term 'social security' rather than the broader notion of social protection (which was used in the 1989 Community Charter). Some doubt might linger therefore as to what extent Article 34 can be deemed as applying to occupational pensions in terms of providing a fundamental right (rather than simply a fundamental principle). Arguably, the connection between Article 34 on social security and occupational pensions depends upon the recognition of occupational pensions as a form of social security. The reference by the EU Charter to solidarity and dignity mentioned in the Preamble, as well as the reference to the 1989 Community Charter provide a broad underpin to the notion of social security, which could be reflected in its interpretation as a legal concept. If that is the case, then the Charter provisions on solidarity are relevant to the treatment of migrant workers' occupational pension rights under EU law.[426] However, Article 34 is not without limitations. Indeed, the mention of the entitlement to social security benefits being "*in accordance with Community law and national laws and practices*" has been criticized by Ewing as a "*potential source of equivocation*".[427]

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[423] "*Potentially, certain workers' rights, for example, the right to working conditions which respect his or her health, safety and dignity or the right to a limitation on maximum working hours may be used to influence contractual relationships between employers and employees.*" CHEREDNYCHENKO.O, Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or towards Walking in Circles?, in S. GRUNDMANN (ed.) Constitutional Values and European Contract Law (Private Law in European Context Series, 13 (2008) p 51.

[424] KOSTA.V, Internal Market Legislation and the Private Law of the Member States – The Impact of Fundamental Rights, 6(4) European Review of Contract Law (2010), pp.409 – 436.

[425] 34 (1) "*The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of the loss of employment, in accordance with the rules laid down by Community law and national laws and practices.*"
34 (2) "*Everyone residing and moving legally within the European Union is entitled to social security benefits and social security advantages in accordance with Community law and national laws and practices.*"
34 (3) "*In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.*"

[426] Mavridis argued in favour of solidarity being enshrined in the Treaty (Op.cit).

[427] Ewing highlights the general qualification contained in Article 52, which may permit qualifications of the social rights of the Charter: he cites a potentially conflicting Charter right, i.e. Article 16, which provides that "*the freedom to conduct a business in accordance with Community law and national laws and practices is recognized*." In that respect, many voluntary occupational pension schemes are indeed set up by employers and their operation will depend to some extent on employer discretion while remaining subject to national law - see

The 'values-based' approach of the EU Charter and the fact that several articles deal with social protection means that it is hard to categorize occupational pensions as falling under a single provision. However, the articles of the EU Charter complement one another; therefore occupational pensions should not slip through the broad net of relevant provisions. Notwithstanding the debate between fundamental 'right' or 'principle', the provisions relating to social security in the EU Charter provide a social rationale for EU law on the free movement of workers to protect the occupational rights of migrant workers. In addition, the legitimacy of the social rationale for EU law on free movement of workers to respect the dignity of workers under EU law has a collective dimension as well as an individual dimension. This is relevant given the collective nature of most occupational pension schemes.

The EU Charter provides a constitutional platform whose social rationale justifies the protection of migrant workers' occupational pensions under EU law on free movement. The social dimension of the freedom of movement of workers thus stems from the articulation of both the Treaty and the Charter as sources of primary EU law. It is now argued that the Treaty provides a tool for determining the scope and effects of the Charter.[428] For the purpose of coherence, one may also argue that Articles 45 and 48TFEU should also be interpreted in line with the Charter: the role of fundamental rights as "constitutive values" of the EU legal order is designed to permeate the interpretation to be given to the Treaty. The free movement of workers under the Treaty should therefore uphold workers' social protection rights against any losses caused by the exercise of a worker's mobility. The recognition of the free movement of workers as a fundamental right contained within the Charter must be interpreted in such a way as to be compatible with other fundamental rights.

Although the social rationale for the free movement of workers does not impose certain levels of social protection, it requires appropriate legal protection of migrant workers' occupational pensions against the risks that may result from the exercise of free movement. There is the potential for a clash with the matter of EU competence though Article 6.2 TEU provides that "*the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties*." The question of competence is obviously of key importance in determining the effects of the EU Charter upon its addressees. Indeed, provided the requirement of competence under EU law is met, both the EU institutions and Member States are therefore legally obliged to "*respect the rights, observe the principles and*

EWING.K The EU Charter of Fundamental rights: Waste of time or wasted opportunity? Institute of Employment Rights, 2002, P.16.

[428] LAZZERINI.N, The scope of the protection of fundamental rights under the EU charter, Florence : European University Institute, 2013.

promote the application" of the EU Charter "*in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*"[429] In the case of the freedom of movement of workers, the question of competence is satisfied as the internal market and its fundamental freedoms are obviously an area in which the EU has competence, as provided for under Article 45 TFEU. However, when regulating the relationship between free movement of workers and the protection of their occupational pensions, any attempt to protect occupational pensions must take care not to appear to regulate the design of those schemes in areas where there is no obvious risk or threat posed by the exercise of free movement.

The Charter provides a binding source of primary law that is of significant interest in terms of the social dimension that it brings to the free movement of workers. In addition, other non-binding sources of fundamental social rights provide relevant points of reference.

c. Non-binding sources of fundamental rights

Among the external influences of EU labour law, one may refer to the ILO's resolutions[430] as well as its reports.[431] However, from a historical perspective, specific importance has been attached to the European Social Charter (ESC), which is mentioned in the Preamble to the TEU. The ESC was signed in Turin on 18 October 1961 and entered into force on 26 February 1965.[432] It aimed to "*promote the social well-being*" of the populations of the member states of the Council of Europe and Part I of the ESC contains key provisions.[433] Although the ESC has no binding legal effect in the EU legal order, it

[429] The provisions of the EU Charter are legally binding on the EU institutions (with due regard for the principle of subsidiarity). This means that the EU's policy and legislative apparatus, namely the Commission, Council and European Parliament are all required to respect and give effect to the EU Charter when enacting legislation in the field of EU law. Whereas the EU Charter seeks to draw on the principles and values that are common to the Member States, the EU must take extreme care to respect the attribution of competences and the principle of subsidiarity. Indeed, it is clear that the EU Charter will only apply within the scope of EU law: Article 51(2) of the Charter confirms that "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."

[430] See the ILO Recommendation no. 202 of June 2012concerning national floors for social protection. The social protection committee of the EU has included social protection floors in its Work Programme 2012.

[431] World Social Security Report 2010/11 "Providing coverage in times of crisis and beyond", International Labour Organization 2010 (International Labour Office Geneva).

[432] It is a 'non-EU' treaty that was entered into by countries that were members of the Council of Europe, which as an organisation includes all the EU Member States, although there were some differences in terms of adherence to its principles as not all of the ESC's contents were uniformly adopted by the EU Member States. E.g. UK see Social Rights WB on ESC and UK.

[433]These include the right of workers to "*just conditions of work*" (Article 1) and to "*a fair remuneration sufficient for a decent standard of living for themselves and their families*" (Article 4).In addition, the ESC covers social protection rights, namely the rights of employed women, "*in the case of maternity, and other*

constitutes a valid point of reference under international law to the value of Dignity for workers and their families. It also constitutes the backdrop to the EU Charter of Fundamental Rights as it is mentioned in its Preamble.

Among the non-binding sources of fundamental rights under EU law that are recognized by the EU Member States, the Charter of the Fundamental Social Rights of Workers was solemnly declared on 9 December 1989 in Strasbourg by eleven out of the 12 EEC Member States who had gathered together in the European Council(the 1989 Charter).[434] It established minimum social provisions and was designed to compensate for the inadequacies of European social policy in light of the single internal market; it set out major principles that underpin European labour law, whose scope covers employment, remuneration, improvement of living and working conditions, social protection and protection of elderly persons.[435] The 1989 Charter also provides an interesting connection between free movement of workers and social protection: Articles 1 and 2 of the 1989 Charter, which concern the rights of migrant workers to free movement and equal treatment of migrant workers both refer to *social protection*.[436] The wording in the 1989 Charter in relation to the social protection of migrant workers is broader than that of Article 45TFEU (ex 39 EC), which refers in more generic terms to "*employment, remuneration and other conditions of work and employment*". However, the reference to "*social protection*" in the 1989 Charter adds weight to the argument for a social interpretation of Article 45 TFEU. One might argue that upholding social protection rights in general and occupational pension rights in particular should be considered an implied term of the fundamental right of free movement of workers, especially given their connection with employment and (even remuneration if one looks to EU equality law for assistance). On social protection, Article 10 of the 1989 Charter

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employed women as appropriate", to a *"special protection in their work*" (Article 8), the right of all workers and their dependants to social security (Article 12), the right of the family, as a "*fundamental unit of society*" to "*appropriate social, legal and economic protection to ensure its full development*" (Article 16), the right of mothers and children... to *"appropriate social and economic protection* " (Article 17), the right of migrant workers (who are nationals of a Contracting party and their family) to "*protection and assistance in the territory of any other Contracting party*" (Article 19) .

[434] Commission of the European Communities, Charter of the Fundamental Social Rights of Workers (Luxembourg: Office of Official Publications of the European Communities, 1990). At the time, the UK was the sole dissenting Member State. The 1989 Charter was only adopted by the UK in 1998 as part of the integration of the principles of the Charter into the Amsterdam Treaty.

[435] For a detailed analysis, see B. BERCUSSON The European Community's Charter of the Fundamental Social Rights of Workers in The Modern Law Review, Volume 53, No.5 September 1990 p.624 – 642 (available online at www.jstor.org).

[436]Article 1 states that: "Every worker of the European Community shall have the right to freedom of movement throughout the territory of the Community, subject to restrictions justified on grounds of public order, public safety or public health. Moreover, Article 2 states that: "The right to freedom of movement shall enable any worker to engage in any occupation or profession in the Community in accordance with the principles of equal treatment as regards access to employment, working conditions and social protection in the host country."

states that "*Every worker of the European Community shall have the right to adequate social protection and shall, whatever his status and whatever the size of the undertaking in which he is employed, enjoy an adequate level of social security benefits*". The criterion of "adequacy" may be considered as a relevant standard and constituent of the right to social protection: it has both a subjective and an objective dimension that it is indirectly related to the concepts of "fairness" and "a decent standard of living", which also apply to a workers' remuneration.[437] Moreover, while respecting the diversity of pension systems according to the arrangements applying in each country, Article 24 specifically mentions that: "*Every worker of the European Community must, at the time of retirement, be able to enjoy resources affording him or her a decent standard of living*". In addition, Article 25 recognises the need for a safety net for those who do not fulfil the requirements for a pension.[438] The onus of implementing the 1989 Charter was placed first and foremost on the Member States. However the EU also has a role to play to implement the 1989 Charter.[439]Since then, the Commission has adopted 'Action Programmes' for the above purpose.[440] In addition, the Commission establishes each year a report on the application of the 1989 Charter by the Member States and by the European Union. The objectives of the 1989 Charter were included in the Treaty of Amsterdam through the integration of the provisions of the Maastricht social protocol in the Treaty. As the 1989 Charter is a non-binding instrument under EU law, its function is that of a socially progressive reference that serves a programmatic purpose. The 1989 Charter is referred to by Article 151 TFEU on the EU's social policy; it is also referred to by the EU Charter of Fundamental Rights.

The combination of both external sources such as the European Social Charter as well as the internal sources such as the 1989 Community Charter and the EU Charter together provide a political, normative and legal mandate for fundamental social rights to be taken into account in areas of EU law that affect occupational pensions. The incorporation of the EU

[437] Article 5 states: "*All employment shall be fairly remunerated, and that in accordance with arrangements applying in each country*", defined to mean "*a wage sufficient to enable them to have a decent standard of living*".

[438] "*Every person who has reached retirement age but who is not entitled to a pension or who does not have other means of subsistence, must be entitled to sufficient resources and to medical and social assistance specifically suited to his needs.*"

[439] The Commission was invited by the European Council to "*submit as soon as possible initiatives which fall within its powers, as provided for in the Treaties, with a view to the adoption of legal instruments for the effective implementation, as and when the internal market is completed, of those rights which come within the Community's area of competence.*"

[440] See the Communication from the Commission concerning its Action Programme relating to the Implementation of the Community Charter of Fundamental Social Rights of Workers).

Charter within primary EU law is controversial in terms of its potential legal effects, as discussed in Chapter VI as this is likely to be the change with the greatest impact on EU law.

Occupational pensions are just one technique of social protection whose relative importance will depend from one pensions system to another. There is a general need for EU law to acknowledge and adapt to the transnational dimension of social protection when determining the choice of legal methods to protect migrant workers. Notwithstanding, the varying role of occupational pensions as a source of adequate social protection, EU law must, within its competence, cater for their protection based on the potential implications for workers' long term right to dignity. This cannot be ignored in the context of their free movement in the internal market. A principled approach to social protection is required to reflect the social vocation of EU law on freedom of movement, based not only on the Treaties but also on the presence of fundamental rights within the EU legal order. The case for applying a fundamental rights rationale to the treatment of occupational pensions is key from a worker's perspective as it justifies legal protection under EU law (even though the method, level and tools of such protection still need to be determined). One may even argue that the social rationale can be narrowed down to one specific issue: dignity.

C. Towards a fundamental rights paradigm for European social integration?

A fundamental rights approach to the free movement of workers ultimately raises a broader question as to the paradigm for European integration. The arguments in support of further social integration rely upon Dignity as the justification for strengthening EU labour law (a) and the need for a re-balancing between social and economic rights (b).

a. Dignity as the justification for strengthening EU labour law

Dignity has a constitutional dimension. It is referred to by V. Papa as the foundational paradigm of labour law, based on a "*relationship of reciprocal implication and/or complementarity between dignity and labour law*" leading to "*triple legality of dignity*" (as a value, principle and right)."[441]Dignity in practice requires measuring individuals' social outcomes. Dignity in theory is a driving force behind the principle of solidarity and the right to social protection. Both are relevant to EU law and the protection of occupational pensions.

[441] V. PAPA. Dignity as the foundational paradigm of labour law, European Journal of social law (2012). For Papa, dignity as a value is an "Axiological pre-requisite of employment law"; as a principle, it is an "interpretative model for positive rights" (e.g. equality/non-discrimination); finally, dignity may take the form of a subjective right which is autonomously applicable.

The individual dimension of dignity is reflected in the Preamble of the EU's Charter, which cites the values of the EU and the need to place individuals at the heart of its activities. Dealing with poverty in old-age has become a political priority for the EU, which has led to it being the focus of the 2012 "European year of active ageing and solidarity between generations" as well as the 2010 European year for combating poverty and social exclusion. This is important in symbolic terms as well as having a role in the context of policy coordination. Although the risk of poverty in old age has led the Commission to recognise the different sources of income in retirement including occupational pensions, the EU has no competence in relation to the appropriate mix of national pension systems. In the context of pensions, there is sometimes a debate as to the merits between first pillar pensions (statutory social security), second pillar pensions (occupational pensions) and third pillar (personal pensions). However, the EU must remain above this debate though it may acknowledge that all three pension pillars have a potential impact on the outcome of a person's dignity in retirement. Papa mentions the role of dignity as supporting individuals' right to self-determination and self-realization.[442] Arguably, dignity in retirement provides a theoretical social underpin that requires EU law to protect workers' occupational pensions in the context of their individual exercise of their right to free movement. In reality, it hinges upon the role of the actors involved in ensuring social protection: workers, employers and social partners.

A 'solidarity' approach to dignity can either justify or challenge the means and process of providing social protection in retirement as well as their outcome.[443] Occupational pensions entail employers meeting a moral obligation to afford dignity to their workers in retirement. One may also draw a parallel between the need for employers to provide a "decent pension" in retirement with that of ensuring that workers' remuneration provides a "living wage". The need for dignity provides a moral justification for protecting the occupational pension rights of all workers (where such schemes exist). However, these are not just ethical requirements. Under national law, employers must comply with a variety of legal obligations, such as prudential requirements and statutory debts that are designed to

[442] Papa (supra) warns that an excessive push for individual autonomy would criticize certain social protection measures (on the grounds that they limit free choice), which might lead some to conclude that they fail to respect dignity.

[443] Historically, employer-led paternalism was traditionally an important feature in the establishment of occupational pensions. This was enhanced through social dialogue and in many cases was followed by a number of States seeking to ensure the expansion in the coverage of occupational pension schemes by making them mandatory. This has led to different conceptions of social security as mentioned above. However, one may point towards an overarching solidaristic approach to dignity notwithstanding the variety of combinations of social protection. A recent example of "libertarian paternalism" in relation to occupational pensions is the automatic enrolment of workers in "workplace" pensions in the UK, subject to workers' right to opt-out.

ensure that workers' right to dignity is maintained.[444] Papa illustrates the economic materialisation of dignity in the context of a decision by the German constitutional court according to which "absolute guarantee of human dignity is transformed into an economic entitlement". Both its individual and solidarity facets support the argument that dignity provides a legal (as well as an ethical) underpin for EU law to protect the occupational pension rights of migrant workers. If the free movement of workers can harness dignity as part of its social rationale, it will surely be a force for social progress in years to come.

Dignity certainly provides a legitimate justification for EU law to address issues affecting migrant workers' occupational pensions. Arguably, EU law needs to provide migrant workers with an appropriate degree of protection against any adverse consequences that may arise from the actions or inactions of employers and/or occupational pension schemes. If it is able to do so, this may compensate for the imbalance of workers' negotiating power at European level when it comes to achieving compatibility between free movement and dignity in retirement. A social rationale to free movement based on dignity thus requires the occupational pensions of migrant workers to be provided with an equivalent level of protection under EU law as that provided under EU law on free movement in relation to statutory social security.

The operation of occupational pension schemes genuinely highlights the general weakness of migrant workers in terms of the effects of their free movement on their occupational pension rights and the ultimate level of benefits received in retirement. For Papa, the statement of dignity as the foundation of EU law "*is not significant enough to cover the deficit of effectiveness of dignity and fundamental rights at a supranational level*." As a means of increasing the effectiveness of dignity as a force for EU labour law, Papa points to the example of EU anti-discrimination law, which saw the translation of dignity into a language of absolute rights, notwithstanding the difficulties that remain.[445] How should the principle of dignity be applied in the context of EU law on workers' freedom of movement and their occupational pensions? Arguably, dignity provides an overarching rationale, whose pervasive vocation means that it requires interaction with other more specific rights to which

[444] Papa argues against an absolute objective or subjective ("duty led" or "rights led") approach to dignity. Her argument is that "personalist and solidaristic" principles can coexist as they both derive from dignity. She contrasts on the one hand, the "series of positive effects" of a "conjugation of liberty and freedom with on the other hand, its potential to be used to justify a "minimalist laissez-faire state"; PAPA (Op.cit).

[445] Despite the expansion of protected categories under EU law, Papa notes the difficulties that subsist to the extent that the predominant interpretation of anti-discrimination law is that "a disadvantage has to be erased rather than a need for an inequality being re-balanced." Indeed, she observes the tendency for equality law to be seen as "guaranteeing the respect of differential characteristics rather than at achieving equal opportunities or results (i.e. the debate between substantive and formal equality). See PAPA (supra).

it can attach. In this regard, the specific focus is on social protection as a relevant principle, objective and technique to be taken into account under EU law. Ultimately, dignity needs to be matched by concrete action in the field of EU labour law that seeks to secure the protection of migrant workers' occupational pensions, by focusing on their right to social protection! This can only be made possible by embracing the existence of workers' rights to social protection in the context of their right to freedom movement. Such an interpretation of EU law is only possible thanks to the existence of certain tools, namely the development of fundamental rights within EU law.

For obvious reasons of competence, EU law has been impotent at avoiding the erosion in the quality of occupational pension provision, which has an impact on social protection in retirement. This has not prevented the Commission from seeking to generate market solutions dealing with issues related to occupational pensions.[446]Its push for an internal market for pension funds, which began with the IORP Directive, has primarily been driven by economic considerations. Though the focus of such legislation was not on the social protection objectives of occupational pensions, the future of both 'social' and 'internal market' proposals for directives ultimately proved linked to one another, showing the need for a re-balancing of social and economic rationales to free movement.

b. Re-balancing of social and economic rights in European social integration

The balance between the economic and social rationale for European integration is an important issue for workers and citizens in general as well as for the development of the EU as an international organisation with a human dimension.[447] At the theoretical level, there has been an evolution of the regulatory role of the EU in terms of the balance between economic and social integration. The ordo-liberal approach has characterised the first stages of European economic integration by focusing on the removal of « *the more visible obstacles to interstate trade*».[448] Meanwhile, EU Member States have mainly retained competence in social policy. Moreover, European integration has historically excluded the idea of a

[446]As Papa, observes, "progressively equating the weak-worker contracting party with the weak-consumer contracting party has made it able, in the last few years, to divert interest from the dignity of the human person situated in a labour relationship and to channel this interest in that of the contracting party "situated in the market of consumer goods and services". She deduces that the focus on correcting market asymmetries does not seem to absorb the differential aspects of employment law. See PAPA (Op.cit)

[447] It is bound to re-appear on the agenda as the discussion of the EU's role comes to the fore in light of the debate over the UK's membership of the EU.

[448] DEAKIN.S, The Lisbon Treaty, the Viking and Laval judgments, and the financial crisis: in search of new foundations for Europe's 'social market economy'" in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (Ed), The Lisbon Treaty and Social Europe, Hart (2012), p.22.

comprehensive labour code or transitional floor of rights at EU level.[449] However, attention has been drawn to the acceptance by the drafters' of the EEC Treaty of the principle of 'selective intervention', namely "the need for social policy harmonisation in those areas where for one reason or another, they did not expect a spontaneous process of 'levelling up' to occur" such as equal pay and social security coordination.[450] Such reasoning could apply in the field of migrant workers' occupational pensions, given its similarities with statutory social security. Spontaneous levelling up of the treatment of migrant workers has proven an awkward and unlikely prospect. The shortcomings of the ordo-liberal model have been exposed by those aspiring to a "social market economy".[451]

The EU's regulatory role has evolved towards the so-called "neo-classical approach to EU internal market law", which views harmonisation through regulation at European level as unnecessary for the purposes of ensuring effective competition.[452] Deakin has commented that the *Viking* and *Laval* cases "*extended this approach to the social policy field*".[453] However, the protection of occupational pensions of migrant workers and their freedom of movement under EU law presents a key difference with the above case-law of the ECJ. Indeed, there is no clash in principle between the rights of workers to social protection under national law and their fundamental freedom of movement under EU law. The higher the protection afforded to workers under national law, the more likely they are to exercise their free movement without incurring an unjustified loss. However, a lack of protection under national law leads to a lack of mobility and freedom of movement unless it is adequately protected under EU law. Nevertheless, there is a tension in terms of substantive economic and social rights: this entails a balancing act between the interests of employers and their freedom

[449] The Ohlin report of 1956 argued that "strong labour systems at national level were understood to be necessary in order to provide a counterweight against the dislocating effects of the economic growth that was expected to follow from market integration."
[450] Spaak report.
[451] See DEAKIN.S, The Lisbon Treaty, the Viking and Laval judgments, and the financial crisis: in search of new foundations for Europe's 'social market economy'" in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (Ed), The Lisbon Treaty and Social Europe (Hart Publishing), pp. 19-43.
[452]According to Professor Deakin, the neo-classical approach is characterised by its "distrust of direct state intervention in the economy" and the view that «a principle role of courts is to remove, through deregulation, legislative interventions which may have arisen in the past on the basis of what are seen as misguided notions of 'social justice'. Furthermore, Deakin describes the "neoclassical view that national labour law is inherently restrictive to the internal market." He thus points to the 'restriction' test following the *Sager* decision as illustrating the neoclassical approach of the ECJ.
[453] See DEAKIN.S (Op.cit) (2012). In Viking and Laval, the ECJ did not rely on the old discrimination test or the « restriction on market access » test used in Sager. The ECJ used proportionality as a means of balancing freedom of movement with fundamental social rights, namely the right to strike. Criticism of *Viking* and *Laval* was also made for the pre-emptive interpretation by the ECJ of the Posted Workers Directive, which implied that it set "both a floor and a ceiling of rights".

to conduct their business/freedom of contract on the one hand and on the other hand, the combination of workers' rights to freedom of movement and social protection.

The neoclassical approach accepts the need for legislation but rejects the logic of harmonisation. Instead it prefers "minimum rights", which is relevant to the method and nature of the Supplementary Pensions Directive with regards to the issues of *acquisition* and *preservation* of migrant workers' occupational pensions that will be analysed in Chapter V. From a labour law perspective, the neoclassical approach to European integration is unsatisfactory as it does not ensure a satisfactory level of protection of workers' social rights. Neither the ordo-liberal approach, nor the neo-classical approach has resulted in a significant improvement in the levels of exercise of worker mobility. Nor have they resulted in any convergence of social protection, in particular in the field of occupational pensions. Mobility may be a factor of enhancing an individual's freedom of movement but it does not automatically result in enhancing workers social protection unless accompanied by a social rationale for adequate legal protection.

The social stalemate at EU level has been compounded by low levels of economic growth and/or recession affecting most EU Member States since 2008. Given the economic difficulties experienced, it should be noted that social partners operating at national level have been mainly concerned with preserving pensions against the risk of erosion and reform by governments at national level. During this period, the European dimension of the free movement and social protection of workers has been largely side-lined until more recently. Moreover, the lack of social dialogue and effective representation of workers at EU level on this subject left migrant workers to rely upon the Commission to keep the flame alive for the Supplementary Pensions Directive to remain on the agenda of the EU legislator.

In light of the inadequacy of the neo-classical approach to protect workers in the EU, Deakin argues for a "Human Developmental approach" as the answer to rebalancing the economic and social rationales for EU integration?[454] Could such an approach be applied in the context of the free movement of workers and their occupational pensions? There is a

[454] See DEAKIN.S (Op.cit) (2012) p.36. His argument is that markets, social rights, economic rights and labour law rules and social policy mechanisms of coordination and protective mechanisms of the welfare state should be viewed as potential means to the advancement of individual capabilities: « they are the means of enhancing the freedom of action of individuals». He also refers to the case of *Astley v Celtec* where a 'capability approach' entered the discourse of the ECJ in support of a social rights based interpretation of EU discrimination law. His justification is that a human developmental view of labour law reform would "benchmark national and social economic performance". He also mentions three changes made by the Lisbon treaty to advance a process of a human developmental (capability) approach to EU law labour law: (i) the restatement of values and objectives of the EU; (ii) the clarification of competences of the EU and member states; and (iii) the recognition afforded to fundamental social rights in the Charter.

strong case for the argument that if workers' right to free movement is deemed to include a social rationale, then it may become a genuine means of enhancing human development. Achieving dignity and quality of life in retirement requires the coming together of social values, principles and objectives of EU law under this rationale.

The above social rationale sets out the legal basis and reasons for protection under EU law. However, the adoption of secondary legislation depends upon the political will and democratic fulfilment of the legislative process. There is no doubt that applying a social rationale to the protection of migrant workers based on fundamental rights may raise some tensions with regards to the constitutional constraints which the EU must abide by, namely the issue of competence (discussed in Chapter IV). Other controversial issues include the justiciability of fundamental rights, which will be mentioned in Chapter VI. A social rationale for the free movement of workers justifies the need for EU law to offer appropriate legal protection of migrant workers' occupational pensions against the risks that may result from the exercise of free movement. This leads one to examine the treatment of migrant workers' occupational pensions under EU law on the free movement of workers.

Conclusive remarks to Chapter III.

The success of the internal market rationale to the free movement of workers has been visible over the last 50 years in the development of EU law in relation to this fundamental freedom, in which both the EU legislator and the Court have relied upon the dynamic of the non-discrimination on grounds of nationality as well as the need to remove obstacles to mobility, which may hinder genuine free movement by making mobility less attractive. However, the social dimension of EU law has itself evolved with the advent of EU citizenship, which has recognised individual rights even without the connection to the free movement of workers. Moreover, the free movement of workers itself has itself become the source of social rights for individuals and their families. Nevertheless, an internal market rationale purely limited to non-discrimination and the removal of obstacles has not been sufficient to lead to an adequate level of protection for migrant workers' non-statutory occupational pensions. Instead, a new social rationale must be found if the protection afforded by EU law to migrant workers' statutory social security pensions (through Article 48TFEU and the Coordination Regulations) can also be afforded to their non-statutory occupational pensions (albeit through different legal instruments and regulatory techniques). The arguments supporting such a social rationale are based on the renewed strength of the social constituents of the Treaties following the Lisbon Treaty, in which the social values,

principles and objectives of EU law have been brought to the fore. Furthermore, the horizontal social clause has added weight to the argument that social protection should be taken into account by EU law on the free movement of workers in addition to its internal market rationale. Finally, the dynamic of the fundamental rights discourse under EU law, through the Treaties, the EU Charter, and even non-binding sources have led to calls for a new paradigm, in which economic and social rights are re-balanced under EU law.

CONCLUSIVE REMARKS TO PART I: The foundations for the protection of occupational pensions under EU law on the free movement of workers

The common demographic, economic and social challenges affecting pension provision in the EU provide a contextual justification for the protection of occupational pensions under EU law on the free movement of workers. Europe's ageing population and the increased rate of dependence of older people have revealed an acute need for Member States to ensure the social protection of workers in retirement, in which the role of occupational pensions should not be ignored but clearly addressed in the context of EU law and policy. The influence of globalisation on occupational pensions, its interaction with financial markets and the impact of the economic and financial crisis as well as the sovereign debt and monetary crisis have shown that occupational pensions must be understood in terms of their interaction with economic factors and events as well as their place within the internal market. In addition, the difficulties of the current social context, namely the high levels of unemployment (and the polarisation of employment) have been in the spotlight in terms of political prioritisation. These social challenges are considered as having an impact on the accrual of rights to a pension in retirement (which is based on employment in the case of occupational pensions and most social security systems). Moreover, the policy solutions adopted at EU level increasingly consider the implications for occupational pensions and social protection of EU employment strategies and measures affecting workers. The paradox lies in the fact that despite the general perception that occupational pensions are required to play a greater role in social protection in the Member States (due to budgetary constraints), which has resulted in greater coverage of occupational schemes, there has nevertheless been some deterioration in the quality and level of the benefits provided by occupational pension schemes. This draws attention to the challenge for EU law, (in areas where it affects occupational pensions) not to contribute to the reduction of social protection of workers but on the contrary to uphold and safeguard social protection in the course of the policies for which it has competence. The EU has embraced the political challenge of increasing worker

mobility at EU level (not least given its potential to reduce unemployment). Moreover, the free movement of workers thus carries an historic legacy of worker mobility in EU integration. In addition, the evolving nature of worker mobility (in terms of the projected increase of occupational and geographic mobility) and its effects have implications for the occupational pensions of migrant workers. This highlights the political challenge for the EU in this field. The EU's choice of method of internal market integration in the field of occupational pensions has been characterised by a two-fold approach: on the one hand the classic method of integration (in both the free movement of workers and the free movement of services) and on the other hand a combination of regulatory techniques (including policy coordination), which has been part of the EU's new 'holistic' approach to pensions in EU law. However, the project of finding solutions to address 'social protection' obstacles to free movement remains work in progress: the rhetoric at EU level still outweighs the action!

The notion of occupational pensions thatemerges from the relevant definitions under EU secondary legislation and policy deals with their complexity in terms of access, establishment and administration while reflecting two common features in particular, namely the connection between occupational pensions and the workplace as well as their supplementary role in providing retirement benefits. It is thus arguable that these definitions support the characterisation of occupational pensions as a form of social protection under EU law. However, these definitions also have a functional approach, which is to serve the purpose of the instruments of EU law in different substantive areas. Moreover, the instrumental distinction between statutory and non-statutory has led to a fragmentation of the notion of occupational pensions due to the differences of scope of the applicable EU law. Specific dynamics operate in the EU law on the internal market, EU equality law, EU competition law and EU labour law. The anti-discrimination is at the forefront of the first two fields in terms of the focus of EU law on combating discrimination based on nationality as well as criterion-based discrimination in the workplace. The spectacular characterisation of occupational pensions as pay has shown the influence of these dynamics in the interpretation by the Court of EU law as well as its implementation in secondary EU legislation. Arguably, the articulation of the notion of occupational pensions with the goal of social protection has taken a back seat in these fields. Nevertheless, in EU competition law, the value of solidarity and the role of collective agreements, which underpin many occupational pension schemes has emerged as strengthening the social protection dimension of occupational pensions given the potential. However, the formal characteristics of the instruments establishing occupational pensions (namely their statutory or non-statutory source or their origin in a collective

agreement) have to some extent put a dampener on the overall coherence of the notion of occupational pensions under EU law, in which the legal form of an occupational pension scheme is sometimes considered as overriding its social protection purpose. Finally, although EU labour law has targeted the protection of workers in different ways (e.g. ranging from employee protection against employer insolvency to the protection of workers in the context of a business transfer), there have been limits (often financial) to the EU's willingness to recognise losses of occupational pensions as unacceptable losses of social protection.

This thesis argues that EU law already provides the necessary foundations for anew social rationale, which justifies protecting migrant workers' occupational pensions under EU law on free movement in addition to the existing internal market rationale. Its need stems from the limitations of the principle of non-discrimination on grounds of nationality and the objective of removing obstacles to free movement in terms of guaranteeing the compatibility between the free movement of workers and their social protection in retirement. The social dimension of the free movement of workers draws upon the social constituents of the Treaties (namely the social values, objectives and principles contained therein) as well as the presence of the horizontal social clause. Moreover, the development of a fundamental rights discourse in EU law constitutes a new dynamic in the protection of workers' rights, which responds to the calls for a new paradigm for European social integration.

The foundations for the protection of occupational pensions under EU law on the free movement of workers are therefore present in terms of their contextual, conceptual and legal justification. However, they are plagued by political tensions, notional paradoxes/incoherence as well as the risk of legal entrenchment in terms of the internal market rationale. Indeed, the EU faces common challenges, which it must address in spite of the difficulties that stem from the need to overcome the diversity and complexity of occupational pensions both in the Member States and as a legal notion in substantive areas of EU law. The characterisation of occupational pensions as a form of social protection justifies its protection in the field of free movement of workers although the fragmentation of the notion has arguably cast a shadow over its coherence as a legal notion and led to different levels of effectiveness of the protection afforded to workers. Nevertheless, the basis for EU law to take a fundamental social rights approach to the free movement of workers exists and offers a powerful rationale for the EU to combine free movement with social protection in order to protect the occupational pension rights of migrant workers. It remains to be seen in Part II whether the substantive measures of EU positive law currently provide migrant workers' occupational pensions with satisfactory legal protection.

PART II. BRIDGING THE SOCIAL DEFICIT IN EU LAW ON THE FREE MOVEMENT OF WORKERS AND OCCUPATIONAL PENSIONS

The assumption of a 'social deficit'

The assumption is that inadequate legislative and judicial protection in relation to the free movement of workers and their occupational pensions would result in a 'social deficit' under EU law. This depends upon whether the legal protection of migrant workers' occupational pensions falls below the level that can legitimately be expected by migrant workers in the EU. It is therefore necessary to assess in objective terms the content of positive EU law implementing the free movement of workers in this field. Furthermore, the relevance of the fundamental right to dignity in old age and the important role played by occupational pensions as a source of social protection makes it appropriate to compare and contrast the legal protection of migrant workers' non-statutory occupational pensions with that afforded to their statutory pensions under the Coordination Regulations.

In order to ascertain the presence of a social deficit, it is necessary to first of all investigate the existence of the historic regulatory gap in EU law. This includes assessing the causes of the lack of positive integration, which have been mainly of an institutional nature (Chapter IV). Secondly, the substantive safeguards and subjective rights offered by EU secondary legislation will be analysed in order to determine the nature and level of legal protection that has gradually been afforded to migrant workers (Chapter V). Thirdly, the state of negative integration under EU law will be determined both in terms of its contribution in relation to both 'vertical' relations (between individuals and States/public bodies) as well 'horizontal' relations (between private parties), in particular in the context of the employment relationship. (Chapter VI). This will involve analysing the role of primary EU law and the potential impact of fundamental rights in terms of their actual and potential role as social levers for the protection of migrant workers' occupational pensions.

CHAPTER IV. FROM THE REGULATORY GAP TO THE SUPPLEMENTARY PENSIONS DIRECTIVE

Section 1. The exclusion of non-statutory pensions from the Coordination regime

A. The reasons for the exclusion of non-statutory occupational pensions

B. The arguments against the exclusion of non-statutory occupational pensions

C. The effect of the exclusion and the need to challenge the status quo

Section 2. The 'first round' of secondary EU legislation on occupational pensions

A. The preparatory work for secondary legislation

B. The Safeguard Directive

C. The IORP Directive: an internal market approach

Section 3. From the failed proposal for a Portability Directive to the adoption of the Supplementary Pension Rights Directive

A. The failure of the European social partners to achieve any agreement

B. From legislative paralysis to legislative trade-off

Section 4. The institutional constraints of EU secondary legislation

A. EU legislative competence and the principle of subsidiarity

a. Social competence?

b. Competence under EU law on free movement of workers

B. The choice of legal basis:

a. From Article 48 TFEU…

b. to Article 46 TFEU

C. Voting requirements and the choice of legislative procedure

a. From unanimity…

b. to qualified majority

Conclusive remarks

Introductory remarks

The Council's press release of 21 June 2013 referred to the legislative differentiation between 'first pillar' and 'second pillar' schemes. On the one hand, statutory social security pension schemes that constitute the 'first pillar' are governed by the Coordination Regulations.[455] On the other hand, 'non-statutory' occupational schemes have historically been excluded from the scope of the Coordination Regulations. This constitutes the starting point for Section 1, which analyses the background to positive integration in this field. This was a political choice by the EU legislator and it is possible to make arguments both for and against the exclusion of non-statutory occupational pensions. The effect is that for many years, there has been a huge regulatory gap at EU level in the field of occupational pensions and the free movement of workers. Indeed, the legislative vacuum, which persisted until 1998 with regards to the protection of non-statutory occupational pensions, was clearly unsatisfactory and needed to be filled by EU secondary legislation.

Section 2 deals with the first round of secondary EU legislation, which reveals the initial objectives of the Commission as well as the tensions and difficulties of legislating in the field of 'supplementary pensions' and the internal market. On the free movement of workers, Directive 98/49 (the ***Safeguard Directive***) was enacted in June 1998 as a first step to deal with the protection of their supplementary pensions.[456] Its content is concise and its significance is measured. In the context of the free movement of services, the IORP Directive was adopted five years later, to deal with the prudential regulation of pension funds.

The evolution of the legislative process in this field is analysed in Section 3. The Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between member states by improving the acquisition and preservation of supplementary pension rights (the ***Supplementary Pension Directive***)[457] constitutes the latest development of EU secondary legislation on the occupational pension rights of migrant workers, 16 years after the Safeguard Directive!

Finally, Section 4 addresses the institutional constraints, which have marked secondary legislation in this field, from EU legislative competence and subsidiarity through to the choice of legal basis, the impact of voting requirements and the applicable procedure.

[455] Statutory pension rights accrued in EU Member States are 'co-ordinated' under Regulation 883/2004/EC so that a migrant worker is not penalised with regards to their statutory social security pension entitlements.
[456] Council Directive (EC) No 98/49 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, 29 June 1998, OJ L 209, 25 July 1998, pp. 46-49.
[457] Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights (Text with EEA relevance) OJ L 128, 30.4.2014, p. 1–7.

Section 1. The exclusion of non-statutory occupational pensions from Coordination

The political choice of the EU legislator to remove non-statutory occupational pensions from the scope of the Coordination Regulations

In determining the material scope of the Coordination Regulations, there was initially a difference of approach between the EU legislator and the ECJ. Indeed, the EU legislator deliberately did not follow the path indicated by the ECJ in the case of *Vaassen Goebbels.*[458] This case involved non-statutory benefits stemming from the employment relationship: the ECJ, in assessing whether such benefits fell within the scope of the Coordination Regulations, took into account the substantive criteria of the *enforceable nature of the scheme* and the *purpose of the benefit provided*.

In contrast, the EU legislator introduced a formal 'legislative' (statutory) criterion in the Coordination Regulations to determine their material scope.[459] This was a deliberate political choice aimed at restricting the application of the Coordination Regulations to statutory social security schemes. The effect was to exclude a large number of occupational pension schemes from the material scope of the Coordination Regulations, namely schemes that had a non-statutory source or contractual source, which were deemed 'supplementary' by nature. This affected voluntary schemes in the private sector. It also excluded occupational pension schemes that were mandatory by law yet non-statutory in form.

The exception to the exclusion of non-statutory occupational pensions from the scope of the Coordination Regulations: Member State Declaration

The exclusion of non-statutory occupational pensions from the scope of the Coordination Regulations is not absolute. Member States may under certain conditions present a declaration to bring a non-statutory occupational pension scheme within the scope of the Coordination Regulations.[460] The French government did so for the AGIRC and ARRCO, which are mandatory occupational pension schemes financed on a PAYG 'solidarity' basis and that pay out defined benefits.[461]As a consequence, workers with pension rights in the AGIRC and ARRCO schemes receive the same level of protection when

[458] Case 61/65 *G. Vaassen-Göbbels (a widow) v Management of the Beambtenfondsvoor het Mijnbedrijf* [1966] ECR 00261.
[459] Article 1(j) of the Coordination Regulations sets out the requirement of the statutory criterion.
[460] This was first allowed under Articles 1j (ii) and 97 of Regulation 1408/71.
[461] This led the Commission to modify Annex IV, part C and Annex VI of Regulation 1408/71. See COM (2000) 186 final.

exercising their freedom of movement as they do for their statutory social security pension rights. In particular, the technique of aggregation under the Coordination Regulations applies.

Such declarations remain an under-used technique by national governments. Yet their potential as a lever for positive integration is significant. Arguably, some flexibility and responsibility lies with the Member States for narrowing where possible the regulatory gap in respect of non-statutory occupational pensions. Trade Unions and members of occupational pension schemes are constantly raising issues at national level concerning the protection of occupational pension rights. However, their impact with regards to improving the position of migrant workers by persuading Member States wherever possible to extend Coordination to their occupational pension schemes has been less significant.

The division of scope of EU secondary law on occupational pensions

The distinction in EU law on the free movement of workers between on the one hand, statutory occupational pension schemes that are subject to the Coordination Regulations and on the other hand non-statutory 'supplementary' occupational pension schemes, which are excluded from its material scope is arguably an obvious cause of the regulatory gap, which affects the legal protection afforded to workers in this field. It largely but not exclusively mirrors a public/private divide. Recital 3 of the Safeguard Directive 98/49 serves as a reminder that the Coordination Regulations concern only statutory pension schemes.[462] Article 1 of the Safeguard Directive thus sets out its objective and scope.[463] The Supplementary Pension Rights Directive sets out its scope in Article 2, which applies to supplementary pension schemes apart from the schemes covered by the Coordination Regulations. The mopping up exercise performed by Safeguard Directive and the Supplementary Pensions Directive and their articulation with the Coordination Regulations reinforces the importance of the statutory criterion in this field. Arguably it provides for a clear division of scope under EU law. However, for certain workers, whose main source of income in retirement stem from non-statutory occupational pension, the above legal distinction has left a legislative gap concerning the protection of their pensions, entailing the risk that these are not adequately protected by EU law on free movement.

[462] "*the system of coordination provided for in those Regulations does not extend to supplementary pension schemes, except for schemes which are covered by the term `legislation*.**"**

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

Chapter II above has addressed the matter of the notion of occupational pensions and its relationship with social protection under EU law. Notwithstanding their different sources and weightings in national social protection systems, both statutory and non-statutory occupational pension schemes have the same *purpose*: i.e. the provision of income in retirement. They are also generally conditional upon the same requirements, namely the pension contributions made during the course of employment. The categorisation of non-statutory occupational pension schemes as 'supplementary' does not necessarily reflect situations in some Member States, where the proportion of replacement income in retirement provided by occupational pension schemes is greater than the amount provided by State pensions. The criteria used for the division in the material scope of the Coordination Regulations (and its effects) are potentially problematic. On the one hand, the exclusion of non-statutory schemes can be justified (A). On the other hand, it can be criticised (B). Its impact on the right of workers to free movement has led to the need to challenge the status quo (C).

A. The reasons for the exclusion of non-statutory occupational pensions

In its report of November 1996, the high level group on the free movement of persons presided by Mrs Veil concluded that: coordination of supplementary pensions was impossible due to the ***diversity*** between member states; and the ***contractual nature*** of supplementary pensions meant the EU should not be more interventionist than Member States.

The argument of "incompatibility" has also been used to justify excluding non-statutory occupational pension schemes from the Coordination Regulations on the basis that they were not adapted to deal with private occupational schemes. However, this approach has been challenged in academic circles. Each justification will be analysed and criticized below.

a. The diversity of supplementary pensions

The main reason often given for not applying the Coordination Regulations to non-statutory occupational pensions is the complexity and diversity of pension schemes both at national level and between Member States.[464] This view has essentially relied upon the

[464] The Communication of 1991 stated that the principle of aggregation, (which is implemented in the Coordination Regulations) was not adapted to supplementary occupational pensions: "*Because of their diversity and large number, it is difficult to conceive how a similar rule of aggregation of service periods could be imposed on supplementary pension schemes.*" Communication from the Commission to the Council: "Supplementary social security schemes: the role of occupational pension schemes in the social protection of workers and their implications for freedom of movement," 22 July 1991 SEC (91) 1332 final.

argument that it would not be practical to 'coordinate' so many different and complex types of non-statutory occupational pension.

In addition, the precise nature and content of existing rules has been deemed not to be suited to dealing with non-statutory occupational pensions. The ECJ has determined that Article 48 TFEU is not directly applicable and ruled that the aggregation rules of the Coordination Regulations cannot be applied to supplementary pensions by analogy with statutory social security pension.[465] This last point is broadly repeated in Recital 4 of the Safeguard Directive. Following this logic, the complexity and diversity of occupational schemes has underlined the need for a different instrument of secondary EU legislation. It may also have affected the choice of legal basis for the Supplementary Pensions Directive.

The position that the Coordination Regulations were not adapted and should therefore not apply to 'supplementary' pensions was reinforced in a report by the Commission's Network of Experts on Supplementary Pensions.[466] This led the Commission to look for alternative legislative solutions to deal with the potential adverse effect on the free movement of workers and their occupational pensions. Indeed, the lack of an adequate legislative framework to deal with occupational pensions has been the source of much criticism, which has spurred the need to make change to address the situation.

b. The 'contractual nature' of supplementary pensions

The focus by the Coordination Regulations on the statutory source of the benefit was initially specified in Article 1(l) of Regulation 1408/71 and is now repeated in Article 1(l) of Regulation 883/2004[467], which states that the term legislation excludes *"contractual provisions*". The reason underpinning this caveat is based on the 'autonomous' nature of contracts between private parties. The reference to the contractual nature of supplementary pensions is broadly designed to support the argument that the EU should minimise its intervention in private law. However, the 'contractual' nature of some supplementary

[465] See Case C-379/09 *Maurits Casteels v British Airways plc* [2011] ECR I-01379.
[466] This stated that: "*a closer scrutiny of the legal, institutional and fiscal environment typical of supplementary pensions in Europe showed that the technique of multilateral coordination used in regulations 1408/71 and 574/72 was not suitable for overcoming the potential obstacles to freedom of movement of persons within the Community posed by the pattern, both complex and diversified, of existing supplementary pension provision in Europe*." REPORT BY THE EUROPEAN COMMISSION'S NETWORK OF EXPERTS ON SUPPLEMENTARY PENSIONS, Supplementary Pensions in the EU - Development, trends and outstanding issues, Brussels, 1994, Social Europe, Supplement 3/94.
[467] REGULATION (EC) NO 883/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 29 APRIL 2004, 30.4.2004, Official Journal of the European Union L 166.

pensions does not necessarily justify putting all non-statutory occupational pension schemes in the same category.

In *Vaassen Goebbels*, the notion of legislation had initially been extended to "*contractual agreements concluded by employers to implement a legal obligation to set up a sickness insurance scheme for their employees*".[468] However, this approach was rejected by the EU legislator who amended the scope of the Coordination regime. It followed from *Commission v France* that mandatory schemes that are not established under national legislation will not automatically fall within the scope of the Coordination Regulations.[469] As a legal criterion, the statutory source of a pension benefit superseded its mandatory nature.

In addition, there are key differences between occupational pensions and 'third pillar' schemes (e.g. personal pensions) with the most obvious being that occupational pensions have a link to the employment relationship. Although employment is by definition a contractual relationship, occupational pensions are not always contractual. The risk of putting all non-statutory occupational schemes under a 'contractual' umbrella is a potential 'misfit': not all eggs should be put in the same basket! In contrast, third pillar pensions do not have a connection to the employment relationship; they involve an individual directly entering into a contract with a financial services provider. From a labour law perspective, there is a need to make a distinction between occupational pensions and personal pensions (where membership is not connected to the employment relationship).[470]

Membership of certain occupational pension schemes is sometimes automatic and may require employees to opt-out if they do not wish to be members.[471] Freedom of choice is not necessarily present in the case of non-statutory occupational pensions that are mandatory. Membership may also be the result of a collective bargaining agreement. Collective agreements are deemed contractual for the purpose of the Coordination Regulations and therefore do not fulfil the 'legislative' criterion. However, as mentioned above, a declaration by a Member State remains a possible route of bringing such schemes within the scope of Coordination. In other cases, membership of an occupational pension scheme is not an

[468] Case 61/65 *G. Vaassen-Göbbels (a widow) v Management of the Beambtenfondsvoor het Mijnbedrijf* [1966] ECR 00261.
[469] Case C35/97 *Commission v France* [1998] ECR I – 5325.
[470] Some trade unions have considered that it was wrong for the Commission to lump occupational pensions (second pillar) and personal pensions (third pillar) under the same umbrella of 'supplementary pensions' by stating that the Green Paper did not adequately reflect the 'collective nature' of occupational pensions whereby both employers and workers contribute to schemes that cover a number of employees, which are dependent upon the employment relationship and which are characterised by varying degrees of solidarity. See ETUC's Opinion on the Commission Communication on "Modernising and Improving social protection in the EU."
[471] This situation exists in the UK, which has introduced automatic enrolment into workplace pension schemes.

entitlement under a worker's contract of employment and may be at the employer's discretion. Given there are many possible sources of scheme membership, it might seem inappropriate to attach such importance to the "contractual" dimension of certain occupational pensions. Moreover, the instrument governing non-statutory occupational schemes may also be different from a contract.[472]

In addition, there is often no inherent link between the financing method and the 'contractual' nature of occupational schemes. It would be wrong to generalise on the basis that "statutory social security schemes are financed exclusively on a PAYG basis whereas non-statutory occupational pension schemes are funded" as this is not always the case.[473]

Furthermore, the benefit structure is often not linked to the 'contractual' nature of a scheme. Traditionally, many occupational pension schemes have offered 'Defined Benefits', which include elements of solidarity. One may thus find common ground with statutory schemes in terms of the techniques of social protection. In contrast, one can also find defined contribution methods among statutory schemes, as well as non-statutory occupational schemes and of course, 'third pillar' personal pension schemes.

Simply relying upon the 'contractual' nature of occupational pensions in support of legislative differentiation may be considered as flawed and incomplete from the perspective of a worker's social protection.

B. Criticism of the exclusion of non-statutory occupational pensions from the Coordination Regulations: the limitations of the statutory criterion

The statutory criterion can be criticised on social grounds on the basis that it disregards certain common characteristics that many occupational pension schemes share with the notion of social security. Prior to the statutory criterion being enshrined by the EU legislator in the Coordination Regulations, the scope of social security was itself the subject

[472] In the UK, many private occupational schemes are established by trust. In a trust, there is independent legal ownership of scheme assets by the trustees, who have 'fiduciary duties' towards the beneficiaries. These are different from contractual obligations as trustees are not allowed to profit from their position.

[473] Indeed, some occupational pensions are financed on a PAYG basis, which reflects the method of solidarity between generations that is traditionally used to finance statutory social security. Moreover, some statutory occupational pension schemes have recently turned to a 'funded' approach although this has raised certain doubts with regards to their suitability to be dealt with under the Coordination Regulations. This is the case of many statutory funded pension schemes in Central and Eastern Europe. See LEPPIK.L, (2006). Coordination of Pensions in the European Union: the Case of Mandatory Defined-Contribution Schemes in the Central and Eastern European Countries. European Journal of Social Security, 8(1), 35 - 55.

of a ruling by the ECJ. In *Vaassen Goebbels*, the ECJ determined two relevant characteristics of schemes falling into the category of social security: ***purpose*** and ***enforceability***.[474]

a. The purpose of occupational pension schemes

As discussed in Chapter II, both statutory and non-statutory occupational pensions share a common purpose of social protection. However, only migrant workers who belong to a statutory scheme will receive the protection afforded by the Coordination Regulations. Other non-statutory occupational pension schemes will be subject to the provisions of the Safeguard Directive and the Supplementary Pension Rights Directive. Arguably, the exclusion of non-statutory occupational pension schemes from the scope of the Coordination regime, results in less favourable treatment for such schemes, despite their common purpose. It is therefore legitimate to ask whether a common purpose should justify a comparable level of protection for both types of schemes? From a worker's perspective, this would enhance the social dimension of their freedom of movement under EU law.

b. The enforceability of occupational pension schemes

The notion of enforceability relates to the existence of an obligation that falls upon a party and that can be invoked before a court in order to be fulfilled. The enforceability of a pension right may stem from the *mandatory* nature of a scheme under national law. A valid legal agreement or a *trust* also creates an enforceable obligation. However, contractual enforceability is effectively distinguished by the Coordination Regulations from the binding nature of legislation.

By their nature, most statutory schemes tend to have mandatory status enabling the enforceability of pension rights under national law. However, non-statutory schemes may also be mandatory, for example where they arise from a binding collective agreement between social partners. Indeed, there are Member States in which binding collective agreements make it mandatory for employees to be members of (and contribute to) certain occupational pension schemes and for employers to contribute to the financing of such schemes. There is not always a statutory source for those occupational pension schemes. One might argue that the legally binding nature of some collective agreements has similar effects

[474] Case 61/65 *G. Vaassen-Göbbels (a widow) v Management of the Beambtenfondsvoor het Mijnbedrijf* [1966] ECR 00261.

to those with a statutory underpin. However, occupational pensions set up under mandatory collective agreements do not *per se* fall within the scope of the Coordination Regulations.

One of the problems with the statutory criterion is that it is narrower than the mandatory status of some occupational pension schemes. Admittedly, there is an exception that allows certain non-statutory occupational pension schemes set up under collective agreements to be included in the scope of the Coordination Regulations provided they have mandatory status and are subject to a declaration by the relevant Member State.

Other criteria might also be considered as relevant such as 'solidarity', which indeed enables Member States to make a declaration to include certain non-statutory occupational schemes within the scope of the Coordination Regulations. In addition, solidarity has also been used by the ECJ to treat non-statutory occupational pensions in the same way as statutory social security schemes in other parallel fields such as competition law.[475] However, even solidarity as a criterion has not proven definitive and has also been subject to an instrumental approach of the ECJ requiring a scheme to be the product of a collective agreement.[476]

C. The effect of the exclusion and the need to challenge the status quo

a. The lack of a legislative framework tailored to the structural reality of occupational pensions?

The scope of the Coordination Regulations has been become slightly problematic both in terms of the schemes that it includes (all statutory schemes), as well as due to its blanket exclusion of non-statutory schemes.

The legislative criterion has the effect of bringing mandatory DC schemes (particularly those from some EU Member States from Eastern Europe) within the scope of the Coordination regime; this has been criticised by Leppik as unsuitable and unsatisfactory.[477] Moreover, in some Member States, national legislation now makes it mandatory for employers to provide access and contribute to certain occupational pension schemes.[478] However, the management and administration of such schemes is carried out

[475] C-67/96 *Albany International BV v. StichtingBedrijfspensioenfondsTextielindustrie* [1999] ECR I – 691
[476] Case C-244/94 *Coreva* [1995] ECR I-04013.
[477] LEPPIK. L, Co-Ordination Of Pensions In The European Union: The Case Of Mandatory Defined-Contribution Schemes In The Central And Eastern European Countries, European Journal of Social Security, Volume 8 (2006), No. 1.
[478] For example, national law in the UK has changed with the advent of 'auto-enrolment' (NEST), which makes membership of a pension scheme the default position for employees (subject to an opt-out) since October 2012. This is more ambitious in terms of employee coverage and employer funding compared to the previous

independently by an occupational pension scheme or outsourced to a private provider. It is debatable whether such schemes might be considered as having a statutory underpin.

Annex 1 to the Commission's White Paper mentioned the need to review the possibility for certain occupational pension schemes to come within the scope of the Coordination Regulations: "*The Commission will in 2012 assess the case for extending the scope of Regulation 883/2004/EC on the coordination of social security systems as regards certain occupational schemes.*"[479] However, it still remains to be seen which schemes the Commission will target as being suitable for Coordination.

In contrast, occupational pension schemes that are set up by a trust deed (as tends to be the case in the UK) will usually be excluded from the scope of the Coordination Regulations. Where the rights under an occupational pension scheme do not arise by virtue of a contract but instead from a trust, should such rights be protected any differently? The current position seems to imply a public/private divide.

Moreover, the exclusion of contractual provisions appears to exclude collective agreements between social partners.[480] From a labour law perspective, one might argue that collective agreements should be distinguished from individual contracts due to their social nature as an instrument of industrial relations.[481] Neither the enforceability of collective agreements nor their social nature is taken into account by the current statutory criterion. The material scope of the Coordination Regulations may thus be criticised both in terms of the schemes it includes and the schemes it excludes. Moreover, the statutory criterion used largely ignores the purpose of occupational pensions.

b. The substantive nature of the regulatory gap

The effect of the exclusion of non-statutory occupational pensions from the Coordination Regulations is that the lack of adequate legal protection of their occupational pensions may affect workers right to free movement as well as their social protection. The

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legislation on Stakeholder pension schemes (under which employers were obliged to provide access to a form of work-related pension but were not required to contribute to such a pension scheme). Moreover the previous default position was that employees had to opt-in in order to be covered by such schemes.

[479] EUROPEAN COMMISSION, White Paper 'An Agenda for Adequate, Safe and Sustainable Pensions, Brussels 16 February 2012 COM (2012) 55 final Paragraph 2 (16).

[480] The previous language in Article 1(j) of Regulation 1408/71 referred to "existing or future industrial agreements."

[481] Collective agreements are agreements between the social partners who represent employers and employees. However, they may have varying degrees of enforceability depending on the legal system of the Member State from which they originate: some instruments may be legally binding while others may be voluntary. For example, in France collective bargaining agreements are regarded as having contractual force whereas in the UK this tends not to be the case.

status quo has long been challenged by experts and academics in the field of social protection, calling for an extension of the Coordination Regulations. In 1989, a working group chaired by Mrs Même argued that "*l'esprit europeen doit l'emporter sur les particularismes*" in a report on supplementary social protection and the internal market, commissioned by the French government.[482] It advocated that the mandatory French occupational pension schemes of the AGIRC and ARRCO would in practice satisfy the requirements of the Coordination Regulations. In 1998, the exclusion of supplementary occupational pensions from the Coordination Regulations was criticised on grounds of the Treaty provisions on the free movement of workers.[483] In 2002, it was argued that the statutory social security pensions that are subject to the technique of 'coordination' are themselves as complex and diverse as the occupational pensions, which remained inadequately protected.[484] In 2010, Lhernould advocated that occupational pensions could be 'co-ordinated' under EU law subject to there being political will to solve technical issues.[485] There has been clear consensus in many circles (political, expert and academic) that change was necessary. The difficult question was how to carry out such change? One option was to review the scope of the Coordination Regulations. However, the fact that for most non-statutory occupational schemes, a regulatory gap has persisted for so long also led to the need to consider an alternative legislative framework at EU level. For Montejo Puig, the exclusion of supplementary pensions from the scope of the Coordination Regulations *"justifies the need to find new systems of coordination for those workers who have an important part of their pension income insured (sic) by this type of protection."*[486]

[482] C.MEME. Protection sociale complémentaire et marché intérieur européen: Rapport au ministre de la Solidarité, de la santé et de la protection sociale, Rapports officiels, Documentation française (1989)
[483] P. MAVRIDIS Régimes complémentaires: droit de la concurrence ou droit social communautaire? Droit Social No.3, Mars 1998.
[484] F.KESSLER, "Une démarche normative à géométrie variable" in Union européenne et protection sociale, La documentation française, 2002.75.
[485]J.-Ph. LHERNOULD, "La portabilité des pensions versées par les régimes professionnels de retraite." Liaisons Sociales Europe No. 265, 2 décembre 2010 p.5.
[486] B. MONTEJO PUIG DE LA BELLACASA, Free movement of workers and supplementary pension schemes. The reform of welfare and its adaptation to the European Community framework." LLM Thesis, supervised by Professor Sciarra, EUI Law Department 1997/1998.

Section 2. The 'first round' of secondary EU legislation

A. The preparatory work for secondary legislation

a. The political challenge and early warning signals of political tension

The Commission's Communication of 1991 recognised there was no EU secondary legislation dealing with 'supplementary' occupational pensions and free movement of workers. [487] It identified three specific areas presenting obstacles: (i) the conditions for the acquisition of supplementary pension rights; (ii) the treatment of "***dormant***" pension rights and (iii) the taxation of cross-border pension contributions and pension transfers. In addition, the Commission saw that obstacles to free movement (e.g. long vesting periods) had adverse effects on the occupational pensions of women and part-time workers.[488] This highlighted the convergence between workers' rights to free movement, equality and social protection.

The Communication of 1991 envisaged different means of overcoming obstacles, including cross-border membership of occupational pension schemes, easier access to schemes for temporary and part-time workers, shorter vesting periods, adequate preservation of vested pension rights, fair transfer values and the avoidance of double taxation.[489] The Commission fuelled discussions in this field while remaining fully aware "*that solutions do exist, even if they are not easy to find*."[490] Time (and the benefit of hindsight) has indeed shown that legislative progress has proven very hard to come by!

In 1992, the Council drafted a resolution requesting "*that measures be implemented by Member States, or by management and labour where they already have a role under national legislation or practice, which recognise the principle that each worker should be able to move from one Member State to another without having to fear undue loss of rights to future occupational retirement pension benefits, when such benefits play an important role in overall retirement income*." This was rejected due to the lack of unanimity. A softer approach was adopted by Council Recommendation 92/442/EEC of 27 July 1992 on the

[487] Communication from the Commission to the Council "Supplementary social security schemes: the role of occupational pension schemes in the social protection of workers and their implications for freedom of movement," 22 July 1991 SEC (91) 1332 final.

[488] "*Certain groups of workers, such as female, part-time or migrant workers are greatly disadvantaged by these features. Only full-time, non-migrant, male workers will profit from a high level of coverage*". It added that "*in countries where complementary schemes replace statutory schemes, this could turn out to be particularly dramatic*." B. MONTEJO PUIG DE LA BELLACASA, op.cit p.51.

[489] For an analysis of the Commission Communication, see B. MONTEJO PUIG DE LA BELLACASA, (op.cit.)p. 45-56.

[490] The Commission anticipated that "*it should be possible to agree on a number of practical and/or legal arrangements to enable workers moving from one country of the EU to another to avoid losing supplementary pension rights or being frustrated in their pension expectations*." Report By The European Commission's Network Of Experts On Supplementary Pensions (1994), op.cit.

convergence of social protection objectives and policies: Member States should "*promote, where necessary, changes to the conditions governing the acquisition of pension and, especially, supplementary pension rights with a view to eliminating obstacles to the mobility of employed workers*."[491]

b. The preparatory work for the Safeguard Directive

The Commission's former DG V started preparatory work as of 1994 on a proposal for secondary legislation. This led to the first draft proposal of the Safeguard Directive being produced in 1994, a second draft of 1995, a third unpublished preparatory draft of February 1997 and a fourth and final draft of the Commission's proposal on 8 October 1997. To understand the substantive outcome of EU legislation, it is useful to consider the position of the High Level Panel on the free movement of workers and then examine the Green Paper of 1997, which preceded the adoption of both the Safeguard Directive as well as the IORP Directive.

The High Level Panel: a conservative approach to positive integration

The High Level Panel on the free movement of workers chaired by Mrs Simone Veil presented its report to the Commission on 18 March 1997. The Panel acknowledged that a loss of occupational pension rights would have an adverse impact on the freedom of movement of workers under the Treaty. However, it opposed "*inappropriate legislation*" that might impede the promotion of occupational pensions, encroach upon national sovereignty in the design of pension systems, or substitute the role of social partners in the field of social protection. In particular, the Panel was against harmonisation but favoured the adoption of common measures by the social partners acting at European level. Furthermore, the Panel advocated a 'non-discrimination' approach between internal migrant workers and cross-border migrant workers.[492] The proposed Safeguard Directive was to focus on the preservation of rights, cross-border payments and the protection of posted workers. The Panel's suggestions have been described as "*limited to a minimalist conception*" of the need for EU legislation.[493]

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[491] Recommendation 92/442/EEC of27 July 1992 on the convergence of social protection objectives and policies OJ L 245, 26.8.1992, p. 49.

[492] "*Community measures should, so far as possible, not place the citizen exercising rights of free movement in a privileged position as it would put Member States under pressure to secure similar guarantees by statutory intervention in the national arena, which would conflict with the voluntary, contractual nature of existing schemes and might lead to the undesirable result of a reduction in coverage and rights for employees*."

[493] B. MONTEJO PUIG DE LA BELLACASA, (op.cit.) p.94.

Finally the Panel concluded on the need for a European Forum on Pensions comprising social partners, pension fund administrators and regulatory authorities. The extent of the Panel's influence was criticised by Montejo Puig as it limited both the scope and substantive ambition of the Safeguard Directive regarding the protection of migrant workers' occupational pensions. Such criticism was qualified insofar as "*the pressures exerted by Member States also explain the disappointing outcome reached by the Commission in the drafting of this (Safeguard) Directive.*"[494] However, the Safeguard Directive was part of a broader strategy for positive integration by the Commission designed to address "Supplementary Pensions in the Single Market."

The Green Paper of 1997 "Supplementary Pensions in the Single Market"[495]

The Commission's Green Paper of 1997 was prepared by DGV and DGXV. It concerned not only the free movement of workers and their 'supplementary' pensions but also had the goal of creating an 'internal market for supplementary' pensions, which would involve the prudential regulation of cross-border pension funds.[496] The Green Paper of 1997 re-iterated the three obstacles to the free movement of workers mentioned in the Commission's Communication of 1991 (acquisition requirements, the treatment of dormant rights and the taxation of supplementary pensions); in addition, a fourth area was identified as important for worker mobility, namely the provision of adequate information to scheme members.

The Green Paper of 1997 mentioned the need for Member States to consolidate 'first pillar' social security pensions, which the Commission had mentioned in an earlier Communication of February 1997 on the Modernisation of Social Protection (1997). It also acknowledged private pension provision as a source of social protection, though this was seen by critics as venturing into the sphere of social policy, which raised issues of competence and subsidiarity (see below in Section 4). In addition, it raised substantive technical issues for future legislation to address in order to achieve genuine free movement of workers, for example '*vesting periods*'.[497]

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[494] B. MONTEJO PUIG DE LA BELLACASA, (op.cit.) p. 96.
[495] EUROPEAN COMMISSION Supplementary Pensions in the Single Market: A Green Paper COM (97) 283, 10 June 1997.
[496] The Green Paper contained 5 chapters. It described the 'three pillar' pension system (Chapter 1), focused on the role of pension funds in capital markets (Chapter 2) and dealt with "Appropriate Prudential Rules" (Chapter 3). Chapter 4 dealt with the free movement of workers. Chapter 5 dealt with taxation.
[497] As pointed out by Montejo, "*The Green Paper is entirely characterised by a strong emphasis on technical matters as a way of appearing politically neutral. Nonetheless, as expressed by the ETUC, this is far from being true.*" B. MONTEJO PUIG DE LA BELLACASA, (op.cit.) p.104.

There was also an opportunity for consultation with interested parties. On 6 April 1998, the Commission produced a document headed 'Overview of the responses to the Green Paper on Supplementary Pensions in the Single Market.'[498] The focus of the financial sector was on the growing importance of pensions for financial markets in the EU. Most Member States were keen to seize the opportunity to remove barriers to the free movement of workers, although some countries (e.g. Germany) did not see the need for EU secondary legislation. Moreover, the social protection dimension of occupational pensions as a form of social protection did not receive sufficient attention from the perspective of both workers' and trade unions.[499]

Nevertheless, the Green Paper of 1997 provided enough impetus for two directives in the field of pensions: the Safeguard Directive in relation to the free movement of workers and subsequently the IORP Directive on the free movement of services and the prudential regulation of occupational pensions at EU level. Nevertheless, the differences of approach and the significant financial interests at stake were warning signals of the difficulties facing EU legislation in this field.

B. The Safeguard Directive

The Safeguard Directive was the first piece of EU legislation dealing with the rights of workers to free movement in relation to supplementary pensions. It took over three years and four drafts before the Commission's amended proposal was finally adopted by the Council and the European Parliament on 29 June 1998. The Safeguard Directive is short both in length and in substance, comprising four pages on 'safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community'.

The need for several legislative stages was envisaged in Recital 4 of the Safeguard Directive, which states that supplementary pensions "*should therefore be subject to specific measures, of which this Directive is the first*…" For 16 years, it was the only piece of EU legislation on this issue until 2014 when the Supplementary Pensions Directive was adopted.

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[498] There were responses from Member States, actors from the financial services industry (including banks, insurance companies and pension funds) and social partners (i.e. trade unions and employers associations). For Montejo, "*the main interest of these responses resides not only in the contents and substance of their criticisms and alternative proposals, but also on the fact that it provides much information about the actors involved*" in the legislative and decision-making process. B. MONTEJO PUIG DE LA BELLACASA, (op.cit.)p.103; On the different types of actors in the field of pensions, see A. MATH & Ph. POCHET Les pensions en Europe: débats, acteurs et méthode, RBSS, 2nd trimester 2001.

[499] The main concern of trade unions was that efforts to promote 'supplementary' schemes should not have an adverse effect on first pillar 'social security' pensions.See ETUC's Opinion on the Commission Communication on "Modernising and Improving social protection in the EU."

An analysis of the successive drafts of the Safeguard Directive was carried out by Montejo Puig, who concluded that "*although the final version will have very limited repercussions in the promotion of the free movement of workers it will, nevertheless, constitute a first step to breaking down the barriers which exist between member states*."[500] The limited substantive impact of the Safeguard Directive is seen in Chapter V.

Having begun to tackle occupational pensions from the perspective of the free movement of workers, the Commission then embarked on secondary legislation in the field of the free movement of services.

C. The IORP Directive: an internal market approach to supplementary pensions

The Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision (the IORP Directive) was adopted in 2003.[501] It was designed to create an internal market in the field of supplementary pensions by enabling pension funds to exploit the free movement of capital and freedom to provide services in the EU. It reflected an economic approach to positive integration aiming to facilitate the cross border provision of services in the field of occupational pensions: "*A genuine internal market for financial services is crucial for economic growth and job creation in the Community.*" However, it also recognised the role of occupational pensions in social protection, which reflected a concern for the beneficiaries of the internal market (pension scheme members).[502]

The Treaty Articles providing the legal basis for the IORP Directive were Article 47(2) EC, Article 55EC (on the freedom of establishment and freedom to provide/receive services) and Article 95(1)EC (now Article 114 TFEU, which concerns the approximation of laws which have as their object the establishment and functioning of the internal market). The legislative procedure used was the Co-decision procedure of Article 251EC. Through minimum harmonisation and mutual recognition, the IORP Directive allows pension funds to manage occupational pension schemes for companies that are established in another Member State; it also enables European-wide companies to have one pension fund for all subsidiaries in Europe. However, the take-up of such opportunities has remained very limited.

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[500] B. MONTEJO PUIG DE LA BELLACASA, (op.cit.) p. 63-90.

[501] 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, OJ L 235 , 23/09/2003.

[502] Recitals 5 and 6 of the IORP Directive provided a legitimate basis for setting the 'prudent person' rule as the underlying principle for capital investment in order to encourage occupational retirement provision on a pan-European scale, "*thus contributing to economic and social progress*." This 'prudential dimension' reflected the need mentioned in Recital 7 to "*guarantee a high degree of security for future pensioners through the imposition of stringent supervisory standards*".

There has been a lack of consensus among many actors in the pension industry regarding the merits of the IORP directive, given not only the diversity and complexity of occupational pensions but also the underlying interests of the schemes actually or potentially affected by the IORP directive as there is a financial cost attached to its prudential requirements. In addition, not all forms of occupational pension provision are covered by the IORP Directive. Book reserve schemes and PAYG schemes are excluded from its scope. Moreover, the prudential regulation of pension schemes in some Member States is subject to other EU secondary legislation: e.g. the directives that applies to life assurance undertakings[503] and the "UCITS Directive".[504]

Having passed two Directives in the field of occupational pensions, one social and one economic, the Commission then returned to the issue of the free movement of workers for the second round of legislation in this field, which proved a minefield!

[503] The prudential rules for life assurance undertakings were recast in 2002 into a single text (Directive 2002/83/EC10). A substantial overhaul took place in 2009 with the adoption of the Solvency II Directive (Directive 2009/138/EC11).

[504] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L 302, 17.11.2009, p. 32–96.

Section 3. From the proposal of portability to the Supplementary Pensions Directive

The proposal for a directive on the 'portability' of supplementary pensions was born from the failure of European social dialogue, which prompted a legislative proposal by the Commission in October 2005 (A). The proposed directive also met deadlock in the Council and caused tension in the European Parliament. Two years later, the Commission amended its proposal for a directive in 2007. Despite the removal of some of the most controversial elements, the legislative procedure was marked by four years of legislative inertia between 2008 and 2012. The proposed directive's progress evolved from an unsuccessful attempt at harmonisation of pension transfers to a legislative socio-economic trade-off based on minimum requirements (B).

A. The failure of the European social partners to achieve any agreement

The need for European social dialogue (between the representatives of management and labour) had its origin in the Single European Act and resulted in Article 118b EEC following the Maastricht Treaty of 1992. This required the Commission to consult with social partners in all social policy initiatives. Under ex Article 138EC (now 154TFEU) and 139EC (now Article 155TFEU), it was possible to enshrine agreements between the European social partners into an EU Directive. However "*these procedures over the past 10 years have been very little used and only for a few high profile issues*."[505] The occupational pension rights of migrant workers were no exception, despite efforts by the Commission to engage the social partners during the period prior to the proposal for a Portability Directive.

The Pensions Forum was created in 2001 to assist the Commission in relation to the occupational pension rights of migrant workers. Despite regular meetings between pension experts and representatives from both employers and trade unions, the Pensions Forum was unable to bring negotiations between the European social partners to fruition. In June 2002, the Commission consulted the European social partners on the basis of *Article 138(2) EC (now Article 154(2) TFEU)* on the need for EU action dealing with the 'portability' of rights under occupational pension schemes'. [506] The Commission discussed the lack of a proper EU legislative framework, identified the negative consequences for the free movement of

[505] See B. VENEZIANI The role of the Social Partners in the Lisbon Treaty in The Lisbon Treaty and Social Europe (op.cit) p.126.

[506] The involvement of social partners reflected their important role in occupational pensions in a number of EU Member States. From the perspective of EU competence, this is interesting as Social Dialogue has now been moved to Social Policy. The issue is whether consultation of social partners depends on the area being primarily one of social policy or whether can one justify involving social partners for an internal market instrument with an impact on social protection/policy?

workers and consulted the social partners on how problems should be tackled.[507] A diversity of opinions, from trade unions, employers and the pension industry was provided.

On 15 September 2003, the second round of consultations began. The Commission's preference was for a framework agreement between the European social partners.[508] However, the European social partners disagreed on the interests at stake, the substantive action required and the type of instrument that should be used. By 2005, the European social partners had not undertaken meaningful negotiations on the matters identified by the Commission partly because of the entrenchment of the business lobby.[509]

For the Commission, such inertia was not satisfactory: a binding legal framework was *"the only appropriate means of assuring minimum requirements to improve the portability of occupational pension rights and, henceforth, mobility of workers across the EU."*[510] The Commission was put in an awkward position of having to sacrifice social legitimacy to overcome legislative inaction. It could either accept the *status quo* and wait for an unlikely agreement between European social partners, or initiate a proposal for EU legislation. Discussions on the subject had begun 15 years earlier in 1991 so one cannot accuse the Commission of impatience. However, the lack of social dialogue and social legitimacy underpinning the Commission's legislative proposal suggested it was doomed to fail.

B. From legislative paralysis to legislative trade-off

The Commission's initial proposal formulated on 20 October 2005 as a proposal for a Portability Directive[511] was subsequently amended on 9 October 2007 and continued to drag

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[507] *"Both sides of industry responded positively to the first consultation, acknowledging that that there was a need for Community action on the topic in order to improve the portability of occupational pensions and, henceforth, mobility of workers across the European Union. The European social partners did have different views, however, regarding the most adequate instrument to tackle this problem."*EUROFOUND website 'Portability of supplementary pensions' (European Industrial Relations Dictionary), 30 November, 2010.

[508] The Commission's reasons were that *"management and labour were the actors closest to the problem, because occupational pension schemes were based on initiatives at the branch or company level."*

[509] Veneziani explains that: "*Employers are naturally reluctant to contribute to an increase in 'hard law' in the labour market. Only two things can persuade them to make concessions: collective action and the threat of legislation. Collective action at European level still appears hardly possible. They rarely have to fear threats of legislation ('bargaining in the shadow of the law') because of the cumbersome decision-making procedures in the Council of Ministers…*" VENEZIANI .B The role of the social partners in the Lisbon Treaty in BRUUN, LORCHER & SCHOMANN (Eds), The Lisbon Treaty and Social Europe, Hart (2012).

[510] EUROPEAN COMMISSION Impact Assessment accompanying the proposal of 20 October 2005 for a directive on improving the portability of supplementary pension rights 2005/0214 (COD) SEC (2005) 1293, which preceded the adoption of the Supplementary Pension Rights Directive.

[511] Proposal for a Directive of the European Parliament and the Council on the improvement of portability of supplementary pension rights COM (2005) 507 final.

its heels in its revised form.[512] Fresh impetus was provided in 2012, following the call at EU level (both by the European Council and by the Commission's White Paper of 2012) for the sustainability of pension systems to be improved. In particular, it was deemed necessary for the acquisition and preservation of supplementary pension rights of mobile workers to be strengthened.[513] This provided an opportunity to re-open the negotiations on the proposed directive until it was again amended in 2013.[514] This was followed by political agreement by the Council in December 2013 and a vote by the European Parliament on the second reading on 15 April 2014 with the result that the Supplementary Pensions Directive was finally adopted! The evolution of the legislative process is analysed below.

a. The origin and demise of the proposed Portability Directive

The Commission published a draft proposal for a directive on the portability of supplementary pension rights on 20 October 2005 with a corresponding press release.[515] The opinions of social partners and Member States were also taken into account in an Impact Assessment. The Commission's proposal was officially transmitted to the Council and the European Parliament on 21 October 2005. On 8 December 2005, Commissioner Špidla presented the proposal to the Council during the UK Presidency. On 15 December 2005, the Council decided to consult the European Economic and Social Committee (***EESC***).[516]

[512] Amended proposal for a Directive of the European Parliament and of the Council on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights COM/2007/0603 final - COD 2005/0214.
[513] EUROPEAN COMMISSION WHITE PAPER An Agenda for Adequate, Safe and Sustainable Pensions COM (2012) 55 final Brussels, 16.2.2012.
[514] On 20 June 2013, the Council of the EU reached a 'general approach' on a directive improving the acquisition and preservation of supplementary pension rights. See COUNCIL OF THE EUROPEAN UNION 11081/13 Provisional Version Presse 263 PR CO 33 Press Release 3247th Council meeting Employment, Social Policy, Health and Consumer Affairs, Luxembourg, 20-21 June 2013. This was followed by the approval by the Permanent Representatives Committee on 4 December 2013. A press release of the European Parliament on 9 December 2013 confirmed the agreed text was endorsed by the Employment Committee of the European Parliament by 39 votes to none. The directive was put to a vote by the full European Parliament on 15 April 2014 and officially adopted by the Parliament and the Council the next day.
[515] Vladimír Špidla, European Commissioner for Employment, Social Affairs and Equal Opportunities expressed his aspirations for the proposal, designed to coincide with the 2006 European Year of Workers' mobility: "*If we expect workers to be mobile and flexible we cannot punish them if they change jobs. Pension rights must be fully transferable. This directive has been long overdue*." IP/05/1320.
[516] The EESC adopted its Opinion on the Proposed Portability Directive, at its meeting on 20 April 2006. It welcomed and endorsed the objectives of the proposed Portability Directive although it had "*mixed feelings about some of the means used to achieve them.*" It questioned the exemptions and the long transition periods for implementing minimum protection in relation to the conditions of acquisition of pension rights. Above all, the need to deal with tax was identified: "*the objectives of facilitating mobility and ensuring effective supplementary retirement income protection can only be achieved if differing taxation systems in Member States are also adjusted.*"

The 'EPSCO' Council (i.e. the Ministers of Employment, Social Policy, Health and Consumer Affairs) discussed the proposed Portability Directive every six months. Opinions were divided: on 8 May 2006, the Council's progress report indicated the presence of certain sticking points referred to as "*major outstanding issues under discussion*". [517] The procedure file shows the Council met on 1 June 2006 and again on 30 November 2006. After that second meeting and following a policy debate in the Council, the conclusions of the Presidency mentioned that there was consensus on the ends but not on the means for achieving positive integration in this field.[518] On 30 May 2007 the Council met again but the lack of unanimity meant deadlock prevailed.[519]

Following its draft report on the legislative proposal on 31 May 2006, scrutiny of the proposed Portability Directive continued in the European Parliament.[520] The debates of the European Parliament were lively and even acrimonious throughout the legislative process in committee as well as for the first reading, thus showing the tensions that arose from the proposed Portability Directive.[521] Diverging political opinions could certainly be seen between MEPS of the same Member State and were not limited to reflecting the diversity of national pension systems. An example of different points of view on the role of occupational pensions was expressed by two German MEPS of different political parties. [522] The focus of

[517] These included: (i) the material scope of the directive (i.e. the types of schemes to be covered), (ii) the role of social partners in relation to supplementary pension schemes, the level of harmonisation needed in rules governing supplementary pension schemes, (iii) transitional periods and application to pension rights accrued before the entry into force of the Directive; and (iv) transfers of supplementary pension rights to other schemes.
[518] "*all delegations supported the draft Directive's overall aim of facilitating mobility of workers; the majority of the Council considered that the Directive should focus on vesting criteria as well as on the preservation of pension rights through a fair treatment of dormant rights*." Some delegations "*regretted the deletion of transferability of pension rights from the text*" and it was suggested that "*other means of improving transferability could be considered, including on a voluntary basis.*" (Council Procedure file).
[519] "*given the impossibility of reaching a compromise that would satisfy all the delegations, the President had to conclude, with regret, that at this stage, the Council was not yet in a position to agree on a text, as the required unanimity was not achieved.*" (EP Procedure file).
[520] In the summer of 2006, there was an opinion of the Committee on Women's rights and gender equality. On 1 February 2007, the Committee on economic and monetary affairs produced its opinion. A decision of the European Parliament's committee on Employment and Social Affairs was produced on 21 March 2007 and its legislative report containing a 'Draft European Parliament Legislative Resolution' was tabled on 27 March 2007.European Parliament Report on the proposed Portability Directive (COM (2005)0507 - 2005/0214 (COD)) of 27.3.2007 Rapporteur Ria Oomen-Ruijten FINAL A6-0080/2007.
[521] Derek Roland Clark (MEP) stated: "*The Employment Committee itself is at odds over it. Never before have I seen one Member standing over another haranguing and shouting at them. That is because this matter is very complex, as a result of the different attitudes the Member States have towards pensions…*".See the Minutes of the European Parliament's debate on 20 June 2007 (CRE 20/06/2007) Item 5.4 (www.europarl.europa.eu/sides)
[522] Thomas Mann (European Peoples Party) stated: "*in Germany, they are a voluntary benefit. The idea is to tie qualified staff into the company for the long term. Company loyalty is therefore rewarded. In Germany alone their value is EUR 250 billion*." In contrast, Elisabeth Schroedter (Verts/ALE) stated that in Germany, "*this issue is still being treated in accordance with the completely outdated view that occupational pensions are a reward for long service to a company. This has not been the case for some time. Occupational pensions are in fact the second pillar of retirement provision…Today's living and working biographies are characterised by*

debate ranged from constitutional and procedural concerns (over competence and subsidiarity) to the cost for employers and pension providers. Concerns for the social protection of migrant workers, in particular the younger generation were mentioned. Strong views were expressed on the technical measures of the proposed Portability Directive, notably transferability, measures affecting acquisition (waiting/vesting periods) and preservation measures (e.g. indexation). On 20 June 2007, the European Parliament adopted its Opinion, which put forward a number of substantive amendments to the proposed directive.[523]

b. The amended proposal for a Supplementary Pensions Directive

On 9 October 2007, the Commission amended the title of the proposed directive to 'Proposal for a directive on the minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights.'[524] The Council met on 5 December 2007 to discuss the amended proposal for a Supplementary Pensions Directive. However, at that meeting, "*following intensive discussions, it was recognised that the required unanimity could not be attained, certain issues remained unresolved, in particular the duration of the vesting period*." The Council had been expected to reach political agreement on a common position by 9 June 2008 but this did not materialise. In an article in Investment & Pensions Europe (IPE) of January 2009, Gail Moss observed that: "*Not quite a dead parrot, it will take a lot longer to get the EU's pension portability directive back to life*." [525] The proposed directive had gone out of the abyss and into a cul-de sac.

The Commission Green Paper of 2010 stated that "*Fresh impetus is needed to reach a solution for all mobile workers.*"[526] The Commission White Paper of 2012 confirmed that

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mobility, career breaks and a wide variety of working conditions. In the lower income brackets it is barely possible to survive on the state pension nowadays."

[523] Doc. 10933/07. The European Parliament's opinion was adopted in first reading on the basis of the resolution drafted by Ria Oomen-Ruijten, the rapporteur for the Employment and Social Affairs Committee. It proposed amendments designed to shift the focus of the Directive away from pension transfers: "*Parliament wanted to make improvements by setting standards for the acquisition and preservation of pension rights, but did not agree with the Commission's proposals on the portability of pensions.*"

[524] The Commission explained its amended proposal for a Directive on Supplementary Pensions as follows: "*Having taken careful note of the European Parliament's decision and the views expressed by experts within the Council working group, the Commission acknowledges this change of priorities and accepts the removal of Article 6 (transfer provisions)*. European Parliament Procedure file to the amended proposal (October 2007)

[525] G. MOSS 'Focus Pension Portability. Where are we now?' in IPE Magazine January 2009. A diplomatic source was quoted as saying: "*It has been blocked at a political level for a year, and it is not likely to come back*." Gail Moss concluded "*The directive is not yet dead. But its chances of reaching fully-fledged legislative status appear further away than ever*."

[526] EUROPEAN COMMISSION Brussels, 7.7.2010 COM(2010)365 final GREEN PAPER towards adequate, sustainable and safe European pension systems SEC (2010) 830.

pensions were back on the agenda in the Council: the EU initiatives in support of Member States efforts in this field were mentioned in Annex 1 Section 2 ('Developing complementary private retirement savings') as including a directive on supplementary pensions.[527]

Both the proposed Portability Directive and the amended proposal for a Supplementary Pensions Directive revealed substantive difficulties and were afflicted by legislative paralysis as a result of the procedural constraints analysed below in Section 4. Meanwhile, legislative difficulties also affected the Commission's proposals to reform the directive's cousin in the field of financial services, namely the IORP Directive. Ironically, the prospect of further prudential regulation of pension funds gave the Commission a vital bargaining chip to bridge the regulatory gap in the field of free movement of workers.

c. A 'trade-off' between worker's rights and pension fund regulation

Financial services are obviously very important for the development of the internal market and given the amount of publicity and attention afforded to the proposed reforms of EU secondary legislation in this area, one might have been forgiven for thinking that the main focus of the Commission was on the economic aspect of its strategy for occupational pensions. However, in 'tactical' terms, it proved essential for the Commission not to lose focus on either the free movement of workers or indeed on its project of an internal market in the field of occupational pensions.

A study of the free movement of services and the prudential regulation in this field is beyond the scope of this thesis. Nevertheless, one cannot ignore the controversial nature of EU legislative activity in this area in the eyes of the pension industry, first with regards to the "***Solvency II Directive***"[528] and secondly with regards to the process to amend and replace the provisions of the IORP Directive.[529] Indeed, the Commission has also faced an uphill task of trying to facilitate an internal market in this field.

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[527] Of particular interest, paragraph 15 confirmed that "*In 2012, the Commission will, in close cooperation with the Council and the European Parliament, resume work on a pension portability Directive setting minimum standards for the acquisition and preservation of supplementary pension rights. While promoting cross-border pension mobility for all occupations, the Commission will also pursue the on-going work on a pan-European pension fund for researchers.*"EUROPEAN COMMISSION Brussels, 16.2.2012 COM(2012) 55 final WHITE PAPER An Agenda for Adequate, Safe and Sustainable Pensions.

[528] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (***Solvency II***) (Text with EEA relevance), OJ L 335, 17.12.2009, p. 1–155.

[529] There has been a great deal of involvement and intense lobbying coming from Member States and players across the pensions industry to make a specific case for the prudential regulation of occupational pensions. The role of pensions as a key element of social protection is often invoked in that context. See www.IPE.com.

A remarkable compromise was struck in 2013, which showed just how connected the destinies of both sets of EU legislative proposals on occupational pensions have proven to be. While negotiations were on-going among a number of member states to reach agreement on both the pension portability directive and the revised IORP Directive, a news article of IPE dated 23 May 2013 revealed that sources close to the Commission had indicated that several EU member states would be willing to reach a compromise with the European Commission: "*They would be ready to make concessions on some controversial elements of the [Supplementary Pensions] directive, such as vesting periods and dormant rights, if Brussels abandoned pillar one of the revised IORP Directive*."[530] On the same day, Michel Barnier, EU Commissioner for internal market and services postponed the implementation of the part of the revised IORP Directive, which dealt with capital requirements.[531] The news was welcomed by representatives of the pensions industry, in particular in the Netherlands and Germany.[532] A month later, on 20 June 2013, the Council reached agreement on the Commission's proposal for a Supplementary Pensions Directive. The Council's agreement marked the end of eight years of negotiations between the Commission and the Member States. The news was greeted by László Andor, EU Commissioner for employment, social affairs and inclusion, who said it was "*an important step not only for the mobility of individuals but also for the functioning of a genuine EU labour market*", which depended on migrant workers not losing their occupational pension benefits.[533]

Political agreement in the Council followed in December 2014. The Supplementary Pensions Directive was voted on in the European Parliament on 15 April 2014 and officially adopted by the European Parliament and the Council on 16 April 2014. This leads to the inevitable question of whether this is the 'end of the road' or the 'beginning of the end' for

[530] See C. SOURBES 'EC ready to drop key IORP II proposal 'in exchange for portability directive', IPE 23/5/2013. The article on IPE's website mentioned that Belgium, Germany, Ireland, the Netherlands and the UK were opposed to the shape of the first pillar of IORP II as they were concerned about the impact of proposals in those countries.According to IPE's sources, "*One more member state opposing the IORP II Directive would lead to a blocking minority, which would then see the proposals being definitely dropped*." IPE's sources added that "*The Commission has seen some of its proposals on pension reforms, including the pension portability directive, rejected in the past – they don't necessarily want to renew the experience*". "*At the same time, the current Commission – which is likely to change next year, with a new round of commissioners coming in – wants to leave a legacy and speed up the introduction of the revised directive, even if it means focusing on pillars two and three for now*."

[531] Barnier is quoted by www.IPE.com as saying that the solvency rules should be an "*improvement for the pensions sector, rather than a punishment*".

[532] B.OTTAWA, L. PREESMAN & O. BOSCHMAN on IPE website 'European schemes breath sigh of relief on delay of solvency rule' 24 May 2013.

[533] Commissioner Andor added that "*People who exercise their right to free movement should not be penalised*". Indeed, greater levels of mobility and increased levels of social protection for migrant workers should flow from protecting their occupational pension rights, thus enabling genuine freedom of movement.

positive integration in this field? Optimistically, one might argue that it is one step further than the ‘end of the beginning’, which commenced with the Safeguard Directive. Indeed, the Supplementary Pensions Directive now requires implementation by Member States (by 21 May 2018) followed by a report by the Member States on its application (by 21 May 2019). There will also be a report of the Commission on the application of the Directive (by 21 May 2020). However, eight years is a long time for a legislative procedure and one may question the reasons for such delay and seek to determine whether they are likely to persist in future.

Section 4. The institutional constraints that affected EU secondary legislation

The Commission's initial legislative proposal of October 2005 floundered throughout eight years before coming to fruition in a much amended form. It is fair to say that positive integration in the field of occupational pensions has been painful in terms of the disputes and delays that have marked its history. Some commentators doubted whether the Supplementary Pensions Directive would ever see the light of day.[534]

Which are the institutional constraints of the EU's legislative process that have affected the EU's legislative process in this field and to what extent are they responsible for having delayed progress? What were the changes that allowed the Supplementary Pensions Directive to be adopted and what lessons can be learnt?

Among the relevant constitutional and procedural hurdles that have impeded the development of EU integration in the field of occupational pensions, three main issues have been identified: the first matter is that of EU competence and the conditions of its exercise in light of the principle of subsidiarity, which has proven a focal point (A); the second is the choice of legal basis, which has procedural as well as substantive implications (B); the third concerns the applicable legislative procedure and the voting requirements in the Council, which have had an impact on the adoption of the Supplementary Pensions Directive (C).

A. EU legislative competence and the principle of subsidiarity

The Treaty of Lisbon provided clarification regarding both the existence and exercise of competence by the EU, as set out in Articles 2 and 5 TEU.[535] Moreover, Article 4(1) TEU confirms that: "*competences not conferred upon the Union in the Treaties remain with the Member States*." It also stated in Article 6(1) (2) TEU that the EU Charter does not broaden EU competence: "*The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties*." In addition, Protocol N.25 clarifies the exercise of shared competence.[536]

With regard to the occupational pension rights of migrant workers, the source of EU competence to legislate must therefore be determined by reference to the principle of

[534] G. MOSS 'Focus Pension Portability. Where are we now?' in IPE Magazine January 2009.
[535] "*The limits of Union competences are governed by the principle of conferral*" (Article 5(1) TEU). "*Competences not conferred on the Union remain with the Member States.*" (Article 5(2) TEU).
[536] "*when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area*."

conferral in light of Article 1(1) TEU, which states that the purpose for conferral of competences is to attain the common objectives of both the Member States and the EU.[537]

Two areas of shared competence are both potentially relevant with regards to the occupational pension rights of migrant workers: the key question is thus whether secondary legislation in this field should come under EU competence on the basis of social policy (a) or the free movement of workers (b)? Moreover, the exercise of competence has proved very problematic given the need to justify compliance with the principle of subsidiarity (c).

a. **The rejection of social policy as a source of EU competence in this field**

In respect of the initial proposal for a Portability Directive, it has been argued that the Commission could have opted in favour of a social policy oriented legal basis.[538] Social policy is indeed an area of shared competence insofar as it concerns the aspects defined in the Treaty (Article 4(2)(b) TFEU). The main Treaty provision which deals with EU competence in the field of social policy is Article 153 TFEU (ex Article 137 EC). Arguably, worker mobility is relevant in the context of social policy objectives such as employment and the need to modernise and improve social protection systems.[539] However, potential problems would arise both in theory and in practice from choosing a social policy oriented Treaty article as a source of EU competence.

First of all, it would infringe EU competence if the proposed EU measures proposed sought to determine the organisation of supplementary pension schemes rather than concentrating on the distinct measures that are necessary in the case of mobile workers. Indeed, the EU has no legislative competence for the modernisation of systems of social

[537] On the extent of these objectives, Lorcher comments: "*It has to be clarified that the objectives are not only common to the Member States, but the Union. Therefore, this reference is not, of course, restricted to the objectives in Article 3TEU but, specifically for social issues, also includes the social policy objectives in Article 151 TEU (ex Article 136EC).*Lorcher in The Lisbon Treaty and Social Europe, Hart (2012) (Op cit) p.171.
[538] KALOGEROPOULOU.K (2006) Improving the Portability of Supplementary Pension Rights, Journal of Social Welfare and Family Law, 28:1, 95-104, "*Article 137 (2) (b) EC also provides for a suitable legal basis for the adoption of a Directive setting minimum requirements in the area of supplementary pensions. This is because such requirements are part of the social security systems of the Member States and the rules concerning their organisation are governed by national laws*." Kalogeropoulou added that "*Article 137 could be used for the adoption of measures towards the portability of supplementary pension rights, since the enhancement of such portability needs to be addressed in order to promote mobility, which constitutes one of the main measures towards the realisation of the Community's aim of full employment and of growth and jobs.*"
[539] (COM (99) 347 and COM (2005).

protection, which is made clear in Article 153 TFEU, which requires the EU to 'support and complement' the activities of the Member States on social protection.[540]

Dealing with occupational pensions through an approach based on social policy would indeed be problematic as expressed by Montejo Puig: "*the distribution of social protection between the three pillars belongs to the national competence and the EC should not, in theory, adopt measures which imply a certain choice in favour of one or other.*"[541] Consequently, any attempt to extend EU competence beyond the internal market could only be done by modifying the Treaty.[542] This would be a particularly unlikely development given the historic attachment of the Member States to their national pensions systems and mechanisms of social protection. Any attempt by the EU to regulate occupational pensions from a purely social perspective would breach EU rules on competence. One should therefore exclude social policy as a source of EU competence for legislation in this field.

The second potential problem associated with the potential exercise of EU competence in the field of social policy lies in the challenge posed by the requirement of unanimity in the Council for any secondary legislation in this field (as discussed below in C). Historically, achieving consensus between the Member States in the Council has proven extremely difficult in the context of passing secondary legislation subject to both unanimity and the co-decision procedure. Indeed, a procedural approach based on the EU's competence on the internal market suffered from the requirement of unanimity so there is nothing to suggest that an approach based on social policy would be more effective in enabling adoption of proposed legislation.

Given the current nature of the competence divide, it follows that social policy should not be used as the source of EU competence for protecting the occupational pension rights of migrant workers. Paradoxically, the best chance for EU law to uphold the dignity and safeguard the social protection of migrant workers is neither through new social competences nor through an extension of EU competence in the field of social policy given the requirement of unanimity in the voting procedure in the Council. The more realistic route, which has been chosen by the Commission, is to use existing articles on the internal market.

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[540] Lorcher argues that the open method of coordination is the appropriate tool for the purpose of modernising systems of social protection, which "*should remain as it stands, especially because it very much impinges on national social (security) systems*." Lorcher in The Lisbon Treaty and Social Europe, Hart (2012) (Op cit) p193

[541] B.MONTEJO PUIG (Op.cit) p.76.

[542] Given the connection of occupational pensions with the fundamental right to social security (Article 34(3) of the EU Charter), a federalist approach to EU integration would support extending EU social competence in this field. However, this would be a minority view from a political perspective, not to mention the practical complexity and diversity of bringing national pension systems together.

However, one cannot exclude the need for EU law on free movement to protect migrant workers' occupational pensions as this neither calls into question the sovereignty of Member States to determine their social protection systems nor does it exceed EU competence in the internal market, which may take social and economic factors into account. It is appropriate, as the Commission has done, to rely upon the Treaty provisions of the internal market as the source of EU competence and legal basis for legislation given that the free movement of workers is at stake. Indeed, the EU is clearly competent to address issues that relate to migrant workers' acquisition of occupational pension rights where these constitute obstacles to free movement.

b. Free movement is the source of EU legislative competence to protect the occupational pension rights of migrant workers.

In keeping with the internal market rationale in relation to the occupational pension rights of migrant workers, the existence and exercise of EU legislative competence in this field is based on the free movement of workers, which falls into the category of 'shared competences' as provided by Articles 2(2) and 4TFEU.[543] For the purpose of EU legislation in the field of the free movement of workers and their occupational pensions, the attribution, nature and exercise of competence are important from a substantive perspective[544] as well as from a procedural angle (in terms of the principle of subsidiarity discussed below in c).

The existence of EU competence stems from the free movement of workers, which is a substantive right that is required to be protected under EU law. Moreover, the relationship between the substantive objectives of EU law on free movement of workers and the notion of occupational pensions holds the key to identifying the source of EU competence in this field.

On the one hand, the existence of EU competence in relation to the protection of migrant workers' supplementary pension rights can be inferred insofar as they can be deemed to form part of social security. Indeed, EU competence to deal with matters of social security that relate to migrant workers is derived from Article 51EEC, (which became Article 42 EC

[543] "*Shared competence regarding the internal market (Article 4(2)(a) TFEU) has implications for the important competences on free movement of workers."* Lorcher in BRUUN, LORCHER & SCHOMANN (Eds), The Lisbon Treaty and Social Europe, Hart (2012) p.174.

[544] From a substantive perspective, Lorcher states that shared competence in the field of free movement "implies a principle of non-discrimination not only in respect of labour law, but social security law" in particular in the Coordination Regulations and Regulation 1612/68. As mentioned above, the principle of non-discrimination is clearly established in Article 45TFEU and is also an implied component of Article 48TFEU. LORCHER (supra).

and is now Article 48 TFEU). This is visible in the recitals of the Safeguard Directive.[545] In the initial proposal for a Portability Directive, this source of EU competence was mentioned in Recital 1.[546]

On the other hand, the EU's power to legislate stems from the target beneficiaries being migrant workers, which brings into play the general provision for free movement of persons, namely Articles 45 and 46TFEU.[547] Recital 1 of the Supplementary Pensions Directive re-iterates the fact that "*the free movement of persons is one of the fundamental freedoms of the European Union*." The source of EU competence thus changed with the choice of the general legal basis for free movement of workers, The justification for the above source of competence is reflected in the purpose of the Supplementary Pensions Directive, which "*promotes worker mobility by reducing the obstacles to mobility created by certain rules of supplementary pension schemes linked to an employment relationship*."

Given the recognition of free movement as the relevant source of EU competence in this field, it has been necessary to determine precisely which article on the free movement of workers should provide the legal basis for secondary legislation (as will be discussed in B).

The focus on free movement as the source of EU competence has the benefit of maintaining distance with regards to Member State competence for the organisation of their pension systems, as is made clear by Recital 9 of the Supplementary Pensions Directive.[548] An illustration of the substantive limits of the EU's competence is contained in Recital 22: "*This Directive does not create any obligation to establish more favourable conditions for dormant rights than for the rights of active scheme members.*"

The nature of EU competence also has an impact on the approach to secondary legislation. Reference to harmonisation was mentioned in Recital 5 of the proposal for a

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[545]"*Whereas one of the fundamental freedoms of the Community is the free movement of persons; whereas the Treaty provides that the Council shall, acting unanimously, adopt such measures in the field of social security as are necessary to provide freedom of movement of workers*."

[546]"*The free movement of persons is one of the fundamental freedoms of the Community; in Article 42EC, the Treaty stipulates that the Council, acting in accordance with the procedure referred to in Article 251EC, shall adopt such measures in the field of social security as are necessary to provide freedom of movement for workers.*"

[547]"*Article 46 TFEU stipulates that the European Parliament and Council, acting in accordance with ordinary legislative procedure and after consulting the Economic and Social Committee shall issue Directives setting out the measures required to bring about freedom of movement for workers as defined in Article 45 TFEU. Article 45 TFEU stipulates that the freedom of movement of workers entails the right to accept offers of employment and 'to move freely within the territory of Member States for this purpose*'."

[548]"*This Directive does not call into question the right of Member States to organise their own pension systems. Member States retain full responsibility for the organisation of such systems and when transposing this Directive into national law are not obliged to introduce legislation providing for the setting up of supplementary pension schemes.*"

Portability Directive.[549] However, the tone and ambition of the amended draft of recital referred to the need to introduce 'minimum requirements' "*in order to improve the rights of workers moving within the Community and within the same Member State*". Moreover, reference to internal mobility was subsequently removed from Recital 5 of the Supplementary Pensions Directive, to reflect the view that EU competence in this field is primarily connected to the cross-border dimension of free movement of workers.

Nevertheless, the existence of EU competence for the proposed Portability Directive has not generally been accepted by members of the pensions industry such as the European Association of public sector pension institutions (***EAPSPI***), who have made the case against the substantive inclusion of its key provisions (e.g. on acquisition).[550] A specific argument was that: "*The conditions governing acquisition, as set up in Article 4 of this Proposal, fall within the sphere of competence of the Member States.*" EAPSPI thus disputed the use of the free movement of workers as the source of competence for some of the substantive measures and also referred to the limits to EU competence in the field of social policy that are set out in Art.137 (4) EC by stating that: "*Member States retain competence for the organisation of their social security systems…*"[551]

The question of EU competence requires assessing where the border lies between the rules that 'organise' pensions and rules that constitute obstacles to free movement. The latter requires one to focus on the effects of the rules governing the acquisition of occupational pensions on workers' mobility and free movement of workers in the EU. Admittedly, EU competence on the internal market may have a social dimension, given that Article 48 TFEU

[549] "*Recourse should also be had to Article 94 of the Treaty, given that the disparities between the national legislation governing supplementary pension schemes are likely to hamper both the exercise of the right of workers to freedom of movement and the operation of the internal market."*

[550] In its position paper of 2006 on the proposed Portability Directive, EAPSPI challenged the inclusion of measures for improving the acquisition of supplementary pensions (contained in Article 4) on the basis that they did not fall within EU competence. The EAPSPI made reference to the Case C-322/95 *Iurlaro vs. INPS* [1997] ECR I-04881. Paragraph 23 referred to Case C-12/93 *Bestuur van de NieuweAlgemeneBedrijfsvereniging v Drake* [1994] ECR I-4337, paragraph 26, which stated that "*Article 51 of the EC Treaty and Regulation 1408/71 do not regulate the conditions under which insurance periods are constituted. It is for each Member State to determine the conditions governing the right or obligation to become a member of a social security scheme, provided that there is no overt or covert discrimination in that regard between nationals of the host Member State and those of other Member States*."

[551] EAPSPI also referred to Recital 9 of the IORP Directive, which states that "*In accordance with the principle of subsidiarity, Member States should retain full responsibility for the organisation of their pension systems as well as for the decision of each of the three 'pillars' of the retirement system in individual Member States. In the context of the second pillar, they should also retain full responsibility for the role and functions of the various institutions providing occupational retirement benefits, such as industry-wide pension funds, company pension funds and life-assurance companies*."

gives the EU competence to coordinate the social security rights of migrant workers.[552] The key point for justifying EU competence is that it must seek to protect and safeguard, but not determine, the conditions of acquisition of occupational pension rights of migrant workers. Protection of migrant workers' occupational pensions must thus be aimed at improving the exercise of free movement.[553]

The position that EU competence for a directive on the occupational pension rights of migrant workers stems from the right to free movement in the internal market does not mean that the proposed legislation cannot have social implications, if these are necessary to achieving genuine free movement, as justified by the social rationale for the protection of migrant workers' occupational pension rights. Arguably, this is explicit in Article 48TFEU, which reflect the fundamental right to social security and implicit in Article 45 TFEU in the context of free movement of workers (as well as in Article 34 of the EU Charter).

The question marks over the existence of EU competence in relation to the proposed Portability Directive and the amended proposal for a Supplementary Pensions Directive led to an even bigger challenge concerning the actual exercise of EU competence in this field in light of the principle of subsidiarity.

c. Exercise of EU competence is subject to Subsidiarity & Proportionality

Article 5(1) TEU states that: "*The use of Union competences is governed by the principles of subsidiarity and proportionality.*" The principle of subsidiarity is seen by many as a democratic safeguard of national sovereignty and a vital constitutional component of EU law that is designed to prevent 'competence creep' by the Commission.[554] Together with the principle of proportionality, it also constitutes a considerable procedural hurdle, which the Commission has to confront in formulating its proposals for secondary legislation in the field of occupational pensions and free movement.[555]

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[552] The Coordination Regulations make it unlawful for Member States to exclude migrant workers' rights to acquire social security pensions. The prohibition of non-discrimination and the right to aggregation both have an impact on the acquisition and recognition of social security pension rights in the Member States.

[553] Recital 4 of the Supplementary Pensions Directive confirmed that: "*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 represents an initial specific measure designed to improve the exercise of the right of workers to freedom of movement as regards supplementary pension schemes*."

[554] Article 5(3) TEU defines 'subsidiarity': "*Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*."

[555] Under Article 5(3), the EU institutions are required to apply the principle of subsidiarity in accordance with the Protocol on the application of the principles of subsidiarity and proportionality. Under Article 5 (4) TEU, the

For the Commission, its intervention is justified given that the impact of the rules governing occupational pension schemes *"constituted, in the eyes of the Commission, an infringement of the principle of free movement of workers".*[556] However, EU-level action must still be seen as appropriate and proportionate in light of the principle of subsidiarity. Some care has been taken by the Commission to justify its compliance with both principles.

The Safeguard Directive

The Safeguard Directive is fairly minimalist in terms of mentioning its compatibility with the principle of subsidiarity.[557] One impact of subsidiarity concerns the choice of instrument.[558] However, the justification for opting for a directive, in light of the "*diversity of supplementary social security schemes*" is open to criticism given that a similar level of diversity exists for statutory social security pensions.[559] As the provisions of the Safeguard Directive offer minimum levels of protection, one may query whether the application of subsidiarity has also had an impact upon both the substantive ambitions and effectiveness of EU law.[560] A similar approach was taken by the Commission with regards to the proposed Portability Directive and the Supplementary Pensions Directive to respect subsidiarity.

The initial proposal for a Portability Directive

The explanatory memorandum that accompanied the proposed Portability Directive sought to justify its compliance with the principles of subsidiarity and proportionality. The

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principle of proportionality provides that "*the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*" The Commission committed itself to the principle of subsidiarity in its work programme for 2006 by saying that "*the EU should only act when necessary and in the lightest form consistent with achieving its objectives. The Commission will pay particular attention to ensuring full respect for subsidiarity and proportionality.*"Communication from the European Commission: "Unlocking Europe's full potential – Commission legislative and work programme 2006", COM (2005) 531 final of 25.10.2005, S. 10 (n° 6 "Delivery and better regulation – subsidiarity and proportionality") – One may note that this document was published only 5 days after the proposed Portability Directive.

[556] *Eurofound website http://www.eurofound.europa.eu/*

[557] Recital 17 provides: "Whereas, in accordance with the principles of subsidiarity and proportionality as set out in Article 3b of the (EEC/EU) Treaty, the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community; whereas this Directive does not go beyond what is necessary to achieve those objectives."

[558]Recital 16 mentions: "Whereas, by reason of the diversity of supplementary social security schemes, the Community should lay down only a general framework of objectives and therefore a Directive is the appropriate legal instrument."

[559] The approach taken by EU law for the occupational rights of migrant workers is in contrast to that of the Coordination Regulations, which provides directly applicable rights to migrant workers. By choosing a Directive, the Commission chose to provide greater flexibility to Member States with regards to the implementation of the Safeguard Directive's objectives and legal framework. One disadvantage from a worker's perspective is the potential delay or failure to implement the Directive. Indeed, the Commission has brought several infringement proceedings for failure to implement the Safeguard Directive.

[560] No preliminary references have been made to the ECJ requiring an interpretation of the Safeguard Directive.

Commission stated that action by Member States could not sufficiently achieve the objectives of the proposal due to the cross-border dimension of the free movement of workers.[561] It also explained why EU legislation would be an effective means of overcoming national diversity to achieve the objectives of the proposal.[562] The timeliness of EU legislation was also highlighted.[563] However, the reference to the need for harmonisation proved a tactical mistake by the Commission, which was seized upon by opponents of the directive who claimed this showed a breach of the principle of subsidiarity.

On proportionality, the Commission also justified the proposals' compliance first by reference to the choice of a directive as the appropriate type of secondary legislation.[564] Secondly, the Commission referred to the measured nature of its substantive content[565] and the need to achieve a balanced result was also recognised by the Commission in its Impact Assessment for the proposed Portability Directive.[566]

The role of subsidiarity and proportionality had a major impact on the preparatory work and research that preceded the proposed Portability Directive: indeed the Commission

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[561] *"Employment markets do not end at the borders of the Member States, so a Community level measure needs to be taken in order to make these markets more flexible and more effective by removing certain obstacles to the mobility of the labour force which stem from these occupational pension schemes." European Commission 20 October 2005, Explanatory Memorandum to the proposed Portability Directive (supra).*

[562] *"The guidelines and recommendations formulated on several occasions over the past ten years by the European institutions have not brought about a significant approximation of the national laws; indeed, there is a risk that divergences could increase in a European Union of 25 countries. The current and future context of the development of European-scale pension systems makes it necessary to adopt a Community instrument today…The proposal therefore complies with the principle of subsidiarity."* (idem)

[563] The explanatory memorandum confirmed that: "on the one hand, the EU has since 2003 had a legal framework which favours the cross-border management of supplementary pension schemes; on the other, as shown in the recent study conducted by the Social Protection Committee in conjunction with the Commission on the future of occupational supplementary pension schemes, these schemes are set to grow significantly. The time has therefore come to provide a common reference framework."

[564] On the choice of a directive as the legislative instrument, the Commission said: "The choice of instrument and the practical aspects are in line with the principle of proportionality: the form opted for is that of a directive and not a regulation, this in order to respect the heterogeneous nature of the organisation of supplementary pension systems in the Member States, while establishing an overall framework setting out the objectives to be achieved by the Member States without prescribing how they are to be attained. The Commission added that "other means would not be appropriate for the following reasons: A less binding instrument, such as a code of conduct, would have little chance of securing the desired result, as the discussions which have taken place for over 15 years at European level have failed to produce a voluntary initiative of this type. Furthermore, many elements on which the supplementary pension schemes are based are governed by the laws of the Member States. A more binding instrument, such as a regulation, would not offer the flexibility needed to take due account of the vast diversity of supplementary pension schemes and the fact that they are often voluntary."

[565] "Lastly, the provisions proposed have been gauged according to the minimum essential requirements taking due account, thanks to the impact assessment, of the possible repercussions on existing national schemes; they also provide for a suitable time frame for transposing certain provisions contained in this Directive."

[566] "the provisions of the Directive should only go as far as necessary to address in a sufficient way the obstacles identified. In particular, the Directive should allow for a certain degree of flexibility to avoid discouraging the further development of supplementary pension provision in the EU. It is important that the proposed measures do not put any unnecessary or disproportionate administrative or financial burden on the employers providing for supplementary pension provision or on the supplementary pension schemes themselves."

relied upon its Impact Assessment as proof that its choices were justified.[567] The relevant factors indicating compliance of the proposed Portability Directive with the principles of subsidiarity and proportionality were included in its Recitals.[568]

Despite the Commission's attempts to justify the exercise of EU competence, there remained a great deal of tension regarding any notion of harmonisation in this field.

The pension lobby's drive to limit the substantive content of EU legislation

Recital 5 of the proposed Portability Directive mentioned that: "*certain conditions governing the acquisition of pension rights must be harmonised and the rules on the preservation of dormant rights and the transfer of acquired rights must be brought closer together*." This was like waving red rag to a bull and the pension fund/employer lobby leapt to challenge the content of the directive by arguing that it did not comply with subsidiarity.[569]

In its Position Paper of 2006, EAPSPI argued that the measures on acquisition were not compatible with subsidiarity. Its argument was first that Member States' competence in the field of occupational pensions excluded any possible intervention by the EU affecting this field;[570] and secondly, acquisition conditions did not have a cross-border dimension.

The point that Member States were competent in relation to the acquisition of pension rights was based on the fact that the Treaty does not confer powers to the EU to modernise social protection systems as mentioned above in (a). However, the EU's competence in relation to the free movement of workers meant that the Commission was able to exercise its competence in line with the principle of subsidiarity, by concentrating on the removal of acquisition-related obstacles to free movement, although such measures may affect the conditions under which occupational pension schemes operate.

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[567] Given the diversity and complexity of occupational pensions in the Member States, the principle of subsidiarity requires assessing the European dimension of legislation affecting occupational pensions. In addition, the principle of proportionality entails assessing the potential effects of EU legislative measures on the pension systems of Member States. Hence the Commission carried out an impact assessment of the costs and benefits of the proposed legislation.

[568] These concerned the greater effectiveness of action at EU level (Recital 13), the need for EU legislation to be sensitivity to national diversity (including the role of social partners) Recital 3, and the effect on the substantive content of the Directive, which set out minimum requirements (Recital 14) and the need to take into account the financial sustainability of supplementary pension schemes (Recital 15).

[569] Euro-commerce stated in a Position Paper of 4 May 2006 that "*In particular, there should not be any EU rules on minimum age, vesting periods and waiting periods. Such fundamental changes of the national systems are neither needed, nor justified in order to achieve cross-border mobility…* "

[570] EAPSPI stated that "*Member States should be responsible for the organisation of their own old age pension schemes under the principle of subsidiarity*." This reflected a German approach, which viewed the principle of subsidiarity as a "*guideline for the existence of competence*" rather than as a "*guideline for the exercise of competence*." See T. BLANKE, "The principle of Subsidiarity in the Lisbon Treaty", in The Lisbon Treaty and Social Europe, p.245-246

On its second point, EAPSPI denied the cross-border implications of acquisition conditions in its argument based on subsidiarity.[571] The flaw in this argument is that it ignores the effects of acquisition conditions upon the free movement of workers.[572]

EAPSPI also invoked subsidiarity as a result of the diversity of pension systems and the different roles of occupational pensions in social protection.[573]

The principle of proportionality was also invoked to try to limit the ambit and substantive content of the proposed Portability Directive. EAPSPI also referred to the Protocol in its argument.[574] In addition, EAPSPI referred to the idea that EU law should "*respect proven national regulations*" and suggested that the substantive measures of the proposed Portability Directive did not do so.[575] The tone of its argument inferred that EU law should conform to national regulations.[576] Such an approach would amount to challenging the actual primacy of EU law on free movement rather than reflect the principle of subsidiarity!

The potential financial impact of the proposed directive

The use of 'subsidiarity' by the pension fund lobby as part of its strategy to challenge the substantive content of the proposed directive ultimately revealed its reticence for pension schemes to shoulder additional costs or comply with new obligations/ "red tape". Indeed, a powerful argument invoked was the potential impact of the proposed Portability Directive in terms of the cost for occupational schemes. Cost became a key criterion for assessing

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[571] "*According to n° 5, first recital of this Protocol, the principle of subsidiarity requires cross-border aspects, which cannot be sufficiently regulated by measures of the Member States… However, conditions governing acquisition do not contain any cross-border aspects…In fact, conditions governing acquisition must be ruled by the national legislator or by the competent social partners, since supplementary pension schemes are – based on their initial meaning – always complementary to the first pillar of the respective Member States."*

[572] These may be actual or potential, as illustrated by the Commission's Communication of 1991, the Green Paper of 1997 and the Commission's Impact Assessment for the proposed Portability Directive.

[573] *"Since the pension systems and the social targets are quite different in each Member State and the role, as well as the importance, of the second pillar varies from one State to the other, respect for the principle of subsidiarity is even more important in the field of pensions. Therefore, the conditions governing acquisition of supplementary pension rights must be ruled by the national legislator or by the social partners in order to maintain the balance of the supplementary schemes with the first pillar.*"

[574] "*According to n° 7 of this Protocol, "proven national regulations as well as structure and function mode of the juridical systems of the Member States" are to be respected. In the context of this Proposal, the Commission has stated, that the directive should not discourage the future development of supplementary pension provisions in the EU.*"

[575] "*As mentioned above, it is doubtful whether the conditions which govern acquisition, set up in Article 4 will* ***respect*** *proven national regulations as well as structure and functionality of the existing supplementary pension schemes. Each supplementary pension scheme is based on several parameters like – for instance – vesting periods or minimum entry age. If these parameters are to be (sensibly) modified, then the basic structure and the assumptions of the whole scheme have to be at least revisited.*"

[576] EAPSPI mentioned effects on "*the basic structure*" of occupational pension schemes. The threat of adverse repercussions on social protection touched a sensitive spot of the Commission regarding the exercise of EU competence. Its impact assessment shows awareness of the coverage of pension schemes.

compliance with the principle of proportionality.[577] In addition to the cost of acquisition related measures, EAPSPI also mentioned the financial impact of Article 5 of the proposed Portability Directive, which dealt with the preservation of occupational pension rights.[578]

Cost also became a factor by which to scrutinize the substantive compliance of the Directive with the principle of subsidiarity. The threat of an adverse effect of higher costs on coverage of occupational pensions and the sustainability of Member States Pension systems became a running theme of the position articulated by the pension funds' lobby.[579] However, the objective of the proposed directive was often either misunderstood or misrepresented.[580]

Despite the possibility of increased costs, the threat of EU legislation having negative repercussions on the willingness of employers to offer occupational pension schemes was somewhat cynical.[581] Furthermore, the Commission showed that it was looking for a middle ground in terms of balancing the cost for schemes versus worker's free movement, to avoid having a disproportionate impact on schemes that could undermine their existence.

The political difficulties of achieving a 'balancing act'

Question marks over the relevance of the directive's method and substantive ambitions were visible at the meeting of the Council in Brussels on 8 May 2006.[582]

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[577] *"the Commission should consider that the financial load of Member States and local authorities is minimised and is appropriate to the objectives. The measures in Article 4 of this Proposal, especially the maximum vesting period of 2 years, might considerably increase the costs of supplementary pension schemes in some Member States, as the Commission has already admitted. Depending on the country and the nature of the insured persons within the relevant scheme, supplementary costs of between 5 % and 20 % might arise, simply from shortening the vesting period, which in turn might impact on labour costs if the employer has to provide for the supplementary pension schemes under consideration.*"

[578] "*Any indexation of preserved pension rights will generate considerable higher costs in those Member States which do not currently operate such indexation, in particular those countries where supplementary pension schemes are of relatively minor significance.*"

[579] Euro-commerce stated: "*The objective of its proposal 'to increase the use of supplementary pension schemes' might be seriously jeopardized as the current proposal could have the opposite effect and discourage employers, and particularly small companies, from offering voluntary supplementary pension schemes at all*."

[580] Euro-Commerce's Position Paper did not accurately quote the text of the proposed Portability Directive which stated that the proposed directive aimed "to increase the use of supplementary pension schemes". This was arguably a distortion of the Commission's explanatory memorandum which stated that: "*the reforms adopted or envisaged in most Member States are moving towards further development of supplementary pension schemes, something which is moreover actively encouraged by certain Member States*." Recital 2 also states that "*supplementary social security schemes linked to the employment contract, which are becoming increasingly common in the Member States.*" However, it did not advocate the use of supplementary pensions as this would have been beyond EU competence and was therefore not part of the Directive's objective. Any suggestion that is what the proposed Portability Directive was about was mistaken.

[581] For more than a decade, many employers have been reducing their pensions exposure by offering less generous pension schemes for their current/future employees (e.g. see the shift from DB to DC).

[582] The minutes report that "While some delegations see a need for harmonisation regarding the joining and vesting criteria (in Article 4), some others stress the subsidiarity principle and consider that these issues could be dealt with at the national level."

At a meeting of the EPPF (the European Parliamentary Pension Forum) of 18 October 2006, Chris Verhaegen presented the position of the European Federation for Retirement Provision, which was critical of the proposed directive.[583]

The political difficulty for the Commission has been on the one hand, its concern to better protect migrant workers' occupational pension rights under EU law, and on the other hand, the need to avoid the exercise of a worker's right to free movement resulting in social regression. The Commission wanted to enact legislation that would go beyond the Safeguard Directive and actually have a positive impact on removing obstacles to free movement and mobility. At the same time, it sought to ensure that workers would not suffer either in terms of coverage or in terms of the value of their pension rights as a result of the proposed Portability Directive.

The obligation for proposed EU legislation to abide by the principles of subsidiarity and proportionality undoubtedly led to "procedural spanners" being thrown into the wheels by opponents of the proposed Portability Directive, in an attempt to water it down.[*584*] In contrast, the prevailing opinion among the trade unions, considered that the proposed Portability Directive was a modest step in the right direction. In addition, one of the factors that may have triggered the above procedural challenges to the proposals for a directive has been the Commission's focus on a technical approach. In terms of method, the Economic and Social Committee had advocated an approach based on principles.[585]

In light of the above tensions, the EU legislator sought to allay concerns about the exercise of EU competence in the 2007 amended proposal for a Supplementary Pensions Directive but it retained its view regarding the greater effectiveness of action at EU level.[586]

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[583] The view of the EFRP was that the draft proposal for a Portability Directive contained a "*policy overload*", which exceeded facilitating mobility and exceeded the principle of subsidiarity.

[584] EAPSPI stated: *"there are doubts as to whether this proposal is too ambitious, as far as aspects beyond the scope of portability alone are concerned. In view of the principle of subsidiarity this affects in particular the shortening of vesting periods and the adjustment of preserved rights."* It is ironic that 'Transferability', one of the most controversial provisions of the proposed Portability Directive, which was dropped in the amended proposal for a Supplementary Pensions Directive, was deemed by EAPSPI to comply with the principle of subsidiarity! See EAPSPI Position Paper 2006.

[585]Point 4.4.1 the Economic and Social Committee's opinion was that "*the detailed content of supplementary pension schemes should be decided at Member State level, including through collective agreements by the social partners. On the European level, rules on conditions for acquisition should therefore focus on principles and provide direction for measures at national level, thereby leaving the social partners sufficient room for collective bargaining.*"Opinion of the European Economic and Social Committee on the Proposal for a Portability Directive SOC/217.

[586] Recital 13 of the amended proposal stated: "*Given that the objectives of the measures envisaged, namely to reduce the obstacles to the exercise of the right of workers to freedom of movement and occupational mobility and to the operation of the internal market, cannot be achieved satisfactorily by the Member States and may therefore, because of the scope of the measures, be achieved more effectively at Community level, the Community may take action in accordance with the subsidiarity principle set out in Article 5 of the Treaty. In*

However, the 2007 amended proposal for a Supplementary Pensions Directive did little to dampen the opposition of the pension lobby. EAPSPI maintained its focus on subsidiarity and proportionality in a second Position Paper published in 2008.[587] It also sustained its pressure in terms of arguments regarding the potential cost for scheme providers that would result from the measures of the amended directive on acquisition.[588]

Subsidiarity has clearly been targeted by the pensions industry as an area in which EU action is vulnerable to the accusation of overstepping into the field of social policy. The Commission has been aware of this, which has led it on numerous occasions to re-iterate that Member States determine the place of supplementary pensions in their pension system.[589]

The Supplementary Pensions Directive and subsidiarity

Occupational pensions constitute a unique legal subject matter with both a social and an economic dimension. Clarifying where the EU has competence is obviously a key pre-condition to secondary legislation. Subsidiarity is also a major institutional constraint.

In the final version of the adopted Supplementary Pensions Directive, Recital 27 provides the justification of compliance with subsidiarity.[590] There is no doubt that narrowing the scope to deal with cross-border occupational mobility made it easier for the Commission. The need for sensitivity to national diversity (including the role of social partners) is also

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accordance with the principle of proportionality referred to in that Article, this Directive, based on an impact assessment conducted with the help of the committee in the area of supplementary pensions (the Pensions Forum), will not go beyond what is necessary to achieve its objectives."

[587] EAPSPI stated: "*Since the new proposal focuses on the acquisition and preservation of supplementary pension rights, EAPSPI suggests to examine, whether these measures still respect the principle of subsidiarity, enshrined in Art. 5 of the EU-Treaty and strengthened by the Protocol no 30 of 2 October 1997, drawn up in the context of the Treaty of Amsterdam*." EAPSPI Position Paper of 4 April 2008 on the proposal of a directive on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights COM(2007) 603 final.

[588] "*Even if the updated proposal will mainly rule the conditions governing acquisition and preservation of supplementary pension rights, EAPSPI underlines the particular situation especially of those pension schemes sponsored exclusively by employers. Therefore, EAPSPI advocates a further discussion only on the basis of the present text. Therefore, EASPSI is against any further modification of this version that might harm the financial basis of supplementary pension schemes or their sponsors.*" EAPSPI Position Paper of 4 April 2008 on the proposal of a directive on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights COM(2007) 603 final p.2.

[589] "*It is up to the member states to decide by what combination of statutory and supplementary schemes the objectives of social protection are to be met*."Communication from the Commission to the Council of 22 July 1991 SEC(91) 1332 final: "Supplementary social security schemes: the role of occupational pension schemes in the social protection of workers and their implications for freedom of movement; See also Recital 9 of the SPD.

[590] *Since the objective of this Directive, namely facilitating the exercise of the right of workers to freedom of movement between Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scope of the action, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve this objective.*

mentioned in Recital 8.[591] It is also noteworthy that the emphasis on social protection concerns the diversity of supplementary schemes, their "*special nature*", the need for the adequacy of legal protection of members and the "*sustainability of existing schemes*".

In terms of compliance with proportionality, Recital 26 reiterates the effect on the choice of a directive as the appropriate instrument.[592] The effect of proportionality on the directive's minimal substantive content is visible in Recital 28.[593] At one stage, there was even a draft provision for extra time for implementation although this was later dropped.[594]

Given the ability for national parliaments to scrutinize compliance with Subsidiarity, the EU legislator has no room for error when enacting controversial proposals such as the Supplementary Pensions Directive.[595] This has made it all the more important to secure the correct legal base for the directive.

B. **The choice of legal basis: Article 46 TFEU vs Article 48 TFEU**

The choice of legal basis of secondary EU legislation is of key importance. First it must reflect EU competence in the substantive field that is being regulated at EU level; secondly it will set out the broader objectives that must be implemented by the secondary legislation as well as the underlying principles that apply. Choosing the legal basis in the field of occupational pensions and the protection of migrant workers has proven a challenging task for the Commission and the EU legislator.

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[591] "Account should be taken of the characteristics and special nature of supplementary pension schemes and the way they differ within and among the Member States. The introduction of new schemes, the sustainability of existing schemes and the expectations and rights of current pension scheme members should be adequately protected."

[592] "*In view of the diverse nature of supplementary pension schemes, the Union should confine itself to establishing the objectives to be achieved in general terms, which means that a Directive is the appropriate legal instrument.*"

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

[594] This was reflected in Ex Recital 27"*In view of the need to take account of the effects of this Directive, in particular on the financial sustainability of supplementary pension schemes, the Member States may avail themselves of an additional period of up to two years in which gradually to implement those provisions which are likely to have effects of this kind.*"

[595] One should point out that the principle of subsidiarity was in the spotlight before the Lisbon Treaty, which reaffirmed its operation and included Protocol (No 2) on the application of the principles of subsidiarity and proportionality. However, at the procedural level, the operation of subsidiarity has not remained still following the Lisbon Treaty, as there is now an enhanced role for national parliaments to scrutinise EU legislation in the context of the legislative procedure. Article 5(3) TFEU provides that "*National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol*." The protocols on the application of the principles of subsidiarity and proportionality provide for the ability of national parliaments to challenge legislative acts on the grounds of infringement of the principle of subsidiarity. see BLANKE.T In in BRUUN, LORCHER & SCHOMANN (Eds), The Lisbon Treaty and Social Europe, Hart (2012).

The new legal basis of the Supplementary Pensions Directive is Article 46 TFEU. This choice marked a change of tack by the Commission, accompanied by a compromise text on the scope of the Directive, limited to free movement between Member States.[596]

Consistency with the Safeguard Directive had been the Commission's reason for choosing Article 42EC (now 48TFEU) up to that point: the rationale for Article 42EC was explained in the Explanatory Memorandum to the proposed Portability Directive.[597]. By deduction, another plausible reason can be found in the need for coherence as to the material scope of the Article 42EC: this approach implicitly recognised non-statutory occupational pensions as nevertheless forming part of social security.[598] Thus, beyond the Commission's approach to the choosing a new legal basis for regulating the protection of migrant workers' occupational pensions, the question at stake was whether in the eyes of the Commission and the EU legislator, non-statutory occupational pensions still formed part of "social security" or should be seen as social protection but not social security.[599]

The Supplementary Pensions Directive has also dropped the reference to Article 94EC (now 115 TFEU). This had been included as the initial purpose of the proposed Portability Directive was to improve occupational mobility in the internal market by including provisions that would harmonise conditions of transferability.[600] From a labour law perspective, the protection of migrant workers' occupational pensions should be considered as the relevant condition for genuine freedom of movement, thus determining the legal basis.

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[596] Changing the legal basis for the directive was a u-turn given that Article 51EEC (now Article 48TFEU (ex 42EC) was the Commission's main choice of legal basis for the Safeguard Directive. Moreover, Article 42EC had been selected as the main legal basis for both the proposed Portability Directive and the amended proposal of 2007 (together with Article 94EC).

[597] "*The proposed legal bases are Articles 42 and 94 of the EC Treaty. Article 42 was already used as the legal basis for Directive 1998/49/EC* (the Safeguard Directive). *Article 94 of the EC Treaty is appropriate in that a genuine improvement in the portability of supplementary pension rights cannot be achieved unless there is an improvement in occupational mobility in general, including within Member States. Furthermore, better general occupational mobility is essential to allow smooth operation of a common market using a flexible labour force unimpeded by the implementation of certain supplementary pension scheme rules, such as those whereby a worker sometimes has to stay with the same employer for a substantial period of time before acquiring rights.*"

[598]Article 42EC (now 48TFEU) is also the legal basis for the Coordination Regulations. Given that the material scope of the Safeguard Directive and the Supplementary Pensions Directive was designed to bridge the gap left by the exclusion of non-statutory pensions from the scope of the Coordination Regulations, the view was that it was necessary to implement Article 42EC in relation to non-statutory pensions.

[599] This might be deemed controversial as it would effectively be interpreting social security as set out in Article 48TFEU in a narrow way. The EU legislator has the freedom to create and amend secondary legislation, including by providing a narrow definition to social security (e.g. as was the case for the material scope of the Coordination Regulations). However, the interpretation of Article 48 TFEU under EU law is the preserve of the ECJ so this issue should arguably be dealt with by the ECJ.

[600] In this context, occupational mobility was mentioned as means to two ends: first as a condition for "*a genuine improvement in the portability of supplementary pension rights.*" Secondly, its aim was "*the smooth operation of a common market using a flexible labour force unimpeded by the implementation of certain supplementary pension scheme rules…*"

The change of legal basis has proven decisive in enabling the adoption of the Supplementary Pensions. Indeed, there is no doubt that this evolution was discussed and reviewed at length by the representatives of the Council and the Commission (a). The relevant justifications for changing the legal basis need to be analysed in terms of its appropriateness to the aims of the Supplementary Pensions Directive (b). One must also take stock of its substantive implications with regards to the principle of aggregation (c).

a. **The review of the legal basis for the Supplementary Pensions Directive.**

In determining the legal basis of the Supplementary Pensions Directive, the main choice was between a general legal basis (Article 45 & 46TFEU) and a specific legal basis (Article 48TFEU). It should be noted that prior to the review, the previous choice of legal bases (Articles 42EC and 94EC (now Articles 48 TFEU and 115 TFEU respectively)) had remained constant throughout the legislative procedure, first in the proposal for a Portability Directive and then the amended proposal of 2007 for a Supplementary Pensions directive.

Another issue was whether the Supplementary Pensions Directive constituted secondary legislation for the "approximation of laws" (i.e. an instrument of harmonisation). The removal of Article 115TFEU (ex 94EC) can be explained by the restricted scope and ambitions of the Supplementary Pensions Directive in terms of substantive content.[601]

The choice of which substantive Treaty article on the free movement of workers to choose was more problematic.

Article 48TFEU represents a specific legal basis dealing with the protection of migrant workers' social security rights. Paragraph 25 of the opinion of the Council's legal service started by referring to the location of Article 48 TFEU (ex 42EC) in Chapter 1 of Title IV of Part Three TFEU on the free movement of workers. Following that logic, Article 48TFEU provides the legal basis for the adoption of such measures in the field of "*social security*" as are necessary to provide freedom of movement for workers.[602]

Article 46 TFEU, is also contained in Chapter 1 of Title IV of Part Three TFEU on the free movement of workers. According to the report of the Council's Legal service, the

[601] By limiting the scope of the Directive to cross-border mobility, it is purely directed at free movement of workers rather than constituting a broader measure affecting the internal market. The Supplementary Pensions Directive does not attempt to harmonise occupational pensions but sets out 'minimum requirements' Arguably, the approximation of laws should not be confused with the removal of obstacles to free movement.

[602] Article 48 TFEU constitutes a legal basis for "*arrangements to secure for employed and self-employed migrant workers and their dependants (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the law of the several countries; (b) payment of benefits to persons resident in the territories of Member States*".

Commission's representative expressed the view that Article 46 TFEU constituted the appropriate legal basis for the proposed Supplementary Pension Rights Directive.[603] Paragraph 40 of the opinion of the Council's legal service states that Article 46TFEU does not specifically concern social security measures, but allows more generally for the adoption, by ordinary legislative procedure, of "*measures required to bring about freedom of movement of workers as defined in Article 45TFEU*". [604]

On 26 November 2012, the Council's Legal Service produced a written opinion to the Working Party on Social Questions, which addressed the legal basis for the amended proposal for a Supplementary Pensions Directive.[605] This revealed a number of different approaches to the choice of legal basis.[606] Question marks and sensitivities remained over the reasons changing the legal basis and whether it was the most appropriate choice.[607]

Above all, the choice of legal basis must be appropriate and coherent under EU law.[608] The merits of both articles in contention for providing the legal basis (namely Article 48TFEU and 46TFEU) are analysed below in terms of their relationship with the objectives and content of the Supplementary Pensions Directive.

[603] The Commission indicated this view in the meeting of the Working Party on Social Questions on 5.11.2012.
[604] Under Article 45 TFEU, the freedom of movement of workers entails the right to accept offers of employment and to "*move freely within the territory of Member States for that purpose*." Hence, Article 46 TFEU provides a possible legal basis for the adoption of a wide range of measures dealing with the free movement of workers, which explains why it can be used for the Supplementary Pensions Directive.
[605] Council of the European Union Opinion of the Legal Service to the Working Party on Social Questions No.16641/12. Cion prop. : 13686/05 – COM (2005) 507 final + REV 1 No. Amd. prop.: 13857/07 – COM (2007) 603 final + REV 1 + COR 1 + REV 1 COR 1 Subject : Amended proposal for a Directive of the European Parliament and of the Council on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights - Legal basis.
[606] *"During the discussions in the Working Party, divergent views were expressed, some delegations favouring Article 46 TFEU (possibly in combination with Article 48 TFEU) as the legal basis, while others supported Article 115 TFEU. In particular, many delegations took the view that those elements of the draft Directive that entailed harmonisation on the internal market (specifically: the provisions governing the pension rights of workers moving within a single Member State) could not be adopted on the basis of Article 46 TFEU.*"
[607]There is no doubt that choosing (and changing) the legal basis for the Supplementary Pensions Directive was a sensitive issue. Indeed, the Inter-institutional file released by the Council on 4 January 2013, which dealt with the question of legal basis was itself labelled "document partially accessible to the public". Consequently, the majority of the document was redacted, leaving mere technicalities for public viewing. Why was most of a document dealing with the legal basis of a directive on occupational pensions be redacted from public view? By not making this document fully transparent, one may criticise the lack of accountability of the EU institutions!
[608]As mentioned by K. Lörcher "*Generally speaking, according to the ECJ's settled case-law, the choice of a legal basis for a measure must rest on objective factors which are amenable to judicial review. Those objective factors include, in particular, the aim and the content of the measure*." See LORCHR in BRUUN, LORCHER & SCHOMANN (Eds), The Lisbon Treaty and Social Europe, Hart (2012) p.176.

b. Which legal basis is appropriate to the *aims* of the Supplementary Pensions Directive?

Article 1 of the Supplementary Pensions Directive states that: "*The aim of this Directive is to facilitate the exercise of the right of workers to freedom of movement between Member States by reducing the obstacles created by certain rules concerning supplementary pension schemes linked to an employment relationship.*"

The connection with Article 48TFEU was based on the association between 'supplementary pension schemes' with social security. The legal position for social security benefits is that the right to free movement entitles a migrant worker first to equal treatment with another worker of the home Member State and secondly to have all of his/her pensionable service in different EU Member States respectively taken into account for the purposes of acquiring, retaining and calculating the overall pension benefit. The approach in treating occupational pensions in the same vein is a social one, namely that the right to free movement entails legal protection of a worker's social protection as a whole (i.e. a worker should not be in an adverse position in occupational pension terms as a result of exercising his or her mobility).

The link with Article 45 and 46 TFEU can be made by reference to the objective of a worker being able to exercise his or her *"free choice of employment"*. Indeed Recital 1 of the Supplementary Pensions Directive refers to the fact that: "*Article 45 TFEU stipulates that the freedom of movement of workers entails the right to accept offers of employment and "to move freely within the territory of Member States for this purpose*". The argument is that free movement is not genuine where obstacles stemming from the rules of an occupational pension scheme might deter a worker from changing employment or punish a worker for being mobile insofar as a migrant worker would lose actual or potential rights under that scheme.

The nuances between the two choices of legal basis are relatively subtle and the aims of the proposed Supplementary Pensions Directive are compatible with both. Ultimately, the key issue is whether non-statutory occupational pensions constitute "*supplementary social security*" as discussed above in Chapter II. The social dimension is arguably present, regardless of the choice of legal basis as it is inherent within the free movement of persons.[609]

[609] Recital 1 of the Supplementary Pensions Directive states that "*The free movement of persons is one of the fundamental freedoms of the Community".* Clearly, Article 48TFEU provides an express connection between free movement and the protection of social security rights: "*the Council, acting in accordance with the procedure referred to in Article 251, shall adopt such measures in the field of social security as are necessary to*

However, for supplementary pension schemes to fall within the scope of Article 42EC, the terms 'social protection' and 'social security' must be considered as broadly interchangeable, which is not so obvious.[610] However, the recognition of Article 45 as the legal basis for removing obstacles affecting a migrant worker's social protection as part of a broader right to free movement should also have the same effect.

There was certainly no argument of incompatibility between the use of Article 48 TFEU as a legal basis and the objective of protecting the occupational pension rights of migrant workers. Indeed, both the ECJ and Advocate General Kokott in the case of *Casteels* have previously acknowledged that Article 48TFEU is a valid legal basis for dealing with non-statutory occupational pensions.

Arguably either article would provide a suitable legal basis to remove obstacles to free movement of workers and both can be interpreted to take into account a worker's social protection. Usually, the specific legal basis would apply before the general legal basis, if it is appropriate. However, it is also important to look beyond the objectives of the proposed legislation: the substantive content of both the Treaty article as well as that of the Directive must have been relevant in determining whether the Supplementary Pensions Directive would tally best with the choice of either Article 45/46TFEU or Article 48 TFEU as legal base.

c. Is the principle of aggregation relevant to occupational pensions?

The Supplementary Pensions Directive sets out 'minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights'. Until the change of legal basis, its connection with Article 48 TFEU related to the acquisition, retention and payment of occupational pensions, which were deemed to constitute social security benefits. For that purpose, Article 48TFEU establishes the principle of aggregation "*for the purpose of acquiring and retaining*

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provide freedom of movement for workers. Moreover, the social dimension was expressed by the recognition of supplementary pensions as part of social protection, which was a key factor in determining Article 42EC as the legal basis for the proposed EU legislation. This is visible in Recital 2, which states that "*The social protection of workers with regard to pensions is guaranteed by statutory social security schemes, together with supplementary pension schemes linked to the employment contract, which are becoming increasingly common in the Member States*." NB/ Recital 2 deleted the words 'social security' and replaced with the words 'pension'.

[610] It is interesting to note the removal of the reference to 'supplementary social security', which had been contained in the proposed Portability Directive, especially given the Commission choice to drop Article 48TFEU (ex 42EC) as a legal base in favour of Article 46TFEU. One might infer that the change of terminology was designed to distance non-statutory occupational pensions from their statutory 'social security' cousins. One might also suggest that the focus on the protection of migrant workers' occupational pensions was more visible through Article 48TFEU insofar as it specifically deals with the social protection dimension of the free movement of workers in general.

the right to benefit and of calculating the amount of benefit". However, the potential relevance of the principle of aggregation in Article 48TFEU to non-statutory occupational pensions proved controversial.

The principle of aggregation is implemented by the Coordination Regulations, which entitles workers to have all periods of pensionable service taken into account as if they had had a unified career. The ECJ has also ruled that the application of the technique of aggregation provided in the Coordination Regulations is limited to the schemes that fall within its scope.[611]. This placed the onus on the EU legislator to find an alternative technique for non-statutory occupational pensions.

Recital 3 of the Supplementary Pensions Directive states that the rules on aggregation in the Coordination Regulations "*do not relate to*" supplementary pension schemes that fall outside their scope.[612] However, there has been no ruling by the ECJ that the ***principle*** of aggregation in Article 48TFEU is not relevant to occupational pensions. On the contrary, the ECJ has interpreted the Treaty to protect civil servants' occupational pensions.[613] It is therefore possible to distinguish between the principle of aggregation and the technique of aggregation as provided in the Coordination Regulations, which implement Article 48TFEU.

When Article 48 TFEU was the chosen legal basis for the Supplementary Pensions Directive, there remained a substantive conundrum for the EU legislator regarding the principle of aggregation.[614] Notwithstanding its discretion, the EU legislator still had a legal duty to try to implement the principle of aggregation so as to comply with Article 48TFEU.[615]

It should be noted that the Safeguard Directive did not deal comprehensively with the acquisition of occupational pension rights (other than those of posted workers) so it is

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[611] Case C-360/97 *Herman Nijhuis* [1999] ECR I-01919.

[612] This is consistent with Recital 4 of the Safeguard Directive, which stated that the rules of aggregation of the Coordination Regulations were "*not appropriate*" to non-statutory supplementary pension schemes that fell outside the scope of the Coordination Regulations.

[613] In *Vougioukas*, the ECJ held that civil servants should not be deprived of the application of the principle of aggregation of their occupational pension rights under the Treaty. Case C-443/93 *Ioannis Vougioukas v. Idryma Koinonikon Asfalisseon* (IKA) [1995] ECR I-4052

[614] Given that the technique of aggregation provided for in the Coordination Regulations was not deemed suitable, what alternative way of implementing the principle of aggregation in relation to occupational pensions could be found? Recital 3 of the 2007 amended proposal for a Supplementary Pensions Directive stated that: "*The Council has wide powers of discretion regarding the choice of measures which are the most appropriate when it comes to achieving the objective of Article 42 of the Treaty*" (now Article 48TFEU). Recital 4 of the Safeguard Directive also mentions the wide discretion of the Council for the purpose of implementing Article 51EEC (now Article 48TFEU).

[615] Indeed, the wording of the Treaty states that the EU legislator "*shall adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self- employed migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries*."

understandable that it did not provide an alternative technique of aggregation. However, the focus of the Supplementary Pensions Directive on the conditions of acquisition and preservation of occupational pension rights provided ample opportunities to ascertain how to comply with the principle of aggregation.

The aggregation of occupational pension rights to avoid a loss of social protection for workers would have been possible in theory. Such an approach could have been implemented in accordance with the principle of subsidiarity.[616] However, it might have proven very challenging to find political agreement, especially given the difficulties encountered by the provisions of the Supplementary Pensions Directive on acquisition. Any socially progressive wording designed to implement the principle of aggregation would probably have been resisted by the pension industry and employers who would have complained about its cost. However, the horizontal social clause mentioned in Chapter III could be interpreted (in line with subsidiarity and proportionality) as requiring EU legislation to balance the need to guarantee workers' social protection with any measures necessary to alleviate costs.[617]

The opinion of the European Economic and Social Committee, which was adopted on 20 April 2006, suggested an alternative wording for Article 4 on acquisition: "*where conditions for acquisition are stipulated, such as minimum age, waiting periods and/or vesting periods, such conditions should be fair and justified on objective (and non-discriminatory) grounds.*" This would have introduced a "fairness test" as well as the requirement of 'objective' justification on any restriction to acquisition of occupational pension rights.[618] This eminently reasonable approach could have been considered a legitimate implementation of the principle of aggregation and would have provided an extra degree of protection to workers' occupational pension rights.

Had Article 48 TFEU remained the chosen legal basis for the proposed Supplementary Pensions Directive, then it would have been appropriate for the principle of aggregation to be included in the secondary legislation if one accepts that the wording of Article 48TFEU constitutes a legal obligation requiring the EU legislator to act notwithstanding its discretion as to the means and extent of implementation (as was visible in

[616] Its broad objective would have an impact on rules for membership, waiting or vesting periods that would start with acquisition of pension rights as the default position. Moreover, it could also leave to Member States to determine how to implement the practical operation of such rules in accordance with their national pension regimes and practices. Workers would in principle benefit in terms of acquisition of pension rights and Member States/occupational schemes would retain flexibility as to how to apply this objective, subject to employers and pension schemes being required to justify the legitimacy and proportionality of any obstacles to acquisition.
[617] See Chapter III on the horizontal social clause in the Treaty and "social protection mainstreaming".
[618] The notion of objective justification is borrowed from the field of discrimination so would again be familiar to employers alike, while affording the flexibility to schemes to insert fair and objective conditions.

the ECJ's ruling in *Vougioukas*, which is discussed further in Chapter VI). There is no doubt that Article 48 TFEU had the potential for causing the EU legislator a controversial and uncomfortable headache over the principle of aggregation.

The alternative legal basis Article 46TFEU, which was subsequently adopted does not provide for the principle of aggregation. It takes a traditional approach of removing obstacles. Article 46TFEU is also characterised by the fact that "*The Council has wide powers of discretion regarding the choice of measures which are the most appropriate when it comes to achieving the objective of Article 46 of TFEU.*" Therefore, its choice as legal basis is not problematic with regard to the content of the Supplementary Pensions Directive as it can be used to protect the position of migrant workers' occupational pensions. However, it potentially offers less protection to workers' acquisition of occupational pension rights given the lack of a guiding principle such as aggregation.

Ultimately, the substantive implications of the choice of legal basis were irrelevant unless the proposed directive was able to be enacted and thus become part of EU secondary legislation. This hinged upon the procedural requirements surrounding the conditions of adoption of the directive, which were also determined by the choice of legal basis.

C. **Voting requirements and the choice of legislative procedure**

The voting requirements in the Council were for a long time a major stumbling block, which resulted in legislative paralysis in the field of migrant workers' occupational pensions. The key procedural factor that made it possible to adopt the Supplementary Pensions Directive was the move from unanimity to qualified majority voting. This stemmed from the change of legal base from Article 48TFEU (and 115TFEU) to Article 46 TFEU. In addition to the substantive reasons for this change (as discussed above), it is possible that the corresponding voting requirements also influenced the choice of legal basis. In particular, the evolution of voting requirements that took place as a result of the Lisbon Treaty facilitated the adoption of the Supplementary Pensions Directive.

a. **Before Lisbon: Articles 42EC, 94EC and co-decision**

As mentioned above, the initial legal bases for the proposed Portability Directive were Articles 42 and 94 EC. It should be pointed out that the initial proposal of October 2005 preceded the Lisbon Treaty by 2 years. In terms of the choice of legislative procedure, the European Parliament was fully involved from the outset under the co-decision procedure

(now the ordinary procedure) required by then Article 42 EC: the European Parliament adopted its first-reading opinion in June 2007.[619]

Before the Lisbon Treaty, Article 42 EC (ex 51EEC) contained a requirement of unanimity in the Council, which was consistent with the general voting requirement for matters concerning social security under Article 137 (2) EC (now Article 153(2) TFEU). Moreover, Article 94EC also required unanimity among the Member States voting in the Council. However, throughout the first three years of the legislative process, the Council never managed to reach unanimity as one or two Member States constantly opposed the proposal in its previous form. The difficulty of achieving consensus in the field of social security was not a new problem. Indeed, less than a year earlier, the adoption of the new Coordination Regulation 883/2004 replacing 1408/71 had also proved an extremely difficult although not impossible task. This prompted a review of the voting procedures in this field.[620]

b. After Lisbon: from Articles 48 and 115 TFEU to Article 46 TFEU

The 2007 amended proposal of the Supplementary Pensions Directive had retained Article 42EC and Article 94EC as its legal bases. However, both the validity of this combination as well as its corresponding voting requirements were affected by the Lisbon Treaty, which came into force in 2009. As a result of the Lisbon Treaty, Article 48 TFEU (ex Article 42 EC) now provides for the ordinary legislative procedure, with qualified majority in the Council on measures concerning the free movement of workers and the field of social security.[621] This created a mis-match of the voting conditions required by the legal bases for the proposed directive as Article 115 TFEU (ex Article 94 EC) still provides for unanimity. For the Commission, this resulted in a "contradiction" between the legal bases.[622]

However, the move from unanimous voting to qualified majority in the Council was not absolute. With regards to the social security of migrant workers, the Lisbon IGC had added a new clause that restricted qualified majority voting if fundamental aspects of a Member State's social security system would be affected.[623] The above procedure is often

[619] The fact that Article 94 EC only provided for consultation of the European Parliament made no difference.
[620] In the Convention on the Future of Europe, which was tasked with preparing the draft Constitutional Treaty (that was subsequently rejected by France and Netherlands), "attempts to reduce unanimity requirements in order to stimulate the functioning of the legislative machinery on social policy by excluding vetoes were unsuccessful" (note the amendment proposed by Emilio Gabaglio, General Secretary of the ETUC)
[621] (CIG 86/04 (25 June 2004).
[622] See D. GHAILANI, I. GUARDIANCICH, D. NATALI, M. FERRERA, M. JESSOULA, Scope of coordination system in the pension field, European Social Observatory, 15 September 2011, p.91.
[623] "Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or

referred to as the "emergency brake" mechanism. According to some experts *"a new Directive based on the new article 48 TFEU requiring a qualified majority might have more chances to be adopted."*[624] However, the "emergency brake" mechanism would have been seen by the Commission as a 'sword of Damocles" hanging over the Supplementary Pensions Directive. The risk would have been that some Member States might have used such a veto.

The Commission's response was a change of legal basis in favour of Article 46TFEU, which provides for the ordinary legislative procedure. The impact was virtually immediate as it resulted in a negotiated compromise that led to an agreement by the Council in June 2013. This also addressed the substantive issues raised by the Supplementary Pensions Directive that had hitherto been a source of disagreement and tension. There is no doubt that the requirement of unanimity was a huge cause of delay and a contributing factor towards the minimum requirements approach of the Directive, which will be addressed in Chapter V.

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would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:
(a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or
(b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted."

[624] See Interviews by the Observatoire Social Europeen in D. GHAILANI, I. GUARDIANCICH, D. NATALI, M. FERRERA, M. JESSOULA, Scope of coordination system in the pension field, European Social Observatory, 15 September 2011, p.91.

Conclusive remarks to Chapter IV

The distinction between statutory/non-statutory occupational pensions has had a profound effect on the scope of EU law on supplementary pensions and free movement of workers.

The criterion of the *statutory* source (of pensions) that is used to determine the material scope of the Coordination Regulations has the advantage of offering a large degree of legal certainty and also provides a means of overcoming the complexity and diversity of national pension systems. However, it disregards the nature of occupational pension schemes as a potentially relevant factor in determining the material scope of social security. Indeed, it fails to acknowledge the connection of occupational schemes with work/employment. Moreover, it overrides considerations with regards to the mechanisms used to provide occupational pensions. It does not take into account the type of benefits provided. It also ignores the role played by social partners through social dialogue and collective agreements. Finally, it has the effect of excluding a number of occupational pension schemes whose purpose and enforceability would otherwise indicate that they are akin to social security, relying on Member States to bridge the regulatory gap by making a declaration. It is therefore up to schemes whose members would benefit from the Coordination Regulations to put pressure on their governments to use of this option.

The focus by the EU legislator on the statutory source of pensions means that the distinction between schemes is a technical one. This may result in some asymmetries that would justify a purposive approach to protection of occupational pensions under EU law based on recognition of their role as a component of social protection. The ECJ's approach in *Vaassen-Göbbels* [625] did take account of the objectives and binding nature of relevant schemes. Had it been retained, such logic could have been extended to a number of occupational pension schemes. Instead, the instrumental distinction between statutory and non-statutory occupational pensions has been enshrined under the Coordination Regulations and more broadly in the field of EU law on free movement of workers and social security. It has arguably had negative effects on the treatment of non-statutory occupational pensions by contributing to the regulatory gap in this field. Moreover, the difference of approach between the ECJ's and the EU legislator fizzled out rapidly, on grounds of the EU legislator's democratic legitimacy. Indeed, this restriction of the material scope of the Coordination

[625] Case 61/65 *G. Vaassen-Göbbels (a widow) v Management of the Beambtenfondsvoor het Mijnbedrijf* [1966] ECR 00261.

regime was acknowledged in *Commission v France* where the ECJ held that the Coordination Regulations did not apply to non-statutory occupational pensions. [626]

One may point to a degree of 'social' incoherence as a result of the legal criteria used to determine the scope of the coordination regulations. Indeed, there is a lack of consistency with the social protection purpose of occupational pensions compounded by the failure to enact EU legislation offering equivalent levels of protection to non-statutory occupational pensions. Above all, the choice to exclude non-statutory occupational pensions has resulted in two different regimes (and levels) of legal protection for migrant workers.

The effects of the regulatory gap

The regulatory gap affecting migrant workers' non-statutory occupational pensions lasted forty years.[627] Therefore positive integration on freedom of movement was ***deficient*** for migrant workers whose non-statutory occupational pensions made up a large part of their social protection.[628] One effect has been an ***historic disparity*** of legal protection, (which has hinged upon the source of the pension at stake): there has not been a level playing field under EU law on free movement between workers migrating between different Member States. Indeed, the social protection of migrant workers whose pension rights (both past and future) stems mainly from statutory schemes has been better protected under EU law than the social protection of migrant workers who derived the bulk of their social protection from non-statutory occupational pension schemes. This may not constitute discrimination on the basis of nationality but it is nevertheless a social deficit under EU law. Moreover, another related effect is that some migrant workers will have either suffered a ***loss of social protection*** as a result or exercising their mobility or will have withdrawn from the opportunity to move between Member States.

The fragmented and incremental approach of EU secondary legislation

The reality of the obstacles to the free movement of workers that relate to their non-statutory occupational pensions has led to the need to bridge the regulatory gap in this field.

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[626] Case C35/97 *Commission v France* [1998] ECR I – 5325, paras 34-35.

[627] I.e. between 1958 (when statutory social security pensions were first dealt with by the EEC) and 1998 (when the Safeguard Directive was adopted). Moreover 27 years elapsed between the Coordination Regulation 1408/71 and the adoption of the Safeguard Directive in 1998.

[628] Given the total absence throughout that period of any EU secondary legislation protecting migrant workers' non-statutory occupational pensions, a social deficit thus characterized EU law on free movement insofar as migrant workers were not afforded the legal rights necessary to ensure their social protection was not adversely affected by exercising their right to freedom of movement.

The Commission has played an important role in identifying both the problems and the approaches to deal with them, including the need for secondary legislation. Its approach can be described as fragmented insofar and incremental for the following reasons. First it has taken two approaches (one social and one economic) to deal with occupational pensions with a view to increasing worker mobility and the creation of an internal market in the field of supplementary pensions. The social 'worker oriented' approach took the form of the Safeguard Directive and more recently the Supplementary Pensions Directive, which have been incremental in terms of their substantive content. The economic 'internal market' approach resulted in the IORP directive and the subsequent efforts taken to build on this. Both approaches can be seen as complimentary in the context of the Commission's holistic approach to pensions. The Commission has largely played its traditional role as the source of initiative for EU legislation. However, it has also provided a great deal of impetus for the regulatory gap in this field to be addressed, through numerous policy documents (e.g. Green Papers and White Papers) as well as through its work as a negotiator behind the scenes.

Nevertheless, this did not prevent there being legislative paralysis due to vested interests from the pensions and business lobby as well as political opposition by Member States in the Council as well as by MEPs. Breaking the political deadlock entailed legislative trade-off between both the social and economic proposals for EU legislation (namely the Supplementary Pensions Directive and the review of the IORP Directive).

The institutional constraints affecting EU secondary legislation

A significant source of the regulatory gap and to a large extent both legislative paralysis and the subsequent breakthrough can be found in the institutional constraints affecting the adoption of EU secondary legislation.

The issue of EU competence has been controversial and illustrated the difficulties of adopting secondary legislation in the field of free movement that has social protection ramifications. It has triggered a debate between the use of social policy or free movement of workers in this field. It seems likely that for the foreseeable future, EU competence for protecting migrant workers' occupational pensions will remain based on the Treaty provisions on free movement. However, the social dimension of the free movement of

workers, (which is supported by the social rationale mentioned in Chapter III) has not always been accepted by the representatives of pension funds and the business lobby. [629]

Arguably, free movement entails EU competence for the removal of obstacles affecting a migrant worker's dignity and/or rights to social protection. From a labour law perspective and given the need for a social rationale, the EU can exercise its competence under either Article 45 or Article 48TFEU in such a way as to reflect the social values contained in Article 2TEU and to achieve the objectives embodied in Article 3(3) TEU. The need for genuine free movement to take into account the occupational pension rights of migrant workers is ultimately compatible with Member States' competence to determine the nature and levels of their social protection.[630]

However, the shared nature of competence as regards free movement has led to additional institutional and procedural issues.[631] Notwithstanding the internal market rationale for the free movement of workers, the exercise of EU competence has been controversial in terms of both the principle of subsidiarity and the choice of legal base.

The influence of the principle of subsidiarity can largely be seen in the substantive impact of the Supplementary Pensions Directive, which in particular is visible in its material scope.[632] The fact that the Supplementary Pensions Directive is limited to cross-border occupational mobility means that Member States remain competent for all matters of purely internal occupational mobility.[633] However, Member States are not able to exercise their

[629]As seen above, the provisions of the proposed Supplementary Pensions Directive that relate to the acquisition of occupational pension rights have been criticized by certain representatives of the business community. Both Business Europe and the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP) have criticised the proposed measures. Their argument is either that such measures stray into the exclusive competence of the Member States or that they do not comply with the principle of subsidiarity: CEEP 2006, Business Europe 2007).

[630] On the conceptions of the EU's social competences, Lörcher concludes that despite their role as "*the foundation of the European social model*", social competences are still not accepted as superior to economic competences. in BRUUN, LORCHER & SCHOMANN (Eds), The Lisbon Treaty and Social Europe, Hart (2012) p167 The default target is a conception of an equal footing with economic competences whereby "*EU social competences are conceived of as aiming to balance or combat the negative social consequences of market integration*" although Lörcher states that "*in practice, this balance is far from being achieved.*"

[631] In the Convention on the preparation of the failed Constitutional Treaty, it had been envisaged that "the Union shall have exclusive competence to ensure the free movement of persons, goods, services and capital, and establish competition rules, within the internal market…" (CONV 528/93 – (6 February 2003). However, this approach was rejected and limited to competition. Such an approach would certainly have simplified the procedural requirements for EU legislation on the free movement of workers and their occupational pensions because it would have removed subsidiarity from the equation.

[632] In light of Article 2(2) TFEU, Member States are pre-empted from exercising their competence in relation to the areas regulated by the Supplementary Pensions Directive although they remain competent in all areas not addressed by any the Directive **"***Member States shall exercise their competence to the extent that the Union has decided to cease exercising its competence*."

[633] Splitting internal and cross-border mobility for the purpose of EU legislation was initially seen as impractical by the Commission. Yet it is hoped that this should not result in too great a disparity between cross-border mobility and internal occupational mobility, as illustrated by the second addendum dated 17 June to the

competence to treat internal mobility more favourably than cross-border mobility where this would result in discrimination on grounds of nationality.

Moreover, the principle of subsidiarity is largely responsible for watering down the ambitions of the Supplementary Pensions Directive, which sets out minimum requirements in relation to the protection of migrant workers' occupational pensions.

An example of the reduced ambition of the directive can be found in the shift from the focus on 'portability' to dealing with the acquisition and the preservation of supplementary pension rights. There is no doubt that the proposed Portability Directive of 2005 was highly scrutinised both in the Council and in the European Parliament in terms of compliance with the principle of subsidiarity, which contributed to its early failure as a legislative proposal.[634] Moreover, it continued to inhibit progress of amended proposal of 2007 and has thus been described as an "*institutional objection*", which has proved "*a major limit to EU action*" in this field.[635] However, it does not preclude regulation by the Social Partners in the Member States insofar as it is either equivalent or goes further in the protection of workers (and is compatible with the Treaty).[636] Above all, this non-regression provision reflects a social use of the principle of subsidiarity insofar as the Supplementary Directive provides a floor of protection, not a ceiling.[637]

As has been mentioned in this Chapter, the parties that have invoked the principle of subsidiarity in this context were not always doing so for the purpose of safeguarding more protective rights for workers under national pension laws. In fact, the business lobby and

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Council's report, which contains a statement by the Council and the Commission: "*This Directive does not provide for the acquisition and preservation of supplementary pension rights of workers moving within a single Member State. However, Member States are encouraged 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*." COUNCIL OF THE EUROPEAN UNION Brussels, 17 June 2013 Interinstitutional File: 2005/0214 (COD) 10890/13 ADD 2 SOC 463 ECOFIN 543 CODEC 1444 Addendum to Report from the Permanent Representatives Committee (Part I) to the Council (EPSCO).

[634] MABBETT.D "Supplementary Pensions between Social Policy and Social Regulation", West European Politics (2009), Volume 32, No 4, pp. 774-791.

[635] D. GHAILANI, I. GUARDIANCICH, D. NATALI, M. FERRERA, M. JESSOULA, Scope of coordination system in the pension field, European Social Observatory, 15 September 2011, p.91.

[636] This would be consistent with the approach in the field of social policy under Article 153(4) TFEU (ex 137(4) EC even though competence for the Supplementary Pensions Directive itself derives from the internal market Treaty provisions. A non-regression clause was thus included in Article 8 of the proposed Portability Directive and was followed by Article 7 of the Supplementary Pensions Directive. "Minimum requirements — non-regression, which reads as follows: 1. *The Member States may adopt or maintain provisions on the acquisition of supplementary pension rights for workers, on the preservation of supplementary pension rights of outgoing workers and on active scheme members' and deferred beneficiaries' right to information which are more favourable than those set out in this Directive.*

2. The implementation of this Directive may not under any circumstances be used as a reason for reducing existing rights for the acquisition and preservation of supplementary pensions and scheme members' and beneficiaries' right to information in the Member States."

[637] This is a welcome clarification in this field, especially given the controversy that arose over the nature of the protection afforded by the Posted Workers Directive in the infamous *Laval* case.

pension fund industry was at the forefront of those who claimed that the proposed EU legislation overstepped the mark in terms of the EU's exercise of its competence in this field. Subsidiarity and proportionality were partly invoked as a means of seeking to avoid extra costs for occupational pension schemes and employers. Their argument was an extremely clever one based on the threat of a reduction of occupational pension coverage. This would clearly be an undesirable result that would be incompatible with the spirit of the objectives targeted by the Supplementary Pensions Directive. As well as being used as a procedural spanner in the wheels, blocking the directive's adoption, it is clear that the principles of subsidiarity thus had a major influence on the objectives, scope and content of the Supplementary Pensions Directive, as will be mentioned below. The principle of subsidiarity thus constitutes a democratic safeguard that has the potential to be used and/or abused by business representatives with vested interests in the status quo who are keen to avoid additional regulation. It is therefore arguable that the application of the principle of subsidiarity has limited European social integration in relation to occupational pensions.

Any intervention by EU law in the field of pensions is likely to have an impact on the operation of pension systems at a national level. In particular, it may have ramifications at an individual, corporate and commercial level. This makes pensions an area 'par excellence' in which the balancing exercise required by subsidiarity must be applied by EU legislation. However, such a balancing act would in theory be achieved by taking a social bargaining approach towards subsidiarity: in A Manifesto for Social Europe, the relationship between '*Subsidiarity'* and *'Solidarity'* was referred to as *"an Active Dynamic of the European Union*".[638] A conclusion of the above Manifesto was that the European legal framework must guarantee a primary role for the social partners, at EU and national level. Recognition of the role of social partners can be seen in Recital 8 of the Supplementary Pensions Directive: "*This Directive should also take particular account of the role of the social partners in designing and implementing supplementary pension schemes*." However, the role of social partners in relation to EU law on occupational pensions has been largely ineffective given the lack of consensus. The Supplementary Pensions Directive acknowledges the possibility for social partners to provide *more favourable* protection of workers' occupational pensions.

Article 45/46TFEU and Article 48TFEU both contain a prohibition of discrimination based on nationality. Ultimately however, the purpose of the Supplementary Pensions

[638]A key argument was that the principle of the attribution of competence was not on its own sufficient to build a "Social Europe". However, one may certainly state that the constitutional requirements such as the principle of subsidiarity may invoke national sovereignty and specificity as a means of thwarting social legislation at EU level even though this is designed to benefit workers.

Directive is to go beyond discrimination in order to achieve genuine free movement for workers, which includes protecting their occupational pensions insofar as these form part of their social protection. Arguably, a conceptual factor for choosing between Article 48TFEU and Article 46 TFEU would be whether occupational pensions are deemed as falling within the notion of social security.[639] The key difference between Article 48TFEU and Article 46TFEU is the principle of aggregation. One may surmise that one of the substantive reasons why the Commission chose to push for Article 46TFEU as an alternative legal basis to Article 48TFEU was because of the content of the Supplementary Pensions Directive did not sit comfortably with the principle of aggregation, for which there was no political will. The Commission thus opted for the easier and safer option. Given the procedural difficulties previously encountered by the proposed legislation, this represented a pragmatic approach.

Last but not least, the voting requirements linked to the original choice of legal basis (which prior to the Lisbon Treaty entailed unanimity in the Council) almost put at risk the very existence, delayed the progress, and clearly affected the form and content of legislation.

[639] One might go back to the intentions of those who drafted the Treaty to look for whether the principle of aggregation was designed only to affect statutory social security. In the absence of any such an indication and given the number of statements to the effect that 'supplementary' occupational pensions are a form of 'supplementary social security', there was a strong case for Article 48TFEU to remain the legal basis for the Supplementary Pensions Directive.

CHAPTER V. POSITIVE INTEGRATION UNDER EU LAW

Section 1. The strategic platform for positive integration under EU law

A. The objectives of EU secondary legislation

B. The scope of EU secondary legislation

Section 2. The substantive deadlock of EU secondary legislation

A. The acquisition of occupational pension rights

B. The treatment of dormant rights

C. Information requirements

D. Non-regression

E. Implementation and reporting

Conclusive remarks

Introductory remarks

EU secondary legislation on occupational pensions and free movement of workers has evolved slowly in substantive (as well as procedural) terms. Indeed, the regulatory gap between the treatment of occupational pensions and the broader field of social security under EU law on free movement has not yet been bridged.[640] Consequently, non-statutory occupational pensions have remained an on-going problem in an area of law that is not mature.[641] Despite the shortage of EU legislation in this field, the Commission has compiled a significant amount of policy documents.[642]

EU legislation on occupational pensions and the free movement of workers is of a technical nature and its impact remains limited to two instruments: the Safeguard Directive and the Supplementary Pensions Directive. Montejo Puig observed "*the watering-down of the proposals*" leading to the Safeguard Directive, following tough responses by some Member States."[643] Some abandoned aspects of the Safeguard Directive were reflected in drafts of the

[640] Mavridis viewed the risk of losing supplementary pension rights for workers who change employment within the EU as a significant shortfall in EU law: "une lacune importante existe dans la législation européenne, dans la mesure ou les personnes qui changent d'emploi au sein de l'Union risquent de perdre une partie ou la totalité de leurs droits." See P. MAVRIDIS (Op.cit) p. 29.

[641] Cornelissen refers to the "*very modest Community legislation protecting people moving within the Union in the field of non-statutory supplementary social security schemes*".R. CORNELISSEN, "50 years of European Social Security Coordination", European Journal of Social security, Volume II (2009), Nos. 1-2.

[642] Among the main documents, one can find: the Commission's Green Paper of 1997: "*Supplementary Pensions in the Single Market*", the more recent Green Paper of 2010 and the ensuing Commission White Paper of 2012: "*An Agenda for Adequate, Safe and Sustainable Pensions*".

[643] In terms of its substantive measures, the Safeguard Directive only contains four articles: Article 4 'Equality of treatment as regards preservation of pension rights', Article 5 'Cross border payments', Article 6 'Contributions to supplementary pension schemes by and on behalf of posted workers' and Article 7 'Information to scheme members.' Montejo's hope and expectation was that *"some of the provisions which have*

proposed Portability Directive but there has been a repeat of the watering down-process, which is unsurprising as the legislative procedure for the Supplementary Pensions Directive took over 8 years.

The Commission's initial proposal for a Portability Directive of 2005 reflected the drive for greater positive integration in this field.[644] However, much of its content proved too controversial (as discussed below) and resulted in stalemate.[645] The evolution of the draft legislation following the amendments of 2007 renamed the proposed directive and redefined its objectives.[646] The treatment of non-statutory occupational pensions under EU law on the free movement of workers has highlighted a number of regulatory gaps given the scope of the EU system of coordination in the pension field.[647] Expert analysis has addressed issues such as feasibility and the impact of secondary EU legislation on occupational pensions.[648]

The Supplementary Pensions Directive adopted in 2014 marks a new stage in the development of positive integration in the field of the free movement of workers and their occupational pensions. The difficulties of establishing a strategic platform for positive integration under EU law are analysed in Section 1: the objectives of secondary legislation in this field have been at the heart of the debate (A). There has also been an evolution in the scope (geographic scope, material scope and effects in time) of the legislation (B).

The evolution of the legal protection of migrant workers' occupational pensions under EU positive law is analysed in Section 2: the substantive content of the Supplementary Pensions Directive has also been modified in terms of the wording, purpose and effect of its main provisions.

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been left aside will be subsequently recovered so as to strengthen what is now an innocuous directive. See MONTEJO PUIG DE LA BELLACASA.B, Free movement of workers and supplementary pension schemes. The reform of welfare and its adaptation to the European Community framework." LLM Thesis, supervised by Professor Sciarra, EUI Law Department 1997/1998.

[644] KALOGEROPOULOU.K (2006) Improving the Portability of Supplementary Pension Rights, Journal of Social Welfare and Family Law, 28:1, 95-104.

[645] MARTIN. P, "Portabilité des retraites et mobilité salariale" in Occupational pension schemes in Europe: European law and comparative law. BRUYLANT 2007.

[646] OLIVER.E (2009) From portability to acquisition and preservation: the challenge of legislating in the area of supplementary pensions, Journal of Social Welfare and Family Law, 31:2, 173-183, DOI: 10.1080/09649060903043547.

[647] See the 2011 report led by GHAILANI.D for the European Social Observatory.

[648] Expert websites such as IPE provide updates on pension issues from a legal/economic perspective. National governments have also studied the impact of the proposals for a Supplementary Pension Rights Directive. Professional organisations have also responded to consultation on the proposed legislation in this field and/or produced "position papers". Some have issued technical advice on issues like "transferability". Notwithstanding the quality of some research, the positions taken are often written by those (including technical experts) who either represent or advise the pensions industry. Trade Unions such as ETUC and worker oriented organisations such as Eurofound have also produced articles and opinions.

SECTION 1. The strategic platform for positive integration under EU law

New normative content in the form of positive integration is necessary to bridge the regulatory gap in the field of free movement of workers and their occupational pensions. It is also dependent upon the objectives and scope of EU secondary legislation. Yet is the choice of strategic platform consistent with the social protection rationale for protecting migrant workers? The evolution of the **objectives** and **scope** of secondary EU legislation from the Safeguard Directive to the Supplementary Pensions Directive is analysed below.

A. The objectives of EU secondary legislation in this field

The objectives of EU secondary legislation in this field have evolved from "safeguarding existing occupational pension rights" through to their unsuccessful "portability of pensions", and finally "furthering worker mobility" between Member States (by improving the acquisition and preservation rights of members of supplementary pension schemes).

Safeguarding existing occupational pension rights

The purpose of Safeguard Directive is "*safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community.*" Article 1 bases its objective on the causal connection between the legal protection of workers' rights under supplementary pensions and the removal of obstacles to free movement of workers.[649] For Montejo Puig "*the protection of workers acquires, in turn, an instrumental character to achieve free movement and is not regarded as an objective in and of itself.*" [650]Article 1 does not reflect the Commission's previous proposal, in which the aim was worded to ensure that "*appropriate protection is given to rights*."[651]

The abandoned objective of "portability" of supplementary pension rights

Facilitating the free movement of workers by protecting the portability of their occupational pension rights was the goal of the initial proposal for a Portability Directive.[652]

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

[650] B. MONTEJO PUIG DE LA BELLACASA, (op.cit) p. 125.

[651] In the first proposal, Article 1 reiterated the wording of Article 51 EEC (now Article 48TFEU) but followed the role of EU directives, which left to Member States the means of achieving its target.

[652] Article 1 of the'Proposal for a directive of the European Parliament and of the Council on improving the portability of supplementary pension rights', aimed "*to facilitate the exercise of the right of workers to freedom*

Its explanatory memorandum referred to **'*portability*'** as "*the possibility for an outgoing worker to acquire and retain supplementary pension rights.*" This extension of its usual meaning led to criticism for being confusing.

The social dimension of occupational pensions was recognised by Recital 2, which re-iterated the role of occupational pension schemes in social protection.[653] Moreover Recital 6 stated that the desired outcome of protecting workers' occupational pension rights under the proposed Portability Directive was "*so that workers, when they exercise their right to freedom of movement or move within a Member State, can receive a satisfactory pension at the end of their career*." A satisfactory pension should provide dignity in retirement and preferably a decent level of replacement income. However, the proposed directive's objective focused on the removal of obstacles to the free movement of workers. Instead of adopting a social protection rationale for the protection of migrant workers, the proposed Portability Directive chose a technical route by regulating scheme rules that are obstacles to the acquisition of occupational pension rights.[654]

The tone of the proposed Portability Directive was that of an 'internal market' instrument rather than a labour law instrument with social objectives. The protection of workers was considered as a social means to an economic end, in a similar vein to the Safeguard Directive. Although its Explanatory Memorandum referred to the revised Lisbon strategy[655] and the Social Agenda[656], the Commission emphasised "*how important mobility is to improving the adaptability of workers and the business sector and increasing labour market flexibility*.[657] Recognising that the rules of supplementary pension schemes can be the cause of obstacles to free movement saw Article 1 adopt a technical approach, which has shaped the method of positive integration in this field.

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of movement and of the right to occupational mobility within the same Member State, by reducing the obstacles created by certain rules governing supplementary pension schemes in the Member States."

[653] "*The social protection of workers with regard to pensions is guaranteed by statutory social security schemes, together with supplementary social security schemes linked to the employment contract, which are becoming increasingly common in the Member States*."

[654] Recital 6 thus stated "*In order to ensure that the conditions for acquiring supplementary pension rights do not undermine the exercise of the right of workers to freedom of movement within the European Union, limits must be established concerning the conditions governing the acquisition of such rights…"*

[655] Working together for growth and jobs. A new start for the Lisbon Strategy', COM(2005) 24, Brussels, 2 February 2005.

[656] Commission Communication on the Social Agenda, COM(2005) 33 final, Brussels, 9 February 2005

[657] "*Considering the increasing importance of supplementary pension schemes to cover the risks of old age, it is thus particularly important to reduce the obstacles to mobility which stem from these schemes."*Explanatory memorandum to the Proposal for a directive of the European Parliament and of the Council on improving the portability of supplementary pension rights presented by the Commission, Brussels, 20.10.2005 COM(2005) 507 final, 2005/0214 (COD).

The objective of "Worker mobility" under the 2007 amended proposal

In 2007, the Commission's amended proposal for a directive deleted the reference to 'Portability' of supplementary pensions' and shifted its focus to 'enhancing worker mobility'.[658] This marked a change in the tone and substance of the directive, which was marked by the removal of the provision on pension transfers (ex Article 6). The ambition of the directive was reshaped through the notion of 'minimum requirements', as reflected in the amended title. Indeed, there was no real attempt at harmonisation.

The objective of mobility did not make a distinction between cross border mobility and internal mobility as this had originally been deemed impractical by the Commission.[659] However, the reference to "*the right to occupational mobility within the same Member State*" was subsequently deleted, arguably for reasons of competence and because it does not exist as a separate right under EU law.[660] It was also perceived that regulating the free movement of workers might favour cross-border mobility over purely national mobility. Such a possible outcome had been opposed by the High Level Panel.[661] It is questionable whether a favourable impact for cross-border workers would tread on the toes of Member States and social partners in their management of national pension systems? EU law on free movement requires legal protection of migrant workers' occupational pensions as is the case with social security pensions under the Coordination Regulations.[662] A privileged position for migrant workers may not be an automatic consequence of legal protection under EU law but it could encourage and protect workers' rights to free movement, regardless of scaremongering.[663]

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[658] The directive's new title was: 'Amended proposal for Directive of the European Parliament and of the Council on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights.'

[659] See the Commission's Explanatory Memorandum. In this light, the 2007 draft of Article 1 thus stated: "*The aim of this Directive is to facilitate the exercise of the right of workers to freedom of movement and to facilitate workers' occupational mobility, by reducing the obstacles created by certain rules concerning supplementary pension schemes linked to an employment relationship*."

[660] An early draft of Article 1 tried to extend its objective to facilitating the exercise of "*the right to occupational mobility within the same Member State*". However, the attempt to enhance worker mobility beyond cross-border mobility (i.e. to include internal situations) hit the wall of subsidiarity, as it was deemed an area that should be left to the competence of Member States.

[661] Page 105 of the report of the High level panel stated that "*Community measures should, so far as possible, not place the citizen exercising rights of free movement in a privileged position as it would put member states under pressure to secure similar guarantees by statutory intervention in the national arena which would conflict with the voluntary, contractual nature of existing schemes and might lead to the undesirable result of a reduction in coverage and rights for employees*."

[662] Indeed, the Coordination regime enables migrant workers to have their pensions rights aggregated as if they had enjoyed a unified career or as a simple sum of pension benefits, whichever is more favourable. Though the Supplementary Directive states that such rules are not be adapted to some supplementary occupational pensions, the stakes of social protection for migrant workers and their right of free movement in the internal market remains the same.

[663] The argument that EU social security coordination and the cost of aggregating periods of pensionable service will lead to national reforms offering less generous social security benefits for all workers is flawed. In reality,

Dealing with occupational pensions and free movement of workers without including purely national situations can be explained by reference to EU law on competence and reverse discrimination.[664] The internal market has traditionally been at the forefront of EU legislative activity whereas EU interventions in social policy have been more modest. Hence, the legislative proposal has focused its attention on migrant workers' right to free movement. The overarching nature of free movement under the Treaty justifies an objective for the directive that is both social and economic. Indeed, the interplay between the proposed directive's economic priorities (mobility, flexibility, effectiveness) and its social considerations (sufficient pension rights) was acknowledged in the Commission's explanatory memorandum to the proposed directive.[665] Nevertheless, the Commission's focus on "*potential barriers to worker mobility*" suggested it was more concerned with the lack of mobility than the negative effects on workers' social protection.[666] The articulation between economic and social objectives shows priority given to the former even though the role of 'supplementary pensions' within social protection systems was acknowledged by the Commission in its Explanatory memorandum to the 2007 draft proposal of the Supplementary Pensions Directive and in Recital 2 of that proposal.[667] However, the link between occupational pensions and "*supplementary social security*" was deleted. The approach to defining the proposed directive's objective was predominantly economic. Migrant workers' social protection through occupational pensions was distinguished from social security and thus seen as a social means to free movement's economic ends.

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demographic and economic pressures affect statutory as well as occupational pensions. Their impact is more significant than a directive offering minimum protection to migrant workers.

[664] EU legislative competence must be exercised in accordance with the principle of subsidiarity. Arguably, it is not the EU's business to regulate the effects of supplementary pension scheme rules on national mobility as this would be perceived as an attempt for EU harmonisation beyond free movement. Secondly, under EU law Member States are allowed to treat their own nationals less favourably in purely national situations if they choose to do so even though this would not be in the interest of their own workers in terms of social protection. In theory, Member States should want national mobility as much as cross-border mobility so would seek to bring national situations up to the same level of protection that would be afforded in cross-border situations.

[665] "*It is thus urgent to ensure that the rules governing the operation of these schemes do not hamper the freedom of movement of workers across Member States or mobility within any Member State, therefore reducing the opportunities for mobile workers to build up sufficient pension rights by the end of their careers. Failure to achieve this will reduce the flexibility and effectiveness of the labour market.*"

[666] "*Even if there are many factors which can determine the choice of any individual to be more mobile, the possibility of losing supplementary pension rights may make an individual think seriously about changing jobs.*"

[667] "*The social protection of workers with regard to pensions is guaranteed by statutory social security schemes, together with supplementary pension schemes linked to the employment contract, which are becoming increasingly common in the Member States*."

The Supplementary Pensions Directive: Worker mobility and free movement

The Supplementary Pensions Directive presents a social deficit as it fails to include a social protection objective as part of the free movement of workers. The Council's press release of 21 June 2013, acknowledged the directive's focus on protecting occupational pensions.[668] However, it lacks a clear social ambition to enhance the protection under EU law of migrant workers' occupational pensions for its own sake. Its main goal has been to improve cross-border worker mobility as shown in Recital 5 of the Supplementary Pensions Directive.[669] Article 1 of the Supplementary Pensions Directive is now headed "*Subject matter*", which departs in style from the wording of the penultimate version that set out the directive's "*Objective*".[670] The Supplementary Pensions Directive thus *"lays down rules aimed at facilitating the exercise of the right of workers to freedom of movement by reducing obstacles created by certain rules concerning supplementary pension schemes linked to an employment relationship."*

The Supplementary Pensions Directive's focus on worker mobility is visible in its wording related to workers' right to free movement and the need to address obstacles.[671] The goal of free movement entails the right not to suffer discrimination on grounds of nationality. However, as discussed in Chapter III, the social rationale for protecting migrant workers should include the upholding of their social protection rights. Despite its social considerations in Recital 2 (concerning the role of occupational pensions in social protection) and Recital 16[672], the Supplementary Pensions Directive has failed to set out the goal of protecting migrant workers' occupational pension rights as a constituent part of their freedom of movement which targets adequate social protection. Instead, the treatment of occupational

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[668] *"Occupational pensions (so-called 'pillar II' pensions) enjoy limited protection under Council directive 98/49/EC, with respect to the preservation of pension rights. The proposal under discussion aims to strengthen the protection of occupational pensions."*COUNCIL OF THE EU 11081/13 Provisional Version Presse 263 Pr Co 33 Press Release 3247th Council meeting Employment, Social Policy, Health and Consumer Affairs Luxembourg, 20-21 June 2013.

[669] "*The objective of this Directive is to further facilitate worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights of members of those supplementary pension schemes.*"

[670] As at 10 December 2013, the draft of Article 1 read: *"The aim of this Directive is to facilitate the exercise of the right of workers to freedom of movement between Member States by reducing the obstacles created by certain rules concerning supplementary pension schemes linked to an employment relationship.*

[671] Indeed, Recital 1 states that: *"The free movement of persons is one of the fundamental freedoms of the Union. Article 45TFEU provides that the freedom of movement for workers entails, inter alia, the right to accept offers of employment and to move freely within the territory of Member States for this purpose. This Directive aims to promote worker mobility by reducing the obstacles to that mobility created by certain rules concerning supplementary pension schemes linked to an employment relationship."*

[672] "*Since supplementary retirement provision is becoming increasingly important in many Member States as a means to secure people's standard of living in old age, the conditions for acquiring and preserving pension rights should be improved in order to reduce obstacles to workers' freedom of movement between Member States.*"

pensions remains an instrument for facilitating free movement seen through the optic of worker mobility. This articulation is not based on the principle of social protection. Arguably, the Supplementary Pensions Directive is not an instrument of social protection 'Coordination'.[673] Nor is it a typical instrument of harmonisation. Its social deficit is characterised by its failure to articulate the free movement of workers with its social protection component as an ***objective*** of the secondary legislation.

Placing the free movement of workers at the heart of the directive's objective was appropriate but remains incomplete. This strategic shortcoming in its objective may affect the directive's interpretation and the selection of implementing measures by the Member States. It has been suggested by the European social observatory that a "*principle-based approach*" would be a suitable way of regulating occupational pensions that could benefit the social protection of workers.[674] Including social and economic aspects of free movement would provide greater certainty for migrant workers. Instead the Supplementary Pensions Directive sets minimum 'technical' requirements designed to improve free movement of workers.

Arguably, the Supplementary Pensions Directive attempts to achieve equilibrium between the protection of migrant workers and the interests of employers/pension schemes. This balancing act between national competence for social protection and EU competence for free movement has led to the directive's socially neutral objective to guarantee the freedom of movement of workers. Ensuring that migrant workers' right to social protection is not penalised remains implicit at best. The directive's social impact will depend upon implementing measures by the Member States and the interpretation by the ECJ in cases that fall within its scope. On the one hand, the adoption of the Supplementary Pensions Directive reduces the social deficit in EU law by addressing issues related to free movement that have an impact on migrant workers' occupational pensions. On the other hand, the lack of a social component in the directive's objective belies its limited social ambition; the impact of occupational pensions on worker mobility is the priority for the EU legislator.

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673 "*Coordination rules are rules of international social security law intended to adjust social security schemes in relation to each other (as well as those of other international regulations) for the purpose of regulating trans-national questions, **with the objective of protecting the social security position of migrant workers**, the members of their families and similar groups of persons.*"F.PENNINGS Introduction to European Social Security Law, Kluwer Law International, 2nd ed. (1998)

674 In that report, D. Ghailani quotes one interviewee as saying: "*You need one simple article saying that every Member State should prevent from (sic) legal obstacles to arise for (sic) the transfer of pension rights across borders. If you use this principle base (sic) then every Member State can look at its own law and understand which obstacles may come out. This is the best way to do it*." Such an approach would state in particular that the aim of the Directive would be for each worker to be able to move from one Member State to another without being adversely affected either by an undue loss of future retirement benefits or by a disproportionate barrier to acquiring future retirement benefits under a supplementary pension scheme.

B. The Scope of EU secondary legislation

The application of the secondary legislation in this field, namely the Safeguard Directive and the Supplementary Pensions Directive depends on how each instrument determines the geographical scope of worker mobility, its material scope(according to the nature of occupational pension schemes) and its personal scope(the types of workers who benefit from its provisions). As part of the political and legal compromise required for positive integration to move forwards, the scope of EU secondary legislation has been carefully defined in this field, which has a significant impact on the breadth of legal protection afforded to migrant workers.

a. The Safeguard Directive: breadth of scope but no depth of substance.

The material scope of the Safeguard Directive is contained in its Article 1, which excludes schemes that fall within the scope of the Coordination Regulations. Recital 3 provides a reminder that only statutory pension schemes are covered by the Coordination Regulations and that "*the system of coordination provided for in those Regulations does not extend to supplementary pension schemes*", (with the exception of schemes that fall under Article 1(l) of Regulation 883/2004, ex 1(j) of 1408/71, whether by reason of legislation or a relevant declaration).[675]Article 1 thus carries out a 'mopping up' exercise as its protection applies to "*pension rights under both voluntary and compulsory supplementary pension schemes*" that are not covered by the Coordination Regulations.[676] Indeed, the Safeguard Directive was designed to plug the gap caused by the exclusion of occupational schemes from the Coordination Regulations. It is the default legal instrument when the Coordination Regulations are not applicable.

The personal scope of the Safeguard Directive seeks to provide protection for migrant workers in general, namely "*employed and self-employed persons*" who move within the EU

[675] Indeed, as previously mentioned, supplementary pensions expressly fall outside the material scope of coordination as set out by Article 3 of Regulation 883/2004/EC. However, there is a conditional extension of the Coordination Regulations to occupational schemes that implement a mandatory insurance obligation, provided that they have been specifically notified by the Member State in a declaration under Article 1(l) of Regulation 883/2004. This is the case of the AGIRC and ARRCO regimes in France.

[676] In doing so, it lumps together occupational and personal pension schemes under the term 'supplementary pension schemes', which has been criticised by the ETUC for failing to recognise the specificity of occupational pensions. Nevertheless, there is overall coherence of material scope underpinning the articulation of the Safeguard Directive with the Coordination Regulations as shown by Recital 5, which provides that no pension or benefit should be subject to both regimes".

and are recipients of rights under occupational pension schemes.[677] This broad wording protects family members and surviving spouses who derive rights under many occupational pension schemes.[678] However, the Safeguard Directive did not offer protection to prospective migrant workers who had not yet become members of an occupational pension scheme. This was left for subsequent efforts to legislate.

b. The proposed Portability Directive: the exclusion of self-employed workers

The material scope of the proposed Portability Directive was identical to that of the Safeguard Directive.[679] However, its personal scope was narrower as it focused on "*outgoing workers*" who leave an employment relationship. Unlike the Safeguard Directive, it did not address the position of self-employed workers (although its original definition of Supplementary Pensions referred to self-employed workers).[680] The Commission rejected a proposed amendment by the European Parliament to extend the directive's protection to "persons" rather than workers.[681] One may deduce that the Commission was specifically seeking to protect employees. However, by excluding self-employed workers from its scope, it marked a significant difference with the Safeguard Directive. Such a narrow personal scope still characterises the social deficit of the Supplementary Pensions Directive.

c. The 2007 amended proposal for a Supplementary Pensions Directive: the focus on occupational pension schemes in the context of employment.

Under the 2007 amended proposal for a Supplementary Pensions Directive, its material scope covered "*supplementary pension schemes in the Member States* ***linked to an employment relationship***." Within this context, the directive's recitals illustrated the types of

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[677] *This Directive shall apply to members of supplementary pension schemes and others holding entitlement under such schemes who have acquired or are in the process of acquiring rights in one or more Member States.*
[678] B Montejo Puig points out that it includes "*those who are not members of their families, but who are equally entitled to be granted the corresponding benefits (unmarried couples for instance)*."
[679] Article 2 stated: *This Directive applies to supplementary pension schemes apart from the schemes covered by Regulation (EEC) No 1408/71.* Moreover, the defined terms "supplementary pension" and "supplementary pension scheme" were identical to those used for the purposes of Directive 98/49/EC, which was designed to achieve consistency with the scope of the Safeguard Directive.
[680] Any extension of the scope to self-employed workers would probably have required an additional legal base, namely Article 308EC ex 235 EEC (as well as unanimity in the Council). No explanation was given for this narrower focus in the explanatory memorandum although one argument concerning self-employed workers is that they tend to have more flexibility when determining both their choice of supplementary pension scheme and their mobility.
[681] The Commission rejected an amendment by the European Parliament (Amendment 18) which had sought to replace the term 'workers' with 'persons' in Article 1. The concern was that this might have expanded the objective and scope of the Directive beyond its focus on workers' freedom of movement and mobility and possibly gone beyond the EU's competence in the field of supplementary pensions.

occupational pensions it sought to cover.[682] It targeted workers' occupational pension rights and excluded from its scope third pillar schemes that are independent of the employment relationship.[683] Moreover, it included a number of 'exempt schemes' that would not be subject to its provisions. [684] These exemptions were also visible in its recitals.[685] Furthermore, the amended proposal identified specific events and arrangements which the directive should not affect: namely reorganisation or winding-up, national pension reserve funds as well as protection or compensation in relation to the insolvency of an undertaking or a pension scheme. In addition, the 2007 amended proposal stated that it only applied to retirement benefits provided by occupational pension schemes. 'Ex Recital 5g' thus stated: "*Nor does this Directive apply to invalidity and survivors benefits*." 'Ex Recital 5h'also excluded minimal lump sum payments at the end of a career.[686] A 'Supplementary pension' was thus defined as: "*a retirement pension provided for by the rules of a supplementary pension scheme established in conformity with national legislation and practice.*"

The proposed directive's personal scope was also amended indirectly through a change in the definition of 'supplementary pension scheme', which therefore only concerned employed workers.[687] By narrowing its scope, the directive did not address the plight of self-employed workers who may also suffer from a lack of protection of their occupational pensions, when exercising their right to free movement.[688]

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[682] "*This Directive should apply to all supplementary pension schemes established in conformity with national legislation and practise, that offer supplementary pensions for workers, such as group insurance contracts, pay-as-you-go schemes agreed by one or more branches or sectors, funded schemes or pension promises backed by book reserves, or any collective or other comparable arrangement*."

[683] This was also made clear in Recital (5g) "*This Directive does not apply to individual pension arrangements, other than those concluded through an employment relationship*."

[684] Article 2.2 thus stated: "*This Directive does not apply to the following:*
(a) supplementary pension schemes, which, on the date of entry into force of this Directive, no longer accept new active members and remain closed to them;
(b) supplementary pension schemes that are subject to measures involving the intervention of administrative bodies established by national legislation or judicial authorities, which are intended to preserve or restore their financial situation, including winding-up proceedings. This exclusion shall not extend beyond the end of the intervention;
(c) insolvency guarantee schemes, compensation schemes and national reserve funds."

[685] Recital 5d reflected the exclusion in 2.2 (a) of schemes that are closed to new members, which the Commission accepted: "*this restriction is a compromise and can be considered a proportionate measure to ensure the on-going sustainability of some supplementary pension schemes*." Moreover, recital 5f repeated that the Directive will not apply to insolvency protection systems, compensation arrangement schemes or national reserve funds.

[686] "*A one-off payment which is not considered substantial income, is not related to contributions made for the purpose of purchasing an annuity, is paid directly or indirectly at the end of a career, and is financed solely by the employer, should not be considered to be a supplementary pension within the meaning of this Directive*."

[687] "*supplementary pension scheme means 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*"

[688] Self-employed migrant workers may suffer from losses of occupational pension rights. E.g, lawyers' occupational pensions in France under the current rules of the "La Caisse nationale du barreau français (CNBF)

d. The Supplementary Pensions Directive: limiting the protection to the future pension rights of employees migrating between Member States

The personal and material scope of the Supplementary Pensions Directive is broadly the same as in the 2007 amended proposal. The main changes concern the directive's scope in time and its geographical scope.

i. Personal scope

The personal scope of the Supplementary Pensions Directive is essentially limited to employed workers. It does not differentiate between various types of migrant workers: e.g. short-term/long-term, posted workers/workers changing employer, young workers/old workers, male/female workers, EU/non-EU citizens, researchers etc. Whether any of these characteristics will prove relevant in determining the protection afforded to migrant workers' occupational pensions remains to be seen. Some categories of migrant workers may be more vulnerable to losing occupational pension rights, which might justify greater protection against obstacles to their free movement and social protection. Arguably, when fundamental rights are at stake, all workers in theory deserve equal rights. Therefore EU law on the freedom of movement for workers should in theory benefit all workers in equal measure. There is also a question of social legitimacy and equal treatment when one contemplates different levels of protection of different types of worker.

However, the Supplementary Pensions Directive does differentiate between migrant workers according to whether they are employed or self-employed in the context of protecting their occupational pension rights in the context of free movement. Arguably, a "one size fits all" approach to EU legislation in this field may not always be appropriate.

It is clearly not satisfactory if some migrant workers do not receive adequate social protection as a consequence of the legal treatment afforded to them under EU law. The Commission has identified researchers as being in particular need of protection with regards to their occupational pension rights under EU law on free movement. Is the trend set for even more fragmentation of EU secondary legislation in this field? There are already separate legal regimes under EU law for statutory and non-statutory occupational pension schemes as well as a subsequent distinction between employed and self-employed workers under the Supplementary Pensions Directive. An extra layer of specific regulation for researchers might be targeting a more "vulnerable" category of worker. However, it would also add to the complexity of EU secondary legislation, which seems to be moving away from the coherence of overarching legal principles in favour of a more technical and specialised approach.

ii. Scope in time

Regarding its scope in time, the Supplementary Pensions Directive neatly provides in Article 2.4 that: "*This Directive applies only to periods of employment falling after its transposition in accordance with Article 8.*" Its provisions are only designed to protect migrant workers' occupational pension rights that accrue during their employment **after** the directive is implemented.

Under Article 8, transposition of the Supplementary Pensions Directive by Member States must take place by 2018.The effective date of protection of migrant workers' occupational pension rights may therefore vary between Member States, depending on when they transpose the Supplementary Pensions Directive in national law.

Protection under the Supplementary Pensions Directive is thus limited to future pension rights.[689] While this may be the result of the compromise needed to pass the directive, there remains a social deficit of legal protection for workers who have acquired pension rights during periods of employment that precede the relevant national measure implementing the directive. For any loss of pension rights caused by the exercise of free movement that relates to periods of employment before that date, a worker would be limited to drawing upon the basic protection afforded under the Safeguard Directive and primary EU law.[690]

iii. Geographical scope

The Supplementary Pensions Directive only covers cross – border mobility as reflected in Article 1 ("*freedom of movement between Member States*") and Article 2.5:"*This Directive does not apply to the acquisition and preservation of supplementary pension rights of workers moving within a single Member State*." In addition, the definition of an "*outgoing worker*" means "*an active scheme member whose current employment relationship terminates for reasons other than becoming eligible for a supplementary pension and who moves between Member States*".[691]

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[689] The underlying reason for this approach may be related to the cost for pension schemes of making the necessary adjustments to occupational pension schemes as well as the argument of legal certainty, which has been invoked by representatives of the pension industry. This is a legislative equivalent to the Barber protocol, which was also designed to avoid additional costs for employers arising from the need to respect the principle of equal treatment in the field of occupational pensions.

[690] A worker might invoke Article 45TFEU to challenge action by an employer or by an occupational pension scheme that would otherwise be in breach of his or her right to free movement. Such a route carries great uncertainty for workers as the ECJ does not yet have a mature body of case-law in this field.

[691] The previous wording of June 2013 had included in its definition of outgoing worker the specific requirement that the worker becomes engaged in employment in another Member State "*within two years*" of the termination

Member States are already required to respect the prohibition of discrimination on grounds of nationality under Article 45TFEU. In theory, they should ensure that their legislation prevents occupational pension schemes from favouring internal mobility over cross-border mobility.[692] However, the geographical scope of the Supplementary Pensions Directive would make it possible for Member States to allow occupational pension schemes to treat internal mobility less favourably than cross-border mobility (reverse discrimination).

The cross-border dimension to the Directive's geographical scope represented a compromise put forward by the Irish presidency in May 2013 to placate those parties concerned that the Supplementary Pensions Directive should not overstep the mark in terms of the exercise of EU competence.[693]

However, Recital 6 confirms that "*Member States may consider using their national competences to extend the rules applicable pursuant to this Directive to scheme members who change employment within a single Member State*." Member States are thus "*encouraged*" to treat all migrant workers equally, regardless of whether their mobility was internal or external, as was made clear in a joint statement made by the Council and the Commission.[694] The Council's report emphasised the "*importance of equal treatment"* and stated that *"practical difficulties were likely to arise if the two categories of mobile workers were subject to different rules".*[695]A difference in treatment of migrant workers' occupational pensions would be undesirable both from a worker's perspective as well as from a Member States' perspective, not to mention the added complication for scheme administrators.

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of employment. This has been deleted, presumably in order to reinforce a more direct connection between the outgoing worker's loss of pension rights and the exercise of their free movement.

[692] Citizens of other EU Member States would be more likely to make up a greater proportion of the total number of migrant workers who exercise their right to cross-border mobility compared to the figures concerning workers who only exercise internal mobility, where a greater proportion are more likely to be nationals of the home Member State.

[693] *"The compromise suggestion would leave the member states free to decide on the rules they apply to internally mobile workers."*COUNCIL OF THE EUROPEAN UNION 11081/13 Provisional Version Presse 263 PR CO 33 Press Release 3247th Council meeting Employment, Social Policy, Health and Consumer Affairs, Luxembourg, 20-21 June 2013.

[694] "*This Directive does not provide for the acquisition and preservation of supplementary pension rights of workers moving within a single Member State. However, Member States are encouraged 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*."COUNCIL OF THEEUROPEAN UNION Brussels, 17 June 2013, Inter-institutional File: 2005/0214 (COD) 10890/13 ADD 2 SOC 463 ECOFIN 543, CODEC 1444 ADDENDUM TO REPORT From: Permanent Representatives Committee (Part I) to: Council (EPSCO) No. prev. doc.: 10378/13 ADD 1 SOC 411 ECOFIN 446 CODEC 1304No. Cion prop. 13686/05 SOC 412 ECOFIN 324 CODEC 933 – COM (2005) 507 final + REV 1; No.Amd.prop. : 13857/07 SOC 368 CODEC 1062 - COM(2007) 603 final + REV 1 + COR1 + REV 1 COR 1.

[695] COUNCIL OF THE EUROPEAN UNION Brussels, 17 June 2013, Inter-institutional File: 2005/0214 (COD)10890/13 SOC 463 ECOFIN 543, CODEC 1444 REPORT From: Permanent Representatives Committee (Part I) to: Council (EPSCO) No. prev. doc.: 10378/13 SOC 411 ECOFIN 446 CODEC 1304, No. Cion prop. 13686/05 SOC 412 ECOFIN 324 CODEC 933 – COM(2005) 507 final + REV 1; No. Amd.prop. : 13857/07 SOC 368 CODEC 1062 - COM(2007) 603 final + REV 1 + COR 1 + REV 1 COR 1.

Equal treatment between migrant workers who move between EU Member States compared to those workers who change employment within a single Member State should result in a levelling up of protection for those pension scheme members as well as cross-border workers.[696]

iv. Material scope

The material scope of the Supplementary Pensions Directive largely reflects the 2007 amended proposal as it is catches occupational pension schemes for employees. Recital 11 confirms the numerous types of supplementary pension schemes that fall in its material scope.[697] This aims to overcome the complexity and diversity of occupational pension schemes by including the different forms they take in the Member States, although this approach was controversial.[698]

Article 2 contains the exemptions to the Supplementary Pensions Directive's material scope: closed schemes, schemes involved in winding-up proceedings, insolvency guarantee schemes, compensation schemes and national reserve funds and one-off payments.

The exclusion of closed schemes reflects the difficult circumstances and background to the adoption of the directive but represents a concession to the pensions industry. It means that the directive does not affect schemes that have closed "*on the date of entry into force of the Directive*". Could this provision lead to more occupational pension scheme closures?[699] For now, it creates a discrepancy between the rights of members of closed and open schemes. This may deprive the members of closed schemes of the minimum protection of their pension

[696] Arguably, the Directive's geographic scope identifies migrant workers as vulnerable to obstacles to cross-border mobility even when obstacles to occupational mobility may exist. Ironically, this more limited scope could fuel populist claims of the "unequal protection" afforded to migrant workers. However, the substantive measures of the Supplementary Directive, namely those on the treatment of dormant pension rights, explicitly state that there is no requirement to treat outgoing members more favourably than active workers (who remain in the first Member State).

[697] "*This Directive should apply to all supplementary pension schemes established in accordance with national law and practice that offer supplementary pensions for workers, such as group insurance contracts, pay-as-you-go schemes agreed by one or more branches or sectors, funded schemes or pension promises backed by book reserves, or any collective or other comparable arrangement.*" This comprehensive approach was previously reflected in Recital 5c of the 2007 amended proposal)

[698] According to the Council's inter-institutional file of 21 June 2013 "*One delegation maintained a scrutiny reservation, expressing the view that "book reserve schemes" (i.e. pension schemes included in a company's budget) ought to be excluded from the scope."*

[699] Arguably, there may be a temptation for certain unscrupulous employers to close down a pension scheme (where they have the power to do so) and open a new one in order to escape the provisions of Directive. This would potentially deprive any migrant workers of minimum rights under EU law in respect of past service. However, any negative effects on migrant workers' right to free movement that might arise from such an action would surely be challenged directly on grounds of non-compliance with Article 45TFEU. This would be obvious where an employee remained with the same employer (see Case C-379/09 *Maurits Casteels v British Airways plc* [2011] ECR I-01379).

rights afforded by the Directive, which may in turn have an impact on their right of free movement.[700] Despite this, employers and managers of closed schemes do not have the right to disregard Article 45 TFEU. Any legislative shortcomings in the material scope of the Supplementary Pensions Directive highlight the role of the judge to uphold primary EU law on the free movement of workers, where applicable and appropriate.

The material scope of the Supplementary Pensions Directive's was amended so that its provisions on preservation and information now also concern "*invalidity or survivor's pensions attaching to supplementary pension schemes*".[701] However, Recital 14 specifies that it does not affect existing national law and rules of supplementary pension schemes concerning such special rules.

As a result of the changes made to the temporal scope, the geographical scope and the material scope, the application of the Supplementary Pensions Directive is much narrower in its protection of the occupational pensions of migrant workers.EU positive integration in the directive is limited to a basic "core" consisting of future occupational pension rights and retirement benefits of employed migrant workers'. However, the restriction of the Directive's scope was not the only compromise necessary for the Supplementary Pensions Directive to be adopted. In order for the final text to meet the approval of the Council (now voting by qualified majority) and convince the Members of the European Parliament, the substantive content of the legislation has evolved: some elements have been removed or watered down *en route* to adoption.

Conclusive remarks to Section 1.

Establishing a platform for positive integration under EU law was difficult due to the numerous hurdles encountered throughout the legislative process, which paralysed the negotiations for many years. Has the EU's strategy for positive integration been consistent with the social rationale for protecting the occupational pension rights of migrant workers? The objectives of the secondary legislation in this field have undoubtedly been at the heart of

[700]The reason previously given to justify this exception is the principle of proportionality, namely to avoid new rules placing an unjustifiable burden on such schemes. Arguably, this reflects the concern about legal certainty as well as political pressure, in which the need for compromise has turned the proposal into a directive that will at least afford 'forward looking' protection. Indeed, any scheme that closes more than 20 days after the publication of the directive in the official journal will still be required to comply with the minimum requirements of the Supplementary Directive in areas of acquisition, preservation and information of supplementary pension rights.

[701]The previous proposal of June 2013 had been worded as a total exclusion so that "*invalidity or survivor's pensions attaching to supplementary pension schemes*" fell among the categories of benefits to which the directive did not apply.

the debate. However, the direction of positive integration has evolved from "safeguarding existing occupational pension rights" to the "portability of pensions", through to "furthering worker mobility" between Member States. Arguably the instrumental approach aims to protect the occupational pension rights of workers as a social tool for a broader economic purpose. In the Safeguard Directive, protecting migrant workers' occupational pension rights is thus seen as a means to achieve free movement. The objective of secondary EU legislation therefore suffers from a social deficit insofar as its objective of free movement does not include social protection as one of its components. The traditional internal market focus on obstacles has translated into a functional objective. Under the Supplementary Pensions Directive, free movement is viewed more as an existential legal reality than a holistic fundamental freedom in which upholding social protection is a legal pre-condition. Social protection is recognized but is not taken into account as a component of the freedom of movement for workers. Moreover, the connection between occupational pensions and social policy has deterred the EU legislator from being bold in setting out the social ramifications of intervening in this field, as if it were caught in a competence vacuum. By distancing the notion of occupational pensions from that of social security, the social neutrality of the Supplementary Pension Directive's objective marks asocial deficit in its overall strategy, which sets the scene for its choice of a technical approach over a principled approach.

The regulatory gap between different kinds of occupational pension schemes has also resulted in the fragmentation of secondary legislation on the basis of the statutory criterion. The task of positive integration has therefore been to breathe coherence of scope in this field by carrying out a "mopping up exercise". The Safeguard Directive is characterized by its broad material scope notwithstanding its lack of depth in substance. Its personal scope is also extensive in that it includes self-employed workers. The controversial dimension of the Supplementary Pensions Directive has led to its geographic scope, material scope and effects in time being ultimately watered down. Free movement of workers in the EU is thus confined to its cross-border dimension, which reflects the legislator's desire to show compliance with EU rules of competence. The Supplementary Pensions Directive also has a narrower personal scope as it excludes self-employed workers. Moreover, it does not differentiate according to other criteria that may affect migrant workers' vulnerability to losses of social protection. Its material scope excludes pension schemes that are independent of the employment relationship while there are specific categories of exempt occupational schemes. The Supplementary Pensions Directive has limited its application to a basic core of occupational pension provision. However, the scope has partially been amended in respect of preservation

and information requirements for which it does seek to cover invalidity / survivors benefits that attach to a scheme. The choice to deal with these situations reflects the need to acknowledge the importance of occupational pensions in the lives of surviving spouses and children as well as members of pension schemes who suffer from invalidity. The Supplementary Pension Directive's scope in time is limited to being a forward looking instrument that will not benefit workers' occupational pension rights in respect of periods before the directive is transposed into national law. This reflects the historic social deficit in the legal protection of migrant workers' occupational pensions under EU law for the period preceding the adoption of the implementing measures of the Supplementary Pensions Directive.

The above trade-offs shows the political weakness of greater positive integration given that strategic compromises were required for the directive to be agreed upon in the Council. Moreover, political tensions ran well beyond the debates on the strategy for positive integration in this field. Indeed, there were many substantive fall-outs from what was to become the Supplementary Pensions Directive as a number of important yet controversial issues were also placed in the spotlight.

SECTION 2. The substantive deadlock of EU secondary legislation

The Safeguard Directive is about "*safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community*". The Supplementary Pensions Directive goes further by "*improving the acquisition and preservation of supplementary pension rights*". It does not deal with "*improving the portability of supplementary pension rights*."

Certain issues have provoked political deadlock and resulted in legislative stalemate for over 8 years notwithstanding the on-going risk of a loss of occupational pension rights for migrant workers, which characterises the social deficit in this field.

The obstacles to the free movement of workers identified in the Communication of 1991 and the Green Paper of 1997 have determined the substantive content of first of all the Safeguard Directive and secondly the Supplementary Pensions Directive. These are: the acquisition of occupational pension rights (A); the preservation of occupational pension rights when a worker changes jobs (B); and the information rights of workers (C). The principle of non-regression in the Supplementary Pensions Directive is discussed in (D). Implementation and reporting are covered in (E).

A. The acquisition of occupational pension rights

In dealing with the acquisition of occupational pension rights, does the above secondary legislation guarantee adequate social protection as part of ensuring the free movement of workers?

The relevance of national pension systems to the protection under EU law of migrant workers' pensions

The need for migrant workers to be able to acquire pension rights is a question of social protection as well as a matter that arises in the context of free movement of workers. It depends on the specific nature of each situation of employment as well as on the pension systems in place in the Member States.[702] The issue under EU law is whether or not the acquisition of migrant workers' occupational pension rights is impeded by free movement.

[702] Governments in the Netherlands and France have made membership of some occupational pension schemes mandatory, which has an immediate impact on the acquisition of occupational pension rights. Other Member States like Germany and the UK have encouraged the acquisition of occupational pension rights but without making them obligatory. This has left a large part of discretion to employers in their provision of occupational pensions. In the UK, the recent implementation of "auto-enrolment" marks an evolution designed to improve coverage and ensure minimum levels of acquisition of occupational pension rights saving (though satisfactory levels of income replacement are not guaranteed).

Obstacles to acquisition and their effects on social protection may be particularly acute if the occupational pension benefits at stake represent a significant part of a worker's overall retirement income. Migrant workers also need to acquire new occupational pension rights without undue delay.[703]

As discussed in Chapter IV, the level of protection under EU law of the acquisition of pension rights depends on whether an occupational pension scheme falls within the scope of the Coordination Regulations (if it is statutory) or within the scope of the Supplementary Pensions Directive (if it is non-statutory). The social rationale of the freedom of movement of workers justifies equivalent levels of protection of migrant workers' pension rights, regardless of the type of occupational pension scheme. The benchmark for comparison is thus provided by the Coordination Regulations, which offers protection in relation to the acquisition of pension rights under 'first pillar' statutory social security pension schemes. A social protection in EU secondary legislation dealing with acquisition of non-statutory occupational pensions would be especially important for workers who move between Member States where these play a vital role (e.g. UK, Ireland, Netherlands, Germany and Denmark).

Recital 2 of the Safeguard Directive states that "*the social protection of workers is ensured by statutory social security schemes complemented by supplementary social security schemes*." However, such a strong recognition of their social protection objective did not enable comprehensive provisions on acquisition in the Safeguard Directive. This gap between rhetoric and substance lasted for many years until the adoption of the Supplementary Pensions Directive in 2014. During that period, the absence of adequate provisions under EU law covering the acquisition of occupational pension rights by migrant workers contributed to the social deficit of EU positive integration. The Supplementary Pensions Directive deals with rules on the acquisition of occupational pension rights that constitute ***obstacles*** to workers' freedom of movement. Is this approach compatible with social protection?

Impeding *acquisition* constitutes an obstacle to free movement and social protection.

The need for migrant workers to acquire occupational pension rights may be important like their need to acquire social security rights, which are protected under the

[703]Future acquisition may depend on there being an occupational pension scheme with a worker's new employer (which may be more or less generous depending on each case). Alternatively, it may take place through statutory social security (if the bulk of retirement income provided in the new Member State stems from first pillar social security pensions), which means that the Coordination Regulations kick in to protect migrant workers.

Coordination Regulations. 'Acquisition-related' obstacles to workers' free movement were mentioned in the Commission's Communication of 1991 and the Council's Recommendation 92/442/EEC of 27 July 1992 on the convergence of social objectives and policies.[704]

The acquisition of pension rights is determined by the conditions governing a worker's past and future employment, in particular membership, pension accrual and vesting (recognition of entitlement) of pension rights in an occupational pension scheme. Two aspects must be considered: first the worker's rights in relation to their current / previous employment; and secondly the prospective rights in the Member State that a worker has moved to (or is intending to move to) for employment. Not having the ability to acquire occupational pension rights in one's new employment (where such a scheme exists) can be deemed an obstacle to free movement.

Primary EU law and the principle of equal treatment are insufficient on their own to protect a worker's right to free movement and social protection in respect of non-discriminatory obstacles to acquisition.[705] Obstacles to acquisition may arise where there is no formal difference in treatment (by an occupational pension scheme) between migrant workers moving from one EU Member State to another, compared to migrant workers who have moved within the same Member State. However, the difference in the social protection outcome may arise where a migrant worker is not able to acquire pension rights to the same extent as a similar mobile worker who has changed jobs but remained within the same Member State. What role should EU law play in protecting the acquisition rights of workers who exercise their freedom of movement? Is the EU's method of protection satisfactory?

The 'technical' method for protecting migrant workers' acquisition rights

The approach taken under EU law for protecting the acquisition by migrant workers of non-statutory occupational pension rights does not mirror the method used for statutory pensions, which takes into account all the periods worked in Member States.[706] The message

[704] The Council recommended that Member States should "*promote, where necessary, changes to the conditions governing the acquisition of pension, and especially supplementary pension rights with a view to eliminating obstacles to the mobility of employed workers.*"Council Recommendation 92/442/EEC of 27 July 1992 on the convergence of social objectives and policies OJ L245, 26.8.1992, p.49.

[705]Migrant workers are protected against the discriminatory obstacles to free movement under Article 45 TFEU, which is directly effective. Indeed, the *Angonese* case saw the Treaty provision being used by the ECJ for the protection of workers' right of free movement against discrimination on grounds of nationality.

[706] Article 48TFEU established the principle of aggregation, which is applied in the context of the Coordination Regulations. For so long as Article 48 TFEU was considered as the relevant legal basis of the Supplementary Pensions Directive (until the change in 2013), the potential relevance of the principle of aggregation could not be ignored. In essence, aggregation recognises that "all work deserves social protection." A similar approach for occupational pensions that fall outside the Coordination Regulations would surely benefit migrant workers.

contained in Recital 3 of the Supplementary Pensions Directive has remained consistent in its rejection of aggregation for 'supplementary pension schemes'.[707] Even if aggregation is not applicable, it provides a benchmark for occupational pensions from the perspective of social protection as it treats work as the source of entitlement to retirement benefits, which is also the basis of social insurance. Aggregation embodies an approach to acquisition of pensions based on social protection as a component of free movement of workers. Instead, the alternative focus of the Supplementary Pensions Directive has been on dealing with *ad hoc* obstacles to the acquisition of pension rights, which stem from the rules of occupational pension schemes. This technical route regulates scheme membership as well as the conditions of accrual of pension rights (waiting periods and vesting periods).

1. Scheme membership

Access to scheme membership as well as continued membership has each presented historical problems for posted workers as well as workers who change employer.

a. Scheme membership for posted workers[708]

Dealing with posted workers' non-statutory occupational pensions was seen as a priority for the Commission following the report of the High Level Panel on the free movement of persons. The risk of a posted worker suffering a disadvantage in terms of their supplementary pensions was considered as incompatible with their right to free movement. Recital 12 of the Safeguard Directive thus set out the need for posted workers to enjoy continued membership of occupational pension schemes. In an effort for the Safeguard Directive to be consistent with the Coordination Regulations (which governs the protection of their statutory pension rights), the same definition was given to the term `posted worker'. Article 6 of the Safeguard Directive provides for the continued 'contributions to supplementary pension schemes by and on behalf of posted workers' and exempts employers from making 'double contributions'. Restricting the provision on acquisition to posted

[707] "*The rules applicable to aggregation do not relate to supplementary pension schemes, except for schemes defined as "legislation", as defined in those Regulations, or which have been the subject of a declaration to this effect by a Member State pursuant to those Regulations*."

[708] Postings tend to be situations of mobility of limited duration where the worker remains with the same employer. In addition, it generally follows an instruction by an employer though some employees may either request or decline a posting. Posted workers usually return to their home Member State at the end of their posting, which made their membership of occupational pension schemes and ability to continue acquiring pension rights a priority for the Commission.

workers was narrower than the previous drafts proposals of the Safeguard Directive.[709] Consequently, the task of enabling migrant workers who change employer to be able to acquire or retain membership rights in occupational pension schemes without being subject to excessively stringent conditions was left for subsequent attempts to legislate.[710]

b. The impact of a change of employment on scheme membership

Situations involving a combination of geographic mobility and a change of employer will generally terminate a worker's active membership of a scheme.[711] The fragmentation of pension rights becomes an inevitable consequence making it important to ensure that a worker's accrued pension rights are not lost or diminished through the preservation of vested pension rights (see below). In addition, the loss of scheme membership may also constitute an obstacle to free movement following a change of employment where there are discrepancies between internal and cross border situations.[712] According to the Commission, "*This problem has to be addressed at the Community level to the extent that it penalises cross-border mobility more than intra-national mobility*".[713] However there is no principle of equal treatment between internal and cross-border situations beyond the prohibition of discrimination on grounds of nationality. Greater mutual recognition of situations would facilitate scheme membership and acquisition of pension rights for migrant workers.[714]

2. The conditions of acquisition

Under the Coordination Regulations, Member States are not allowed to impose discriminatory or unfavourable conditions on the membership of social security regimes (upon which the acquisition of statutory pension rights depends). The same logic is true for

[709] These had envisaged the possibility for workers who changed employer and moved to another Member State (on a temporary basis) to remain members of the same supplementary pension scheme in their home Member State. However, there was a lack of clarity and legal certainty regarding which workers would be allowed to maintain affiliation to their previous scheme, which led to such wording being dropped.
[710] In the first draft of the Safeguard Directive, Member States were simply required to prevent conditions for acquisition from being too onerous for workers. This provision was also dropped in the final text.
[711] Membership of most occupational pension scheme is limited to employees of the sponsoring undertaking (or companies from the same group who are participating companies). A worker who changes employer will usually cease to be an active member of the employer's occupational pension scheme and thus stop acquiring rights under that scheme. The outgoing worker's status changes to that of deferred member.
[712] Where an occupational pension scheme is sectoral and/or national, a job change for a worker who remains within the same industry and the same Member State may not entail that worker being penalised by the loss of pension rights. In contrast, a job change that involves moving to the same professional sector in another Member State will entail leaving an occupational scheme and may penalise such a worker or discourage mobility.
[713] Commission Communication 1991, p.17.
[714] Cass.Soc. 11 Mars 2009 Pourvoi N. 08-40381. See the case-note by LHERNOULD: "La SNCF est tenue de prendre en compte la carriere accomplie en Belgique." Liaisons sociales Europe N.224 (16-29 April 2009) p2.

non-statutory occupational pensions as far as the prohibition of discrimination is concerned. Secondary EU legislation also needs to address the actions of employers and occupational pension schemes that impose conditions upon migrant workers' membership of those schemes that would constitute non-discriminatory obstacles to free movement. However, the principle of subsidiarity has been invoked by the pensions lobby to suggest that EU law should leave membership conditions to Member States and social partners.[715]As a fundamental right is at stake, one may find an analogy in the field of EU equality law where the ECJ intervened in relation to the conditions of membership of occupational pension schemes, which was followed by secondary legislation.[716] The freedom of movement for workers is a fundamental right provided under the Treaty so it is legitimate for EU secondary law to protect workers' rights of access to occupational pension schemes in the context of free movement. Occupational pension schemes should avoid undue restrictions on migrant workers' membership, where these result in an obstacle to free movement.

The Commission's Communication of 1991 observed that the rules of supplementary pension schemes may be an obstacle to free movement of workers where the acquisition of occupational pension rights is made conditional on a worker remaining with the same employer for long uninterrupted periods: "*Vesting requirements and waiting periods can be a particularly important cause for reduced pension entitlements after a career with frequent job changes.*" Scheme membership, waiting periods and vesting periods have thus been the focus of the Supplementary Pensions Directive.

The financial implications of dealing with the acquisition rights of migrant workers have contributed to the tensions between the cost for occupational pension schemes of implementing the proposed measures versus the need to respect the rights of migrant workers. to free movement and social protection. The provisions of the Supplementary Pensions Directive should be scrutinised in terms of their impact on the social protection of workers. Moreover, the directive's approach has been marred by age discrimination and technical confusion en route to its adoption. The following analysis assesses the "minimum requirements" approach taken by the EU legislator in the final text of the Supplementary

[715] Their argument is that it is wrong for the EU to get involved in this aspect of the employment relationship. The counter-argument would be based on the potential effects of scheme membership rules on workers' free movement.

[716] Indeed, the ECJ ruled in the *Bilka* case that the principle of equal treatment between men and women required equal access to membership of occupational pension schemes for part-time workers who were mainly women. Its judgment was based on Article 119EEC (which is now Article 157TFEU). Case 170/84 *Bilka-Kaufhaus Gmbh v. Karin Weber von Hartz* [1986] ECR 01607.

Pensions Directive as well as the evolution and difficulties faced by previous legislative proposals. To put the directive's substantive impact in context, three tables offer a sample of the laws and practices concerning the acquisition conditions in some EU Member States.

a. The minimum requirements on waiting periods

Waiting periods delay workers from joining an occupational pension scheme: only after completing a minimum period of employment with a company can an employee start accruing occupational pension rights. During the waiting period, a worker does not build up any entitlement to occupational benefits, which acts as a brake on the level of future social protection. The length of waiting periods varies between Member States (see Table 1).

TABLE 1: WAITING PERIODS[717]

MEMBER STATE	MAXIMUM LENGTH OF WAITING PERIODS	OTHER COMMENTS
Luxembourg	Up to 10 years BY LAW (combined with vesting)	generally: 1-2 years
Finland	Up to 10 years	usually 4-6 months
Ireland	Up to 5 years	30% of DB schemes
Austria	Up to 5 years	
Spain	Up to 2 years BY LAW	
UK	1 year or less	no waiting period in the public sector
Sweden	0-3 months (collective agreement)	

The Commission's impact assessment of the proposed Portability Directive evaluated its substantive provisions in terms of the social protection and mobility of workers as well as the cost to pension providers and the consequences for coverage of supplementary pensions. In most Member States, waiting periods tend to be short and rarely exceed 2 years. The Commission considered that, subject to other acquisition requirements, a total elimination of waiting periods would be positive in terms of social protection.[718] It then assessed that a maximum waiting period of one year would still have a positive impact on social protection although it was recognised that often it is the combination with other acquisition conditions that results in lower social protection of mobile workers. There would also be a positive effect on mobility. In terms of cost, the UK reported back to the Commission that extra costs

[717] Data based on the Commission's Impact Assessment of 20.10.2005. The maximum length of a waiting period may be specified BY LAW; where there is no legal maximum, some limits may apply in practice.

[718] Moreover, it could improve the pension coverage of employees with fixed term or temporary contracts (who are often women). In addition, "*total abolition of waiting periods can have a positive effect on the mobility of workers*". The cost would depend on whether a pension scheme currently applies waiting periods or not: "*the overall cost will depend on whether temporary/fixed term workers would be covered; if so the overall costs might be significant*." The UK reported to the Commission that the administration of small entitlements would lead to higher expenditure for private sector schemes: GBP £180-220 million per year. However, extra costs for the public sector would be negligible. In countries where there was no compulsory membership, it said there might be "*potential negative consequences on the willingness of employers to open or continue such schemes*."

for public sector would be negligible.[719] On waiting periods for scheme membership, the initial proposal for a Portability Directive thus set out a maximum of either 1 year (for workers over 21) or reaching the upper age limit (21), whichever the later.

By opting for a combined maximum of one year in respect of the duration of waiting periods and vesting periods, the Commission's approach for protecting the conditions of scheme membership sought to achieve a balance between keeping costs down and ensuring greater mobility/social protection. The minimum requirements approach to waiting periods can be explained because such a provision would affect workers in general. Indeed, the subsidiarity argument was pursued vigorously by EAPSPI in its Position paper of 2006.[720] The business lobby also opposed the proposed directive's provisions on the acquisition of supplementary pension rights on grounds of cost for employers/schemes. Subsidiarity was thus invoked not only as a constitutional safeguard for national competence but as a bargaining tool. Despite the controversy and political tension, the 2007 amended proposal still required Member States to take all necessary steps to ensure that: ***"****where active scheme membership is made conditional upon a period of employment, this period shall not exceed one year".* The solution with regards to waiting periods changed with the Supplementary Pensions Directive, which envisaged the negative effect on free movement of delaying or denying the acquisition of occupational pension rights. Recital 17 identified 'long waiting periods' (for scheme membership), 'vesting periods' and 'minimum ages for vesting' as all being obstacles to free movement.[721] The controversy over vesting periods resulted in the overall limits being connected to waiting periods in the wording of the Directive.

b. The minimum requirements on vesting periods

Vesting periods delay the legal entitlement to pension rights by setting a period during which a worker has to remain employed before becoming legally entitled to the pension

[719] It stated that the cost for UK schemes in the private sector would be GBP £100 – 120 million per year (if schemes did not adapt: again, one must assume this concerns potential claims for compensation).
[720] "*According to article 4 c), the worker can join the scheme after one year of employment. This delay has been chosen in order to be in line with the qualifying period, which generally does not exceed one year. However, this will mean that workers with a temporary contract lasting more than one year will also have the right to join a pension scheme. This might be seen as running counter to the intention of the respective national legislator.*"
[721] "*The fact that in some supplementary pension schemes pension rights can be forfeited if a worker's employment relationship ends before he or she has completed a minimum period of scheme membership (vesting period) or before he or she has reached the minimum age (vesting age) can prevent mobile workers from acquiring adequate pension rights; long waiting periods required to become a member of a pensions scheme have a similar effect. Such conditions therefore represent obstacles to workers' freedom of movement.*

rights accrued through service and the payment of contributions. [722] "*Any job change before the acquisition of a vested right implies that no occupational pension will be paid in respect of this period of employment*."[723] Conditions for vesting constitute an area in which legislative intervention at national level has historically been deemed necessary to prevent employer abuses that adversely affect workers' social protection. Historically, vesting periods in Member States have varied considerably from immediate vesting to vesting at retirement. The constraints imposed by national law on vesting periods also vary in the EU (see Table 2).

TABLE 2 VESTING PERIODS[724]

MEMBER STATE	MAXIMUM LENGTH OF VESTING PERIODS	OTHER COMMENTS
France	Up to retirement (remaining with the same employer)	excluding AGIRC & ARRCO, which are subject to Coordination (and aggregation)
Portugal:	Up to retirement (remaining with the same employer)	sometimes 10 years
Spain	20 years BY LAW for "non-qualified plans"	immediate vesting for qualified plans
Luxembourg	10 years BY LAW (combined limit for vesting and waiting periods)	vesting period of 5 years = general practice
Austria	10 years BY LAW for book reserve schemes (5 year minimum) 5 year maximum for funded schemes	
Germany	5 years BY LAW	5 years is general practice
Denmark	5 years BY LAW	Personal contributions vest immediately
Cyprus	5 years	
UK	2 years BY LAW	After 3 months, right to a Cash Equivalent Transfer Value
Ireland	2 years BY LAW	
Belgium	1 year BY LAW	Personal contributions vest immediately
Greece	1 year BY LAW	The role of supplementary pensions is still marginal
Norway (EEA)	BY LAW 1 year in private sector; 3 months in public sector	

The differences between Member States are stark.[725] National legislators are often subjected to fierce lobbying from employer groups and pension funds on the conditions of

[722] Vesting matters because where an employee's pension rights under a scheme have not vested, the consequence is that an employee fails to acquire pension rights and is therefore not entitled to pension benefits on retirement. Instead, a worker is generally only entitled to recover the contributions he has made.
[723] Supplementary Pensions in the Single Market: A Green Paper COM (97) 283.
[724] Where the maximum length of a vesting period is BY LAW, this is specified in the table; otherwise, there is no legal maximum but some limits apply in practice. In other Member States not mentioned, there is either no legal limit/requirement for vesting periods or vesting periods are not applied in practice.
[725]In Netherlands, vesting periods are short (a couple of months at most). In the UK, vesting periods may not exceed 2 years. In contrast, Germany is one country that has historically allowed employers and occupational

acquisition of occupational pension rights. They raise practical issues of cost, as well as moral and philosophical arguments as to the very nature of occupational pensions.[726] The arguments made by those representing the interests of German employers also opposed any development in EU legislation in respect of vesting periods in occupational pension schemes. Their approach ran counter to the view of the Commission that the provision of occupational pensions is a "*fundamental aspect of social protection in the European Union*."[727]The conclusion reached by the Commission was that long vesting and waiting periods were "*severe obstacles to labour mobility*".[728]

In the first draft proposal for the Safeguard Directive, it had been provided that the conditions for acquiring supplementary pension rights should not be an obstacle to the freedom of movement for workers.[729] However, German opposition to rules on vesting led to the deletion of the reference to "*rights in the course of acquisition*" in the final version of the Safeguard Directive. In addition to the cost for employers, the debate was over the nature of occupational pensions: were they "loyalty benefits" or instruments of social protection? Ultimately, the result was criticised for "*leaving an important percentage of workers unprotected in some countries, due to insufficiently protective measures*."[730] The issues of acquisition and vesting were thus left for later...

The Commission in the 2005 proposal for a Portability Directive had tried to limit vesting periods to a maximum of 2 years. In its impact assessment, the Commission sought to adopt a balanced approach to dealing with vesting periods by performing a cost/benefit analysis in respect of vesting periods of 5 years[731], 2 years or 1 year.[732] The Commission

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pension schemes to apply fairly long vesting periods. Indeed, vesting periods of up to 10 years were allowed until 2002; the maximum vesting period under German law was then reduced to 5 years.

[726] Employers' views may vary depending upon the strength of their neo-liberal values compared to their social values and their interpretation of the notion of corporate social responsibility. Some employers dispute the social protection role of occupational pensions. In Germany, some employers have argued that voluntary occupational pensions are just another loyalty programme at their disposal in which vesting and waiting periods area means of achieving employee loyalty and necessary for administration purposes.

[727] See Commission's Communication on Social Protection COM (97) 102.

[728] In the Commission's Green Paper of 1997 "Supplementary pensions in the Single Market" (COM (97) 283), the "*qualifying conditions for acquiring rights*" were once again highlighted as an obstacle to cross-border mobility in the EU. It was recognised that the existence of vesting periods may affect both mobile workers remaining in the same Member State as well as those moving to another Member State.

[729] Draft provisions had been included to deal with vesting periods with a view to imposing a maximum length that would initially be 8 years and then 5 years. This would have had a significant impact in Germany, where lengthy vesting periods were very common.

[730] B. MONTEJO PUIG (op.cit).

[731] The Commission had assessed that introducing a limit of 5 years on vesting periods would only really affect Luxembourg, Austria (book reserve schemes); occupational pension schemes in France other than AGIRC & ARRCO (which are subject to the same requirements as statutory social security schemes) and Portugal (where supplementary occupational pensions play a minimal role anyway).

stated that immediate vesting would be beneficial with regards to workers' social protection and mobility. However, in terms of its cost to providers, it would present a significant increase in cost for schemes which currently have long vesting periods. Administrative costs would increase too since there would be more deferred members. From a pension scheme's perspective, the lower the limit (on the length of vesting periods), the higher the costs; this could have an adverse effect on coverage of workers. However, from a worker's perspective, the lack of a limit to vesting periods results in a loss of social protection.[733]

The amended proposal of 2007 provided that *"where a vesting period is applied this shall under no circumstances exceed one year for active scheme members over the age of 25. For active scheme members below this age vesting periods shall not exceed five years.* A one year limit for workers over 25 would of course be better than 2 years. However, a 5 year limit for migrant workers under 25 (who often change jobs) would have rendered the provision ineffectual at protecting younger migrant workers' free movement and social protection.

One can point to the "fudge" achieved by the Commission in the Supplementary Pensions Directive by combining the time limits on both waiting periods and vesting periods, which under Article 4.1(a) are now limited to a total of 3 years for outgoing workers. Vesting period and vested pension rights are defined in Article 3 (e) and (f) of the Supplementary Pensions Directive.[734] In addition, Recital 18 specifies the narrow interpretation to be given to "*Vesting requirements".*[735] The combined limit of 3 years with regards to waiting periods and vesting periods is designed to limit the overall length of time during which a worker can be prevented from acquiring vested occupational pension rights. From an employer's perspective, there is a cost attached to reducing these limits whereas from a migrant worker's

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[732] A 2 year limit would affect the same countries, plus Germany, Denmark, Austria (for funded pensions) and Cyprus. A 1 year limit would affect the above countries plus UK and Ireland.

[733] To do nothing would mean "*the early leaver may face a serious loss in pension rights and will be reluctant to leave the employment relation (sic) before having accomplished the vesting period. If he leaves before the end of the vesting period, he will not have built up any pension rights and may only receive reimbursement of the (sic) own contributions. This could result in a significant reduction of the (supplementary) pension rights of the mobile worker*". *cf.* Commission's Impact assessment.(*supra*)

[734] "*vested pension rights" means any entitlement to the accumulated supplementary pension rights after the fulfilment of any acquisition conditions, under the rules of a supplementary pension scheme and, where applicable, under national law*; "*vesting period" means the period of active membership of a scheme, required under national law or the rules of a supplementary pension scheme, in order to trigger entitlement to the accumulated supplementary pension rights*."

[735] It states that they *"should not be likened to other conditions laid down for the acquisition of a right to an annuity made with regard to the pay-out phase under national law or under the rules of certain supplementary pension schemes in particular in defined contribution schemes. For instance, a period of active scheme membership which a member needs to complete after becoming entitled to a supplementary pension in order to claim his or her pension in the form of an annuity or capital sum does not constitute a vesting period."*

perspective, protecting the acquisition of pension rights should improve retirement benefits. The merits of a 3 year limit on waiting and vesting periods can also be debated.[736]

c. Minimum ages for acquisition

Minimum age requirements for vesting are considered by the Supplementary Pensions Directive as potential obstacles to free movement, though it can still be criticised for permitting "ageist" criteria. The position in the Member States varies (see Table 3).

TABLE 3: MINIMUM AGE FOR VESTING (Upper Limit)[737]

MEMBER STATE	MINIMUM AGE FOR VESTING (Upper limit)	OTHER COMMENTS
Germany	30 - BY LAW	subject to the worker fulfilling a vesting period up to 5 years
Sweden	28	
Belgium	25 - BY LAW	In reality, rights may start vesting from as late as 26
Luxembourg	25	
Portugal	25	
Denmark	25 in public sector and 20 in private sector	
Netherlands	24 years	Over 50% of pension schemes did not apply minimum age requirements in 2001
UK	21	The application of a minimum age is subject to the maximum vesting period of 2 years).
Norway (EEA)	20 years BY LAW in public sector; no minimum age in private sector	

The Commission has acknowledged that in some Member States, there is a trend towards the elimination of minimum age requirements, as for example in the Netherlands. However, the level at which to regulate this issue under EU secondary legislation proved controversial. Allowing a minimum age requirement to acquire occupational pension rights was also subjected to a cost/benefit analysis by the Commission. In its impact assessment, it found that a total elimination of minimum age requirements would be beneficial in terms of social protection (especially for "mobile workers" and for blue collar workers who start working at a young age) but this would also depend on other acquisition conditions. The impact on mobility would also be positive "*since acquisition of pension rights will no longer*

[736] For workers over 25, three years is one year longer than the maximum 2 year (1+1) possible total. For workers under the age of 25, one may argue that three years represents an improvement (compared to the 2007 amendment), which might have seen them have to wait for up to 6 years (1 year waiting + 5 years vesting).
[737] Where this is BY LAW, this is specified; otherwise, there is no legal maximum but some limits apply in practice. In other Member States not mentioned, there is either no legal limit/requirement for minimum age or minimum age not applied in practice.

depend on the age of the employee." However, there was no mention of the potential for a minimum age to be subjected to scrutiny on the basis of age discrimination. Instead, the Commission looked at the provision "*from a perspective of improving the flexibility of the workforce,"* concluding that *"it is difficult to justify the application of age requirements*."[738] The Commission even envisaged the impact of fixing an upper limit at 25/30 although such an option was deemed pointless.[739] Under the first draft proposal for a Portability Directive, employers would have been permitted to impose a minimum age requirement of up to 21 to start accruing 'vested rights'.[740] Fixing an upper limit at 21 was assessed by the Commission as having a positive impact on social protection and on mobility. [741] The amended proposal of 2007 set out a maximum vesting period of 1 year (for workers over 25) or 5 years for workers under 25. Such a threshold for would affect migrant workers' pension acquisition rights differently depending on whether he/she was over or under 25.[742] The problem under that provision was that where a young migrant worker's pension rights had not vested, he or she would only have been reimbursed for the contributions paid during a period of up to five years. Such a scenario would have been detrimental to the long term social protection of young migrant workers who had worked in Member States where lengthy vesting periods have been commonplace such as Germany.[743]

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[738] In Germany, it was deemed that funding costs would increase but would "*not be substantial as most workers stay until they have a vested right*". However, the Commission added that this increase in cost would be in respect of younger workers! It also stated that "*the consequences for coverage will depend on the extra costs*"! "*Employer financed schemes in Germany might be affected*". "*It might be that fewer employers will be inclined to open schemes*." The influence of the employer lobby can be noted.

[739] It concluded that an upper limit of 30 would have no impact at all in practice! An upper limit of 25 would only have an impact in Germany and Sweden (for white collar workers). It estimated that there might be a positive impact on worker mobility but was also concerned that "setting the statutory minimum" might "influence behaviour" with the undesirable effect that some schemes might raise their minimum age. In terms of costs, it also suggested that potentially higher costs in Germany and Sweden might affect coverage.

[740] "*Vested pension rights*" were defined in Article 3(d) as meaning "*any entitlement to a supplementary pension after the fulfilment of any acquisition conditions, under the rules of a supplementary pension scheme and, where applicable, under national legislation*." This is an example of the technical complexity of drafting in the amended proposal for a Supplementary Pensions Directive. A vesting period (as defined in Article 3(e) will constitute such an 'acquisition condition'.

[741] In terms of cost, it would be negligible in the public sector in the UK but in the private sector, its cost was assessed by the DWP at GBP £40-50 million (if schemes did not adapt: i.e. again one must assume this figure refers to the potential cost of compensation claims).

[742] The proposed wording allowed a different maximum vesting period of up to five years for members *under 25*, which gave employers significant discretion. However, once a worker *over 25* had accrued pension rights for one year, he would become entitled to pension rights upon retirement corresponding to the rights accrued during the period worked. The maximum vesting period suggested in the previous draft was two years so this was a welcome amendment for workers over 25.

[743] This would have been bad for a worker who joined a company in Germany at the age of 18, in which the rules of an occupational pension scheme allowed a minimum vesting age of 21 as well as a five year vesting period for workers under 25.Suppose the worker left his or her employer at the age of 22 in order to work in another EU Member State. The first 3 years of employment would not count for pension purposes as pension

The prospect of allowing different vesting periods based on age disregards the risk of a lack of adequate provision by younger workers as regards their social protection in old age.[744] Given that young workers generally accrue social security rights from the moment they start working, to give employers the discretion to apply age-based criteria denying them the right to acquire occupational pension rights would be less protective than the approach of the Coordination Regulations to first pillar social security pensions.[745] Young workers could potentially be subjected to a double breach of general principles of EU law: first of their right to free movement under Article 45TFEU and secondly, a breach of their right not to be discriminated against on grounds of age, compounded potentially by a worse outcome in terms of social protection.

The Commission's explanatory memorandum stated that "*younger workers have greater mobility than those over the age of 25 and that the accrual of pension rights for those under the age of 25 may be less urgent than for those above this age*". However, such a justification is at odds with the principles of the free movement of workers, social protection and equal treatment on grounds of age.[746] EU secondary legislation should in principle uphold the rights of young migrant workers to acquire occupational pensions. Young workers *under 25* should not be discriminated against but instead ought to receive protection of pension rights on the same basis as workers *over 25* including the right to the same maximum vesting period. There was pressure on the Commission and the EU legislator to bow to requests from businesses that did not wish the flexible and short term basis upon which they employ many young workers (often in a precarious situation) to have an added pensions cost.[747] In mitigation, the maximum length of ***vesting periods*** were amended under the Supplementary Pensions Directive and limited to 3 years regardless of age.

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rights would only start to accrue at the age of 21. For a worker under 25, a long vesting period would prevent occupational pension rights from vesting, resulting in a loss of pension rights.

[744] The media frequently reports the fact that young people are waiting too long before they start "making provision" for their retirement. This issue is a ticking social time-bomb. In the long term, workers who have not been able to build up sufficient levels of occupational pensions to supplement their social security pensions may run the risk of poverty in old age.

[745] It also conflicts with the political discourse by Member States and the EU that occupational pensions have an increasing social protection role to play.

[746] If young people are more mobile, then this must be encouraged. To penalise them as regards their occupational pensions may make them less mobile. To suggest that they are not in need of legal protection as they are already mobile misses the point. Such a flawed argument would be similar to the mistaken assumption that a worker who has exercised his or her right to free movement cannot have suffered a breach of Article 45 TFEU.See for example the rejection of this argument by AG Kokott in Case C-379/09 *Maurits Casteels v British Airways plc* [2011] ECR I-01379, Opinion of AG Kokott.

[747] The argument by employers that not allowing a minimum age for pension accrual would constitute a barrier to young workers entering the job market is a negative one. The EU legislator should have combined free movement with social protection while complying with non-discrimination on grounds of age (and allowing objective justification when appropriate). The acquisition of occupational pension rights by younger workers is a

The requirements regarding a minimum age for vesting of pension rights have also been simplified in the final wording of the Supplementary Pensions Directive. Nevertheless, the same age of 21 is retained in Article 4.1(b) as the upper limit on any minimum age for vesting pension rights. [748] This might still be challenged in due course on grounds of age discrimination. Even an age limit of 21 for the acquisition of pension rights remains problematic as was acknowledged by the European Parliament.[749]

It should be noted that the Supplementary Pensions Directive also draws a distinction between minimum age requirements for ***vesting*** of pension rights and minimum age requirements for ***scheme membership***. Recital 17 states that "*By contrast, minimum age requirements for membership do not constitute an obstacle to freedom of movement and are thus not addressed by the present Directive."* This might lead employers and pension schemes to consider using or maintaining minimum age requirements for membership as an alternative method of reducing cost without falling foul of the Supplementary Pensions Directive.[750] In theory, a minimum age for scheme membership could be challenged on the basis of age discrimination under the "Framework directive" 2000/78[751] in the absence of any objective justification. The Supplementary Pensions Directive could thus be viewed as tacitly condoning limitations on the acquisition of pension rights that are potentially age-discriminatory, given that many migrant workers are young persons.

d. Overcoming technical confusion and uncertainty

The level of technicality of the proposals for determining the limits to vesting conditions has often caused confusion and uncertainty over the treatment of unvested pension rights in the legislative process leading to the adoption of the Supplementary Pensions

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key issue that deserves full attention and should not have been compromised. Failure to grasp the above legal and social implications allows discriminatory measures in the directive.

[748]This minimum age must be interpreted as being subject to the overall 3 year time limit on vesting requirements that is provided in Article 4.1.(a). Therefore, a 16 year old worker who remains employed by the same employer for 3 years will see his pension rights vest when he is 19. He should not have to wait until he is 21.

[749] When the European Parliament reviewed the initial proposal, it opted to delete references to a minimum age for vesting.

[750]Any minimum age requirement for membership would still be subject to the three year limit in Article 4.1(a). However, the very acceptance of age conditions for membership of an occupational pension scheme raises a tension with the general principle of equal treatment under EU law although there are limits to its effectiveness and justiciability. See both *Mangold* and *Kucukdeveci (supra),* also Case C-411/05 *Palacios de la Villa.* [2007] ECR I-08531

[751] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Directive. The articulation of the sub-provisions in Article 4 was not clear under the initial proposal for a Portability Directive.[752]

The Commission's explanatory memorandum did not clarify precisely what it meant by "***acquiring***" but it did point out the adverse risk for social protection.[753] The link between waiting periods and vesting periods (referred to as qualifying periods), seemed to suggest that the minimum age in 4(b) was intended to work as a minimum age for scheme membership (as an alternative to the one year waiting period in 4(c).[754] Even experts in the pension industry were confused![755] The initial proposal was so technical that it had the potential to be confusing for national administrations seeking to implement the Directive.[756] There were even diverging translations![757] The 2007 proposal amended Article 4 with regards to the 'Conditions governing acquisition' but it still addressed limitations on workers being able to join a scheme, accrue and obtain vesting of their pension rights. The provisions on vesting periods and vested rights remained a source of technical confusion although the Commission's explanatory memorandum argued that a minimum age of 21 provided greater clarity with regards to maximum vesting periods.[758]

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[752] The UK's Department for Work and Pensions (DWP) was concerned that "*the way the text is currently drafted could possibly impose a minimum age for scheme entry of 21*." It perceived a 'behavioural risk', namely that any implementing national legislation that included an upper limit to a minimum age for acquiring pension rights, might encourage employers to introduce or raise a minimum age where there was none before. In relation to 4(b) and 4(d), it was not obvious whether one should interpret that 21 as a vesting age or age of accrual (i.e. a membership age). The first reading would mean that all pension rights acquired after reaching the relevant age would automatically vest. The latter reading (based on 'acquisition' meaning 'accrual' of pension rights would mean that the young worker in question would still be subject to any applicable vesting period (as per 4d).

[753] "*The requirement for a high minimum age is a major disincentive to the mobility of young workers if a departure before reaching this minimum age results in the loss of pension rights for the period worked before the minimum age. A worker must start acquiring supplementary pension rights at the latest as of the age of 21*." Explanatory memorandum to the proposed Portability Directive.

[754] The explanatory memorandum in respect of 4(c) stated that "*The waiting period during which a worker cannot yet become a member of the scheme should be reduced. This period should not exceed one year (unless the minimum age has not yet been reached). The schemes thus maintain in particular the possibility of linking the waiting period to the qualifying period (which generally does not exceed one year).*"

[755] "*Article 4 b) fixes the minimum entry age as 21 years. Since the waiting period should not be more than 2 years, any national rules which stipulate a higher age than 23 years as minimum age for establishing any entitlement to supplementary pension rights will have to be revised. Additionally, it should be mentioned that the reference between Article 4b) and Article 4d) is not clear. Are they to be seen as cumulative or alternative?*" EAPSPI Position Paper 2006.

[756] Even the UK's Financial Services Authority got confused as seen from its comments of 16.02.2011 on the amended proposal, which stated that the Directive "*sets a minimum age for entry to a scheme*". An upper limit for a minimum age is not the same as establishing a minimum age but such wording could have posed potential problems for implementation.

[757] As mentioned by the EAPSPI: "*It has to be mentioned, that the German, English, Italian and French version seems to be different in the wording.*"EAPSPI Position Paper 2006 (op.cit) p.9.

[758] Criticism was expressed in the EAPSPI Position Paper 2008 (op. cit) page 4-5. Some arguments would also have arisen over whether multiple limitations on the conditions of acquisition were exclusive of one another or not (e.g. if an occupational pension scheme applied both a minimum age of 21 for accruing vested rights and a five year vesting period for workers under 25).The combined effect of a minimum age of 21 and a 5 year vesting period would have entailed a greater barrier to the acquisition of pension rights by young migrant workers.

An alternative to a technical approach would have been to protect all migrant workers' right to acquire pension rights as a matter of principle.[759] Arguably, stronger protection of acquisition rights would boost social protection and have a positive effect on cross-border mobility which may have associated benefits in terms of employment.

The recitals of the Supplementary Pensions Directive re-iterate the link between the conditions governing the acquisition of occupational pension rights and the free movement of workers. From a worker's perspective, some of the new requirements are more favourable in enabling the acquisition of occupational pension rights although on the whole, the text is a compromise. The main advantage of the provisions adopted under Article 4 (compared to the 2007 draft) has been the removal of the areas of technical confusion. The end result is greater certainty regarding the provisions on acquisition in Article 4 of the Supplementary Pensions Directive. However, criticism can be made of the treatment of unvested pension rights.

e. Recovering contributions in respect of 'unvested' pension rights: who should be entitled to employer contributions?

Protecting the recovery of contributions in respect of unvested pension rights was envisaged under the Portability Directive through the reimbursal or transfer of employee contributions in the case of failure to acquire 'vested' pension rights.[760] In reality, several Member States already included recovery of the employee's own contributions, (e.g. UK). The 2007 amended proposal also dealt with the reimbursement of the investment value derived from contributions in respect of unvested rights.[761] Article 4 (c) of the Supplementary Pensions Directive deals with reimbursing contributions in the case of unvested pension rights when the employment relationship is terminated. It limits the right of an outgoing

[759] Such an approach would enable workers to change employment in the knowledge that their acquisition of pension rights would not be penalised following the exercise of free movement. This would treat occupational pensions in a manner equivalent to the treatment of social security pensions under the aggregation technique. This would be possible only if (i) all periods of work performed with their previous employer are taken into account for the acquisition of occupational pension rights and (ii) workers are able to immediately start acquiring occupational pension rights with their new employer where an occupational pension scheme exists.

[760] The explanatory memorandum states: "*A worker who has not yet built up any acquired rights within the supplementary pension scheme but who has already paid contributions should not lose them. Accordingly, contributions should be reimbursed or transferred in full*."

[761] A worker was entitled under Article 4(d) to be reimbursed the contributions that he or she paid or that "*were paid on his/her behalf*" plus the investment value arising from contributions where the outgoing worker bears the investment risk. In respect of the investment value, Recital 6(a) reminded that "*the value (of the investments derived from those contributions) may be less than the contributions paid by the outgoing worker. If the value is negative, there is nothing to refund*." One may criticize this as such amounts were paid into a scheme in order to provide social protection benefits in old age. The financial security of investments raises a question of who is exposed to the investment risk? Clearly in the case of DC schemes, workers bear the investment risk. Workers and pensioners therefore rely on the performance of the market and the quality of their investment advice.

worker to recover pension contributions in the case of unvested pension rights to "*the contributions paid by the outgoing worker, or paid on behalf of the outgoing worker, in accordance with national law or collective agreements or contracts, and where the outgoing worker bears the investment risk, either the sum of the contributions made or the investment value arising from these contributions*".[762]

The expression "*paid by, or on behalf of"* could be construed to include employer contributions as employers pay contributions in respect of their employees. The most interesting point is whether in the implementing measures by Member States the employer contributions should be included in the amount recovered by outgoing workers? There are two possible approaches, which lead to different outcomes.

The more conservative approach is to treat employer contributions as the property of the employer and/or the pension scheme.[763] However, it may also be considered unfair on migrant workers to lose the benefit of contributions paid in respect of their social protection. A convincing argument made by AG Kokott in *Casteels* , in support of a worker's entitlement to employer and employee contributions, was based on an interpretation of the doctrine of **unjust enrichment**.[764] In the case of DB schemes, the actuarial calculations and employer contributions would have included that employee until they left the scheme. Nevertheless, in a DB occupational pension scheme that is underfunded or has suffered a loss following poor investment returns during the worker's period of membership, then an employer might argue that it would be fair for the employer to retain part or all of its contributions.

The second worker-oriented approach views employer contributions as funds that have been allocated by the employer towards the **social protection** of an employee. Consequently the full amount of contributions should be recovered by a migrant worker whose pension rights have not vested so that they can be put towards that worker's social

[762] Further clarification is provided by Recital 19.

[763] An employer might therefore oppose a worker receiving a cash windfall on the basis that other workers with vested rights would have to wait until retirement before receiving a benefit; they might also the potential extra cost. In the case of DB schemes, there would be an extra burden on employers if they had to pay their contributions over to an outgoing worker, where for example the value of a scheme suffered a loss during the period in respect of which an outgoing worker would be seeking to recover the pension contributions paid by his or her employer. Therefore, to justify an employer recovering its contributions, some employers might argue that their willingness to bear the investment risk in certain schemes reflects the principle of solidarity. Any change of employment by a migrant worker may actually benefit the pension scheme and the employer. Indeed, the scheme may be allowed to retain the employer's contributions (even though they were paid on the basis of the relevant employee being a member of the pension scheme at the time).

[764] An outgoing worker might argue that it would be **unjust enrichment** for the employer/scheme to get an unexpected windfall from an amount originally designed to provide retirement benefits for a named employee who is no longer part of that scheme. Indeed, the employer would not recover pension rights that have vested.

protection. Ideally such amounts should be transferred to a new scheme.[765] An additional argument in favour of workers retaining employer contributions is that these represent a form of **deferred remuneration** in respect of a relevant period of employment. [766] One could thus argue that any failure to credit an outgoing worker with an amount of employer contributions paid in respect of that employee would constitute an 'unlawful deduction of wages.'[767] Given that a worker is ultimately at a disadvantage when his or her pension contributions do not vest and are not converted into pension rights, allowing the outgoing worker to recover employer contributions would **mitigate** a worker's future loss of social protection, provided such amounts were re-invested in a supplementary pension scheme. However, as the Supplementary Pensions Directive only provides minimum requirements, this would require a more socially ambitious implementation by Member States.

In theory, a worker should not be unjustly deprived of an amount that has been deducted from his/her salary for the purpose of building occupational pension rights. In terms of social protection, any recovered pension contributions should be put towards another supplementary pension scheme, which will subsequently allow the worker to buy an annuity on retirement.[768]

Nevertheless workers must also contemplate the possibility that the returns on their investments will be poor or even negative. Indeed, Recital 19 states that "*The value may be more or less than the contributions paid by the outgoing worker."*[769] Ultimately, the obligation for schemes to reimburse pension contributions in relation to unvested pension

[765] Arguably, recovery of contributions could be made conditional upon payment by the employee into another supplementary pension scheme, which would reflect the purpose for which they were made. It would thus be compatible with the right of employees to build up social protection entitlements. Any re-imbursement or cross-border transfer could result in a Member State seeking to recover any tax deduction granted in respect of such contributions. However, it is debatable whether this would be fair or satisfactory where a worker pays the amount recovered into a supplementary pension scheme.

[766] Indeed, occupational pensions (including employer contributions) have been categorised as pay for the purposes of EU law on equal treatment. See the case of *Worringham* (supra).

[767] Although the notion of remuneration is itself a complex one and with the exception of a worker's basic wage, some remuneration may be conditional upon fulfilment of certain conditions, the wording, "*contributions paid by the outgoing worker, or paid on the worker's behalf*" is broad enough to argue that employer contributions paid in respect of that employee should be included given that they were paid on the worker's behalf and for his/her benefit.

[768] The reimbursement of contributions in cash would not usually assist a worker from a social protection perspective as the worker may spend the money otherwise and will thus lose out on a source of social protection in the future. Moreover, Member States will usually presume that any tax deduction awarded for making contributions to an occupational pension scheme, should be forfeited and will thus tax, often substantially any reimbursal of pension contributions.

[769] The fact that occupational pensions constitute a form of social protection might lead one to ask whether all workers (not just mobile workers) should be able to expect a degree of certainty that, at the very least, the amount of their contributions are secure and will not be lost. However, such a consideration would come up against the argument of competence and subsidiarity and could therefore only be provided by the Member States. Moreover, the prudential regulation of occupational pension schemes with cross-border membership is dealt with under the IORP Directive.

rights may be limited to the worker's contributions in most DB schemes. With regards to unvested pension rights, the Supplementary Pensions directive does not prevent the exercise of free movement from resulting in a more favourable outcome for pension scheme members who are not mobile. Nor does it offer any safeguard as to the value of contributions of migrant workers. This may discourage workers from exercising their freedom of movement.

f. The role of social partners to raise the protection of acquisition.

The minimum requirements approach to acquisition leaves scope for the social partners to beef up the protection of migrant workers. Under Article 4 (d) of the Supplementary Pensions Directive, "*Member States shall have the option of allowing the social partners to lay down different provisions by collective agreement, to the extent that those provisions provide no less favourable protection and do not create obstacles to the freedom of movement for workers.*"

Reinforcing the acquisition of occupational pension rights entails a cost for employers as well as being a key concern for migrant workers who need to build up social protection entitlements while exercising their freedom of movement. However, the issue of cost is not conclusive and may be viewed as a short term concern associated with improving the quality of protection afforded to workers under EU law. Despite its extra cost, increased worker mobility should generate competitiveness as well as opportunities for growth. The minimum rights approach of the Supplementary Pensions Directive should avoid any disproportionate cost for occupational pension schemes. The limitation of its scope to deal with acquisition in respect of future periods of employment should also allow schemes and employers enough time to budget for this purpose. Member States should provide the necessary support and incentives for this to happen at the national level in the context of their pension system. Ultimately, the European social model and the fundamental rights that are at stake require a three way social bargain involving member states and social partners, which treats social protection as a full component of free movement. The minimum requirements approach puts the responsibility squarely on the shoulders of Member States and social partners to reduce the social deficit in positive integration on matters of acquisition.

Lessons on the EU's protection of the acquisition of occupational pension rights

The approach of the Commission when drafting the provisions on the acquisition of occupational pension rights under the Portability Directive was based primarily on the need for worker mobility rather than the need to protect migrant workers' social protection. It thus

translated into a technical approach based on minimum requirements. The various stages of drafting EU legislation also showed the technical difficulty of trying to reflect the complexity and diversity of occupational pensions in EU law. In its explanatory memorandum, the Commission acknowledged the loss of pension rights for young workers as "*a major disincentive to mobility*". However, it did not reflect in the Supplementary Pensions Directive the need for young workers to start building up social protection rights from the earliest possible age. Moreover, the Commission side-stepped the general principle of EU law, which prohibits age discrimination, on the basis of which this provision could be challenged as contrary to Article 19 TFEU (ex Article13EC).

Some of the provisions of the Supplementary Pensions Directive may have practical benefits for workers in countries where the rules of occupational pension schemes still constitute obstacles to acquisition. It should be noted that overly stringent conditions of acquisition particularly affect women and workers whose work patterns are either irregular or precarious (fixed term worker).

In dealing with acquisition, the proposed legislation has engendered some heated disputes with regards to vesting periods in the European Parliament. Debates in the Council were heavily influenced by arguments coming from the pensions funds. Unsurprisingly, such tensions resulted in the provisions on acquisition being amended and watered down.

The acquisition of occupational pensions is just one part of the social protection and free movement equation for mobile workers. Once a migrant worker has acquired occupational pension rights through employment, those rights need to be protected.

B. The Treatment of Dormant Rights and its effect on the free movement of workers: Preservation, Portability and Commutation

Under national law, the protection afforded to the preservation of worker's occupational pension rights has evolved as governments have recognised the need to prevent the adverse scenarios that historically afflicted many workers.[770] The connection between the treatment of the occupational pension rights of migrant workers and their right to free movement makes it important for migrant workers who 'leave pension rights behind' in their old scheme to know that these will be secure and that they will not lose rights acquired.

[770] For example, many employees who were made redundant in Britain in the 1960s sadly lost their occupational pension rights in addition to their jobs. This led to national moves to improve the rules on preserving pension rights at national level. In some countries of the EU, the existence of intersectoral schemes has avoided the problem of dormant rights altogether by enabling workers to continue acquiring pension rights even though they have changed employer.

Failure to provide such a safeguard would be an obstacle to the free movement of workers. In dealing with the treatment of dormant rights, to what extent does EU positive integration guarantee adequate social protection as part of ensuring the free movement of workers? An issue that has polarised opinion has been the method to maintain the value of acquired pension rights. The main technical choice as to the method(s) considered for the purpose of EU legislation has been between "preservation" and "portability".

The treatment of dormant pension rights: preservation, transfer or commutation?

For the purpose of EU law on the freedom of movement of workers, the key is to ensure that the treatment of acquired occupational pension rights do not raise actual or potential obstacles to the free movement of workers.[771] The observation was that schemes have a natural bias towards their active members.[772] EU law on free movement of workers was seen as requiring the prevention of less favourable treatment by pension schemes of migrant workers compared to non-migrant workers. This led to the principle of non-discrimination under the Safeguard Directive. The Commission also envisaged the different techniques of treating dormant rights.

The usual consequence of changing employment on a cross-border basis is that a worker ceases to be an "active member" of the scheme relating to his previous employer and will no longer accrue pension rights under that scheme.[773] The default position tends to be that: "*An early leaver who has acquired rights can in principle leave these rights in the scheme of origin.*"[774] Thereupon, the status of the worker changes to that of "deferred member" of the pension scheme and the worker's accrued pension rights become known as

[771] The Commission's Communication of 1991 and its Green Paper of 1997 considered that obstacles to free movement resulted from a lack of protection of migrant workers' '*dormant'* rights. This situation was initially assessed on the basis of the difference in treatment of the pension rights of a migrant worker who becomes a deferred member compared to the position of a non-mobile worker who remains an active member of the scheme until retirement.

[772]According to Paragraph 3.2 of the1991 Commission Communication: "*Supplementary pension schemes would normally privilege the interests of current scheme members, as opposed to scheme leavers (i.e. workers who leave the scheme before retirement and either take their rights out of the scheme or maintain their rights in it). Many features of such schemes will penalise scheme leavers, and individuals who frequently change jobs would usually finish their career with significantly reduced benefit entitlements. This problem has to be addressed at the Community level to the extent that it penalises cross-border mobility more than intra-national mobility*."Communication from the Commission to the Council of 22 July 1991: 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.

[773] This scenario assumes that migrant worker's new employer does not participate in the same occupational pension scheme, which will tend to be the case in most cross-border situations. Hence, the worker no longer contributes or receives employer contributions to the original pension scheme.

[774] Commission Staff Working Document, Annex to the: "Proposal for a Directive of the European Parliament and the Council on the improvement of portability of supplementary pension rights" COM (2005) 507 final Brussels 20.10.2005 SEC (2005) 1293 p.17.

"dormant" or "deferred" rights. The legal treatment afforded to "deferred rights" (that remain behind) is thus known as "***preservation***".

Under the 2005 proposal for a Portability Directive, the ambition of creating an internal market in the field of supplementary pensions was combined with the need for worker mobility: a wide interpretation was given to the notion of "***portability"*** of pensions. The main novelty concerned regulating the possibility for occupational pension rights to 'follow the worker', which also tied in with the free movement of capital and services. This technique for dealing with a job leaver's pension rights involves transferring pension capital from the old scheme to a new scheme (e.g. one sponsored by the new employer), which will provide pension rights to the migrant worker. This is referred to as "***transferability***".

Alternatively, where the value of pension rights of an outgoing worker is 'minimal', this raises the issue of how EU law should deal with the "***commutation***" of pension benefits into lump sums in such a way as to avoid any adverse treatment of migrant workers.

1. The preservation of dormant rights

The maturity of national legislation on the preservation of dormant rights varies between Member States.[775] Finding the correct approach for regulating preservation under EU law in the context of free movement has been subject to an evolving approach.

An evolutionary approach: from equal treatment to minimum requirements

At the beginning, EU law focused on the need to prevent significant differences of treatment between migrant workers and static workers (who spend their career with the same employer). This was a key consideration when addressing national preservation rules governing the occupational pension rights of workers, which varies between Member States.[776] Certain trends have been observed by the Commission, which compared the situation of static workers with that of mobile workers. Despite national preservation laws, worker mobility clearly has an adverse impact on the level of pension benefits.[777] Where the

[775] Belgium, Ireland, Netherlands and UK in particular have had laws providing for the preservation of dormant rights for a number of years. However, the preservation laws in other Member States often depend on the importance of occupational pensions in the relevant pension system.

[776] Some Member States have assessed the impact of the preservation measures contained in the proposed EU legislation by reference the effects of their existing preservation laws on enabling worker mobility. However, there is a shortage of empirical case-studies dealing with the European dimension of on this point, namely the impact of national preservation laws on cross-border mobility.

[777] One scenario given by the Commission contrasts two workers, each earning 25,000 euros per year at the beginning of a 40 year career (starting at the age of 25 and finishing at 65). The static worker (A) receives a

application of preservation rules under national law leaves migrant workers at a disadvantage, there is arguably an obstacle to free movement that treats migrant workers less favourably.[778] EU law on free movement has an obligation to prevent any discrimination from occurring.

Subsequently, the need for EU law on free movement to deal with preservation rules related to the need to ensure the social protection of migrant workers by safeguarding their vested pension rights when they change employment. The adjustment of the value of the deferred rights to take account of inflation or average wage increases depends on the preservation legislation in place in each Member State, which varies across the EU.[779] In practice, there may be adverse consequences that come from leaving pension rights behind as "dormant rights", which may have a knock on effect on mobility.[780] Hence the need for EU law to protect the value of the deferred occupational pension rights of migrant workers.

Two approaches have emerged with regards to EU secondary legislation in relation to the rules governing the preservation of the deferred pension rights of migrant workers: first of all, the principle of non-discrimination was seen as the driving force underpinning the approach to free movement in the Safeguard Directive. Secondly, the approach of the Supplementary Pensions Directive is to establish "minimum requirements" for preservation.

The preservation of dormant rights and the principle of equal treatment

Recital 10 of the Safeguard Directive makes it clear that the principle of equal treatment applies to protect migrant workers with regards to the risk of the treatment of their deferred pension rights becoming an obstacle to free movement.[781] The Safeguard Directive provided the first step regarding the link between the preservation of the occupational pension rights of migrant workers and the free movement of workers. Its main focus is on

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pension of 9009 euros per annum (40% of final earnings), whereas the mobile worker (B) receives a pension of 7536 euros per annum (33% of final earnings).

[778] On discrimination on grounds of 'migration', see the Opinion of AG Fenelly in C-190/98 Graf: " the guarantee of freedom of movement for workers within the Community in Article 39 EC also entails the prohibition of national measures which distinguish, not according to nationality, but according to whether a person engages in an uninterrupted economic activity in his country of origin, on the one hand, or on the other, either moves to another country to work in an employed or self-employed capacity or works in more than one country at a time, to the prejudice of those who thereby exercise their right of free movement.

[779] "*Such preservation may be limited to a nominal value (e.g. a monthly pension of 100 euros as of the age of 65)*". Such a situation would mean that value of "preserved" pension rights would fall in real terms because of inflation. The Commission's crucial observation is that "*the higher the inflation rate, the greater the mobility loss due to insufficient preservation. The mobility loss will be amplified by the fact that individual earnings tend to rise faster than prices or even aggregate earnings.*"

[780] For example, unlike workers with an uninterrupted career, any future pay rises of deferred members would usually not be taken into account for the calculation of deferred benefits in a DB scheme.

[781] *"Whereas, in order to enable the right of free movement to be exercised effectively, workers and others holding entitlement should have certain guarantees for equal treatment regarding the preservation of their vested pension rights deriving from supplementary pension schemes."*

"preventing cross-border workers from being discriminated on grounds of nationality and 'migration'."[782]

The key provision of the Safeguard Directive on preservation is Article 4.[783] It entails a comparison with the preservation rights of non-mobile deferred members. There is no doubt that protection against discrimination is of vital importance when preserving the occupational pension rights of migrant workers. Nevertheless, it is not sufficient to prevent obstacles to the free movement of workers EU law from occurring in this field. There is always the possibility for preservation rules to constitute non-discriminatory obstacles to free movement, which would potentially affect internal mobility as much as cross-border mobility. This left EU legislation to target non-discriminatory obstacles through a minimum requirements approach.

Addressing the techniques and levels of preservation: from harmonisation to 'fairness'

In its impact assessment for the proposed Portability Directive, the Commission had originally envisaged the different techniques of preservation.[784] It assessed such techniques in terms of their costs to pension schemes as well as their benefits in terms of their "*impact on social protection rights of mobile workers*" and "*impact on mobility*". [785] The Commission concluded that the status quo on preservation was not satisfactory and would lead to a lack of cohesion in the response by Member States. However, the Safeguard Directive failed to deal with such unfavourable effects of mobility on the dormant occupational pension rights of migrant workers.[786] Hence, the Commission proposed additional requirements for preservation at EU level. The social protection rationale for protecting migrant workers' occupational pension rights under EU law certainly justifies preserving deferred rights to minimise the loss of social protection caused by exercising free movement.

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[782] F. RAVELLI, The ECJ and Supplementary Pensions Discrimination, European Journal of Social Law, No.1 March 2012.

[783] It stipulates that: "*Member States shall take the necessary measures to ensure the preservation of vested rights for members of a supplementary pension scheme in respect of whom contributions are no longer being made to that scheme as a consequence of their moving from one Member State to another, to the same extent as for members in respect of whom contributions are no longer being made but who remain within the same Member State*."

[784] It looked at adjusting deferred rights based on inflation, according to the rate used for pensions in payment, according to the rate of return of pension fund assets and according to the rate of general wage development.

[785] The impact on social protection examined "*whether the proposed measure enables the mobile worker to end his/her career with sufficient and adequate pension rights*" (which included comparing them to comparable non-mobile employees who remain with the same employer during their entire career). The impact on mobility examined "*whether the proposed measure will avoid that a (potential) early leaver faces a significant loss of his pension rights at the moment of cessation of employment so as to deter the willingness to change employment*."

[786] It "*would leave it entirely over to Member States whether they wish to lay down in law a requirement that dormant rights should be adjusted and if so to what extent*." Failure to address this *"would result in many leavers having a much lower amount of supplementary pension benefits at the end of their career as compared to those employees who remain members of the same pension scheme throughout their career*."

The proposed Portability Directive sought to improve the conditions governing the preservation of deferred rights. Its goal of achieving an 'approximation of laws in this field' was reflected in Recital 5.[787] This showed that the Commission was seeking to harmonise preservation rules for the purposes of benefiting workers' free movement in the internal market. The explanatory memorandum to the proposed Portability Directive provided the rationale for Article 5 on the preservation of dormant pension rights.[788] By providing for minimum requirements on preservation, the directive would enhance the protection of the deferred pension rights of mobile workers in purely national situations. The wording was sufficiently broad as to leave a great deal of flexibility to Member States.[789] It also provided a principle to guide their approach. The introduction of a criterion of 'fairness' in Article 5 was a *qualitative* leap designed to catch non-discriminatory preservation rules that would unfairly penalise migrant workers. [790]

Under the 2007 amended proposal, a new recital 6b emphasised the right of outgoing workers to leave their vested pension rights as dormant rights in the scheme in which they vested.[791] Recital 7 clarified how dormant rights should be calculated and preserved, whilst emphasising the need to consider the particular nature of the scheme and the rights of active members who remain within the scheme.[792] Recital (7a) also stated that the Directive did not create any obligation to establish more favourable conditions for the dormant rights of outgoing workers than for the rights of active scheme members. Significantly Article 5 granted outgoing workers the right to leave their dormant rights within the scheme where they had vested, subject to certain conditions.[793] The Commission considered this was "*a*

[787] "*The rules on the preservation of dormant rights and the transfer of acquired rights must be brought closer together*."
[788] "*A mobile worker should not have to suffer a considerable reduction in the acquired rights he has left within the supplementary pension scheme under his former employment relationship."*
[789] Indeed, Article 5.1 provided that: "*Member States shall adopt the measures they deem necessary in order to ensure a fair adjustment of dormant pension rights so as to avoid that outgoing workers are penalised*."
[790] Its ethos was based on the need for a fair deal for migrant workers compared to non-migrant workers. A fairness test is less onerous for pension schemes than a certain level or technique of preservation. It departed from traditional criteria of EU law such as non-discrimination, restrictions of market access and proportionality. Given that fairness entails a lack of bias towards one category of worker or another, there is a need for a balancing act between the interests of active members and deferred members, when dealing with preservation.
[791] This recital showed that the Commission was particularly concerned about certain situations where highly mobile workers might have their rights discharged to another supplementary pension scheme that fulfilled the provisions laid down in article 5.1, in particular in the context of DC pension schemes.
[792] The wording of Recital 7 referred to '*national law and practice*' for the calculation of pension right values, rather than 'actuarial standards' to avoid confusion with the cross-border provisions within the IORP Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision.. In addition, the text also referred to '*justified administrative costs*' that may be taken into account in the event of dormant rights being adjusted. The Commission considered this to be a "proportionate and necessary addition".
[793] It stated: "*where applicable, the value of newly formed dormant pension rights should be calculated at the moment a worker leaves a scheme. This value acts as the reference point for the future treatment of dormant*

reasonable compromise to protect the long term sustainability of supplementary pension provision." Article 5 was amended to confirm the role social partners may play when implementing its provisions on preservation.

The Supplementary Pensions Directive seeks to respect specificities that may exist at national level and at scheme level by providing for minimum requirements on preservation in the context of free movement. This can be seen in Recital 19.[794] The key provisions on preservation are broadly the same in substance as in the 2007 amended draft. However, some improvements have been made to the wording to render clearer and more precise Article 5 on the "Preservation of vested and dormant pension rights".

Lessons on regulating preservation under EU law

Since the Safeguard Directive, EU law has applied the principle of non-discrimination to the preservation of occupational pensions, which provides protection similar to that offered by Article 48TFEU and the Coordination Regulations to statutory pensions. The inclusion of a legal requirement of fairness by which to assess preservation measures constitutes an additional safeguard for migrant workers, which goes beyond protection against discrimination. It enhances their protection while aiming to be fair to employers and other scheme members. Given this balancing act, it is clear that the free movement of workers, despite its status as a fundamental freedom/ fundamental right under EU law, does not constitute an absolute right. As far as preservation of dormant pension rights is concerned, the right to free movement under EU law may not prevent a loss affecting a migrant worker's occupational pension benefits if it is "fair" and represents equal treatment with static workers.

The criterion of '*fair'* treatment has been retained by the Supplementary Pensions Directive. This does not focus on the effects of the exercise of free movement on a worker's social protection.[795] Instead, the provision on 'fairness' in Article 5 compares the treatment of

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rights as set out in article 5.1." Article 5.1 referred to preservation of the value of dormant rights "*in line with the value of the rights of active scheme members*" or treatment in line with the "*development of pension benefits currently in payment*" (two methods of treating dormant rights) as comparators for fair treatment. Article 5.1 also listed two examples of methods of fair treatment of dormant rights. Finally, Article 5.1(c) allowed Member States to set proportionate limits when dormant rights are adjusted in line with price or wage inflation.

[794] "*In accordance with national law and practice, steps should be taken to ensure the preservation of dormant rights or the value of such dormant rights. The value of the rights at the time when the member leaves the scheme should be established in accordance with national law and practice. Where the value of dormant rights are adjusted, account should be taken of the particular nature of the scheme, the interests of the deferred beneficiaries, the interests of the remaining active scheme members and the interests of retired beneficiaries*."

[795] The reference to an underlying social purpose "*so as to avoid that outgoing workers are penalised*" has been deleted. A worker may still seek to show that his or her mobility has resulted in a loss of occupational pension rights. However, this will not be sufficient to constitute a breach of his rights to preservation under the Supplementary Pensions Directive.

dormant rights to that of active members or that of workers drawing a pension. The approach is similar to formal equality. This is consistent with the principle that under the Supplementary Pensions Directive, migrant workers are not entitled to receive preferential treatment (compared to workers who are not mobile) as stated by Recital 22.[796] Arguably, it would have been more favourable for a migrant worker to determine an obstacle where there was a loss of occupational pension rights as a result of exercising his or her right to free movement. The fairness test will enable schemes and employers to avoid having to compensate migrant workers where they can justify the fairness of passing on a loss of social protection to the worker. In doing so, employers and schemes may refer to their treatment of other workers. One should note that Recital 21, which in the penultimate draft had allowed '*justified administrative costs*' affecting dormant pension rights has been deleted, which is to the advantage of outgoing workers.[797] As a test, "fairness" can be considered as having both a subjective and objective dimension. While, there is no express criterion of 'proportionality', it is implicit in any fairness test to be applied. As with formal equality in the field of EU law on discrimination, the risk of fairness "by comparison" is that of a race to the bottom. To avoid a loss of substantive rights for migrant workers, such a risk must be compensated by other mechanisms: Article 7 against non-regression is designed to serve that purpose.

The fairness test in the Supplementary Pensions Directive will be used to ascertain the existence of restrictions upon the freedom of movement for workers that stem from the preservation of dormant rights. Arguably, it is different from the reasons that may be invoked by Member States to justify restrictions upon free movement of workers under Article 45TFEU (e.g. public policy).[798] Furthermore, Member States may provide more specific examples of what constitutes fair preservation in their implementing legislation. This test may prove a contentious point in the future with regards to how national judges apply the fairness criterion and may also become a source of ECJ case-law.[799] Will the compatibility of the preservation requirements for migrant workers with the directive's fairness test be ascertained by considering the effects on a worker's social protection? The treatment of migrant workers' dormant rights under EU law should preferably take into account

[796] "*This Directive does not create any obligation to establish more favourable conditions for dormant rights than for the rights of active scheme members.*"
[797] The issue of excessive administrative charges has become a hot topic for occupational pensions.
[798] Arguably, when implementing the directive, Member States will need to consider on the one hand to public policy and the sustainability of occupational pension schemes, while seeking to ensure the social protection of migrant workers on the other hand.
[799] References may be made in future to the ECJ on the interpretation of 'fair treatment' given that Member States are required to have regard 'to the nature of pension scheme rules or practice' which may vary in each national context.

circumstances where a worker's pension loss results from the exercise of free movement. However, a social protection loss is not conclusive of a breach of the Supplementary Pensions Directive, which belies its social deficit and places the onus on the Court to interpret restrictively any attempt by an employer or scheme to justify on grounds of fairness any preservation rules that result in a loss of occupational pension rights. Moreover, the alternative proposal of making occupational pensions *portable* proved too controversial.

2. The portability of occupational pensions: from legal rights to voluntary transfers

Pension transfers generally involve an agreement between three parties: the worker and two pension schemes (one transferring and the other receiving).[800] Rules governing pension transfers vary between Member States and also depend on the nature of occupational pension schemes (e.g. funded or PAYG, DB or DC). The Green Paper of 1997 identified the need for greater transferability, stating that one of the conditions for more effective mobility of workers was the establishment of "*machinery for transferring supplementary pension rights."* This proved to be one of the most controversial issues ever discussed at EU level in this field. The main source of tension arose over whether EU provision on pension transfers should provide employees with a legal right or remain voluntary for occupational schemes.[801]

The initial legislative proposal gave employees a right to a pension transfer

The proposed Portability directive included a provision on 'Transferability'.[802] This was considered as being at the "*heart*" of the notion of "Portability".[803] Its most significant provision was that, outgoing workers would have had the right to request within 18 months of

[800] First, the outgoing worker must request a transfer and then agree to the conditions of that transfer; secondly, the transferring pension scheme must be willing and able to provide a transfer amount; thirdly, the receiving pension scheme must be willing to accept the transfer and indicate the amount of service to be credited.
[801] One option was for EU secondary legislation to give rights to workers and set out the conditions for transfers to take place. Alternatively, pension transfers could remain subject to national law and in cases where they remained voluntary, their operation could be left to the pensions industry to 'self-regulate'.
[802] *Under Ex-Article 6 (1): Unless a capital payment is made in accordance with Article 5(2), the Member States shall take the necessary action to ensure that if an outgoing worker is not covered by the same supplementary pension scheme in his new job, he may obtain on request and within 18 months after the termination of his employment the transfer within the same Member State or to another Member State of all his acquired pension rights.(2). Member States, in accordance with their national practice, shall ensure that where actuarial estimates and those relating to the interest rate determine the value of the acquired rights to be transferred, these shall not penalize the outgoing worker.(3). Under the supplementary pension scheme to which the rights are transferred, the rights shall not be subject to conditions governing acquisition and shall be preserved at least to the same extent as dormant rights in accordance with Article 5(1).(4). Where administrative costs need to be paid during a transfer, the Member States shall take the necessary action to prevent them from being disproportionate to the length of time the outgoing worker has been a scheme member.*
[803] EAPSPI Position Paper 2006. p.11.

the termination of employment, the transfer of all acquired pension rights to a new scheme, (whether in the same Member State or between different Member States.) [804] The right of workers to choose between preservation and a transfer was also mentioned in ex Recital 9.[805]

The ambition of transferability was to enable the consolidation of supplementary pension rights.[806] In determining the conditions of pension transfers, occupational pension schemes could continue to use actuarial estimates and apply relevant interest rates in accordance with national practice. However, Member States were required to ensure that the application of these methods did not "*penalise the outgoing worker*". Ex Article 6(4) also contained a criterion of proportionality in relation to the length of time the outgoing worker had been a scheme member, which applied to the imposition of any administrative costs as a result of the transfer. However, some members of the pensions industry including EAPSPI challenged the potential costs of transferability as unfair.[807]

A significant additional advantage for workers whose rights would be transferred was that they would not be subject to acquisition conditions under the new scheme. For example, there would be no vesting period for 'transferred in' rights. This promoted continuity of retirement provision. Transferability was seen as a technique removing barriers to acquisition. It was also designed to be compatible with preservation as the same safeguards would apply to "transferred rights" as to dormant rights. The objective was to protect the supplementary pension rights of migrant workers by breaking down barriers between occupational pension schemes in the Member States. However, this proved to be the most controversial provision of the proposed Portability Directive.

The complexity of the providing workers with the right to a pension transfer revealed several technical difficulties.[808] Furthermore, the nature of the pension rights being

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[804] EAPSPI viewed 18 months as "*too long*": "*For the sake of legal certainty, it would perhaps be better to provide scope to Member States to shorten this period or to consider it as a more flexible deadline so that a shorter period is possible*."

[805] "*Workers who change jobs must be granted the possibility of choosing either to retain their pension rights acquired under the original supplementary pension scheme or to transfer the corresponding sum to another supplementary pension scheme, including one in another Member State.*"

[806] Arguably, this would have had practical benefits for mobile workers whose pension rights might otherwise be scattered across the Member States. In theory, pension transfers might have been considered as a valid means of implementing the principle of aggregation provided in Article 42EC, now 48 TFEU, which was the directive's initial legal basis. It was an alternative method designed to provide workers with legally enforceable protection and consolidation of their occupational pensions, just as Regulation 883/2004 provides migrant workers with the aggregation of their periods of statutory insurance and coordinates the different statutory pension regimes in force in the Member States.

[807] EAPSPI asked: *"who pays the costs linked to portability? The employer? The workers who do not transfer? Or everyone? Is it fair that these supplementary administrative costs, caused by early leavers with relatively short periods of scheme membership, should be borne by the remaining workers and / or the employer?"*

[808] EAPSPI stated: "*Article 6 states the rights a worker has to demand a transfer. It should be mentioned that such a right will not be satisfactorily complete if either the new receiving employer or employer pension scheme*

transferred, the guiding principle underpinning a pension transfer and the calculation of workers' pension rights were also seen by EAPSPI as requiring greater precision.[809] One complication for calculating cash equivalent transfer values stemmed from the absence of uniform actuarial standards. Another technical difficulty concerned those pension schemes regimes whose funding is based on accounting provisions as well as PAYG schemes where on-going contributions are used to pay benefits.[810] However, the implementation of transferability was expected to be gradual and left some discretion to the Member States who were asked *"to endeavour to progressively improve the transferability of rights from unfunded schemes*" in order to "*ensure equal treatment for workers covered by funded schemes and workers covered by unfunded schemes"***.**

There was a great deal of political opposition to transferability and the argument of "sustainability" of supplementary pension schemes was debated at length.[811] The complexity and diversity of occupational pension schemes in the Member States was matched by the technical difficulty of pension transfers and political opposition. To boot, the proposed provision of ex Article 6 on transferability contained linguistic issues as to translation. It was thus effectively condemned to deletion.

The removal of the provision on transferability

When the proposed directive was amended in the 2007, its focus shifted away from transfers (as reflected by the new title, which removed the reference to '*portability*') in favour

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is not obliged to accept this transfer. The proposal does not stipulate any obligation of acceptance of a CETV. But without any obligation to accept the right to transfer fails to work."

[809] "*First of all, it should be clear that Article 6 applies only to the cash equivalent transfer value (CETV) and not the entire pension entitlement. An entire pension entitlement can hardly be transferred since it would have to be treated as continuous in the new scheme, which is almost impossible. Effecting a CETV, however, is the best way to complete any kind of transfer and is the nearest one can get to achieving this aim. Considering the principle of a fair transfer, a rule should be adopted in Article 6 (2) that the CETV is calculated according to the original (transferring) competent pension institution. Thus, specific aspects of each pension scheme can be fully taken into account without penalising the outgoing worker. On the other hand, the new scheme should receive and pass on a CETV according to its own rules."*

[810] Such schemes might find it difficult to produce cash equivalent transfer values without suffering an adverse impact or economic cost. Consequently, an exemption to transferability for unfunded schemes was envisaged by Recital 10 "*for reasons of financial sustainability".* The above exemption was provided in Article 9(3), which stated: "*Notwithstanding the first paragraph, and in order to take account of specific conditions duly substantiated and linked to financial sustainability of supplementary pension schemes, the Member States may exempt pay-as-you-go schemes, support relief funds and companies which constitute book reserves with a view to paying pensions to their workers from the application of Article 6(1). Any Member State wishing to make use of this possibility shall immediately notify the Commission, indicating the schemes concerned and the specific reasons for the exemption, together with the measures adopted or planned with a view to improving the transferability of rights from the schemes concerned.*"

[811] In particular, the Netherlands was worried that the financial stability of its funded occupational pension schemes could be negatively affected if they were required to pay pension transfers across to pension schemes in other Member States. This led to a strong Dutch opposition to transferability throughout negotiations in the Council.

of "*acquisition and preservation*". The European Parliament had considered at the time that a compulsory transfer option "*would place too great a burden on some supplementary pension schemes and would, furthermore, cause considerable technical difficulties*." The Commission acknowledged this change of priorities and deleted ex article 6 (on transfer provisions). Amendments were also made to the directive's objective (Article 1) as well as the recitals of the 2007 amended proposal for a Supplementary Pensions Directive. For the avoidance of doubt, a new recital was included. Recital 24(ex 9a) now states that "*This Directive does not provide for the transfer of vested pension rights.*"

The reasons for the removal of Article 6 were acknowledged by the Commission in its explanatory memorandum to the 2007 amended proposal, which referred to "*the technical difficulties involved in agreeing general provisions for transfers and concerns over the impact on the financial sustainability of some supplementary pension schemes.*" However, the Commission also expressed its regret that the amended proposal did not contain "*provisions specifying how the transfer of pension rights should be undertaken*".

Despite the deletion of Article 6 on pension transfers, both the Commission and the European Parliament still wished to clarify that the proposed Directive did not discourage the transfer of pension rights.[812] Ultimately though, transferability has been relegated to a voluntary status consistent with the open method of coordination. It remains to be seen whether the development of pension transfers may take place through self-regulation. The point of transferability is to consolidate pension rights and thus avoid workers having multiple pension pots. The fragmentation of occupational pensions might result in a loss of social protection (due to multiple administrative charges) as well as being inefficient from a 'logistical' perspective as it further fragments the sources of a workers' social protection. However, where the value of a member's vested pension rights are not worth the hassle or cost of administering, social protection is often put aside in favour of commutation into cash.

3. The commutation of 'minimal pensions'

To avoid pension schemes having to administer small amounts of pension assets that would provide minimal/trivial pension benefits, Member States pension laws and the rules of many occupational pension schemes often allow such amounts to be 'commuted' into a lump

[812] Therefore Recital 24 confirms that Member States are invited to encourage transfers, particularly in new supplementary pension schemes although the reference to improving conditions of transfer has also been dropped. A link between the transferability of vested pension rights and the improvement of 'occupational mobility' had originally been made but this has also been amended to refer only to the need to facilitate cross-border mobility between Member States. It should be noted that with the advent of auto-enrolment in the UK, transferability has been viewed as an option for the future.

sum. This results in a cash payment rather than an annuity.[813] The perceived advantage is that it saves both the member and the scheme from incurring administrative costs that might be disproportionate, given the minimal level of pension rights involved.[814] However, the downside is that a worker who accepts 'commutation' into a lump sum will miss out on receiving occupational pension benefits in retirement in the form of an annuity.[815]

The initial choice between preservation and transfer, which was granted to migrant workers under the proposed Portability Directive, still remained subject to the right of occupational pension schemes to commute 'minimal pensions' according to the thresholds in force in the relevant Member State.[816] The cost-based explanation for commutation was reflected in Recital 8 of the proposed Portability Directive and in the Commission's explanatory memorandum.[817] The 2007 amended proposal for a Supplementary Pensions Directive made some minor changes with regards to the commutation of trivial pensions. Recital 8 concerned the discharging of small amounts of vested pension rights of outgoing workers and clarified the calculation of capital payments. Some drafting changes were also made to article 5 with regards to how pension schemes could discharge liabilities as a capital sum when accrued rights are below a specific threshold set by national legislation.

Article 5(3) of the Supplementary Pensions Directive contains the provision on the commutation of minimal/trivial pensions.[818] The right to determine whether or not to commute pensions is given to pension schemes in accordance with national law and practice. Member States therefore have a major responsibility to set thresholds that enable workers to

[813] Significantly, George Osborne, the UK's Chancellor of the Exchequer took the bold move in his budget speech of 2014 to introduce a general right to commutation (in the case of DC schemes). The full impact on the pensions industry remains to be seen. However, it is a choice that is only relevant upon reaching retirement, which is different from the commutation of pensions as an alternative technique to preservation.

[814] Commutation may spare employees from the value of their pension contributions being diminished on an on-going basis by fees and charges. It may also spare employers and pension schemes from administration costs.

[815] Indeed, commutation converts into cash funds that were originally designed to provide for a pension in retirement. While some employees may welcome a short term cash benefit, this will frequently result in a loss of long term social protection, unless employees choose to invest that money in a pension plan. The knock on effect may be particularly acute for workers who commute 'minimal pensions' several times.

[816] Article 5.2 provided "*The Member States may allow supplementary pension schemes not to preserve acquired rights but to use a transfer or payment of a capital sum representing the acquired rights when these do not exceed a threshold established by the Member State concerned. The Member State shall inform the Commission of the threshold applied*."

[817] The explanatory memorandum stated that: "In order to avoid excessive administrative costs stemming from the management of a high number of low-value dormant rights, the proposal provides for the option not to preserve these pension rights but to use a transfer or a payment of a capital sum representing the acquired rights when these do not exceed a threshold established by the Member State concerned."

[818] "*The Member States may allow supplementary pension schemes not to retain the vested rights of an outgoing worker but to pay, with the worker's informed consent, including as regards applicable charges, a capital sum equivalent to the value of the vested pension rights to the outgoing worker, as long as the value of the vested pension rights does not exceed a threshold established by the Member State concerned. The Member State shall inform the Commission of the threshold applied.*

retain their rights as dormant rights within a scheme wherever possible while avoiding placing excessive administrative burdens upon pension schemes.[819]

However, workers are given the right to choose whether or not to consent to commutation, subject to having received the necessary information. This provides an additional layer of protection to workers. The outcome of the Supplementary Pensions Directive with regards to commutation is again a "balancing act" between the interests of schemes and the interests of workers. The Commission will in principle be able to monitor whether the thresholds set by Member States are low enough to reflect that purpose. In theory, this should limit obstacles to the free movement of workers and a loss of social protection resulting from commutation. Moreover, under Article 5(4) of the directive, social partners are able to determine more favourable levels of protection.

Lessons on the treatment of dormant rights

The approach to EU secondary legislation has been a progressive one of seeking to deal gradually with the various legal techniques and means of protecting the dormant rights of migrant workers. There have been major changes to the substantive content of the Supplementary Pensions Directive, in particular the rules on preservation and the removal of an operative provision on pension transfers. Arguably, there has been an improvement from the perspective of protecting migrant workers' freedom of movement, especially given the "fairness" test. However, the directive does not rule out a negative impact on the value of occupational pension rights that would entail a loss of social protection. Fragmentation as a potential obstacle to free movement is thus not catered for under EU law: transfers remain a possibility for workers and occupational pension schemes but on a voluntary basis. Commutation is another option made available to occupational pension schemes, subject to limits set by Member States. The overall result represents a compromise, which seeks to offer minimum protection to workers while taking on board the opinions voiced by Member States and the pensions lobby group. There is no doubt that the arguments of cost, technicality and flexibility have influenced the minimum requirements approach of the Directive. Nevertheless, the Commission's efforts to reconcile the interests of employers/pension schemes with the interests of migrant workers should be welcomed insofar as they go beyond the principle of non-discrimination. By setting out minimum requirements, the directive does not seek to harmonise the treatment of dormant rights but rather to give migrant workers a

[819] In this regard, Recital 21 states that the purpose of commutation is "*in order to avoid excessive administrative costs resulting from the management of a large number of low-value dormant rights*".

basic form of protection of their occupational pensions, which will go one step further to address the conditions under which they may exercise their right to free movement. But in order to improve the protection of migrant workers, it is vital that they should be adequately informed of the effects that their mobility would have on their occupational pension rights.

C. Information requirements

Information is a vital tool to safeguard workers' and pensioners' rights, by assisting them with their choices and promoting a culture of communication between occupational pension schemes and their members. There is a need to facilitate the understanding of pensions by all parties by providing information that is clear, simple, timely and effective, appropriate, accurate and useful.[820]

Historically, the lack of "worker-specific" information has often resulted in workers not being able to make informed decisions about the effects of exercising their right to free movement on their occupational pensions. A lack of adequate information constitutes an obstacle to free movement of workers that needs to be addressed by EU law and in practice. Responsibility for this task falls upon the governments of Member States, specific public bodies and private actors such as employers, trustees and pension scheme managers.

Information coming from the EU and public bodies in the Member States has vastly improved over the last decade with new sources of information, advice and assistance benefiting EU citizens and individuals in general. Such progress has been made possible by the Commission and the Member States. Remedying the information gap has been deemed a priority for secondary legislation, which shapes the positive integration in this field in order to protect migrant workers' occupational pensions' free movement under EU law.

The first legislative provisions on information were contained in the Safeguard Directive. These were followed up by further provisions in the initial proposal for a Portability Directive, in the 2007 amended draft proposal as well as in the final version of the of the Supplementary Pensions Directive. Two observations can be made: firstly, the role of information has evolved from a tool to mobility to a pre-condition to free movement; secondly information requirements must be adequate and proportionate.

[820] In his annual report for 2007, the Irish Pensions Ombudsman, Paul Kenny, noted that a significant number of the complaints he received were due to "poor communication". Kenny suggested that "*communication in the pensions industry is sometimes misleading*" leaving members uncertain about their contributions and potential benefits. He pointed out that many scheme sponsors and trustees are keen to comply with regulations but these are often overly burdensome, which leads to the information being too technical or incomprehensible: "*The problem is most of the communication is done on a box-ticking basis and is very jargon-laden. Nobody ever takes a step back to check whether Joe Soap can understand it*".

a. The role of information: from a tool for worker mobility to a precondition to the free movement of workers?

Workers' rights to information have grown in importance across the full spectrum of EU labour law. There are provisions on information for employees in both the Directive on the transfer of undertakings and in the Information and Consultation Directive 2002/14/EC.[821] In the context of the free movement of workers and the coordination of statutory social security pensions, there are specific information provisions in Regulation 883/2004 on coordination of social security regimes. In the IORP Directive, which regulates the cross-border activity of occupational pensions and the free movement of services, Article 11 provides a legal right for "Information to be given to the members and beneficiaries" whereas Article 13 deals with Information to be provided to the competent authorities."

The Green Paper of 1997 identified the provision of "*adequate information*" to scheme members as important for worker mobility. The focus of EU secondary legislation in the field of occupational pensions and the free movement of workers has reflected the need for information to translate into legal rights for workers under EU law. A right of workers to information was first included in the Safeguard Directive. This was bolstered by Article 6 of the Supplementary Pensions Directive, which provides a legal right to information for members of an occupational pension scheme. The provisions of Article 6 are independent from those in Article 11 of the IORP Directive 2003/41/EC.[822] The status of information under EU law on occupational pensions has gradually grown: it has become a key legal right for workers and a pre-condition to their freedom of movement.[823] The quality of the information provided is essential: indeed, the need for adequate information to be provided to scheme members and beneficiaries is recognised in Recital 23 of the IORP Directive.[824]

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[821] Article 7 of Council Directive 2001/23/EC of 12 March 2001 deals with information relating to the safeguarding of employees' rights in the event of transfers of undertakings/business transfers.

[822] Article 6 targets information for scheme members from the perspective of their freedom of movement as workers. Its provisions are stated as being "without prejudice" and in addition to those of the IORP Directive. Notwithstanding the substantive overlap, the free movement of workers justifies its own information requirements. There is potential for duplication of information but this is designed to ensure that the information provided under the Supplementary Pensions Directive reflects the logic of free movement and is adapted to the needs of migrant workers. Similarly, the cross-border provision of pension services has its own "consumer"-based logic in terms of information. Separate legal obligations should avoid employers/ pension schemes invoking compliance with one set of information requirements to justify complying with the other.

[823] A legal right to information should in principle enable greater worker mobility. However, the devil is in the detail. For example, the timing and burden of information raises the question of whether it should be provided automatically or on request, as well as whether there should be any limits placed on the provision of information due to the cost for employers and schemes of providing it. Who should be responsible for providing workers with such information? Finally, to whom should the information be provided: active members, deferred members, other beneficiaries (e.g. the spouse of a deceased member)?

[824] Recital 23 of the IORP Directive states: *"Proper information for members and beneficiaries of a pension scheme is crucial. This is of particular relevance for requests for information concerning the financial*

b. The evolution of the quality and standard of information required.

The provisions on information need to be compatible with enabling genuine free movement for workers that upholds their social protection. What therefore is the nature of the details that employers and schemes need to provide and are workers offered valid choices and alternatives? Given that many migrant workers terminate employment before commencing new employment, the impact of termination on a worker's occupational pension must be suitably dealt with. Workers must be able to know their rights, track their pensions and make informed decisions. The above issues raise concern over the quality and standard of the information to be provided to workers. Is "adequate information" a suitable benchmark? Given that the legal obligation for providing information falls upon private actors (e.g. employers and scheme managers), certain limitations designed to achieve a proportionate balance between members' legal rights and scheme responsibilities have been included.

Two trends stand out from the evolution of information requirements under EU law: first, the shift from equal treatment to adequate information; and secondly the limitation of employers/pension schemes' information obligations to "minimum requirements".

i. From equal treatment to adequate information

Recital 14 of the Safeguard Directive stated that workers exercising their right to free movement should be "*adequately informed*" by employers, trustees or others responsible for the management of supplementary pension schemes. It specified the need to have particular regard to the "*choices and alternatives*" available to such workers. This entailed that the timing of the information should arise before a worker decides to exercise his or her right to free movement. Article 7 of the Safeguard Directive sets out the requirements on information for scheme members.[825] Its approach set the benchmark as "adequate information" and was also based on "equal treatment" with deferred members who remain within the same Member State. The driving force of non-discrimination was thus equally applicable in terms of information. The main focus of Article 7 was to place an obligation on occupational pension schemes to inform workers about the treatment of pension rights upon termination of membership. It was implied that adequate information should take place prior to termination.

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soundness of the institution, the contractual rules, the benefits and the actual financing of accrued pension entitlements, the investment policy and the management of risks and costs."

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

One means of improving adequacy of information has been to extend the material nature and scope of information required.[826] However, the potential additional cost for employers and pension schemes has also been taken into account.

ii. **Minimum requirements on information obligations.**

Under the Supplementary Pensions Directive, the structure and content of the provisions on information are broadly similar to the 2007 amended draft. However, there is no reference to the quality of the information required. Instead, Article 6 has taken an instrumental approach, stating the precise nature of the information to be provided rather than set out an objective standard to be met by schemes and employers. Nonetheless, Recital 25 clarifies that "active scheme members and deferred beneficiaries who exercise or plan to exercise their right to freedom of movement should be "*suitably informed, upon request, about their supplementary pension rights*".[827]

The 2007 amendments introduced the change that information was only required to be provided 'upon request'. The information requirement under the Supplementary Pensions Directive is thus reactive rather than proactive in that it must be requested by the worker. This was clearly designed to reduce the cost to employers and pension schemes. However, it may prove slightly problematic for workers who have to make a request, which may signal to their employer that they are considering leaving their existing employment.[828]

The requirement that information should be provided by employers/pension schemes "*within a reasonable period of time*" may be seen as offering flexibility but arguably it is rather vague and lacks precision.[829] Moreover, Member States may provide that "*such information need not be provided more than once per year*." This limitation on the frequency

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[826] The proposed Portability Directive of October 2005 targeted rights to information for active and deferred members with regards to the acquisition and preservation of occupational pension rights. It also included rights to information in respect of transfers. Specific responsibility for the provision of information was placed upon "*the person responsible for managing the pension scheme*", which had also been the case in the Safeguard Directive. However, the wording referred to "*sufficient information*", which was potentially confusing with the requirement of "*adequate information*" provided in the Safeguard Directive. There was a potential risk of workers being overloaded with information, which they might find hard to digest.

[827] "*Without prejudice to Directive 2003/41/EC of the European Parliament and of the Council, active scheme members and deferred beneficiaries who exercise or plan to exercise their right to freedom of movement should be suitably informed, upon request, about their supplementary pension rights. Where survivor's benefits are attached to schemes, surviving beneficiaries should also have the same right to information as deferred beneficiaries. Member States should be able to stipulate that such information need not be provided more than once per year*."

[828] Many employees may not wish to do this until they have accepted a firm offer from a new employer and are therefore in a better position to give notice to their employer. Conversely, information may be requested before a firm decision has been taken by the worker to exercise their free movement within the EU.

[829] Would a week or a month be reasonable? A worker may be under pressure to give an answer to a potential employer who has made a job offer. Therefore, employees need information from an early stage.

of the right to request information is driven by cost. The downside from a social protection perspective is that it may affect whether a worker has up-to-date information. Arguably, adequate information should be prompt and include any changes to the worker's pension that would be expected to occur during that year.

The wording of Article 6 of the Supplementary Pensions Directive was amended in December 2013 and again in February 2014. However, it still provides specific minimum requirements. The burden of information remains that it is to be provided 'on request'. On its substance, Article 6 requires information to be provided regarding the conditions governing the acquisition of supplementary pension rights and the effects of applying them when the employment relationship is terminated. Given the relevance of vesting conditions, adequate information is fundamental to workers making decisions that take into account the impact on their social protection.[830] The requirement of information being in writing provides greater certainty and transparency for all parties. The protection of workers' rights to information is in line with the notion of minimum requirements that constitutes the main thrust of the Supplementary Pensions Directive, which seeks to achieve a balance between workers' needs and the costs for employers/schemes.

D. Non regression and the role of social partners

a. Minimum requirements and non-regression: a floor of rights

With the Supplementary Pensions Directive, the message is clear from its title: this is a "minimum requirements" directive that equates to a floor of rights for migrant workers.[831] Recital 28 reiterates that Member States are able to adopt or maintain more favourable provisions for workers. In addition, it states that "*the implementation of this Directive cannot be used to justify a regression vis-à-vis the existing situation in each Member State*." Furthermore, the directive provides a "non-regression clause" in Article 7.

The Supplementary Pensions Directive is an instrument designed to achieve social progress: the result of the directive must be that migrant workers receive greater legal

[830] The personal scope of Article 6 now provides similar but separate information rights to "*active scheme members"* and to *"deferred beneficiaries"* regarding the value and conditions governing the preservation of their occupational pensions. Surviving beneficiaries are also included in 6.3 as having a right to request information in the same way as deferred beneficiaries. Article 6.4 requires that "*Information shall be provided clearly, **in writing** and within a reasonable period of time. Member States may stipulate that it need not be provided more than once a year."*

[831] This should avoid a repeat of the debate in the *Laval* case over whether the Posted Workers Directive provided a floor of rights for employees or a ceiling. See KILPATRICK.C Internal Market Architecture and the Accommodation of Labour Rights: As Good as it Gets? EUI Working Papers LAW No. 2011/04.

protection than before. Schemes and employers may are barred from using the directive in order to diminish the rights of migrant workers, even where the new rights would be compliant with the substantive requirements of the Directive. However, the level of protection of migrant workers may be raised by social partners.

b. The role of social partners

The wording of the Supplementary Pensions Directive reaffirms the key role that social partners play in the pension systems of several EU Member States. Indeed, Recital 8 points states that "*This Directive should also take particular account of the role of social partners in designing and implementing supplementary pension schemes*."

Despite the initial failure of social partners to reach agreement at European level on the occupational pensions of migrant workers, (which led to the Commission drafting secondary legislation), the social partners may have a role in the implementation of the Supplementary Pensions Directive. This opportunity for social dialogue and collective agreement is designed to increase the level of protection afforded to migrant workers.

On the substantive rights provided to migrant workers under the directive, Article 4.2 and Article 5.4 both provide that social partners may agree on a higher level of protection for workers' rights of acquisition and preservation of their occupational pension rights provided they do not impede workers' free movement.[832]

Moreover, Recital 30 clarifies that Member States may grant the social partners responsibility for implementing the Supplementary Pensions Directive subject to three conditions: first, such a decision must be taken in accordance with national provisions governing the organisation of supplementary pension schemes; secondly, the social partners must make a "*joint request***"** to be given responsibility for implementation; thirdly the Member States must ensure that the Social Partners are at all times able to guarantee the outcomes prescribed in the directive. Any delegation of the implementation of the directive to social partners leads to a monitoring obligation for Member States, who remain accountable for any failure to fulfil their obligations under EU law.

[832] "*Member States shall have the option of allowing the social partners to lay down different provisions by collective agreement, to the extent that those provisions provide no less favourable protection and do not create obstacles to the freedom of movement for workers.*"

E. Transposition and reporting

a. Transposition

Member States are required to "*adopt the laws, regulations and administrative provisions necessary to comply with*" the Supplementary Pensions Directive within **four** years following its entry into force. The same time period for implementation also applies in the event that Member States delegate the task of implementing the directive to the social partners. [833] Therefore, the Supplementary Directive should be implemented across the EU Member States at the latest by 21 May 2018. Upon transposing the Directive, Member States are required to **immediately** inform the Commission.

Given the nature of EU directives, the results that they prescribe are binding on the Member States. Its objectives are mandatory although there is some flexibility to determine the means to implement the Supplementary Pensions Directive. The minimum requirements nature of the Supplementary Pensions Directive results in a situation where for some Member States the level of implementation of the directive may vary. The UK deems that it already complies with most requirements of the Supplementary Pensions Directive. However, in Germany, the limits to vesting periods will involve a change to national legislation.

b. Reporting

Article 9 of the Supplementary Pensions Directive requires Member States to communicate "*all available information concerning the application of this Directive to the Commission"* within five years of the entry into force of the Directive (i.e. by 21 May 2019). This will allow the Commission to verify the steps taken by the Member States to render the Directive effective in national law.[834] Whether the parties and stakeholders involved think that further positive integration is required in future remains to be seen. The method and form that it would take would also need to be determined. Reporting will provide an indication over whether the EU should ever consider going beyond minimum requirements and interpret the free movement of workers in line with its social protection component.

[833] This uniform timeframe for implementation is far simpler and more straightforward than the earlier draft of the directive, which allowed for different lengths of the period for implementation, subject to Member States justifying and informing the Commission of the difficulties posed by its implementation.

[834] This information will be used by the Commission which has its own obligation by 21 May 2020 (six years after the entry into force of the Supplementary Pensions Directive) to draw up a report on the application of the Directive that will be scrutinized by the European Parliament, the Council and the European Economic and Social Committee. The extent to which the Supplementary Pensions Directive will have addressed the regulatory gap and the effectiveness of the national implementing legislation in enhancing the free movement of workers by protecting their occupational pensions will be verified at that point in time.

Conclusive remarks on Section 2

The provisions dealing with the acquisition and preservation of occupational pension rights in the Supplementary Pensions Directive reflect the relevance of national pension systems. The financial cost for occupational pension schemes and employers has also been taken into account notwithstanding the impact on migrant workers' social protection.

First of all, the acquisition of occupational pension rights has implications for the free movement of workers and social protection. Its importance has been especially visible with regards to the right of posted workers to remain active members of their occupational pension scheme. Indeed the Safeguard Directive provides the right of posted workers to continue making contributions to supplementary pension schemes. Given the EU legislator's historic failure to deal with the acquisition of occupational pension rights by migrant workers, despite it constituting a key obstacle to free movement, the Supplementary Pensions Directive's Article 4 represents progress for migrant workers. However, the level of protection is not equivalent to the treatment offered by the Coordination Regulations.[835] In terms of its impact, the regulation of waiting and vesting periods has been balanced against the costs for employers and occupational pension providers and resulted in a compromise.

Clearly, the presence of "age-differentiation" on matters of acquisition is not satisfactory. Permitting a minimum age was a concession to employer groups who lobbied hard to reduce the cost of the Directive for employers and pension schemes who would otherwise be obliged to recognise the acquisition of pension rights by younger employees from an earlier age. However, if one accepts that a greater number of younger workers are more likely to be mobile and to move within the EU, then younger workers should be protected accordingly! Providing younger workers with a lesser degree of protection under the Supplementary Pensions Directive is surely unfair, discriminatory and may have a negative impact on their longer term social protection. The Supplementary Pensions Directive implicitly legitimises different treatment on grounds of age with regards to membership and tolerates different treatment with regards to vesting. It is unsatisfactory when analysing the wording of EU legislation to find that an employer's economic interests might supersede a

[835] The main contrast between the Supplementary Pensions Directive and the Coordination regime is that the principle and technique of aggregation has been rejected in favour of a technical approach. The fragmentation of membership of occupational pensions thus remains the consequence of the exercise of free movement with the one exception being posted workers who are able to remain in their scheme of origin. The Supplementary Pensions Directive's minimum requirements approach targets pension scheme rules whose conditions of acquisition are barriers to the free movement of workers.

young migrant worker's right not to be discriminated against on grounds of age while acquiring social protection rights. [836]

In practice, Article 4 (c) of the Supplementary Pensions Directive seeks to prevent any unjust enrichment by a pension scheme where the employee bears the investment risk (e.g. in most DC schemes). It is equitable that a mobile worker should get the upside of any growth in a defined contribution scheme where the worker bears the risk. The combined wording of Article 4(c) and Recital 19 might suggest that any upside arising from scheme investments could be pro-rated to reflect the proportion of employee contributions that made up the amount invested. A more social interpretation would advocate that any implementing legislation give workers the right to recover the upside from their own contributions as well as from the contributions made by the employer in the case of DC schemes.[837]

Secondly, on the preservation of dormant rights, there has been an evolutionary approach: from non-discrimination, which was at the heart of the Safeguard Directive to minimum requirements under the Supplementary Pensions Directive. The fairness test is used to ascertain the existence of restrictions upon the freedom of movement for workers that stem from the preservation of dormant rights. However, a "social protection dimension" of fairness has been omitted in favour of a "comparative fairness approach" in relation to the treatment of other members.[838] To date, positive integration in this field has not yet embraced a holistic approach to preservation (that would include the effect on workers' social protection). Portability through transferability, once at the heart of the proposed legislation has been relegated to a voluntary status because affording workers a right to a transfer was an unpalatable proposal for many pension schemes so the EU made a pragmatic choice of accepting fragmentation and focusing on the preservation of occupational pensions. There is thus no advantage for workers in terms of consolidation, which reflects the difficulty of

[836] The Treaty and the EU Charter on fundamental rights should safeguard against such an evolution should any case be brought before the ECJ on the matter. There has already been much case-law in relation to the principle of non-discrimination on grounds of age.[836] If one considers that the right to free movement should be interpreted in conformity with fundamental rights then a minimum age for acquisition should be considered a breach of Article 45 TFEU as well as a form of age discrimination! By allowing such a minimum age in the Supplementary Pensions Directive, the EU legislator was prepared to fudge on fundamental rights as important as social protection and equality.

[837] Ideally from a worker's perspective, the implementing legislation would provide that for all DC schemes as well as DB schemes with a surplus, an outgoing worker should be able to recover the amount of employer contributions, provided these are paid into another supplementary pension scheme. However, EU law does not offer a legal framework that ensures employer contributions can be recovered by migrant workers. This situation might encourage workers to remain with their employers until their pension rights have vested, given that vesting requirements are now limited to 3 years under Article 4.1.(a). It could even reduce mobility as it does not harness social protection in the spirit of a fundamental rights approach to the free movement of workers.

[838] Arguably, this is similar to formal equality and workers' social protection may thus be penalised (if other types of members are also penalised). The risk is of a race to the bottom but the limit is proportionality.

regulating free movement of workers in respect of their occupational pensions, given the asymmetric nature of EU pension systems. Any harmonisation in the treatment of private sector pensions seems even harder to carry out than EU coordination of social security!

Thirdly, the commutation of occupational pension rights of migrant workers has set national thresholds that are designed to achieve a balancing act between the interests of schemes and members. In that context, providing workers with the right to choose subject to proper information as well as monitoring of thresholds by the Commission should help to manage the risk of Member States setting thresholds that are too high.

In addition, information has grown from a simple tool for worker mobility to a precondition to the free movement of workers, as shown by the requirement of information to validate decisions on commutation. Furthermore, the evolution of the *quality* of information required has displayed a shift from 'equal treatment' to 'adequate information'. A balancing act on grounds of cost has set limits on the obligation of employers/pension schemes to provide information such as the frequency (e.g. once a year). This shows the "minimum requirements" approach of the Supplementary Pensions Directive. The requirement of information in writing also shows its practical nature.

Moreover, the principle of non-regression in the Supplementary Pensions Directive ensures that the minimum requirements approach is not only consistent with the establishment of a floor of rights but also that it constitutes an instrument of social progress.

Finally, the directive recognises the role of social partners to increase the protection of migrant workers provided it does not result in obstacles to free movement. It also requires prior consensus between the social partners who must make a "joint request" to be afforded this responsibility. Social tensions may limit this in practice…

Conclusive remarks to Chapter V on positive integration

The complexity and diversity of occupational pensions in the EU Member States have shaped the nature of EU secondary legislation as well as the degree of intervention. Moreover, the relevance of national pension systems to the type of pension acquired and the protection it receives under EU law indicates something of a 'social/geographic lottery' for migrant workers. Those who migrate to/from countries whose pensions are subject to the Coordination Regulations are likely to receive better protection of their freedom of movement, e.g. in terms of acquisition of pension rights. However, it would be a cop-out to blame the above circumstances for the differences in treatment resulting from the divided implementation of EU law on free movement of workers or to consider that there is no alternative approach. The fundamental nature of free movement and its role as an objective of the Treaty means that EU law must adapt and overcome the diversity of pension systems in order to ensure that ***all*** EU citizens benefit equally from the free movement of workers.

The social rationale for workers' social protection to be a component of their freedom of movement must guide the substance of positive integration in this field. It entails a principled approach to guarantee adequate social protection for workers who exercise their right to free movement. Only then will the legislative gap in this field be truly filled.

In this regard, the secondary legislation dealing with non-statutory pensions has been conservative both in terms of its objectives (free movement of workers) as well as its material scope (non-statutory supplementary schemes), its geographic scope (cross-border), and its scope in time (future). In strategic terms, the legislation can thus be characterized as suffering from a social deficit. The scope of positive integration began with the Safeguard Directive as very broad in order to deal with the fall-out from the exclusion of non-statutory occupational pensions from the Coordination Regulations. Despite the deepening of substantive provisions in the Supplementary Pensions Directive, the minimum requirements approach has yet been offset by its narrower scope.

The procedural change to its legal base enabled the Supplementary Pensions Directive to bring about a "minimum requirements" approach to the protection of migrant workers' occupational pensions. Nevertheless, one must celebrate the fact that the adoption of the Supplementary Pensions Directive has broken the substantive deadlock in this field, which has resulted in greater protection of migrant workers' rights to acquisition, preservation and information in relation to non-statutory occupational pensions.

Important progress has thus been made in substantive terms as the Supplementary Pensions Directive has gone beyond discrimination by seeking to tackle obstacles to free

movement. It has thus addressed conditions that impeding acquisition, which constitute social obstacles to free movement and social protection. However a technical approach has resulted in a legislative quagmire for the Commission, which has been bogged down in one controversy after another (first transferability, then vesting periods). This has postponed and watered down legislative progress on difficult issues. With regards to waiting periods, positive integration to improve worker's free movement has been balanced against the costs for employers and occupational pension providers. In addition, the minimum requirements on vesting periods point to a 'fudge' overcoming what is in principle an obstacle to free movement. By tolerating minimum ages for acquisition, such "age differentiation" under the directive is clearly not satisfactory and legitimises different treatment on grounds of age with regards to vesting and membership (which it does not deal with). This is 'misplaced' in terms of social protection and risks being challenged on grounds of age discrimination.

On the entitlement to employer contributions in respect of 'unvested' pension rights, the directive also makes a distinction based on who bears the risk of an investment. The nature of the scheme (e.g. DB or DC) will thus tend to determine recovery. The alternative would have been a more purposive and social approach that supported all pension contributions being put towards a worker's social protection.

One may suggest that the resulting legislative trade-off has put business interests on a par with free movement in shaping the secondary legislation. However, the Commission has played a role as a key counterweight to pension lobby.

The above 'social' shortcomings of a technical approach suggest that from a worker's perspective, the chosen method of positive integration is not satisfactory. An alternative principled approach (based on the need to avoid migrant workers suffering a loss of occupational pension rights) would deem rules that penalise social protection as constituting obstacles to workers' free movement. It is questionable whether the minimum requirements approach will succeed in upholding the need for adequate social protection. The directive allows social partners to agree measures offering workers greater protection (beyond its minimum requirements) provided they do not create obstacles to free movement. However, it remains to be seen in how many Member States, social partners seize this opportunity.

The report of the Commission six years after the directive's entry into force will provide an indication of whether it has had a positive impact both on the number of workers exercising their right to free movement as well as on the treatment of their occupational pension rights as a result of the above. However, even an improvement of the legal protection afforded to migrant workers will not be sufficient unless the national pension systems of the

EU are able to provide workers with levels of replacement income in retirement that constitute adequate social protection.

Notwithstanding the dilution of some of the substantive aspects of the Supplementary Pensions Directive, one has to admire the tenacity of the Commission and of the rapporteur of the European Parliament (Mrs Ria Oomen Ruijten) for pursuing this legislative project through to its adoption before the European Parliamentary elections of May 2014. Nevertheless, one may suggest that the many difficulties of the legislative process for the Supplementary Pensions Directive have 'scarred' the EU legislator. Even though any future secondary legislation would only require qualified majority, it would not be surprising if policy coordination became an avenue pursued in future by the Commission in this field. The European Social Observatory's report mentioned the role of soft law as an alternative at a time when the adoption of the Supplementary Pensions Directive was not forthcoming. The disadvantage of soft law is the lack of a binding legal obligation designed to protect migrant workers' rights to social protection.[839] The fundamental rights at stake justify the use of 'hard-law', i.e. secondary EU legislation. Indeed, secondary legislation was necessary to implement the objective of free movement under Treaty, even if it provides a floor of rights which offers minimum protection to migrant workers, while leaving to Member States the responsibility of cementing the European social model in an upwards direction. Ultimately, the adoption of the Supplementary Pensions Directive has marked progress in terms of the legislative coherence in EU law on free movement. Nevertheless a social deficit remains in terms of both the strategic platform for positive integration as well as in terms of substantive legal protection. Putting flesh on the bones of the social rationale of free movement requires social partners to play a greater role in future, not only in the implementation of the Supplementary Pensions Directive but in any future measures of positive integration. Failing that, migrant workers may seek to uphold the social protection dimension of their right to free movement by having resort to the courts and looking for other legal tools in support of their legal rights to free movement under EU law. This highlights the potential importance of negative integration and the role of the judge in upholding fundamental rights under EU law.

[839] In other words, the implementation of the EU's objectives could not be measured in terms of justiciability as workers would not be able to enforce their rights in court. Given the historical reticence on behalf of many employers and representatives of the pension industry to remove certain obstacles to free movement, the Commission considered that only a binding legal framework would render effective the fundamental rights at stake. However, it has watered down the spirit and substance of its objective.

CHAPTER VI. NEGATIVE INTEGRATION IN RELATION TO OCUPATIONAL PENSIONS AND THE FREE MOVEMENT OF WORKERS UNDER EU LAW

Section 1. Vertical relations and the free movement of workers

A. The taxation of occupational pensions

a. Tax deductions: the discriminatory effects of taxation

b. Double taxation: combating obstacles to free movement

B. Member States as public sector employers

Section 2. Horizontal relations in the context of employment

A. The horizontal effects of the Treaty on the free movement of workers

B. The role of Fundamental rights in Horizontal situations

Conclusive remarks

Introductory remarks

The role of the ECJ as provided by Article 19(1) TEU is to "*ensure that in the interpretation and application of the Treaties the law is observed*." The ECJ has historically taken a dynamic approach to rendering effective EU law, particularly in relation to EU equality law and EU law on the internal market.[840] This judicial 'strategy', often referred to as 'negative integration', can be found in the broad interpretation given by the ECJ to Article 34 TFEU (ex Article 28EC) since *Dassonville* and *Cassis de Dijon* in the context of the free movement of goods. With regards to the free movement of workers, Craig & De Burca observe that there has been "a significant increase in the number of cases involving challenges to non-discriminatory national regulations"; they also comment that "the case-law on free movement of workers after the *Bosman* case is, albeit many decades later, following a similar path to that which the case-law on free movement of goods took after *Dassonville*".[841] This Chapter will therefore examine the state of negative integration under EU law on free movement with regards to the protection of migrant workers' occupational pensions.

The historic lack of EU secondary legislation dealing with occupational pensions and free movement of workers has undoubtedly stymied the development of EU case-law in this

[840] "*the Court rendered the Treaty and EC legislation effective when the provisions had not been implemented as required by the political institutions and the Member States. This was exemplified by the ECJ's role in the creation of the internal market, requiring removal of national trade barriers, at a time when progress towards completing the Single Market through legislative harmonisation was hindered by institutional inaction.*"CRAIG & DE BURCA EU Law Text Cases and Materials (5th edition) p.63: The landmark cases referred in relation to the free movement of goods were Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837 and Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung fur Brantwein* [1979] ECR 649 (*Cassis de Dijon*).

[841] CRAIG & DE BURCA EU Law Text Cases and Materials (5th edition) p.762.

field. The recent adoption of the Supplementary Pensions Directive should, once it has been implemented (and/or the deadline for implementation has passed) hopefully result in more cases being brought by migrant workers to oppose any losses to their occupational pensions caused by free movement. However, the substantive limitations of positive integration (mentioned in Chapter V) may still entail a breach of workers' right to combine freedom of movement and social protection. The key issue therefore is one of the effectiveness of EU law on free movement, which leads one to question the role of primary sources of EU law (in particular the Treaty and the Charter) and their capacity to be invoked by workers as legal tools with the potential to create justiciable rights. Furthermore, the judicial interpretation of the right to freedom of movement raises the question of the applicable principles, tests and potential remedies that are available to migrant workers under EU law.

Negative integration under EU law varies according to the public/private nature of the parties against whom the freedom of movement of workers may or may not be invoked. To what extent can EU law offering protection to migrant workers' occupational pensions be enforced, on the one hand against Member States and on the other hand against private parties on what basis? This depends on the nature of the legal tools available to the ECJ for the purpose of upholding EU law on free movement. In the absence of a mature body of secondary legislation, the effective protection of workers' occupational pensions and their right to free movement depends upon primary EU law. Historically, the ECJ has turned to the direct effect of certain Treaty provisions.[842] A short definition of 'direct effect' by De Witte is "*the capacity of a norm of Union law to be applied in domestic court proceedings*."[843] The two relevant Treaty provisions on the free movement of workers are Article 45 and 48TFEU. Following the entry into force of the Lisbon Treaty, the binding nature of the Charter as primary EU law raises the question of its role as a legal tool that may be invoked by workers.

Section 1 analyses the state of vertical negative integration in the field of free movement and occupational pensions. Section 2 deals with horizontal negative integration.

[842] The ECJ "*used the doctrine of direct effect in the 1960s and 1970s to make more effective Community policies, which either the Member States or the Community institutions were failing to implement*."CRAIG & DE BURCA EU Law Text Cases and Materials (4th edition) p.11.

[843] B. DE WITTE Direct effect, Primacy, and the nature of the legal order in The Evolution of EU law (edited by Craig & De Burca) (2nd edition) p.323; Craig and De Burca also refer to a definition of 'objective' direct effect as "the capacity of a provision of EU law to be invoked before a national court", which they contrast with a narrower definition of 'subjective' direct effect being "the capacity of a provision of EU law to confer rights on individuals which they may enforce before national courts."

Section 1. Vertical relations and the free movement of workers

The Treaty provision on the free movement of workers, which is now contained in Article 45TFEU (ex 39EC ex 48EEC) was first recognised by the ECJ as having 'vertical' direct effect in *Van Duyn*.[844] In the context of occupational pensions and the freedom of movement, the Commission has used its powers to bring enforcement actions based on the Treaty in order to challenge protectionism by the Member States in the field of taxation of occupational pensions: the ECJ has thus been given the opportunity to hold to account Member States in terms of their compliance with EU law on free movement (A). Moreover, Member States have been required to comply with primary EU law in their capacity as employers of public sector workers whose occupational pension rights have been at stake in the context of their freedom of movement (B).

A. The taxation of occupational pensions

Although direct taxation remains the competence of the Member States (and its international dimension is addressed by bilateral tax treaties), there is still a requirement for Member States to exercise their powers consistently with EU law. The EU's failure to legislate on tax-related obstacles placed the onus on the ECJ to adjudicate upon such matters by reference to primary law. It did so in the cases of *Kraus* case[845] and *Schumacker*.[846] Article 45 TFEU cannot be used to challenge the diversity of tax rules in the EU nor the possibility that a migrant worker may suffer a loss of pension benefits following taxation as shown in the *Weigel* case.[847] However, the taxation of occupational pensions has become an area for negative integration where it discriminates, impedes or renders "*less attractive*" the exercise of the free movement of workers. The test of a "*greater disadvantage*" has been developed by the Court so that Article 45 TFEU can be invoked to prevent unfair treatment of migrant workers compared the treatment afforded to non-mobile workers. Consequently, migrant workers should not (in theory) be unfairly penalised in relation to their occupational pensions by tax rules that adversely affect them simply because they have exercised their right to free

[844] Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337.
[845] In *Kraus*, the ECJ ruled held that Article 45 TFEU (ex39EC ex48EEC) "*implies not only the abolition of any discrimination based on nationality but also the suppression of any national measure likely to impede or render less attractive the exercise, by Community nationals, of the fundamental freedoms guaranteed by the Treaty*." Case C-19/92 *Kraus* ECR [1993] I-1663.
[846] Case C-279/93 *Finanzamt Koln-Alstadt v Schumacker* [1995] ECR I-225.
[847] The ECJ held that "*negative tax consequences for an individual who moves to work from one Member State to another will not necessarily be contrary to Article 45 TFEU, even if it is likely to deter the worker from exercising rights of free movement, if it does not place that individual under any* ***greater disadvantage*** *than those already resident and subject to the same tax*." See Case C-387/01 *Weigel* [2004] ECR I-4981.

movement. Following the string of cases mentioned above, the Commission identified obstacles to the free movement of workers in its Communication on the taxation of occupational pensions.[848]

Both direct and indirect discrimination on grounds of nationality are caught by Article 45 TFEU (though Member States may seek to use the defence of objective justification in the latter case). In its case-law on the taxation of occupational pensions, the free movement of workers has been considered by the ECJ in conjunction with other fundamental freedoms such as the free movement of establishment, services and capital. When examining the compatibility between national provisions dealing with the taxation of occupational pensions and EU law on the internal market, two main issues have come under scrutiny: (a) tax deductions; and (b) double taxation.

a. Tax deductions

The issue of tax deductions for pension contributions is not specific to occupational pensions but extends to personal pensions and other types of provision for retirement/death. The implications of tax deductions tend to be the same as they encourage individuals and employers to contribute to such schemes to enable social protection in old age. The *Bachmann* case showed the ECJ's efforts to resolve the clash between the taxation of pensions and the fundamental freedoms of the internal market.[849] The justification based on the fiscal cohesion of the tax system is an exception that has been interpreted narrowly by the ECJ as shown in the *Wielockx* case and subsequent cases.[850]

The Commission has been active in bringing cases before the ECJ concerning tax deductions for pension contributions, where national rules deny equal treatment to pension institutions established in other Member States. Between 2003 and 2006, the Commission

[848] European Commission, 'The elimination of tax obstacles to the cross-border provision of occupational pensions', Brussels COM (2001) 214 final, 19.4.2001.

[849] In that case, under Belgian law, only pension/ life assurance contributions paid to an institution established in Belgium were tax deductable. The ECJ recognised that the non tax deductible nature of contributions paid to an institution outside Belgium was in principle contrary to EU law. However, it found that the tax-related obstacle was justified as the tax revenue made up for the fact that the Belgian regime did not tax benefits paid out. The argument of the Belgian government based on need for the coherence of its tax system was thus accepted.Case C-204/90, Bachmann [1992] ECR I-249.

[850] In *Wielockx*, a self-employed worker who lived in Belgium but worked in Netherlands (where he set aside a portion of his income for his pension) was not able to deduct tax (unlike Dutch residents) in respect of the above pension savings. The ECJ found this to be in breach of what is now Article 49TFEU and referred to an individual worker's right of establishment in another Member State (Case C-80/94 [1995] *Wielockx* ECR I-2493. Subsequently, the ECJ has not upheld the claims made by Member States arguing the exception of fiscal cohesion in cases such as cases C-484/93 Svensson [1998] ECR I-3955; C-107/94 *Asscher* [1996] ECR I-3089; C-264/96 *ICI* [1998] ECR I-4711; C-294/97 *Eurowings* [1999] ECR I-7449; C-55/98 [1999] *Vestergaard* ECR I-7643; C-251/98 *Baars* [2000] ECR I-2787 .

brought infringement proceedings against Denmark, Spain, Belgium, Italy, France, Portugal and Finland. In *Danner*[851] and *Skandia*[852], the Member States were at fault for allowing tax deductions for contributions to domestic pension funds but not allowing the same deductions in respect of contributions to overseas pension funds. The ECJ found that the freedom to provide services under what is now Article 56 TFEU was limited by the national tax rules on deductibility of contributions.[853] The Court rejected the arguments of tax coherence put forward by the Member States, even where these were based on the operation of bilateral tax treaties. The argument of the Danish government concerning the risk of individuals "forum shopping" for tax purposes was also rejected as it was deemed secondary compared to any restriction of a fundamental freedom of the internal market. The ECJ judgments in *Danner* and *Skandia* led to some commentators anticipating tax harmonisation "*through the back door*" in respect of supplementary pensions.[854] There has been a modest evolution in some Member States.[855] However, there are no harmonised tax-rules on pensions, which may please Euro-skeptics but in practice does nothing to enhance the mobility of workers.

Restricting discrimination is the driving force of EU negative integration, which has led national governments to review their provisions on tax deductions to ensure they do not unfairly affect migrant workers or providers of occupational pension schemes.[856] The inter-related nature of the fundamental freedoms of the internal market is visible in the field of occupational pensions. Indeed, the operation of diverse tax systems can be a barrier to both the free provision of services and worker mobility. The examination of the compatibility of national legislation with both the free movement of workers and services was evident in *Bachmann* case. In *Commission v Denmark*, the ECJ ruled on 30 January 2007 that Denmark was in breach of both the free movement of workers and capital.[857]

The question of tax deductions with regards to occupational pensions has been a key focus of the Commission in its determination to ensure a level playing field for pension providers by seeking to stamp out the discriminatory effects of national tax laws. The narrow

[851] Case C-136/00 *Danner* [2002] ECR I814743.
[852] Case C-422/01 *Forsakringsaktiebolaget Skandia and Ola Ramstedt v Riksskatteverket* [2003] ECR I-6817.
[853] From a business perspective, these rules favoured domestic pension funds over overseas pension funds and from a workers' perspective, they would put workers whose pension contributions were paid to an overseas pension scheme at a disadvantage by not allowing equal tax deductions.
[854] G. WAYMOUTH, *Impact of EC law on UK occupational pensions*, Association of Pensions Lawyers course (5.5.2005).
[855] For example, the Danish government started to make changes to its tax regime from 2009,designed to see *"the focus of tax shift from pensions institutions to individuals to accommodate the opening of the market to overseas pensions institutions*."J. HENDERSON, IPE 26/02/2008.
[856] R. VAN DER JAGT "European Court of Justice Says Deductibility of Pension Contributions Must Be Allowed: The Netherlands' Reaction" , KPMG Meijburg& Co., Amsterdam, (2002).
[857] Case C-150/04 *Commission v Denmark* [2007] ECR I-1163.

scope for objective justification of indirect tax discrimination should reduce the risk of workers being unduly penalised as a result of exercising their right to free movement. This would be consistent with the objective of creating a single market for occupational pension schemes.

b. Double taxation

The occupational pensions of migrant workers may be affected by the tax treatment of their home Member State as well as by the tax rules of their host Member State. There is thus the potential for double taxation. Member States and other non-EU countries usually seek to avoid double taxation through bilateral tax treaties. These normally determine which country should tax pension contributions and pensions in payment. Nevertheless, there has been no comprehensive instrument that either unifies or coordinates the tax rules that apply to occupational pensions in the EU. Indeed, the political hurdles would be significant. For now, EU law protecting migrant workers against double taxation of occupational pensions is limited to the provision in Article 5 of the Safeguard Directive, which relates to the 'Cross-border payment' of occupational pensions.[858] The rule that occupational pensions must be paid net of taxes provides some reassurance that a worker should avoiding having to pay tax twice on his or her pension.[859] National tax administrations should not tax the proceeds of occupational pension benefits where these stem from another Member State. In theory, this should reduce instances of double taxation in EU Member States. However, although it may not be taxed twice, a retired worker's occupational pension benefit may in practice be taken into account a second time for tax purposes by the host country.[860]

Any double taxation of occupational pensions would undoubtedly render the free movement of workers "*less attractive*".[861] One might draw a parallel with the prohibition of

[858] "*Member States shall ensure that, in respect of members of supplementary pension schemes, as well as others holding entitlement under such schemes, supplementary pension schemes make payment in other Member States, net of any taxes and transaction charges which may be applicable, of all benefits due under such schemes*."

[859] In principle, pension benefits that are paid net of taxes and received by British citizens who retire in Spain or by Dutch pensioners living in France should not attract further tax liability in those countries.

[860] For example, if an English pensioner lives in France while receiving his British pension and has a spouse who works in France and pays French tax, the English pension will still be taken into account (although not taxed) as the basis for taxation is the household income.

[861] Case C-19/92 *Kraus* ECR [1993] I-1663.

double contributions in the field of social security.[862] By analogy, any double taxation of occupational pensions should constitute an obstacle to free movement of workers/persons.

The state of negative integration in this field is affected by the complexity and diversity of tax regimes. Workers may not always be aware that they have been subject to double taxation. Moreover, they may not connect the impact of taxation on their pensions with the exercise of their freedom of movement. Negative integration is a meagre substitute for positive integration. A common approach at EU level on the taxation of occupational pensions would provide greater clarity, certainty and uniformity for migrant workers.

B. Member States as public sector employers

The ECJ's case-law on the effect of Article 48 TFEU in 'vertical' situations has dealt with the principle of aggregation in relation to occupational pensions where the employer is a Member State. The case of *Vougioukas*[863] concerned a public sector occupational pension scheme for civil servants. Although the pension scheme did not fall within the scope of the Coordination Regulations, it was nevertheless considered by the ECJ as falling within the scope of Article 48TFEU. Consequently, the ECJ held that Article 42 EC (now 48 TFEU) granted migrant workers who were civil servants a "right to aggregation", which could not be limited by the Coordination Regulations. Arguably, in that case, the ECJ was assessing the conformity of the Coordination Regulations with Article 48 TFEU. Nevertheless, by recognising an individual's "right to aggregation" against a Member State, the ECJ in *Vougioukas* was, according to Mavridis, recognising that Article 48 TFEU was directly effective in vertical situations.[864] This was a significant recognition of the relevance of the principle of aggregation contained in the Treaty, which not only underpins the technique of aggregation contained in the Coordination Regulations but thus also provided a subjective right to public sector workers. The direct effect of the Treaty superseded the previous scope of secondary legislation, which had to be amended by the EU legislator. This led to question whether free movement of worker should also have direct effect in horizontal situations.

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[862] Indeed, in *Sehrer*, the ECJ recognised that double payment of contributions towards supplementary benefits constituted an obstacle to the free movement of workers (Case C-302/98 *Sehrer* [2000] ECR I-04585. For further analysis in French of the prohibition of double contributions: see also P. MAVRIDIS in "La fin des doubles cotisations en Europe? Droit social, 2000.11.04.

[863] Case C-443/93 *Ioannis Vougioukas v. Idryma Koinonikon Asfalisseon (IKA)* [1995] ECR I-4052.

[864] P. MAVRIDIS. La sécurité sociale à l'épreuve de l'intégration européenne. Ed. Bruylant (2003).p.189. Mavridis argues that the important issue on aggregation arises where a national law takes into consideration periods of work performed within that Member State while excluding periods of work performed abroad as this would be an obstacle to the free movement of workers.

Section 2. Horizontal relations in the context of employment

The prohibition of discrimination on grounds of nationality that forms part of the free movement of workers under Article 45TFEU (ex 39EC) was given 'horizontal' direct effect (i.e. against a private party) in the case of *Angonese*.[865] However, to what extent is primary EU law able to provide justiciable rights through which migrant workers may protect their occupational pension rights in respect of ***non-discriminatory obstacles*** to their fundamental freedom of movement?

A remarkable breakthrough took place in 2011 with a ruling of the ECJ dealing precisely with the free movement of workers and the occupational pension rights of a migrant worker regarding a case brought against his private employer. Indeed, *Casteels*[866] stands out as the only case to date in which the ECJ has provided some specific jurisprudence in this field on a reference concerning a dispute between a worker and his private employer. One must thus examine the horizontal effects of the Treaty Articles on the free movement of workers (A). In addition, there has been recent case-law in which the justiciability of fundamental rights contained in the Charter has been at stake, which raises questions as to the role of fundamental rights in the context of horizontal negative integration (B).

A. The horizontal effects of the Treaty articles on the free movement of workers

The Opinion of AG Kokott in *Casteels* in December 2010 provides a crucial insight into the issues at stake regarding the free movement of workers. [867] The background of the case, the nature of the claim, the relevant legal framework and the reference to the ECJ followed by its ruling are presented below:

The background and nature of the claim

Mr Casteels, a Belgian worker had been continuously employed by British Airways (***BA***) for over 30 years and had worked in Belgium, Germany and France before returning to work in Belgium. During his career, he was a member of BA's occupational pension schemes in those countries: the contractual intention of the parties was for Mr Casteels to be subject to the relevant occupational pension scheme of BA in the country where he was employed.[868]

[865] Case C 281/98 *Angonese* [2000] ECR I-04139.
[866] C-379/09 *Maurits Casteels v British Airways plc* [2011] ECR I-01379.
[867] C-379/09 *Maurits Casteels v British Airways plc* [2011] ECR I-01379, Opinion of AG Kokott.
[868] Their aim was to avoid him being affiliated simultaneously to more than one BA occupational pension scheme. The agreement with BA was that his continuous employment with BA since 1974 would determine his

Mr Casteels thus moved from BA in Germany to BA in France then returned to BA in Belgium where he again became a member of BA's Belgian occupational pension scheme until his retirement. When his occupational pension rights were calculated, BA refused to grant him pension rights in respect of his period of service in Germany (of nearly 3 years).[869] Mr Casteels' claim before the Belgian court (ArbeidshofteBrussel) was for recognition of his pension rights in respect of his period of employment in Germany.

The relevant legal framework leading to the reference to the ECJ

The national law applicable to BA's occupational pension scheme in Germany was the German "Law on the enhancement of occupational old-age pensions" (GesetzzurVerbesserung der betrieblichen Altersversorgung of 1974 hereafter the ***BetrAVG***). The social partners were entitled to derogate from certain provisions of the BetrAVG by means of a collective agreement and Mr Casteels' employment relationship with BA in Germany was subject to the mandatory provisions of "Collective Pension Agreement No.3 for Ground Crew and Cabin Crew of British Airways plc in Germany" (***Collective Pension Agreement No.3***). Indeed, the rules on the qualifying period and the level of entitlement to occupational pension benefits for employees who left employment "*of their own free will*" were determined by Collective Pension Agreement No.3.

The Belgian labour court noted in its reference to the ECJ that the Safeguard Directive was not in force in respect of the period for which the entitlement to pension rights was claimed in this case, hence it could not apply 'ratione temporis'. Therefore, as stated by AG Kokott in paragraph 24 of her opinion, "*only the provisions of primary law on freedom of movement for workers are relevant in answering the questions*" referred to by the Belgian labour court.[870] The ArbeidshofteBrussel asked the ECJ to rule on two questions concerning the applicability of Article 45TFEU and 48 TFEU in *Casteels*. The following analysis deals with the ECJ's ruling and aims to show both the effects and limitations of the above Treaty provisions on free movement of workers in horizontal situations concerning migrant workers' occupational pensions.

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conditions of employment as a German employee. However, there was also a contractual exclusion regarding membership of the German occupational pension scheme: the relevant date was the date his employment commenced in Germany (1988).

[869] BA's arguments were twofold: firstly, Mr Casteels had not been affiliated to the German occupational old-age pension scheme for the prescribed minimum period (the "qualifying period"), so his occupational pension rights had not vested; and secondly his move to another BA establishment in France was voluntary although this was contested by him.

[870] C-379/09 *Maurits Casteels v British Airways plc* [2011] ECR I-01379, Opinion of AG Kokott.

a. Article 48TFEU does not have horizontal direct effect

As mentioned in Chapter IV, Article 48TFEU constitutes the legal base for the Coordination Regulations as well as the Safeguard Directive. It was also the initial legal base for the Supplementary Pensions Directive until this was changed to Article 46TFEU. Its role in the context of negative integration leads to the question of its substantive effects. Article 48 (1) TFEU provides that the EU legislator *"shall make arrangements to secure for employed and self- employed migrant workers and their dependants:(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;"*

The ECJ in *Vougioukas* had all but granted 'vertical' direct effect to Article 51EEC, the predecessor to 48TFEU, as mentioned in Section 1 above. *Casteels* thus provided the opportunity to test whether Article 48 TFEU (ex 42EC) was 'horizontally directly effective'. The first question referred to the Court was: "*Can Article 42 EC, in the absence of action on behalf of the Council be invoked by a private individual against his private-sector employer in a dispute before national courts?*"

On 10 March 2011, the Court held that Article 48 TFEU was not horizontally directly effective. This is discussed below in two regards: first of all in terms of the arguments for and against its horizontal direct effect; secondly regarding the implications of the non-application of the principle of aggregation to non-statutory private sector occupational pensions.

(i) The reasons for the lack of horizontal direct effect of Article 48TFEU

The first question referred to the ECJ in *Casteels* asked whether Article 42 EC (now 48TFEU) was directly effective in a horizontal situation: could Mr Casteels invoke Article 48TFEU as a source of a legal right in litigation against his private employer? The answer given by the ECJ was negative; its reasoning is analysed below.

The ruling of the ECJ in paragraphs 13 to 16 of its judgment in *Casteels* concurred with AG Kokott's opinion that Article 48 TFEU did not have direct effect but the ECJ clearly specified that this was the position in respect of *horizontal* situations.

The criteria for direct effect were considered by AG Kokott in paragraph 28 of her opinion in *Casteels*: "*According to settled case-law, a provision of EU law is directly applicable only if it is clear and unconditional and not contingent on any discretionary implementing measure.*[871] *Put more simply, a provision must therefore be, as regards its*

[871] Case 26/62 *Van Gend & Loos* [1963] ECR1 and Case 44/84 *Hurd* [1986] ECR 29, para 47.

content, unconditional and sufficiently precise so that individuals can rely on it directly". AG Kokott concluded that Article 48TFEU was neither unconditional nor sufficiently precise as regards its content, in particular with regard to the provisions of Article 48TFEU on the aggregation of insurance periods and on the exportability of benefits. In particular, she opined that Article 48 TFEU was not sufficiently precise because "*it is not possible to deduce directly from Article 48 TFEU how far and on what conditions insurance periods are to be aggregated.*" Clearly, the conditions, effects, extent and method of implementation of the principle of aggregation are not mentioned under Article 48 TFEU whereas they are indeed specified under the Coordination Regulations. The opinion of AG Kokott and the ruling of the ECJ in *Casteels* were consistent with the ECJ's previous reasoning for not applying the principle of aggregation to non-statutory occupational pensions, either by analogy with the Coordination Regulations (see *Nijhuis*[872]) or directly insofar as non-statutory occupational pensions fall outside the scope of the Coordination Regulations.

The Court's reasoning focused on the grounds that Article 48TFEU is a legal basis that provides a mandate and sets out objectives for EU legislation. The Court deemed that the effects of Article 48 TFEU were contingent upon the existence of secondary legislation. At the time of the ruling in *Casteels*, Article 48TFEU was the chosen legal basis for the Supplementary Pensions Directive. As an aside, did *Casteels* influence the Commission to review and change the directive's legal base?

However, the ECJ's ruling on the exclusive role of Article 48TFEU as a legal base is not wholly convincing as subjective rights may be provided by Treaty provisions that also form the legal basis of secondary legislation. This is the case for example with regards to Article 157TFEU on equal pay. Moreover, the Court had ruled in *Vougioukas* that Article 48TFEU did have the effect of ensuring that public sector migrant workers could benefit from its principle of aggregation, which offered them protection against losses of occupational pension contributions caused by free movement.[873]

For the sake of consistency between private sector and public sector workers, Article 48TFEU could in theory have been recognised as providing the same level of effective protection to all workers regardless of the nature of their employer! By ruling in *Casteels* that Article 48TFEU did not have horizontal direct effect, the ECJ has brought about a distinction between public sector and private sector workers in the field of free movement and their

[872] The ECJ's ruling in *Nijhuis* held that "an application by analogy of the provisions applicable to statutory pension schemes is not possible"
[873] Case C-443/93 *Ioannis Vougioukas v. Idryma Koinonikon Asfalisseon (IKA)* [1995] ECR I-4052.

occupational pensions. One may argue that Article 48TFEU is addressed to the Member States and that such a distinction is necessary for the purpose of legislative coherence and legal certainty under EU law. However, as it results in different levels of protection of freedom of movement for workers, according to whether they are public sector or private sector, a labour law approach suggests that such a distinction is not satisfactory. [874] One may point out that in the more dynamic field of EU law on equal pay, both private sector and public sector workers are entitled to protection under Article 157TFEU with regards to the treatment of their occupational pensions.[875] Upholding a distinction between private and public sector workers through the lack of horizontal effect of Article 48TFEU may be seen as devaluing the role of private sector occupational pensions as a source of social protection.

One might interpret the ECJ's ruling as one of judicial minimalism, in which it implicitly reflected the articulation between the material scope of the Coordination Regulations and the horizontal effects of primary EU law on the free movement of workers.[876] Any attempt to apply Article 48 TFEU in relation to occupational pensions might also have been subjected accusations of judicial activism.[877] While the Court may have been mindful of such considerations in its decision not to recognise the horizontal direct effect of Article 48TFEU, it is just possible that the tail wagged the dog for democratic reasons.

The lack of horizontal direct effect of Article 48TFEU arguably contributes to the social deficit of EU law in terms of negative integration given that it does not provide a justiciable right for private sector migrant workers to protect their freedom of movement and social protection. Moreover, the resulting distinction between private and public sector workers means that the latter's acquisition rights are better protected under EU primary law

[874] It does not create a level playing field under EU law in terms of the legal protection afforded to migrant workers' freedom of movement. Moreover it does not have regard to the need to uphold workers' social protection equally as between different categories of workers. In theoretical terms, the outcome also distances private sector non-statutory pensions from the notion of social security and social protection.
[875] Case C-7/93 *Bestuur van HetAlgemeen Burgerlijle Pensioenjbnds v Beune* [1994] ECR I-4471 C-379/09 *Maurits Casteels v British Airways plc* [2011] ECR I-01379, Opinion of AG Kokott.
[876] Indeed, the exclusion of non-statutory occupational pensions from the scope of the Coordination Regulations may have led the ECJ to consider the need for consistency between the effects of its case-law and the scope of secondary EU legislation. Both Advocate General Kokott and the ECJ recognised that non-statutory occupational pension fall outside the Coordination Regulations. Both the AG and the Court would have been aware of the difficulties facing the proposal for a Directive on Supplementary Pensions at the time.
[877] One may suggest that the ECJ's ruling in *Casteels* points to its constitutional awareness as well as a hidden element of "real politik" in this sensitive field for Member States. It is arguable that the ECJ did not wish to attract criticism from the other EU institutions. Moreover, the ECJ would have been aware of the strong lobby group that has forced a minority of Member States to adopt a negative stance towards positive EU integration in this field because of their fear of an adverse impact on their own pension systems (such a rationale is surely protectionist in spirit if not in reality).

where the employer is a Member State or public body for whom the principle of aggregation applies.

(ii) The social implications of the principle of aggregation not being justiciable under Article 48 TFEU for all migrant workers

As mentioned in Chapter IV (in the discussion of the legal basis for secondary legislation), the principle of aggregation under Article 48TFEU arguably provides the gold standard for the protection of migrant workers' acquired pension rights. It basically requires all the periods worked by a worker in different Member States to be taken into account "*for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit".*

On the one hand, there are technical and ideological arguments against applying the principle of aggregation to private sector non-statutory occupational pensions.[878] On the other hand, by denying its horizontal direct effect, *Casteels* showed the limitations of the Court's willingness to use Article 48 TFEU to uphold the social protection of migrant workers' (through the acquisition of occupational pensions) in the context of free movement. With the exception of public sector workers, who receive preferential treatment insofar as they automatically benefit from the principle of aggregation, the protection of private sector migrant workers' rights to acquisition and preservation of their occupational pensions now depends entirely upon secondary legislation.

Given the exclusion of non-statutory occupational pensions from the Coordination Regulations, the lack of horizontal direct effect of Article 48TFEU may be seen as compounding the historic regulatory gap regarding the protection of private sector migrant workers' freedom of movement. In the past, the ECJ has sometimes sought to fill legal vacuums and overcome legal complexity, including in relation to the application of the Coordination Regulations, by turning directly to the Treaty provisions on free movement.[879] However, by not doing so, the Court's ruling may also be seen as justified from a democratic

[878] See above in Chapter IV. The prevailing view held by many experts is that the technique of aggregation is not adapted to occupational pensions, especially in the case of private schemes. To apply aggregation might have been seen as unwarranted interference in a private-law relationship, which would have attracted fierce opposition from employer groups and pension funds. Judicial restraint was thus the more conservative option.
[879] See Case C-158/96 *Kohll* [1998] ECR I-1935 and Case C-120/95 *Decker* [1998] ECR I-1871 where the ECJ turned to the Treaty provisions on free movement of services and goods in its reasoning) – For an insight on the impact of EU law on health care see also thesis by MAKARA.K The development of patients' rights in cross-border health care and its impact on the Member States of the European Union, EUI thesis October 2012.

perspective insofar as the rules on acquisition of occupational pension rights have only recently been addressed in the context of the Supplementary Pensions Directive.

Is the absence of horizontal direct effect of Article 48TFEU the 'end of the road' for the application of the principle of aggregation as far as non-statutory occupational pensions are concerned? The Court's position has laid the onus firmly back onto the shoulders of the EU legislator. Given the change of legal basis for the Supplementary Pensions Directive to Article 46TFEU, there are only three ways in which the principle of aggregation contained in Article 48 TFEU could apply to non-statutory occupational pensions between private parties. The first option would be for the EU legislator to extend the Coordination Regulations to more occupational schemes thus bringing them within their material scope. Such a bold move is likely to remain extremely limited given that the EU legislator took the express decision to exclude non-statutory schemes from the scope of the Coordination Regulations in the aftermath of the *Vaassen-Göbbels* case by introducing the statutory criterion. However, more recently, the option of extending the Coordination Regulations to some pension schemes has been considered by the Commission White Paper as an option for the future.[880] A second option would be for Member States to make more use of their ability to declare certain occupational pension schemes as falling within the scope of the Coordination Regulations where these meet the legal requirements. A third option would be for the EU legislator to enact a different instrument of secondary legislation that would envisage its own alternative technique of aggregation in relation to non-statutory occupational pension schemes. This looks seemingly unlikely given the trouble and difficulty in adopting the Supplementary Pensions Directive (which has also changed its legal basis to Article 45TFEU, which does not require aggregation).[881]

Arguably, it might have been asking too much of the ECJ to come to the rescue of private sector migrant workers by allowing them to invoke Article 48TFEU in horizontal situations to protect their occupational pension rights (especially given the sensitive field of this field and the legislative negotiations that were ongoing at the time). Nevertheless the ECJ did show in *Casteels* that it was prepared to use Article 45 TFEU in order to protect workers'

[880] Any changes to the Coordination Regulations have in the past taken a long time to agree in the Council due to the previous voting procedures. The removal of the requirement of unanimity on matters of social security given the change to the ordinary legislative procedure following Lisbon Treaty may change this in future though Member States still have a right to veto measures that affect the sustainability of their social security systems.
[881] It could be argued that the principle of aggregation was reflected in the notion of 'transferability', which was contained in the first draft of the proposed Portability Directive but was so controversial that it had to be dropped. Given the recent adoption of the Supplementary Pensions Directive and its minimum requirements approach, the prospect of the principle of aggregation being implemented in secondary legislation in one form or another seems a long way off!

right of free movement, thus perhaps sending a message to the EU legislator that it needed to make progress with the Supplementary Pensions Directive!

b. Article 45TFEU

The reference to the Court in *Casteels*, also concerned the application of Article 39EC (now 45 TFEU) on the free movement of workers, as summed up by AG Kokott:

first of all "*whether, in relation to the completion of qualifying periods for rights to supplementary occupational pensions, freedom of movement for workers requires that account be taken of the entire duration of a worker's employment with the same employer at his establishments in various Member States?*";

secondly "*whether freedom of movement for workers prohibits the transfer of such an employee from one establishment to another from being regarded, in relation to the completion of such qualifying periods, as voluntary departure from the relevant establishment, even if the employee agrees to the transfer?*" [882]

Article 45 TFEU (ex Article 39 EC) constitutes the general provision on workers' right to free movement under EU law.[883] It provides more than a legal base for EU secondary legislation on the free movement of workers (Article 46TFEU is also used for that purpose). Indeed, Article 45 TFEU provides a justiciable right to workers to review the acts of Member States whose effect is to impede freedom of movement: the ECJ thus ruled that Article 45 TFEU provides a directly effective right in vertical situations (*Van Duyn*). It has also been invoked in horizontal situations against private employers. One may identify two types of breach of the free movement of workers in which the direct effect of Article 45TFEU has afforded a justiciable right to workers against private employers: first where there has been discrimination on nationality impeding a workers' free movement *(Angonese)*; and secondly,

[882] C-379/09 *Maurits Casteels v British Airways plc* [2011] ECR I-01379, Opinion of AG Kokott.

[883] 1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
(a) to accept offers of employment actually made;
(b) to move freely within the territory of Member States for this purpose;
(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

where there has been a non-discriminatory obstacle to free movement in situations that one may describe as 'semi-vertical' insofar as the source of the obstacle may be found in measures that collectively regulate employment (*Walrave and Koch*, *Bosman).*

In terms of its role as a tool for negative integration, the first issue for analysis following the Court's ruling in *Casteels* concerns a worker's ability to invoke Article 45TFEU in a horizontal situation where he/she has suffered a non-discriminatory loss of occupational pension rights that has been caused by the exercise of free movement.

However, there are potential limits to the effectiveness of Article 45TFEU in horizontal situations. To what extent does this depend upon the formal legal status of the rule that is being challenged with regards to its compatibility with EU law? In other words, does it matter whether the rule of the occupational pension scheme stems from a binding collective agreement or would a similar ruling apply to an equivalent provision contained in a private trust deed and rules? Moreover, are there circumstantial limits to the effectiveness of Article 45TFEU in horizontal situation. In particular, would a change of employer limit the horizontal effect of Article 45TFEU?

It is important to assess the broader legacy of *Casteels* with regards to the indirect effect of Article 45TFEU to challenge non-discriminatory obstacles to free movement.

Finally, it is relevant to discuss how remedies for workers may be determined following any breach of their rights to free movement in situations where Article 45TFEU has indirect effect.

i. *Casteels*: the horizontal indirect effect of Article 45TFEU in relation to non-discriminatory obstacles to free movement

As mentioned above, the Court had previously recognized in *Angonese* the horizontal direct effect of Article 45TFEU in cases involving discrimination on grounds of nationality. The interesting point that arose in *Casteels* was therefore the potential for Article 45TFEU to be justiciable in cases that involved non-discriminatory obstacles to free movement. However, the Belgian labour court's preliminary reference in *Casteels* did not ask the Court whether Article 45TFEU had direct effect in such cases. It simply limited itself to asking whether the lack of recognition of a period of pension contributions was compatible with the free movement of workers under the Treaty. In its ruling, the Court therefore did not therefore address the issue of whether Article 45 TFEU should have horizontal direct effect in the case of 'non-discriminatory' obstacles to free movement. Instead, it confined itself to an

approach based on the indirect horizontal effect of Article 45TFEU: the Court held that Article 45 TFEU was applicable to the facts of the case (paragraph 20) and required the national court to set aside the application of Collective Pension Agreement No.3 insofar as it would result in the breach of Mr Casteels' right to free movement.

In her opinion, AG Kokott did refer to the ECJ's jurisprudence in *Angonese* in order to recognise that the direct effect of Article 45 TFEU had set a legal precedent imposing a legal obligation upon employers to respect workers' right to freedom of movement. This justified the potential for Article 45TFEU to have a legal effect in a dispute between private parties. The need for a national measure to be interpreted 'in conformity' with Article 45 TFEU was thus stated by AG Kokott: "*according to established case-law, it is for the national court, to the full extent of its discretion under national law, to interpret and apply domestic law in conformity with the requirements of EU law*." [884] Moreover, she set out in her opinion precisely what such an interpretation 'in conformity' entailed in the facts of the case having referred to "*the spirit and purpose"* of Article 45TFEU.[885] If this were not possible, the national court would be required to set aside the provision of the Collective Agreement that was in breach of a worker's right to freedom of movement.[886]

The ECJ in *Casteels* confined itself to expressing that the lack of recognition of pensionable service under Collective Pension Agreement No.3 would not be in conformity with Article 45 TFEU.[887] The Court's phrasing of its ruling was arguably in line with the strategy of "exclusionary" direct effect that may be considered as a less 'intrusive' judicial

[884] The cases relied on by AG Kokott and the ECJ in support of this approach were: C-157/86 *Murphy and Others* [1988] ECR 673, paragraph 11 and C-262/97 *Engelbrecht* [2000] ECR- 7321, paragraph 39 and C-208/05 *ITC* [2007] ECR I-181).

[885] "*the rules of the relevant occupational pension scheme are to be interpreted and applied as far as possible in conformity with Article 45 TFEU. In particular: - in calculating the periods of service which such an employee must have completed for his employer in order to acquire a non-forfeitable entitlement, account must be taken of the entire duration of his employment at all establishments of the same employer; - the transfer of such an employee from one establishment to another may not be regarded as voluntary departure from the relevant occupational pension scheme, even if the employer has agreed to his transfer."*

[886] "*If, contrary to expectations, an interpretation and application in conformity with European Union law is not possible, the referring court would have to disapply Collective Pension Agreement No.3 in so far as it precludes exercise of Mr Casteels's pension entitlement. According to established case-law, direct recourse to freedom of movement for workers is permitted in relation to collective agreements, including in horizontal legal relationships between private persons.*"

[887] "*Article 45 TFEU, in the context of the mandatory application of a collective pension agreement precludes, for the determination of the period for the acquisition of definitive entitlements to supplementary pension benefits in a Member State, the non-inclusion of the years of service completed by a worker for the same employer in establishments of that employer situated in different Member States and pursuant to the same coordinating contract of employment.***"**

technique by which EU law may permeate national legal systems.[888] Nevertheless, the ECJ also noted that it should be possible to treat Mr Casteels for pension purposes as having been employed since he began his career at BA in 1974 and as not having interrupted his continuous employment with BA despite moving to its French establishment. This is not a million miles away from the principle of aggregation![889]

The type of breach of free movement (discrimination or obstacle) is clearly relevant in terms of determining the nature of the horizontal effect of Article 45TFEU (i.e. direct effect for the former and possible indirect effect for the latter). It could be said that in *Casteels*, both AG Kokott and the Court adopted a purposive approach that reflected the social protection component of Article 45 TFEU. Free movement of workers under the Treaty should indeed "*prevent an employee from losing possible rights to a supplementary occupational pension when he moves from one establishment of his employer to another establishment of the same employer situated in another Member State.*"[890] The outcome was that the Belgian court was required to ignore the rules of the pension scheme that were not in conformity with Article 45 TFEU. However, although the Court held that Article 45 TFEU provided a source of legal protection for migrant workers in respect of non-discriminatory losses of occupational pension rights, it is debatable whether the specific circumstances of the case as well as the nature of the obstacle test have the potential to limit its relevance to other cases.

ii. Potential limits to the effectiveness of Article 45TFEU in horizontal situations.

In *Casteels*, the nature of the instrument governing BA's occupational pension scheme in Germany whose rules were being examined for compatibility with Article 45TFEU (i.e. Collective Pension Agreement No.3) certainly made it easier for the Court to afford indirect horizontal effect to Article 45TFEU to prevent a loss of recognition of a migrant worker's occupational pension rights. However, is a binding collective agreement a formal pre-condition to the horizontal effect of Article 45TFEU or can one adopt a broader interpretation to the category of acts aiming at the *collective regulation of employment*?

[888] On the "exclusionary and substitution effect – two variations of the theme of direct effect", see the discussion in ENGSTROM.J, The Europeanisation of Remedies and Procedures through Judge-made Law – Can a Trojan Horse achieve effectiveness?, EUI Thesis, Florence July 2009.
[889] The ECJ's decision would have been even bolder if it had recognised the direct effect of Article 45 TFEU as this would have provided a positive right that would have substituted the rule in Collective Agreement No.3 that constituted a breach of free movement. However, this might have looked very much like an application of the principle of aggregation through the backdoor, which the ECJ had avoided in the earlier part of its ruling dealing with the lack of direct effect of Article 48 TFEU.
[890] C-379/09 *Maurits Casteels v British Airways plc* [2011] ECR I-01379, Opinion of AG Kokott.

The Court held that "*Article 45 TFEU, in the context of the mandatory application of a collective pension agreement precludes, for the determination of the period for the acquisition of definitive entitlements to supplementary pension benefits in a Member State, the non-inclusion of the years of service completed by a worker for the same employer in establishments of that employer situated in different Member States and pursuant to the same coordinating contract of employment.***"**[891] The provisions of the Collective Pension Agreement No.3 thus constituted an obstacle to the free movement of workers under Article 45 TFEU (the ECJ referred to case C-325/08 *Olympique Lyonnais* [2010] ECR I-2177).

Although Mr Casteels' dispute against his private sector employer meant his claim for a breach of his right to free movement concerned a horizontal situation, his case still contained a 'semi-vertical component' in the form of a mandatory collective agreement. Both *Bosman* and *Walrave and Koch* were landmark cases that concerned rules made by sporting associations in which the free movement of workers was invoked as a means of reviewing the legality of rules that were "*aimed at regulating in a collective manner gainful employment and the provision of services…*" The ECJ recognised the effect of Article 45 TFEU in horizontal situations involving either discrimination (*Walrave and Koch*) or non-discriminatory obstacles to market access (*Bosman*).

Following the ECJ's judgment in *Casteels*, where the obstacle to the free movement of workers finds its source in a collective agreement, Article 45TFEU will have horizontal effect and apply in relation to the treatment of a worker's occupational pension. The referring Belgian labour court phrased its question to the ECJ in a manner which according to AG Kokott "*places these collectively agreed rules at the heart of its considerations when it refers in its second question to the determination of a period for the acquisition of definitive entitlements to supplementary pension benefits.*" This enabled AG Kokott to rely upon the cases of *Walrave and Koch*, *Bosman*, *Merida* and *Olympique Lyonnais.*[892]

The broader question is whether Article 45 TFEU can be used to review scheme rules governing occupational pensions that *do not* stem from a collective agreement, when they result in an obstacle to free movement? The extensive scope of Article 45TFEU was dealt with in paragraph 39 of AG Kokott's opinion.[893] From this one may imply that coverage by

[891] Case C-379/09 *Maurits Casteels v British Airways* plc [2011] ECR I-01379.
[892] Case 36/74 *Walrave and Koch* [1974] ECR 1405, para 16 & 17, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 82 to 84; Case C-400/02 *Merida* [2004] ECR I – 8471, Case 325/08 *Olympique Lyonnais* [2010] ECR I-2177.
[893] She states that "*Article 45 TFEU covers not only legislative measures and the actions of public authorities, but also rules of any other nature aimed at regulating gainful employment in a collective manner, in particular*

Article 45 TFEU of "*rules of any other nature aimed at regulating gainful employment in a collective manner"* is not limited to collective agreements (although these are a primary example). This was broadly reiterated by the ECJ in paragraph 19 of its ruling in *Casteels*, in which it relied upon *Olympique Lyonnais*.

The collective dimension of the coverage of Article 45 TFEU as a result of *Casteels* was subsequently referred to in the Opinion of AG Trstenjak in case C-171/11 *Fra.bo SpA v DVGW* [2012] ECR.[894] She also noted that, "*As, the horizontal effect (of fundamental freedoms) concerns private individuals only in the context of a well-defined rule-making activity, it is limited in its impact*." (para 34) while acknowledging that the rule-making activity accepted by the ECJ in its jurisprudence can be of a non-public law nature. In support of her argument for the application of Article 45TFEU to that case, AGTrstenjak also made an interesting parallel between the free movement of workers and other fundamental freedoms of the internal market.[895] In doing so, not only did she refer to *Bosman, Walrave and Koch* but also to the controversial *Viking* case.

An overly strict approach to *Casteels* might lead one to deny the horizontal effect of Article 45TFEU in respect of occupational pension schemes that do not stem from a collective agreement but whose rules might nevertheless be the source of an obstacle affecting a migrant worker's freedom of movement. The potential problem of not affording horizontal effect of Article 45TFEU to the latter would be that this would create a distinction between two categories of workers: on the one hand, those whose occupational pension rights were governed by collective agreements would have the ability to invoke Article 45TFEU to review the rules of their scheme; whereas on the other hand, those members whose occupational pension scheme was governed by a different type of instrument would not enjoy such protection. The social rationale mentioned above in Chapter III goes against such a narrow approach as does the practical reality whereby the majority of occupational pension schemes share a common denominator insofar as they apply rules on membership and pension benefits to a group of members (i.e. current and former employees).[896] Therefore one

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collective agreements. Accordingly, collectively agreed rules on supplementary occupational pensions, such as those at issue in the present case, can be measured against the criterion of freedom of movement for workers."

[894] "*From that case-law it follows inter alia that the rules agreed by parties to a collective agreement and laid down in a collective agreement can be examined for their compatibility with the said fundamental freedoms*."

[895] "*Thus the Court rules in what is now settled case-law that Articles 45 TFEU, 49 TFEU and 56 TFEU apply not only to acts of official bodies, but also to bodies of rules of other kinds intended to collectively govern employment, self-employment and the provision of services*."

[896] Some schemes are simply governed by a trust deed or other legal instrument that governs the conditions of accrual and entitlement regarding workers' pensions, in a similar way as occupational pension schemes set up

may argue that the ***collective nature*** of occupational pension schemes put in place for groups of employees should be sufficient to consider that they are "*aimed at regulating gainful employment in a collective manner."* From a labour law perspective, one hopes that in future the Court will not be overly formalistic with regards to the exact legal form in which the pension scheme is established, provided it is collective in its coverage.[897]Arguably, the ECJ has on occasion been too formalistic in the past, for example see the distinction in *Pavlov* where the absence of a collective agreement was a key difference in determining that an exemption from the scope of EU competition law, (which had been granted in *Albany*), should not be granted.[898] It would seem unfair on workers to limit the horizontal effect of Article 45TFEU based on a strict interpretation of an instrumental criterion.[899] Indeed, one has already witnessed in Chapter IV the discrepancies in the treatment of migrant workers' occupational pensions (depending on whether they are statutory or not). If all occupational pensions of a collective nature were deemed to benefit from the ECJ's jurisprudence in *Casteels*, this would at least create a more level playing field with regards to the protection offered by the horizontal indirect effect of Article 45 TFEU.

The issue of whether Article 45TFEU has a universal vocation as a legal tool for negative integration would also provide a response to the need to avoid discrepancies in the protection afforded to public/private sector workers (as mentioned above in relation to Article 48 TFEU). Greater consistency of treatment between employees is desirable from a labour law perspective. It would therefore be useful to detach the question of whether Article 45TFEU has horizontal effect from a strict instrumental approach to the notion of collective regulation against which the freedom of movement can be enforced. Engstrom's view is that

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by collective agreement. Indeed, the form in which occupational pension schemes are established may vary according to the pensions culture and the legal system of the Member States.

[897] Where whole groups of employees are subject to the same trust deed and rules, it would be right for members of that pension scheme to be treated under EU law in the same way as members of a pension scheme established by collective agreement.

It is not necessary to draw a parallel between the role of the State in providing social security and that of the sponsoring employer of an occupational pension scheme (that may be entirely voluntary). One may also point to the unequal bargaining power between employers and their workforce on matters of occupational pensions. However, in moral terms, it is a question of providing workers with equal levels of protection of what is a fundamental freedom under EU law. This requires overlooking instrumental criteria that are not conclusive.

[898] LHERNOULD. J.Ph., Nouvelles dérives libérales de la CJCE en matière de retraite complémentaire. Droit social 2000 p.1114.

[899] It is not necessary to draw a parallel between the role of the State in providing social security and that of the sponsoring employer of an occupational pension scheme (that may be entirely voluntary). One may also point to the unequal bargaining power between employers and their workforce on matters of occupational pensions. However, in moral terms, it is a question of providing workers with equal levels of protection of what is a fundamental freedom under EU law. This requires overlooking instrumental criteria that are not conclusive.

"*the appreciation of direct effect must be relative and have regard to the case at hand*".[900] The question of whether there is a breach of free movement also invites an analysis of the substantive merits of each case.

It also remains to be seen whether in substantive terms, the Court's assessment of a potential breach of Article 45TFEU (and its horizontal effect) would vary according to whether a migrant worker remains with the same employer or changes employment. Arguably, for future purposes and in cases concerning obstacles linked to future acquisition, preservation and/or information regarding the treatment of occupational pension rights, these will in due course fall within the scope of the Supplementary Pensions Directive (and the relevant implementing legislation under national law) regardless of whether or not there is a change of employment. Moreover, once the time limit for implementation of the Supplementary Pensions Directive has expired, private sector workers may have an action in damages against a Member State if the level of protection afforded does not meet the standard of the Directive.[901] However, a problem concerns the protection of migrant workers' historic occupational pension rights that do not fall within the temporal scope of the Supplementary Pensions Directive. *Casteels* provides a clear legal precedent for workers who have remained employed by the same employer. Yet a key outstanding substantive point for horizontal claims that fall outside the temporal scope of the Supplementary Pensions Directive is whether a worker who has changed employment may rely upon the indirect effect of Article 45TFEU?

iii. The broader legacy of *Casteels*

In order to gauge the legacy of *Casteels*, it is important to verify whether the Court's jurisprudence supports a broad application of the obstacle test whereby losses to migrant workers' occupational pensions (including those that may occur in the context of a change of employment) may be deemed to constitute a breach of a worker's freedom of movement.

The scope of the obstacle test involves addressing the pre-condition of cross-border worker mobility. It also raises the issue of occupational mobility. Moreover, the operation of

[900] Engstrom argues in favour of "*disengaging the attributes of the person relying on the norm from the question of direct effect.*" In doing so, she states that "*it is useful to detach the question of whether a norm has direct effect and is of a quality that permits its obligations to be enforced from the question of who, in the case at hand, can enforce the rule*."On direct effect and the principle of effectiveness in EU law, see J. ENGSTROM, The Europeanisation of Remedies and Procedures through Judge-made Law – Can a Trojan Horse achieve effectiveness?, EUI Thesis, Florence July 2009.

[901] Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-05357.

the obstacle test reveal some of the difficulties of establishing a restriction as well as showing the presence of causation and dealing with any potential justification of such obstacles.

The scope of the obstacle test: the requirement of actual/potential cross-border mobility

Casteels dealt with the occupational pension rights of a worker who remained employed by the same economic undertaking (British Airways) while moving between Belgium, France and Germany. The requirement of cross-border mobility between Member States thus came to the fore as a pre-condition to the application of Article 45TFEU. [902] A purely internal move by a worker to another establishment of the same employer or to another employer in the same Member State would not fall within the scope of the obstacle test under Article 45TFEU.[903] This was mentioned by AG Kokott in her opinion in *Casteels*: "*The primary law provisions concerning freedom of movement for workers do not apply to purely internal situations.*" However, cross-border mobility within the EU may be ***actual*** or ***potential***. As Mr Casteels had moved between Belgium, Germany and France, his situation was a clear example of the former. Although Mr Casteels had exercised his right to free movement, this did not mean that Article 45 TFEU had not been breached by his employer, British Airways in its determination of his occupational pension rights.[904] Nevertheless, geographic mobility should not be hypothetical; therefore a worker who has not actually moved would have to show that he/she had the opportunity to seek and/or obtain employment in another Member State.[905] The geographic scope of Article 45TFEU thus remains clear

[902] EU law distinguishes between two scenarios of geographic mobility that may occur: on the one hand, internal mobility within a Member State and on the other hand cross-border mobility between two or more Member States. Only the latter triggers an application of Article 45TFEU.

[903] In practice, a move to another employing company within the same group may not impact on that workers' pension accrual provided the new employing entity participates in the same occupational pension scheme. Where there is a change of employer within the same Member State, then the pension arrangements of workers may be affected as different employers may operate different schemes although such a situation will remain outside the scope of EU law. However, even then, certain sectors may operate occupational pension schemes that allow workers who change employer but remain within the same sector and within the same Member State to retain their active membership of such schemes. Thus, the legal protection of workers' occupational pension rights in purely national situations, which is a question for national law, tends to be less problematic than situations where there is cross border mobility within the EU.

[904] As noted by AG Kokott in her opinion, the fact that Mr Casteels had actually exercised his right to free movement did not prevent him from being able to rely upon Article 45TFEU to challenge a measure resulting in a loss of occupational pension rights. Moreover, Article 45 TFEU could still bite even if a worker had decided not to move to a job in another EU Member State on the basis of the effects that such movement would have on his or her pension rights, following the ECJ's ruling in case C-18/95 *Terhoeve* [1999] ECR I-493. The ECJ held that an obstacle to free movement could stem from provisions that could preclude or deter a national of a Member State from leaving his country of origin in order to exercise his rights to free movement. AG Kokott also referred to case C - 212/06 *Flemish Care Insurance* [2008] ECR I-01683.

[905] In practice, a job offer would be proof or at the very least a job application should be sufficient. However, the existence of a job vacancy in another Member State might be considered too remote as to pass the geographic mobility test.

insofar as it requires actual or potential cross-border mobility. What must be clarified in the aftermath of *Casteels* is whether the obstacle test under Article 45 TFEU would have any purchase on situations of cross-border movement also involving a change of employer?

The scope of the obstacle test: does it apply where there is a change of employment?

Mr Casteels remained employed by the same business (British Airways) in different EU Member States, throughout the period of his career for which he claimed recognition of his occupational pension rights. In its reasoning, the Court recognised that the treatment that BA purported to apply to his occupational pension rights had an adverse impact, which constituted an obstacle to free movement under EU law. The Court held that Article 45 TFEU protected Mr Casteels, who had been transferred from an establishment of his employer in one Member State to an establishment of the same employer in another Member State; he was not to be regarded as having left his employer of his own free will.

However, it is debatable whether a migrant worker involved in a change of employment would be able to invoke successfully the indirect effect of Article 45TFEU? Bollen-Vandeboorn and Stevens adopt a cautious approach in this regard: "*The fact that there is only one employer involved in the issue regarding mobility renders the case specific. This is so because there is no transfer of obligations between employers."*[906] *Casteels* specifically showed that the continuous nature of an employment relationship impacted upon its ruling that Mr Casteels should not suffer a loss of occupational pension rights as a result of exercising his right to free movement under Article 45 TFEU.

Nevertheless, it would be wrong to suggest that Article 45TFEU is not capable of horizontal indirect effect where there is a change of employer as the freedom of movement does not limit its application to situations of continuous employment. In theory all migrant workers should be able to invoke Article 45TFEU in a horizontal dispute in order to challenge rules governing an occupational pension scheme whose application would result in a loss of pension rights caused by the exercise of mobility within the EU. The author of an obstacle to free movement may be a new or a former employer/pension scheme. The facts in *Casteels* do not provide an answer to this question but they should not limit a worker's right to the protection afforded under Article 45TFEU where the loss suffered can still be attributed to the exercise of free movement. Nevertheless, situations involving a change of

[906] BOLLEN-VANDENBOORN.A & STEVENS.Y, *Maurits Casteels v British Airways*: Limitation of length of service with one employer in the context of the acquisition of pension rights not EU proof, European Journal of Social Law, No.1 March 2012.

employer may result in some differences with regards to the choice of comparator as well as the assessment of any arguments made by employers to justify any obstacles.[907]

The requirements of the obstacle test

Casteels depicted a situation where a migrant worker's loss of occupational pension rights pointed to the exercise of his right to free movement as the cause of the ***disadvantage*** he suffered. The fact that Mr Casteels remained employed by BA throughout his career in 3 Member States arguably highlighted the existence of an obstacle to free movement.

Three criteria stand out for the horizontal operation of the obstacle test under Article 45 TFEU to a migrant worker's occupational pension rights. As mentioned by AG Kokott in her opinion in *Casteels*, these are: the existence of a rule governing an occupational pension scheme, which restricts freedom of movement; an obstacle in the form of an actual or potential hindrance/disadvantage (generally a financial loss); and causation between the exercise of free movement and the loss of pension rights. Each criteria is addressed below:

First of all, Article 45 TFEU prohibits "*national rules which impede (or 'restrict') the freedom of movement of the workers concerned, even where such rules are applicable irrespective of their nationality*." [908] The existence of a ***restriction*** is independent from the discrimination test. In *Casteels*, there was no question of discrimination on grounds of nationality.[909] The restriction was that the rules of Collective Pension Agreement No.3 did not take into account his years of service as a worker employed by BA in an establishment of the same employer in another EU Member State; moreover, the same rules treated his move to BA in France as a voluntary departure.

The second criterion requires a migrant worker to demonstrate that the restriction in question constitutes an ***obstacle*** to free movement. In paragraph 21 of *Casteels*, the ECJ referred to its case-law in cases C-212/06 *Flemish Care Insurance* [2008] ECR I-1683, paragraph 45 and C-325/08 *Olympique Lyonnais* [2010] ECR I-02177, paragraph 33 to deal

[907] BA did argue that Mr Casteels would have lost his pension rights under BA's German scheme had he moved to a different employer in Germany. However, that argument was rejected by AG Kokott as the relevant comparator chosen was another BA employee who had remained employed by BA in Germany.
[908] AG Kokott referred to the following cases: (Case C-190/98 *Graf* [2000] ECR I-493, para 18; Case C-387/01 *Weigel* [2004] ECR I-4981, paras 50-51; Case C-464/02 *Commission v Denmark* [2005] ECR I-7929, para 45; and Case C-269/07 *Commission v Germany* [2009] ECR I-7811, para 107).
[909] It is unlikely that discrimination will be an issue where which the rules governing occupational pension schemes are being scrutinized for compliance with free movement, given that the relevant pension factors (length of service, pensionable salary and/or pension contributions) are independent from nationality.

with the notion of disadvantage.[910] The Court developed in *Casteels* its jurisprudence on what may constitute an obstacle to free movement under Article 45 TEU by extending it to a loss of occupational pensions.[911]

In the requirement for a worker to prove that he/she has been placed at a disadvantage or subjected to a 'hindrance', *Casteels* showed that the obstacle test contains both a ***subjective*** and ***objective*** dimension:

The subjective dimension of the notion of disadvantage involves a comparison with other comparable workers. In *Casteels*, the fact that there was one single employer had an impact on the comparisons that were made by the ECJ in determining the existence of a disadvantage as these comparisons were limited to other BA employees. In applying Article 45 TFEU to review Collective Pension Agreement No.3, the Court first of all compared the treatment of Mr Casteels' length of service with BA workers in Germany who had not exercised their freedom of movement (i.e. *static workers*)[912]; secondly, the Court compared the effect on his pension rights of Mr Casteels' departure from the BA establishment in Dusseldorf (Germany) to BA in France, with the treatment of other BA workers who had moved to another establishment of BA in Germany (i.e. *nationally mobile workers*).[913]

Given that Mr Casteels had remained a BA employee throughout his cross-border movement, the approach by the ECJ was to compare "like with like" where a comparison could be made with other BA employees.[914] The subjective dimension to the obstacle test

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[910] "*the provisions of the TFEU relating to the freedom of movement are intended to facilitate the pursuit by nationals of the Member States of occupational activities of all kinds throughout the EU, and preclude measures which might place EU citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State*."

[911] "*Article 45 TFEU precludes any national measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by Union citizens of the fundamental freedoms guaranteed by the Treaty*."

[912] The Court assessed the fact that Mr Casteels' period of service performed in Belgium was not taken into account for the purpose of determining the qualifying period of service required by Article 7 of the Collective Pension Agreement No.3 in order for his pension rights to vest under BA's German scheme. In comparison, a 'static worker employed by BA at Dusseldorf with the same length of service for BA as Mr Casteels would benefit from an uninterrupted period of service for the purpose of the acquisition of pension rights.

[913] The Court referred to Paragraph 51 of AG Kokott's opinion: "If, when he left Dusseldorf in 1991, Mr Casteels had merely moved to another BA establishment within Germany, that move would, under Collective Pension Agreement No.3, have had no impact at all on his pension right. On the other hand, the cross-border move to a French BA establishment – at least on the present interpretation by BA – brought about the forfeiture of his pension right under Collective Pension Agreement No.3." in Case C-379/09 *Maurits Casteels v British Airways plc* [2011] ECR I-01379, Opinion of AG Kokott.

[914] AG Kokott rejected as erroneous BA's argument that there was no restriction because Mr Casteels' pension right would also have been forfeited had he moved to another establishment in the same Member State. This was a clear rejection by AG Kokott of any comparison with an employee moving from/to a non-BA establishment in Germany. Where there is no change of employer (which is to be understood in the broader sense for any multinational undertaking), the comparator must be an employee from the same company. The ECJ determined that the effect of that collective agreement was to place workers in the position of Mr Casteels at a disadvantage compared to workers employed by BA who had not exercised their right to free movement. (para 23). Less

applied by the ECJ in *Casteels* might be likened to one of 'discrimination on grounds of cross-border mobility'.

Where there is a change of employer, the relevant factors surrounding the choice of comparator will depend upon a case by case basis.[915] Choosing the right comparator can prove crucial in determining the outcome of discrimination cases. However, it may be to a worker's advantage not to have to prove less favourable treatment compared to a national situation but to simply be able to show that an obstacle to free movement caused a loss. In her opinion, AG Kokott made it clear that "*the notion of restriction of freedom of movement for workers does not necessarily require that there must be unequal or less favourable treatment of cross-border situations in comparison with purely national situations*." Indeed, the ECJ has recognised that "*restrictions exist in cases in which the rules at issue affected both national and cross-border situations equally*" (see *Bosman* and *Olympique Lyonnais*[916]).

The objective dimension of the obstacle test may be seen in the form of a ***financial loss*** of occupational pension rights, as a result of which a worker's access to the labour market in other Member States is unreasonably or unfairly impeded.[917] AG Kokott determined in paragraph 55 of her opinion that "*it is beyond doubt that as a result of his move in 1991 from the German establishment of BA to its French establishment Mr Casteels in fact sustains financial losses in terms of his private old-age pension provision if the collectively agreed rules are applied as BA envisages.*" By taking into account the financial loss arising in relation to the treatment of Mr Casteels' occupational pension rights, the ECJ's assessment of the exercise by him of his freedom of movement was that he had not been able to do so 'unhindered', hence there was an obstacle to his free movement. [918] Genuine freedom of movement is thus seen as entailing both economic and social rights.

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favourable treatment of cross-border situations in comparison with purely national situations usually indicates a restriction of free movement, which would typically arise in discrimination cases.

[915] Hypothetically, if Mr Casteels had changed employer while moving from one Member State to another (i.e. to a non-BA establishment), then an obvious comparator would be another employee changing employer but remaining within the same Member State.

[916] See Case C-415/93 *Bosman* [1995] ECR I-4921 and Case C-325/08 *Olympique Lyonnais* [2010] ECR I-02177.

[917] Mr Casteels suffered from a loss in the form of a reduction of occupational pension rights. However, the ECJ even referred to the potential financial loss of workers considering a change of establishment. In paragraph 29 of its ruling, the ECJ stated that the prospect of "such a disadvantage" might discourage workers from exercising their freedom of movement within the EU with the same employer. AG Kokott referred to the "deterrent effect on workers who are considering a change of establishment." In the *Flemish care insurance* case, the ECJ held that freedom of movement for workers is impeded, where, on account of national provisions concerning social security, they "find themselves in a situation in which they suffer either the loss of eligibility [for] care insurance or a limitation of the place to which they transfer their residence". There remains the issue of workers having to show that their pensions loss is actually connected to their right to free movement.

[918] Crucially, the existence of a financial loss need not be 'actual'. Indeed it may be 'potential.' In her opinion, AG Kokott made a reference to the general protection offered by EU law to the fundamental freedoms in

The third criterion of the obstacle test relates to ***causation*** (and remoteness): it requires a causal relationship between the exercise of freedom of movement and an actual or potential disadvantage affecting a migrant worker's occupational pension: "*Article 45 TFEU precludes any national measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by EU citizens of the fundamental freedoms guaranteed by the Treaties.*"[919] In her opinion, AG Kokott referred to the broad body of the ECJ's existing case-law in this regard.[920] A genuine impediment to market access must therefore occur as a result of the application of the rules of a pension scheme to a migrant worker. Furthermore, the obstacle in question must not be too remote. The fact that Mr Casteels had exercised his free movement of workers, which had a direct consequence on the application of the rules of Collective Agreement No.3, was sufficient for the Court. Moreover, the ruling in *Casteels* was also significant insofar as Mr Casteels's movement from one BA establishment to another was not to be regarded as a voluntary departure, even though he may have 'agreed' to his transfer. In doing so, the Court gave a narrow interpretation to voluntary departure, which protected Mr Casteels's right to free movement and ultimately his occupational pension.

On remoteness, the point made by AG Fenelly in his opinion in *Graf*, (which related to compensation on termination of employment under Austrian law) has been summarised by Craig and De Burca as follows: "*neutral national rules could be regarded as material barriers to market access only if it were established that they had actual effects on market actors akin to exclusion from the market*."[921] One may note that in *Casteels*, a remoteness argument was made by BA based on a false analogy with *Graf*; it was rejected by AG Kokott as not reflecting the connection between the loss of pension rights with the exercise of free movement.[922] In addition, AG Kokott also took into account the impact on Mr Casteels in

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general, including but not limited to the freedom of movement for workers: "*there is always a restriction where a measure is capable of hindering or rendering less attractive the exercise of the fundamental freedoms guaranteed by the Treaty.*" The cases of C-19/92 *Kraus* [1993] ECR I-01663 and C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2010] ECR I-02177 *('Flemish care insurance')*, which concerned the free movement of workers, as well as Joined Cases C 171/07 & C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I – 4171, which concerned the freedom of establishment) were cited in support of a common approach between the fundamental freedoms.

[919] In paragraph 22 of its ruling in *Casteels*, the ECJ relied on its previous ruling of 1 April 2008 in Case C-212/06 *Flemish care insurance* [2008] ECR I-1683, paragraph 45.

[920] AG Kokott referred to the following cases: Case C-19/92 *Kraus* [1993] ECR I – 1663, paragraph 32; Case C-150/04 *Commission v Denmark* [2007] ECR I-1163, paragraphs 35 and 45.

[921] Case C-190/98 *Volker Graf v Filzmoser Mashinenbau GmbH* [2000] ECR I-00493.

[922] "*The present case centres on a pension right whose acquisition under Collective Agreement N.3 depends by no means on a 'future and hypothetical event', but rather on a circumstance linked, ex hypothesi, to the exercise of the right to freedom of movement, namely the choice of place of work.*"

terms of the loss of social protection.[923] Her reasoning is attractive from a migrant worker's perspective and is implicitly in line with a labour law approach to free movement of workers in light of fundamental rights (see below). It is also pragmatic because occupational pension rights usually depend upon a continuous accrual as a result of regular pension contributions, which are deducted at source from a worker's monthly salary (as is usually the case for employees' social security contributions). [924]

Meeting the obstacle test will depend on the facts of the case but is by no means the end of the road. Lhernould's case report on *Casteels* emphasised that identifying obstacles to the free movement of workers and the criteria for justifying such obstacles were key.[925]

The justification of obstacles to the freedom of movement for workers

Can a justification provided by employers/occupational pension schemes for such rules can be accepted under EU law, notwithstanding a loss of occupational pension rights for migrant workers caused by the exercise of their free movement? If so, under what conditions? The test for justifying an obstacle to free movement was set out by AG Kokott in paragraph 62 of her opinion.[926] In an occupational pension scheme, an employer or trustee would therefore need to show that any rule that is as an obstacle to free movement is ***legitimate***, in the ***public interest***, ***appropriate and proportionate***. Ultimately, one may draw a parallel with the notion of objective justification that applies to indirect (sex or race) discrimination; in the field of EU anti-discrimination law, Moreau mentions the risk of a clash between social and market values regarding the justification of discrimination under EU law.[927]

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[923] AG Kokott stated that: "*It should further be borne in mind that BA's guarantee as to benefits in respect of Mr Casteels came into effect when he entered service in Dusseldorf (Germany) on 15.11.1988) and Mr Casteels acquired through his own pension contributions and those of his employer, a right to a supplementary occupational pension from the first day. Now to regard this right as 'forfeited' would ultimately result in a loss of savings which had been built up for Mr Casteels during his almost 3 years service in Dusseldorf to provide him with a private old-age pension. In this respect too, this case differs fundamentally from Graf*."

[924] A potential obstacle may thus occur where a migrant worker's occupational pension rights are (or would be) adversely affected by lengthy waiting periods or vesting periods, which can either delay or negate accrual, hence it being addressed by the Supplementary Pensions Directive. Some employers may argue that those rules are by definition designed by employers to tie workers to their jobs.

[925] LHERNOULD. J-Ph, "La portabilité des pensions versées par les régimes professionnels de retraite." Liaisons Sociales Europe No. 265, 2 décembre 2010 p.5.

[926] *"A measure which constitutes an obstacle to freedom of movement for workers can be accepted only if it pursues a legitimate aim compatible with the Treaties and is justified by overriding reasons in the public interest. Even if that were so, application of that measure would still have to be such as to ensure achievement of the objective in question and not go beyond what is necessary for that purpose."*The cases cited in this context were *Kraus* paragraph 32, *Bosman* paragraph 104, *Flemish care insurance* paragraph 104 and *Olympique Lyonnais* paragraph 38.

[927] MOREAU. M-A,, Les justifications des discriminations, Droit Social No.12 décembre 2002, p.1113.

Both the Advocate General and the ECJ dealt with the issue of the qualifying or vesting periods, which arose in *Casteels*: they looked at the underlying rationale for the vesting periods, which was "*to promote and reward an employee's loyalty to the company.*" As pointed out by AG Kokott, it was recognised by the parties to the proceedings that vesting periods such as those at issue in *Casteels* served "*primarily to bind employees to their employer*." Other relevant reason for having vesting periods that were mentioned by the Advocate General were "*certainty of planning*" and the need for cost efficiency when "*administrating and fulfilling 'particularly minor' pension rights*".

Given that Mr Casteels had remained employed by BA throughout his career, the ECJ in paragraph 32 of its ruling in *Casteels*, excluded BA's argument that employee loyalty was a justification to such vesting periods. On that occasion, the vesting period set out in Collective Agreement No.3 failed the first criterion of justification, namely that of legitimacy. However, would the position be different if a worker moved to a new employer in another Member State? A vesting period may still constitute an obstacle to free movement although there may be greater room for employers to justify such rules. AG Kokott did state in paragraph 63 of her opinion that the objective of loyalty (and the aforementioned minor objectives) would be considered as "*legitimate considerations relating to labour and social law, which are attributable to the field of overriding reasons in the public interest.*" An employer might argue that vesting periods are a legitimate means of rewarding employee loyalty (although the criteria of appropriateness and proportionality would still apply to determine justification). The requirement of a minimum period of service (i.e. a vesting period) is sometimes referred to as a "*a golden chain*": Bollen-Vandenboorn and Stevens point out that "*the problem of the Casteels case lies in Germany*", where the golden chain has its roots as 'supplementary' occupational pensions are "*primarily seen as a salary component and much less as a form of social protection. Therefore, employers have always regarded supplementary pension benefits more as an employer's prerogative concerning organisation, management and particularly allowance*".[928] Moreover, whether a long vesting period is actually an appropriate means of achieving employee loyalty is clearly subject to debate.[929] It

[928] "It is an effective way of encouraging staff loyalty. Because the employee cannot leave he is chained, so to speak, be it (*sic*) with a chain of gold. If he stays, he rakes in the supplementary pension benefits."A. BOLLEN-VANDENBOORN & Y. STEVENS, *Maurits Casteels v British Airways*: Limitation of length of service with one employer in the context of the acquisition of pension rights not EU proof, European Journal of Social Law, No.1 March 2012. p.73-74.

[929] The imbalance of power, which gave employers a hold upon the welfare of their workers in retirement led to the German legislator to gradually bring down the maximum length of vesting periods from 15 years to 5 years. Much shorter maximum vesting/waiting periods of 2 months apply in the Netherlands under Article 14,

may certainly be an effective one, but arguably social protection in the workplace should not be considered as akin to a loyalty bonus. Employers have other tools at their disposal to incentivise employee loyalty as an alternative to depriving workers of occupational pension benefits. Nevertheless, certain costs associated with the operation of pensions (which may relate to the payment of benefits and the administration of schemes) would certainly be a legitimate consideration for employers, which could rightly be invoked in order to justify scheme rules, provided they were both appropriate and proportionate.

In order to be legitimate and appropriate, vesting periods should be scrutinised by reference to the criteria of fairness and objectiveness. In paragraph 31 of its ruling in *Casteels,* the Court mentions the risk of an "*unjustified prejudice*" resulting from the loss of supplementary pension rights in respect of the period during which Mr Casteels contributed to the German occupational pension scheme. The same paragraph also referred to the doctrine of unjust enrichment, which AG Kokott mentioned in paragraph 79 of her opinion.[930]

In *Rockler,* the ECJ has ruled upon the limits to objective justification in the broader field of free movement.[931] It has thus been reported that "*The ECJ rejected arguments based on the supposed financial burden on the national security scheme, ruling that justifications based on purely economic grounds could not be accepted, and that the justification put forward was not proportionate*."[932] It should be noted that in the case of occupational pension schemes, the cost of employer contributions, (mandatory in some cases or voluntary in others), has already been paid for (or accounted for and allocated for the purpose of social protection. Moreover, it corresponds to a period of employment. In the event of a change of employment in the context of free movement, there may be an on-going administrative cost for a pension scheme where the worker remains a deferred member of the scheme or upon a pension transfer to another pension scheme. In *Olympique Lyonnais*, the Court held that any cost that could legitimately be passed on to the employee/ new employer) had to be proportionate to the expense incurred by the former employer.[933] The notion of objective,

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paragraph 2 of the Dutch Pension Act, precisely "*in order to prevent (too big) a loss of acquisition of pension rights*." See BOLLEN-VANDENBOORN.A & STEVENS.Y, Op.cit p.74.

[930] There was no risk of Mr Casteels becoming unjustly enriched. Under the rules of Collective Agreement No.3, BA would have re-gained the employer contributions it had paid towards Mr Casteels' pension.

[931] Case C-137/04 *Amy Rockler v Försäkringskassan* [2006] ECR I-01441.

[932] CRAIG & DE BURCA, EU Law Text Cases and Materials (5th edition) p.733.

[933] If a vesting period were challenged for being too long, this would require employers and/or schemes to show the proportionate nature of the cost structure in terms of the actual administrative costs to the scheme. Different occupational pension schemes may have different cost structures and thus negative integration would have the advantage of adapting to the specificity of each scheme.

legitimate and proportionate justification will need to be monitored strictly by the ECJ to avoid denying workers genuine freedom of movement.

iv. Remedies

Any failure by the employer to justify an obstacle to a worker's right to free movement under Article 45TFEU requires such a breach to be remedied. What are the remedies available to individual workers in horizontal disputes where the result of reviewing a measure against Article 45TFEU reveals a breach of a worker's right to free movement involving a loss of occupational pension benefits?

In paragraph 76 of her opinion in *Casteels*, AG Kokott concluded that "*Article 45 TFEU requires, with regard to the completion of qualification (vesting) periods, that the entire duration of the employee's employment with the same employer at his establishments in various Member States be taken into account*." This was echoed by the ECJ's ruling, which provided the Belgian court with a clear interpretation of the effects of Article 45 TFEU: the periods of service performed by Mr Casteels in Germany for BA would have to be taken into account when determining his overall pensionable service. Failure to do so would breach Article 45 TFEU. In doing so, the ECJ specified the principle that should guide the remedy but did not specify the precise outcome as it left this to the national court as is the usual procedure. The Belgian court was required to ascertain exactly the manner in which the periods of Mr Casteel's pensionable service in Germany are to be taken into account.

Ironically, the requirement of taking all periods of work (with the same employer) can to some extent be compared with the principle of aggregation mentioned above in relation to Article 48 TFEU. The result of the ECJ's ruling is indeed similar in practice to the remedy that might have emerged if the ECJ had afforded horizontal direct effect to Article 48 TFEU. However, the route taken by the ECJ in *Casteels* reaches this result after applying the obstacle test in Article 45 TFEU, which gives employers a chance to justify the rule of the scheme under scrutiny. This is more satisfactory from an employer's perspective as the alternative would have resulted in a direct requirement for the national court to apply the aggregation test, which would probably have been criticised as judicial activism.

Given the facts of the case in *Casteels*, the relevant parameters of any remedy in the event of a change of employer remain to be seen. One is therefore left to try to anticipate whether (and if so how) the legal principles and the approach of the ECJ and the Advocate General in *Casteels* could be transposed in the context of a change of employment.

In her opinion in *Casteels*, AG Kokott referred in paragraph 75 of her opinion to the "*spirit and purpose" of Article 45 TFEU to provide the greatest possible freedom for workers*." Arguably, workers who change employer should also be able to benefit from the same spirit and purpose of the treaty. AG Kokott concluded that "*it is necessary to prevent an employee from losing possible rights to a supplementary occupational pension when he moves from one establishment of his employer to another establishment of the same employer situated in another Member State*." Arguably, from a migrant worker's perspective, it is necessary to prevent an employee from losing possible rights to a supplementary occupational pension when he/she moves to the establishment of a new employer situated in another Member State. Such a remedy should reflect the same logic as the social and internal market rationale that led to the protection of migrant workers social security.

In paragraph 76 of her opinion, AG Kokott concluded that "*Article 45 TFEU requires, with regard to the completion of qualification (vesting) periods, that the entire duration of the employee's employment with the same employer at his establishments in various Member States be taken into account*." While this is entirely logical in the situation where an employee remains with the same employer, it is unlikely that the same principle would apply to a situation involving a change of employer.

However, national courts have themselves taken steps to reflect workers' right to free movement in determining their substantive employment rights and benefits. Such was the case in France, when the Cour de Cassation took account of periods worked by a Belgian worker in a comparable activity (in that case, the rail industry) in another Member State (Belgium) in order to determine his salary level when he became employed by the French railways SNCF.[934]

The facts of *Casteels* were explicitly referred to by the ECJ to justify its reasoning in interpreting Article 45 TFEU and to show the relevance of the Treaty principles in relation to the consequent remedy. However, it must be hoped that *Casteels* is merely the first of a long run of case-law that will ensure that workers who change employers do not miss out on judicial protection. From a worker's perspective, it would be desirable for the same purposive approach to safeguard equal levels of legal (and social) protection to workers who change employer as those who remain with the same employer. It would be great if one could aspire to a legal situation in which any potential remedy would be established having regard to the length of pensionable service and the level of pension rights accrued by *equivalent* static

[934] Cass.Soc. 11 Mars 2009 Pourvoi N. 08-40381. See the case-note by LHERNOULD: "La SNCF est tenue de prendre en compte la carriere accomplie en Belgique." Liaisons sociales Europe N.224 (16-29 April 2009).

workers who worked for the same amount of time with the same employer. In most cases workers are allowed to either retain rights in the same pension scheme. In some cases where a voluntary transfer is possible, workers may transfer their rights across to a new scheme, ideally that of the new employer. Before determining the level of pension benefits that a migrant worker could hope receive in respect of a pension transfer, the first stage would of course be to ensure that accrued rights are transferred in full so as to include at least the proceeds of both employer and employee contributions. This seems obvious in cases where there is no change of employer.[935] However, in cases involving a change of employer, such a remedy would require a remarkable legal combination that would reflect workers' rights to genuine free movement, equal treatment of workers and social protection by avoiding an unfair loss of occupational pension rights. Whether or not such an approach is taken by the Court in future cases remains to be seen (it would certainly be supported by the fundamental rights discourse mentioned in B below).

One final point may be made on the issue of remoteness of compensation in the case of a breach of a worker's right to free movement. The above discussion has focused entirely upon a loss of pension rights for which the most likely remedy in any case involving a rule of an occupational pension scheme that affects a worker's right to free movement would be that any unjustified rule should be set aside and the corresponding pension rights recognised. Any alternative monetary 'compensation' not based on rectifying a loss of pension rights may be hard to evaluate. For example, what sort of damages might a worker expect to obtain in a national court if they turned down a better paid job in another EU Member State on the ground that they would lose occupational rights with their existing employer? This would be a potential can of worms for workers and employers alike. The more important issue is to remove obstacles arising in the rules governing occupational pension schemes so that workers can move freely (in the knowledge that their occupational pension rights are secure).

One should also note that the newly adopted Supplementary Pensions Directive provides a maximum combined vesting/waiting period which provides greater legal certainty, clarity and should avoid the need to avoid clogging up the judicial systems of the Member States and the EU with questions on the interpretation of Article 45TFEU and what would constitute an appropriate remedy

[935] In paragraph 82 of her opinion in *Casteels*, AG Kokott commented that the effect for Mr Casteels would be that "*Mr Casteels would be entitled not only to pension benefits arising from his own contributions, but also those based on the employer contributions up until his move to France. Therefore, Mr Casteels would have a full entitlement in respect of his periods of service completed in Germany in relation to which both his own contributions and those of his employer would be taken into account*."

However, given the historic absence of any meaningful positive integration in the preceding period, one is left to ponder how the Court may deal with claims brought by migrant workers who have suffered an unjustified loss of pension rights following a breach of their right to free movement but are not able to rely upon the Safeguard Directive or the Supplementary Pensions Directive given the scope in time of these instruments. Both the Advocate General's and the ECJ's approach acknowledged either expressly or implicitly that the objective of occupational pensions was social protection and took this into account in a case involving free movement of workers. Should the fundamental rights of the Charter affect the interpretation of the EU Treaty provisions on the free movement of workers?

B. The role of Fundamental rights in horizontal situations

The Court took the opportunity in *Casteels* to establish an historic precedent in relation to horizontal situations dealing with migrant workers' occupational pensions by developing its case-law on the use of Article 45TFEU through the technique of indirect effect. However, the Treaty is not the only relevant source of primary EU law. Indeed, the legally binding status of the Charter as a source of primary EU law is set out in Article 6TEU, which states that the EU Charter has "*the same legal value as the Treaties*" with effect from 1 December 2009, the date of entry into force of the Treaty of Lisbon.[936] The EU Charter is binding on the ECJ, which must interpret the powers and tasks of the EU, where these are unclear, in light of the objective of protecting the rights laid down in the Charter.[937]

The fact that the free movement of workers under Article 45 TFEU is also a fundamental right (as stated in Article 15 of the EU Charter) raises the question of whether it could impact on its effectiveness in horizontal situations. The role of fundamental rights has been discussed above in Chapter III in the argument for a social rationale to the protection of migrant workers' occupational pensions. It is therefore relevant to ascertain the role of fundamental rights contained in the Charter as a potential social lever for interpretation of the free movement of workers and occupational pensions. [938]

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[936] Article 6(1) TEU states: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

[937] See BERCUSSON.B in European labour law and the EU Charter of Fundamental Rights – edited by BERCUSSON.B – summary version, ETUI (2002), p. 79.

[938] Lazzerini observes that "*the effective enjoyment of many fundamental rights granted by the Charter can be impaired not only by activities or omissions by the Union or it Member States' public authorities, but also by the (active or passive) conduct of other persons; she also states that "a number of Charter provisions are particularly suited to be applied in horizontal relationships. Think of, for instance, the provisions in Title IV on*

However, the potential for the Charter to provide an effective source of legally enforceable rights in a horizontal situation involving the free movement of workers and their occupational pension rights is likely to prove extremely limited, given the constitutional, substantive and temporal limitations that apply (a). Instead, the potential role of fundamental rights as a lever for negative integration in this field lies it its influence over the interpretation of the Treaty provisions on free movement (b).

a. The limitations of the Charter as a source of horizontal rights/entitlements

With regards to any cases whose facts took place before 1 December 2009, there is a *temporal limitation* concerning the effectiveness of the Charter. In addition, there are *constitutional* as well as *substantive* limitations to the Charter's horizontal effectiveness.

The constitutional limitations of scope on the horizontal effectiveness of the Charter

The key constitutional limitation regarding the binding nature of the Charter is that it is subject to falling within the scope of EU law. Article 6TEU confirms that "*The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.*" The general provision on its field of application is set out in Article 51of the EU Charter.[939] As observed by Lazzerini, "Union fundamental rights have no freestanding status, so that they can only be invoked where another EU provision is applicable to the situation concerned".[940] She referred to the *Akerberg Fransson* case, which confirmed that fundamental rights only apply to cases that fall within the scope of EU law.[941] As far as the protection of migrant workers' occupational pensions is concerned, Article 45TFEU is clearly applicable in the context of situations (including horizontal relationships) where a worker's right to free movement is at stake. However, Lazzerini also deduces that "admitting that the Charter is applicable in horizontal relationships, not all violations that find their origin in the

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'Solidarity', which may well apply in the context of working relationships with private law employers." LAZZERINI (Op.cit) p.421.

[939] "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties."

[940] Lazzerini (Op.cit) p.423.

[941] Case C-617/10 *Akerberg Fransson* [2013] OJ C 114/7, para 19-22.

conduct of private [parties] (*sic*) may be reviewed against EU fundamental rights, but only those that show a sufficient connection with an EU provision other than fundamental rights themselves."[942] Arguably, a migrant worker's loss of social protection will not be reviewable against the Charter unless it qualifies as an obstacle to the free movement of workers.

In addition to the general 'constitutional' requirement (that limits the legally binding effects of the EU Charter to the scope of EU law), a specific express limitation to its effectiveness can also be found in "Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom", which is annexed to the Treaties. Article 1 of that Protocol purports to limit the ability of the ECJ to review the national laws of both Member States by reference to the Charter.[943] Moreover, Article 2 of the same Protocol states that Title IV does not create justiciable rights.[944] Interestingly, Title IV of the EU Charter, which is referred to above in Article 1(2) of the Protocol, is the Title on Solidarity, which is relevant to workers and their social protection![945] An additional concern raised by Ewing was the reference to "*national laws and practices*" as a "potential source of equivocation", which is clearly relevant in the context of occupational pensions that are governed by national laws and practices.[946] However, provided there is another existing source of EU law, such as Treaty article, general principle of EU law or secondary EU legislation, that requires the respect of fundamental rights, then the Protocol should not bite in such a situation and both Poland and the UK would remain bound by such fundamental rights along with all the other Member States. Given that the UK and Poland are bound by EU law on the free movement of workers, the effectiveness of the fundamental rights contained in the Charter thus depends on their substantive overlap with Treaty rights and/or general principles of EU law applicable in this field as interpreted by the ECJ.

The 'substantive' limitations of the Charter's horizontal effectiveness

[942] Lazzerini (Op.cit) p.423.

[943] "*The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.*

[944] *"In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law."*

[945] Title IV contains Articles 27 to 38 of the EU Charter. Both Articles 31 and 34 are relevant to social protection in general and occupational pensions in particular. Clearly, the UK was concerned about the cost involved should it be found to be infringing any of the above social rights contained in the Charter. However, Article 25 on the rights of the elderly is outside Title IV.

[946] Article 2 of the Protocol states that: "To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom." NB/ The national laws and practices in the field of occupational pensions vary considerably given the diversity of pension systems.

Article 52 (2) of the Charter specifies the scope and interpretation of rights and principles in the EU Charter: "*Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.*" In the context of the protection of the occupational pension rights of migrant workers, the existence of a right recognized by the Charter and the Treaties is fulfilled through the provisions on the freedom of movement for workers, which is recognised by the EU Charter (Article 15) and by the Treaty by Articles 45, 46 and 48TFEU. The above normative overlap shows a clear expression of the same right under EU law. As such, one may at this stage avoid the debate between 'rights and principles and simply accept the position that the free movement of workers is an ***"entitlement"***, whose legal source may be found in both the Treaties and the Charter.[947]

The more complex issue concerns the identification of the conditions and limits to the exercise of free movement under the Treaties. One is drawn to examining the Court's jurisprudence on the free movement of workers. As the Court recalled in *Viking*, Article 39EC (now 45TFEU), does not just apply to the actions of public authorities but also extends to "rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services." The controversial question regarding the effectiveness of the free movement of workers ***in its capacity as a fundamental right*** (as well as a fundamental freedom contained in the Treaty under Article 45TFEU) concerns the conditions under which it can be applied when the nature of the dispute is horizontal and where the origin of the infringement is the result of the behaviour of a private party (such as an employer or an occupational pension scheme). It has been suggested by Lazzerini that "the Charter does not provide a clear answer to the question of the horizontal application of the fundamental rights granted therein…the drafters wanted to leave this question open to elaboration by the Court of Justice."[948]

The Court's ruling in *Mediation sociale* held that "*Article 27 of the Charter… cannot not be invoked in a dispute between individuals*" in order to disapply a national provision that was incompatible with Directive 2002/14/EC on information and consultation of employees.[949] Interestingly, the Court chose not to follow the Opinion of AG Cruz Villalón, which had advocated recognizing the horizontal effect of the Article 27, as "concretised" through Article 3(1) of 2002/14/EC.

[947] LAZZERINI.N, The scope of the protection of fundamental rights under the EU charter, Florence, European University Institute, 2013.
[948] LAZZERINI.N (2013) (Op. cit).
[949] Case C-176/12 *Association de médiation sociale* [2014] ECR -00000

However, different fundamental rights contained in the Charter may have different levels of effectiveness in horizontal situations. For example, in the field of EU equality law, the ECJ in the *Test Achats* case has referred to the EU Charter's prohibition of sex discrimination in order to review the compatibility of secondary EU legislation. Moreover, the Court in *Mediation sociale*, while distinguishing that case from *Kucukdeveci* held obita dicta ruled that "*the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.*"

As mentioned above, Article 45 has two components. Article 45(2) contains a prohibition of discrimination on grounds of nationality, which in *Angonese*, was given direct effect in horizontal situations. The rest of Article 45 has been the source of the ECJ's jurisprudence dealing with *obstacles* to the free movement of workers. In terms of the effects of the articulation of the Treaty and the Charter, could the binding nature of the Charter tip the balance in favour of the whole of Article 45 TFEU (not just paragraph 2) being given horizontal (direct) effect in the context of the employment relationship? Arguably the Charter should not alter the split 'effect' of Article 45TFEU regarding horizontal direct effect of discrimination and horizontal indirect effect of its prohibition of obstacles. Indeed, the Charter does not change the requirements of direct effect that a workers' right to free movement as a whole must be sufficiently clear, precise and unconditional (and fundamental). [950] Therefore, it is more likely that the main potential of fundamental rights as a social lever for greater negative integration in this field stems from its vocation as a (mandatory) aid to the interpretation of the Treaty provisions on the free movement of workers, which may be a source of indirect horizontal effect (following *Casteels*).

b. The potential role of the Charter as an aid to the interpretation of Article 45TFEU

EU institutions are bound by fundamental rights, insofar as they constitute general principles of EU law whose sources are mentioned in Article 6TEU.[951] The ECJ thus has a duty to interpret EU law in conformity with EU fundamental rights contained in the Charter.

[950] The existence of secondary legislation implementing Article 45TFEU to deal with the free movement of workers and the removal of occupational pension-related obstacles (including the Supplementary Pensions Directive) might well point against the above requirements for direct effect being met. However, the presence of secondary legislation is not a conclusive sign that a Treaty article is not effective (for example, in EU Equality law this did not prevent ex Article 119EEC (now157TFEU) being given horizontal direct effect in Case 43/75 *Defrenne v Sabena (No. 2*) [1976] ECR 455).

[951] Case 11/70 *International Handelsgesellschaft v Einfuhr – und Vorratselle fur Getreide und Futtermittel* [1970] ECR 1125.

Therefore, one should expect to see a growing influence of the Charter on the interpretation of Treaty rights. Could fundamental rights have a potential impact in substantive terms on subsequent judgments of the ECJ concerning the interpretation of Article 45 TFEU?

The dual presence of the free movement of workers in the Treaty and the Charter could add weight to the argument for a broader interpretation of the provisions on the free movement of workers in light with the Charter. One may point to the dynamic, which resulted in the development by the ECJ of its jurisprudence for the protection of workers against age-discrimination, notably through the reference to general principles of EU law as a relevant source of interpretation of EU law in the cases of *Mangold* and *Kucukdeveci*. The dynamic of discrimination is an *acquis* under free movement. The question is whether the obstacle test under Article 45TFEU should be interpreted in light with the Charter?

There is clearly a need for workers to access employment in other Member States without suffering a loss of occupational pension rights. As stated above, the social fundamental rights contained in the EU Charter (in particular Article 34 on the right to social security and social assistance, Article 31 on the right to fair and just working conditions and Article 25 on the rights of the elderly to dignity and independence) do not provide a source of horizontally effective rights. Nevertheless, they should also be taken into account by the ECJ when interpreting Article 45 TFEU. As mentioned, social protection takes different forms in each of the Member States. As mentioned above, Article 52(6) provides that "*Full account shall be taken of national laws and practices as specified in this Charter*." In addition Article 52 (7) provides that "*The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States*." The provision of Article 53 (4) of the EU Charter, which specifies the method of interpretation, is applicable: "*In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.*" On that basis, Article 45TFEU should be interpreted in conformity and "*in harmony*" with Member States' traditions of social protection. The fact previously mentioned that occupational pensions are seen by many employers in Germany as 'loyalty benefits' may constitute a source of tension, if a more social interpretation were given to the obstacle test under EU law on free movement.

The room for interaction between internal market legislation, the private law of the Member States and the role of fundamental rights in this context is fascinating.[952] It is of interest to labour lawyers if it can bolster the protection of employees, who are generally the weaker parties in their contractual relations with employers and other disputes arising under private law. Inevitably, the issue of whether it is legitimate for judges to apply the fundamental rights under the EU Charter in the context of disputes arising under private law has been criticised. In the opinion of Cherednychenko, "*the subordination of contract law to fundamental rights does not lead to an enrichment of legal discourse for the benefit of the weaker party*."[953] However, given the historic regulatory gap in the protection of migrant workers' occupational pensions, one may suggest that EU law on free movement interpreted in compliance with the Charter would improve the protection of migrant workers. Ultimately, the complexity and diversity of occupational pensions at the national level must be overcome by the common social protection objective of occupational pensions, which is to provide income in retirement to workers who have contributed to such a scheme during their career.

The opinion of the Advocate General Cruz Villalón in *Mediation Sociale* suggested that future case-law in this field may rely upon a combined reading of the Charter and secondary legislation. Although the Court did not use this judicial technique to set a precedent for enhancing the effectiveness of fundamental rights, a combined interpretation of the Treaty in light of the EU Charter of fundamental rights would offer benefits for the protection of migrant workers' occupational pensions.

How to take into account the rights contained in the EU Charter in relation to Article 45 TFEU is a potentially complex exercise and requires projecting its potential advantages for workers. One may argue that subjecting the conditions of exercise of the free movement of workers to an interpretation in line with the Charter would have an impact in two regards: first of all in relation to the scope of the obstacle test under Article 45TFEU; and secondly in relation to the operation of the obstacle test under the Treaty.

An example of a possible impact on the scope is that this would be broadened to extend the scope of *Bosman* by including a greater number of occupational pension schemes (not just those set up by collective agreement). Combined with *Casteels*, this would enable

[952] V. KOSTA, Internal market legislation and the private law of the Member States – The Impact of Fundamental Rights, European Review of Contract Law (2010), pp 409-436

[953] CHEREDNYCHENKO. O "Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or towards walking in Circles? In GRUNDMANN S (ed) "Constitutional Values and European Contract Law", Kluwer Law International (2008) p 49.

more workers to rely upon the indirect effect of Article 45TFEU in horizontal situations involving a 'social' obstacle to free movement.

Migrant workers might also benefit from an interpretation of the obstacle test in line with the need to uphold their social protection. For example, this might entail either a broader approach to recognize "social protection obstacles" to free movement where the exercise of mobility would result in a (non-discriminatory) loss of occupational pension rights, including in situations involving a change of employer. Finally, fundamental rights might reduce the margin for employers to justify obstacles to free movement of workers. They should arguably be taken into account when determining the notions of legitimacy and public interest. However, it remains to be seen whether they could supersede attempts by employers to argue that the objective of loyalty is legitimate enough for a scheme rule to deprive a worker of occupational pension rights accrued during employment. Ultimately, the scene is set for the Charter to play a pervasive role in the interpretation of Article 45TFEU!

Conclusive remarks to Chapter VI

In Section 1, the relevance of 'vertical' negative integration was first discussed in relation to the taxation of occupational pensions. Despite the fact that taxation of occupational pensions is determined by the Member States, they have been required to exercise their competence in a way that is compatible with the Treaty. The Court has required Member States to remove both discriminatory and non-discriminatory obstacles to free movement that arise from their rules on taxation. The Commission has targeted tax-related discrimination which has an adverse impact on the internal market.[954] Ravelli points to an 'anti-discrimination' dynamic in the ECJ's case-law; he describes it as a driving force of EU law on free movement that is "*protected by provisions structured as prohibitions to discriminate on grounds of nationality*."[955]

The lack of coordination in the field of taxation is mitigated by the ECJ's rulings against Member States in situations where the tax outcome penalises a worker for having exercised their right to free movement (compared to static workers). The role of the ECJ has been to deal with the matter of taxation from the perspective of avoiding discrimination and

[954] European Commission, 'The elimination of tax obstacles to the cross-border provision of occupational pensions', Brussels COM (2001) 214 final, 19.4.2001.

[955] Ravelli identifies two underlying causes of tax obstacles to free movement: on the one hand, they may stem from "*coordination defects between the various national tax systems*" as a result of the lack of harmonisation; on the other hand, they may be the result of "*protectionist policies"* that favour pension schemes that are based in the Member State. See RAVELLI, The ECJ and Supplementary Pensions Discrimination, European Journal of Social Law, No.1 March 2012.

protectionism (between pension providers) in order to create a level playing field. There is an underlying notion of the need to apply fair competition rules in respect of a financial industry whose purpose from a workers perspective is designed to provide social protection in retirement. However, Member States are able to justify practices relating to tax deductions provided they can justify these on the basis of tax coherence although a high threshold is required. In relation to the risk of double taxation, there have been no cases brought before the ECJ on such grounds in the field of occupational pensions even though national administrations often retain a largely national mind-set in the absence of a common legislative framework dealing with tax. The lack of negative integration is unsurprising given the sensitivity of tax in the Member States and the shortage of genuine positive integration in this field. However, the rule in the Safeguard Directive on the payment of pensions net of taxes should reduce the scope for double taxation. Vertical negative integration depends on the ECJ having the legal tools under the Treaty to tackle protectionism or discrimination by Member States, where this affects occupational pensions and the free movement of workers.

Moreover, the effect of Treaty provisions on freedom of movement has proven central in vertical situations where migrant workers are employed by public sector employers. They may have recourse to the Treaty (in particular Article 48TFEU) as a source of rights: indeed, the ECJ in *Vougioukas* effectively compensated for the shortcomings of secondary legislation in the protection of public sector migrant workers' occupational pensions. Member States are thus required to implement the principle of aggregation in relation to their occupational pensions, which resulted in a change to the scope of the Coordination Regulations.

However, the more controversial question addressed in Section 2 has been whether and to what extent private parties (namely employers and occupational pension schemes) should be held to account under EU primary law for actions that are likely to impede a worker's right to free movement in relation to their occupational pension rights.

As the Safeguard Directive has a limited material scope and the temporal scope of the Supplementary Pensions Directive will only apply in respect of rights accrued after the directive's transposition (by 2018), it may be a while yet before positive integration results in a significant body of case-law. Workers may therefore need to rely upon primary EU law to challenge any breaches of their freedom of movement insofar as these are not regulated under secondary legislation.

The current state of negative integration and its potential for development in situations involving private parties has been analysed above. With just one case (*Casteels*) as a precedent, it would be easy to conclude that there is a social deficit in EU law in quantitative

terms in this regard. Indeed, there is no doubt that what is missing is another case before the ECJ, in which the free movement of workers is at stake in a situation where a migrant worker has changed employer and therefore lost occupational pension rights in the process.

The cautious approach is undoubtedly not to be too optimistic about the implications of *Casteels* in situations involving a change of employment. However, this Chapter argues that there is scope for the tools discussed by the ECJ and the Advocate General in *Casteels*, namely the horizontal effect of Article 45 TFEU and the legal test with regards to non-discriminatory obstacles, to be applied in situations involving a change of employer.

The need for 'equal' rights of free movement under the Treaty to be recognised to all workers is also a key theme of this Chapter. Indeed, with regards to the application of Article 45 TFEU, it would be preferable for the ECJ to favour outcomes that do not result in undesirable distinctions between private sector employees and public sector employees, or between workers who change employer and workers who remain with the same employer, or between workers whose occupational pension schemes are set up by collective agreement and those whose occupational pension scheme is established by trust. With regards to the latter in particular, the collective dimension of occupational pension schemes should tick the box of collective regulation in the same way as collective agreements do. In addition, both the subjective and the objective dimensions of the notion of disadvantage for migrant workers should be taken into account: in some cases, there may be a useful comparator; in other cases, a rule may be unreasonable if it would unfairly deprive a worker of social protection rights.

The need for a fair, coherent and contextual approach is essential. Indeed, the ECJ has an array of supporting case-law, which can inspire future decisions. Although each case presents different facts, *Bosman*, *Angonese* and now *Casteels* can all be thrown into the mix in order to ensure that the free movement of workers and their occupational pensions is effectively protected under EU primary law. In this way migrant workers should no longer suffer from the absence of a comprehensive EU legislation dealing with such matters. However, to achieve a socially progressive interpretation of the free movement of workers, there is no need for 'backwards reasoning' on behalf of the ECJ, but merely the need for fundamental social rights and the purpose of occupational pensions to be at the forefront of every judicial analysis.

Following *Casteels*, the onus of justifying a restriction to free movement falls upon employers. A key issue for the future should be the extent to which employers are able to justify obstacles to rules such as vesting periods where these are held to result in obstacles to free movement. *Viking* and *Laval* may indirectly have a potentially positive influence from a

worker's perspective insofar as the employers' objective of retaining employee loyalty must be balanced against the need for those employees to build up social protection. There are a number of positive and negative strategies that employers can adopt for this purpose: legitimacy and proportionality must thus run hand in hand: the longer the waiting/vesting period, the less likely it should be to pass the test of justification. Any further case-law on occupational pensions and free movement of workers must of course remain mindful of the need to balance constitutional correctness with the need for both fundamental rights and freedoms to be effective and thus meaningful for workers in the EU. At the same time, the ECJ must show in any such judgments that it is and will remain impartial when it comes to managing the potential tensions that may exist between workers and employers in this field. Only in that way can it achieve negative integration that will be a legitimate and acceptable alternative to positive integration while remaining true to the principles of the rule of law (including the primacy of EU law and the importance of fundamental rights), in private law situations involving occupational pensions and the free movement of workers.

Despite the Charter being a binding source of primary EU law, fundamental rights may not have an impact on the effectiveness of the freedom of movement in horizontal situations. However, they now provide a potential lever for the interpretation of Article 45TFEU in a manner consistent with the social rationale for the protection of migrant workers' freedom of movement. This would influence the case-law of the ECJ by protecting the occupational pension rights of migrant workers and thus re-balance the economic and social dimension of the free movement of worker.

CONCLUSION

This study has mapped the evolution of the protection of the occupational pension rights of migrant workers under EU law on the free movement of workers. This has slowly but inevitably become an important aspect of the articulation between this fundamental freedom and the social protection of migrant workers insofar as EU law has sought to adapt to the hybridization of pension provision and promote worker mobility. However, the journey of transforming a theoretical need into a legal reality has been marked by difficulties, which themselves hinge upon the contextual, conceptual and vocational foundations for the protection of migrant workers in this field.

1. The need to build on the social foundations for the protection of occupational pensions under EU law on the free movement of workers are visible but their full social potential remains 'untapped'.

The on-going demographic, economic and social challenges facing the EU make it necessary to protect migrant workers' occupational pensions under EU law on free movement. Occupational pensions are increasing in importance as a source of social protection in many Member States. This trend leads to the need for EU law to address its articulation with the exercise by workers of their free movement. This does not entail setting the agenda in terms of the modernization of pension systems, which is the prerogative of Member States. Neither does it equate to advocating the development of occupational pensions by Member States or the 'privatization of social security pensions', which would be controversial in terms of competence. However, it does require EU law to adapt to this changing context insofar as the Member States' pension systems have evolved and are not solely based on social security pensions, (which are already 'coordinated' under EU law). Under the 'internal market' paradigm, EU law on the free movement of workers has historically failed to sufficiently take account of the growing role of occupational pensions as a source of retirement income. Such legal protection is necessary for the freedom of movement for workers to be genuine and holistic under EU law, by encompassing both the social and economic rights of migrant workers. Any omission or incomplete protection of the former arguably constitutes a shortcoming, which may be described as a 'social deficit' and is clearly at odds with the demographic, social and economic challenges affecting the EU's Member States as well as the workers and citizens of the EU.

The focus by the EU on increasing cross-border worker mobility has developed (and is set to increase given the associated opportunities for reducing unemployment across the EU), which also requires EU law to cater for the protection of their occupational pensions. Indeed, the strategic goals of the EU involve finding equilibrium between the economic benefits of the internal market and its human dimension, namely the social conditions for the exercise by workers of genuine freedom of movement. Almost simultaneously, the increased importance of pension funds has also brought about the agenda for a financial services approach to occupational pensions based on the objective of the creation of an internal market in the field of occupational pensions. On the one hand, political prioritisation involving a combination of two different approaches at EU level (one worker-oriented and/or one based on the freedom to provide services) together with political pressures, lobbying from the pensions industry and the EU's institutional constraints have delayed EU policies (whose effectiveness still needs to be measured). On the other hand, by not putting all of its legislative 'eggs' into the same basket, the Commission has retained vital 'bargaining chips', which have subsequently enabled it to carry out a legislative trade-off between 'social' and 'prudential' regulation of occupational pensions. The above context explains the strategic difficulties concerning the choice of approach which have shaped EU legislative policy on the protection of migrant workers' occupational pensions. Paradoxically, these same circumstances have also been the source of tensions that have delayed and diminished social progress in this field of EU law.

The notion of occupational pension under EU law and the need to protect migrant workers' social protection rights constitutes a 'mixed bag of coherence and uncertainty'. The multi-faceted and pluri-dimensional notion of occupational pensions under EU law on free movement has thus been shaped in part as a result of the complexity and diversity of occupational pensions in the Member States and partly as a consequence of the operation of EU law in different substantive areas, which entails a number of discrepancies. On the one hand, there is consistent support within for the relationship between occupational pensions and the principle of social protection. On the other hand, the capacity of EU law to adapt to key legal dynamics like *discrimination* (including the characterization of occupational pensions as 'pay') and its preference for the certainty of instrumental criteria (e.g. from the statutory source of pensions to schemes established by collective agreement) has overshadowed the relationship between occupational pensions and the notion of social

protection (notwithstanding the relevance of key values such as solidarity within EU law). There is no doubt that this has led to some difficulty in articulating the notion of occupational pension under EU law. There has been a tendency for the EU legislator to give priority to the need for legal certainty, resulting in a division of occupational pensions under EU law according to their statutory source. Moreover, the power of certain legal dynamics such as discrimination and equal pay has shaped the characterization of occupational pensions under EU law, which has first recognized and then diluted but not (yet) permanently detached the recognition of the main *purpose* of non-statutory occupational pensions, which belongs to the field of social protection.

The consistent operation of the statutory criterion used to determine the scope of EU law has led to the ***fragmentation*** of the notion of occupational pensions, which has largely been divided between statutory pensions and non-statutory pensions. The latter have been deemed 'supplementary', which has arguably had the effect of legitimizing the statutory criterion used to differentiate in terms of the legal protection offered to workers. This thesis has argued that a theoretical *reconstruction* of the notion of occupational pensions is necessary to reconnect it with social protection by taking into account its key characteristics, namely its *purpose* to provide social protection in retirement as well as its connection with the *employment relationship* and/or the workplace. Although an autonomous notion of occupational pensions may not be feasible under EU law, there is no doubt that the level of protection of migrant workers' occupational pensions hinges upon their legal characterization, which has not in the past always reflected their inherent social features.

The internal-market rationale based on removing 'obstacles' to mobility has not delivered a system of legal protection that places migrant workers social protection rights at the heart of their fundamental freedom of movement. The key question that goes to the heart of the foundations for the protection of migrant workers' occupational pensions is therefore that of its legal rationale under EU law on the free movement of workers. The traditional dynamic contained within the free movement of workers has been the prohibition of discrimination based on nationality as well as the need to remove obstacles to this fundamental freedom. This has resulted in a considerable body of case-law designed to outlaw any discrimination (including through the development of EU citizenship as a legal notion entailing legal rights). Although these legal developments also offer additional safeguards to workers in the relation to their occupational pensions, the main risk for

workers' social protection stems from *non-discriminatory obstacles* in horizontal situations involving private employers. The need to remove obstacles to workers' freedom of movement has been developed as a legal rationale by the ECJ in its general case-law, which has also begun to trickle through in relation to occupational pensions. Notwithstanding certain limitations to its effectiveness in horizontal situations, it entails a focus on 'restrictions' to market access that place migrant workers at a 'disadvantage'. Although this extends in theory to the protection of their occupational pensions, a key limitation of the internal market approach is that it does not aim *per se* to ensure that the free movement of workers, when applied to (non-statutory) occupational pensions, will prevent a loss of social protection. The above is arguably in contrast to the social rationale for the protection of social security pensions through the Coordination regime, underpinned by Article 48TFEU, the Coordination Regulations and the case-law of the Court which have together extended both the scope and the effectiveness of the protection afforded to migrant workers in that field.

This thesis has argued for a more social approach to the protection of migrant workers' occupational pensions, which is an example of a substantive area that could contribute towards a greater "re-socialisation" of EU law.[956] Support for a new social rationale in the field of occupational pensions stems from the need to recognize that the free movement of workers will be more complete (and 'richer') if it draws upon the social constituents of EU primary law in order to make migrant workers' occupational pensions a substantive area in which social protection is integrated within free movement. To do so would enable this fundamental freedom to be considered as harnessing both its economic and its social dimension. Occupational pensions are thus a relevant area in which EU law can embrace and contribute to a "fair mutualisation" of risks to workers. [957] The case for a social rationale offers a valid theoretical alternative to protect the occupational pension rights of migrant workers using the available instruments of positive EU law in this field. The first justification for a social rationale is based on the social constituents of the Treaties (namely the renewed importance of its social values, principles and objectives as well as the presence of a horizontal social clause. This last mechanism has the potential to be a 'game-changer' in the field of occupational pensions by 'mainstreaming' social protection into the free

[956] COUNTOURIS.N AND FREEDLAND.M (Eds) Resocialising Europe in a Time of Crisis, Cambridge University Press (2013) 978-1-107-04174-5.
[957] STRAUSS.K, Equality, fair-mutualisation and the socialisation of risk and reward in European pensions in COUNTOURIS.N AND FREEDLAND.M (Eds) Resocialising Europe in a Time of Crisis, Cambridge University Press (2013) 978-1-107-04174-5.

movement of workers. The second justification for a social rationale stems from the development of a fundamental rights discourse, which finds its energy not only in the fundamental status of the free movement of workers in the Treaties but also in the Charter of Fundamental Rights of the European Union, which has a new 'binding' legal status. Moreover, the call for a social rationale for the protection of migrant workers' occupational pensions is consistent with the broader calls that have been made highlighting the merits of a new paradigm for European social integration based on fundamental rights (including dignity in old-age), citizenship and the re-balancing between the economic and social objectives of the EU.

2. Stemming the tide of the historic social deficit in EU law on the free movement of workers and their occupational pensions

An historic regulatory gap has afflicted this field as a result of the exclusion of non-statutory occupational pensions from the scope of the Coordination Regulations, which has seen the development of a significant body of EU secondary legislation and case-law dealing with the protection of the statutory pensions (and other social security rights) of migrant workers and EU citizens! This scoping of the legal protection afforded to workers' pensions in the context of free movement was an active and democratic choice made by the EU legislator, which determined that an 'institutional/instrumental' approach would guide the material scope of the Coordination Regulations, thus departing from the purposive approach of the Court in *Vaassen-Göbbels*.[958] This had the effect of condemning non-statutory occupational pensions to decades of legislative wilderness. The debate in light of the arguments for and against the statutory criterion is not conclusive but has stymied the protection of migrant workers' occupational pensions and led to a geographic/social protection 'lottery' in the EU, which is hardly beneficial in terms of achieving broadly similar levels of substantive protection under EU law.

This study has also observed that for many years, EU legislation on the protection of migrant workers has 'suffered' from legislative paralysis despite the ambitions of the Commission. The political tensions arising from the entrenched attachment of national governments to longstanding traditions of pension provision in the Member States as well as

[958] Case 61/65 *G. Vaassen-Göbbels (a widow) v Management of the Beambtenfondsvoor het Mijnbedrijf* [1966] ECR 00261.

the poor health of industrial relations on this topic, given the diversity of views and the weight of the pensions lobby compounded the deadlock.

The long-term absence of secondary EU legislation offering equivalent protection for non-statutory occupational pensions was unsatisfactory from a worker's perspective: throughout the 40 years that spanned between the Treaty of Rome and the Safeguard Directive, the lack of positive integration must have had an adverse impact on the free movement and social protection of those migrant workers in the EU whose old-age occupational pensions would not have been adequately protected in the event they exercised their right to mobility within the EU or who may have been deterred altogether deterred from exercising their freedom of movement. This has had a knock on effect on the case-law of the Court, which has been constrained by the need to respect the separation of powers, within the EU, the democratic legitimacy of the EU legislator to determine the scope of its secondary legislation on Coordination and the competence of Member States in the regulation of occupational pensions.[959] As a result, second-pillar pensions have thus largely been 'second-class' pensions from the perspective of the protection they have received under EU law.

Finding a 'path-breaking' solution has proved nigh on impossible and the journey has been incredibly strenuous, especially given the institutional constraints to which the EU is subject when articulating the free movement of workers with matters of social protection under EU law. The existence and exercise of competence in accordance with the principle of subsidiarity has proven a significant constitutional hurdle to overcome. In particular, it has showed how in this context, the regulation of occupational pensions is at the cross-roads of social protection and the internal market. The former has legal limitations in terms of competence; moreover political appetite for EU intervention in the field of social protection is not forthcoming. Hence it is only the latter category that includes a cross-border dimension highlighting the (shared) legal mandate of the EU in the context of the free movement of workers. The principle of subsidiarity has itself been used as a tool by the pensions lobby to challenge the appropriateness (and level) of EU legislative intervention. Determining the choice of legal base has also been an awkward choice, overshadowed by substantive confusion and a lack of procedural transparency. The choice of legal basis of secondary legislation has evolved from Article 48 TFEU (ex 42EC, ex 51EEC), which also provides for the coordination of social security to Article 46 TFEU, which represents the general legal

[959] Case C35/97 *Commission v France* [1998] ECR I – 5325.

basis that accompanies Article 45TFEU (ex 39EC ex 48EEC). A 'conceptual' effect of this change has been to distance non-statutory occupational pensions from the notion of social security, and another more substantive effect is to remove secondary legislation from having to implement the principle of aggregation (which is a defining principle of the Coordination regime) although this had long been acknowledged by both the EU legislator and the Court.[960] Above all, the voting requirement of unanimity that applied prior to the Lisbon Treaty all but killed off any chance of a successful outcome to the proposed legislation. The change of voting requirements from unanimity to qualified majority, which followed the Lisbon Treaty, was a major institutional change that made it possible to adopt the Supplementary Pensions Directive. It is likely that any future proposal in this field would have a slightly easier ride through the legislative process provided it is accompanied by sufficient political will.

In terms of the EU's law-making process, a cause of the social deficit in this field has been the historic ineffectiveness of the EU's legislative method. Despite the adoption in 1998 of the Safeguard Directive, the enactment of secondary legislation has proven a laborious and lengthy process marred by delay, amendment and the failure of its most controversial provisions in the initial proposal for a Portability Directive (namely that on pension transfers). It is tempting to state that the adoption of the Supplementary Pension Rights Directive in 2014 has been 'miraculous', especially given the failure of the European social partners to achieve any consensus either before or during the legislative process, which pointed to the weight of the vested interests of the pension lobby as well the entrenched attitude of some Member States in their attempt at what one might describe as "social protection protectionism". The Commission has played a significant role above and beyond having the initiative for secondary legislation. It has acted as a counter-weight to the opposition of both the pensions lobby and certain Member States while seeking to consult interested parties at every stage. It has also remained steadfast to its choice of the classic community method by seeking to enact hard law in this field, in spite of all the difficulties that it has faced, which can be justified by the fundamental nature of the free movement of workers. Indeed, the connection between the protection of occupational pensions and the social fulfillment of workers' freedom of movement has remained an objective of the Commission for over twenty years since 1991. This has resulted in two stages of positive integration, first in 1998 in the form of the Safeguard Directive and recently in 2014 in the

[960] Case C-360/97, *Herman Nijhuis and Bestuur van het Landelijk Instituut Sociale Verzekeringen* [1999] ECR I-01919.

form of the Supplementary Pensions Directive. Through amendments and compromise (including a legislative trade-off concerning the prudential regulation of pension funds, i.e. the amendment of the IORP directive), the Commission, the Council and the European Parliament managed (just!) to see the Supplementary Pensions through to a dramatic last-minute enactment just before the European Parliamentary elections of May 2014. This meant that the imbalance of legal protection of migrant workers and the 'social deficit' in this field could be addressed and 'offset' in light of new tools for greater protection of workers.

In terms of substance, both instruments of secondary EU legislation that have been adopted (namely the Safeguard Directive and the Supplementary Pensions Directive) may be criticized for a relative lack of *social ambition*. Their main objective of free movement has been largely influenced by the view that the legal protection of occupational pensions is a means of enhancing worker mobility, which is itself a means of reducing unemployment and creating growth. Moreover, neither directive enshrines a principle designed to protect migrant workers against losses of occupational pensions where these would result in a deterioration of a workers' social protection in retirement. In addition, secondary EU legislation still relies predominantly upon traditional 'drivers' such as non-discrimination.

Furthermore, the scrutiny and compromise involved in the adoption of secondary legislation in this field (in particular the Supplementary Pensions Directive have shown an evolution of its scope and objectives, which have been narrowed as well as with regards to its substantive content, which is characterized by a technical approach based on 'minimum requirements' that offers a floor of rights in the field of migrant workers' occupational pensions that is merely a 'second cousin' of the Coordination Regime and a distant relative of social harmonization. From a worker's perspective, one may further criticize their objective, their scope and their content. Among the areas *not covered* by the directive, one may highlight self-employed workers as well as the effects of purely national mobility on workers occupational pensions (which represented a 'U-turn' from the scope of the first draft proposal. Moreover, the restriction of the directive's temporal scope to exclude occupational pension rights accrued *prior* to the directive's implementation (or the time limit in 2018) also shows its limitations as a strategic platform for positive integration, which may also bring into play primary EU law for matters not covered by either the Safeguard Directive or the Supplementary Pensions Directive in order to protect migrant workers whose rights are affected.

Another major difference of the focus of the Supplementary Pensions Directive's minimum requirements on acquisition and preservation (compared to the Coordination Regulations) is that they do not address the fragmentation of occupational pension entitlements with different employers in different Member States. Indeed, the principle of aggregation does not apply. Moreover pension transfers have not been dealt with. Whether or not a renewed attempt will be made in future to deal with transferability remains to be seen but for the time being, it remains a voluntary option for pension schemes to agree, should a member wish to pursue it. One may thus criticize the technical approach of the Supplementary Pensions Directive for lacking an overall social 'philosophy' (in contrast with the fictive reconstitution of a migrant workers' career, which results in the aggregation of statutory pension rights by taking full account of all periods of employment for that purpose. Nevertheless, by focusing on the acquisition and preservation of migrant workers' pension rights as well as their information rights, the EU legislator reached a pragmatic compromise by taking important practical steps designed to enhance the free movement of workers.

Finally (in terms of criticism), there still remain some unsatisfactory elements such as the tolerance of age criteria for acquisition and scheme membership, which may lead to challenges based on the general principle prohibition age-discrimination.

Notwithstanding the above limitations and shortcomings, the Supplementary Pensions Directive provides a vital step forwards for migrant workers at a time when EU intervention in social policy is not always embraced by EU citizens and stakeholders.

The provisions dealing with waiting periods and vesting periods should make it easier for migrant workers to acquire occupational pension rights. However, workers who move jobs too frequently may lose out on the possibility to either begin accruing pension rights or whose pension benefits would not have vested by the time of departure.

Although some discrepancies between the levels of social protection afforded under occupational pensions to migrant workers and static workers may persist (as in the case of national/sectoral schemes), these may not automatically result in significant losses of social protection rights provided that schemes comply with the limits on waiting and vesting periods set by the national measures implementing the Directive (which may be even more protective of workers' rights of acquisition). One further option to improve acquisition of occupational pension rights in future would be to adopt a principle of recognition of equivalent situations, which would remove any barriers to acquisition, although this would need the backing of

social partners at EU level to have any chance of success and may politically be a step to far at this point in time.

One may therefore argue that the labour law considerations in both directives on 'supplementary' occupational pensions represent an important step in bringing EU law on free movement of workers in a more social direction. Indeed, they provide safeguards not just with respect to national measures but also to 'private' measures taken by employers that might otherwise result in discrimination and/or 'social obstacles to the free movement of workers. The provision in the Safeguard Directive banning discrimination on matters of preservation is not dissimilar from the prohibition of discrimination on grounds of nationality that permeates the Coordination Regulations and is increasingly seen as one of the hallmarks of EU citizenship. Given that the treatment of dormant rights focuses on preservation, one should also point to the potential advantages for some migrant workers that may stem from the requirements regarding the level and techniques of preservation, which goes beyond discrimination and provides a social dimension to the Supplementary Pensions Directive.

The complexity of the treatment of migrant workers' occupational pension rights, the stakes involved and their fragmentation has led to important additional information rights for workers, which have become a pre-condition to the genuine exercise of their freedom of movement, even though they have also been impact assessed in terms of cost-benefit.

Furthermore, the legislative technique of minimum requirements has been combined with the principle of non-regression in the implementation of the Directive as well as the ability for Member States to delegate the implementation to social partners. This may result in more protective rules either remaining in place or being adopted within the Member States, thus making the Supplementary Pensions Directive a floor of rights at the same time as a potential instrument of social progress.

In doing so takes on board its nature as a fundamental freedom with a social dimension. It is also symbolic (and slightly ironic) that in achieving a trade-off to reach agreement on the Supplementary Pensions Directive, the draft proposal that was sacrificed/delayed by the Commission was the 'market-driven' financial services' approach to the prudential regulation of pension funds (namely the review of the IORP Directive). 2013 also saw the Commission issue a Proposal for a Directive on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement.[961] Could this

[961] Proposal for a directive of the European Parliament and of the Council on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers (COM(2013)0236 – C7-0114/2013 – 2013/0124(COD)), for which the Commission also produced an Impact Assessment of 26 April

mark a shift towards a more social approach towards the internal market in general? It should be noted that the Commission's approach is not limited to the intra-EU migration and remains targeted but fragmented with regards to the free movement of highly skilled third-country nationals.[962] Of course, the Supplementary Pensions by no means offers a panacea to the hitherto incomplete legal protection of migrant workers' occupational pensions when they exercise their freedom of movement within the EU. The onus is put firmly on Member States and where possible social partners to implement and go beyond its minimum requirements while respecting the principle of non-regression. This latest stage of positive integration is one that respects the complexity and diversity of the pension systems of Member States in line with the principle of subsidiarity as well as the private interests of employers. It also makes employers 'participants' in the implementation of the freedom of movement of workers. If as in the past, the presence of EU secondary legislation is not sufficient to ensure that employers and occupational pension schemes behave in a way that is compatible with workers' rights to free movement, then there may be a need for further positive integration. Yet any EU intervention in the field of occupational pensions, which is often populated by voluntary schemes has proven a hugely controversial challenge for the Commission. It therefore seems increasingly likely that any future legislative proposals by the Commission in this field will have as their objective the protection of specific categories of mobile workers, which may in turn lead to the fragmentation of legal protection of what is a fundamental right. It is clearly important that both businesses and workers receive legal certainty regarding the practical expectations of the treatment of workers' acquired and future occupational pension rights. The desirable outcome is that the Supplementary Pensions Directive, through the national implementing measures, will improve the treatment of migrant workers by providing them with subjective rights, which will in turn drive the case-law of the ECJ and gradually bring about greater maturity to its jurisprudence in this field (as the Court has already done in the field of social security).

The role of the Court in the field of occupational pensions and EU law on the internal market has shown some disparities between vertical and horizontal negative integration. The Commission and the Court have clearly required Member States not to use their tax systems as a means of either discriminating against migrant workers or pension providers from other EU Member States or imposing tax-related obstacles to freedom of movement. Meanwhile,

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2013. The proposal was followed by a draft European Parliament legislative resolution of 25 July 2013 and was followed by a Report on 14 November 2013.

[962] COUNCIL DIRECTIVE 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

the Court's jurisprudence in this field in the context of employment has been more modest to date, both in quantity and also in quality. The Court has not shaped the evolution in this field other than in a couple of cases, in contrast to its greater involvement in the field of equality law.[963] One may also find discrepancies in the Court's approach, depending on whether the employer is from the public sector or the private sector. Arguably, the free movement of public sector workers receives a higher standard of protection against actions of Member States (and public sector employers) insofar as Article 48TFEU is deemed relevant (together with the principle of aggregation).[964] In *Vougioukas*, the Court sought to protect public sector workers by affording them rights of aggregation under Article 48TFEU.

In contrast, the jurisprudence of the Court has been restrained and remains incomplete with regards to the effects of primary law in situations involving private employers. Following the case of *Casteels*, migrant workers will be able to rely upon the indirect effect of Article 45TFEU to challenge any non-discriminatory obstacles that stems from a pension scheme established under a mandatory collective agreement, where this would result in not taking into account all periods worked with the same private sector employer. This use of primary EU law arguably offers protection to migrant workers' occupational pensions whose rights are not covered by the Safeguard Directive or the Supplementary Pensions Directive. The Court's ruling in *Casteels* has thus reached a first 'core' stage of negative integration in situations involving a non-discriminatory obstacle caused by a private employer by referring to EU primary law to indirectly uphold the free movement of workers and their non-statutory occupational pensions. However, its legacy remains to be determined in terms of whether it extends to schemes not established by a mandatory collective agreement as well as to situations involving a change of employment. This thesis has made the argument that the development of essential judicial safeguards by the ECJ to protect the free movement of workers in relation to their occupational pensions has the potential to mitigate the limitations of positive integration in this field. In addition, the Supplementary Pensions Directive (and its national implementing measures) should begin to create a body of case-law. EU law has the potential to consolidate the recent progress made to develop the protection of migrant workers' occupational pensions and broaden its future prospects. However, it remains to be seen how the Court will develop its case-law based on the role of primary EU law in order to further improve the protection afforded to migrant workers' occupational pensions. This

[963] See VIELLE. P, (1994) European Communities - Occupational pension schemes: towards perfect equality? In: International Labour Review, no. 4, p. 440-450 (1994).
[964] Case C-443/93 *Ioannis Vougioukas v. Idryma Koinonikon Asfalisseon (IKA)* [1995] ECR I-4052.

thesis has argued that fundamental rights should certainly play a role in the interpretation of Treaty rights, thus supporting a social protection approach to Article 45TFEU (even if it does not necessarily alter its effectiveness). The dynamic of fundamental rights undoubtedly has the vocation to protect migrant workers from suffering undue losses of retirement income. However, there is a long way to go before the body of jurisprudence under EU law that deals with non-statutory occupational pensions reaches a more mature level of protection, let alone match that afforded to migrant workers' statutory pensions. For the time being, such protection remains supplementary to that offered by the Coordination regime, which continues to provide the major source of protection of pension rights in the context of the free movement of workers.

Nevertheless, the role of the Court can also be mentioned as perhaps having indirectly 'nudged' the EU legislator to making progress in this field. Instruments of secondary EU legislation (and their implementing measures under national law) are usually the first port of call as regards the provision of subjective legal rights of migrant workers (especially in situations involving private employers). However, the Court has been prepared to act either where there is a legislative loophole (or defect) in secondary EU legislation, which has involved it relying upon primary EU law (including through the techniques of direct or indirect effect) to uphold the free movement of workers as it did in relation to Article 48TFEU in *Vougioukas* (which resulted in the extension of the Coordination Regulations to civil servants) and more recently on Article 45TFEU in *Casteels.*[965] The Court has certainly exercised a reasonable amount of judicial restraint in this field (due to sensitive nature of occupational pensions given its connection with both social protection and the private sector as well as due to the fact that negotiations for EU legislation were on-going). Nevertheless, the EU legislator, Member States and other interested parties would have been aware that a permanent failure of positive integration might have led to greater negative integration based on the Treaty, with the potential for its interpretation in light of the Charter.

Ultimately, the development of the legal protection of the occupational pension rights of migrant workers under EU law on free movement is only likely to benefit workers provided relevant schemes offer 'valuable' sources of social protection in retirement. The challenge for the EU is to build bridges and offer a 'joined-up' approach between hard law and soft law, between social competence and internal market competence, between

[965] Case C-443/93 *Ioannis Vougioukas v. Idryma Koinonikon Asfalisseon* (IKA) [1995] ECR I-4052.

fundamental rights and corporate social responsibility. This may involve redefining the boundaries of competence so that solidarity and social protection are no longer seen as the sole preserve of Member States but also as a dynamic phenomenon requiring and legitimizing any efforts by the 'EU law machine' to take greater account of the split social responsibilities for managing social protection. Any intervention in the relationship between workers and employees as well as between workers themselves is always going to be controversial but should not prevent EU law from breaking down the public/private divisions (between employers and employees), especially when this is designed to ensure a more level and social playing field for migrant workers. There is no doubt that this can be done without threatening either the main tenets of private contractual autonomy or the essence of first pillar pensions (i.e. the public and mandatory social security systems that have historically protected workers in old age). However, this will only be possible if greater consensus can be found between social partners (at EU and national level), Member States and the institutions of the EU to forge a social and legal settlement that not only has the backing of EU law but also of EU citizens in order to 'resocialise' the free movement of workers.

Given the current political climate, it would be optimistic to suggest that further social progress in EU law is imminent in this field. Hence some attention should be devoted to improving the communication of the practical benefits that workers may derive from the new sources of protection that EU law provides to migrant workers' occupational pensions. This should contribute to the free movement of workers being seen by EU citizens as an opportunity (rather than as a threat) and thus stand a greater chance of becoming a genuine social reality.

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