



Mr A.J. de Geus  
Minister of Social Affairs and Employment  
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2509 LV The Hague

The Hague : December, 9 2005  
Our ref. : S.A. 05.10184/K  
Your ref. : AV/PB/2005/87808  
Re : Proposed Directive on Improving the Portability of Supplementary Pension Rights

Dear Mr de Geus,

In response to your request by letter of 8 November 2005, the Labour Foundation (Stichting van de Arbeid) hereby presents its views on the Commission of the European Communities' proposal for a Directive on Improving the Portability of Supplementary Pension Rights (hereafter referred to as the Portability Directive).

The Labour Foundation's views fall into two categories. First, we make a number of more general remarks on the desirability of a Portability Directive for the EU, and the appropriate content and scope of such a directive in light of the objective expressed by the Commission and taking into account the various pension systems within the EU. Second, we make a number of more specific remarks regarding the proposed text of the Directive.

#### *General remarks*

The Labour Foundation fully endorses the objective formulated by the Commission that it is particularly important to remove obstacles to labour mobility caused by supplementary pension schemes within the EU as much as possible.

The transfer of pension rights has been an established practice in the Netherlands since the mid-1980s, and since 1994 it has been a legal right for every worker who changes job and transfers to a different pension scheme.

As a result of the large-scale transition from final-pay pension schemes to average-pay pension schemes, combined with the legal provision for the indexation of non-

contributory dormant pension rights in the same manner as payable pensions, the big problem of the 1970s and 1980s – that workers who changed jobs could lose significant pension rights compared to the rights they would have built up within the same scheme had there been no interruption (i.e., had they not changed jobs) – has clearly become less significant. Against this background, in the Netherlands the transfer of pension rights is therefore no longer a very necessary or effective means of preventing loss of pension rights after a change of job. However, this does not alter the fact that final-pay schemes are still quite common, so that most employees who come to work for an employer with such a scheme can clearly benefit from such a transfer.

Furthermore, the transfer of pension rights remains important in the Netherlands as a means of preventing pension payments from a variety of sources (i.e., to ensure administrative simplicity). It also offers scope to better adapt the pension system to the needs and wishes of the individual. (For the sake of completeness, it should also be noted here that individuals can choose not to request a transfer in certain situations, for instance to better spread financial risks.)

Due to various developments over the past few years, the original objective of the legal right to transfer – namely to eliminate the risk for workers of losing pension rights when they change jobs – has lost much of its value. In the current situation in the Netherlands, the legal requirement for the same indexation of payable pensions and dormant pensions already goes further towards the original objective than transfer does. This is certainly true for workers who move to a company with an average-pay pension scheme.

Viewing the Commission's proposal for a Portability Directive against the objective of increasing labour mobility within the EU, the Labour Foundation notes that obstacles to labour mobility between member states are mostly due to taxation issues. The Foundation regrets that the Commission largely overlooks these issues. A very important point in this respect is the risk that the Dutch state faces in the event of pension rights transfer to another member state or even in the event of workers' migration without any such transfer. This risk concerns the fact that, although the state grants the workers involved tax relief for the pension contributions they make, it will not receive any compensation for lost tax incomes from pensions paid. In the Foundation's opinion, a satisfactory solution must first be found to this problem, which is much more pressing than the issue of insufficient possibilities for the transfer to pension schemes in other member states.

Another significant problem that is insufficiently addressed is the substantive scope of the proposed Directive, which mostly concerns supplementary pension schemes in just a few member states, and particularly those countries where 'second pillar' supplementary pension schemes are fully funded. The Directive therefore does not apply to member states where occupational pensions are funded on a pay-as-you-go basis or countries with book reserve systems. This means that the proposed Directive

would predominantly apply to the Netherlands, the United Kingdom and Ireland only. The Labour Foundation is strongly opposed to such a very limited scope.

The Foundation believes that developing a satisfactory scheme for the transfer of pension rights between countries in the EU, based on a system of calculation and taxation rules that allow pension rights to be transferred without tax or actuarial consequences, will be highly problematic.

For those workers in the Netherlands entitled to transfer pension rights, and where the financial settlement of those rights benefit or disadvantage employers or those responsible for implementing the scheme, a European transfer system can only be based on the value of the pension rights being transferred. These rights would first be calculated on the basis of the calculation rules and actuarial bases that apply in the country of departure. Once the amount calculated in this way has been transferred, the pension rights would then need to be determined on the basis of the applicable calculation rules and actuarial bases that apply in the country of arrival. As substantial disparities exist between the calculation rules and actuarial bases of the various member states (e.g., market rate of interest and life expectancy), workers would only be prepared to transfer their rights if their pension does not lose value as a result. For instance, transferring from a member state with a low market rate of interest to a member state with a high rate would be attractive, while a transfer the other way around would be unattractive and therefore unlikely to take place. The same is true for transfers between member states with a relatively high life expectancy and those with a lower one.

Unlike under a transfer system such as the one legally established in the Netherlands, the transfer of pension rights between EU member states could therefore lead to an increase or decrease in the value of an individual's rights, not only due to differences in the expected performance of the pension scheme in question (regardless of whether it is a fully funded scheme, a pay-as-you-go scheme, or a scheme funded via the company balance sheet), but also due to real disparities in the calculation rules and actuarial bases of the member states involved.

The Labour Foundation believes it would be a mistake to overlook (as the Commission appears to do in its proposal) the complexity and problems of a European system of pension rights transfer caused by the application of disparate calculation rules and actuarial bases, and the consequences of disparate rules and bases in practice. Overlooking these real problems does not solve them and will lead to instability within the EU. In addition, the Foundation considers it highly unlikely that workers would be sufficiently informed about the benefits and disadvantages of transferring their pension right from one member state to another.

The proposed Directive skirts around these problems by focusing on the rights of participants, and even infringes on the content of occupational pension schemes in the

individual member states. Moreover, as stated above, the proposed Directive in fact only concerns those countries with a system of fully funded occupational pension schemes, such as the Netherlands (where the right to transfer has already existed in law for over a decade). Furthermore, occupational pension schemes are considered part of the terms of employment in the Netherlands, in that the social partners are primarily responsible for their content. The Labour Foundation believes that the Dutch government should lodge a strong objection against interference in the country's affairs as proposed in the draft Directive, and the following in particular:

- The formulation of a minimum norm in indexation policy (Article 5(1))
- The indexation of dormant pension rights (Article 5(2)), including in relation to Article 6(3).

Intervening in indexation policy in this way also limits the flexibility of many Dutch pension funds with defined benefit schemes.

In view of the above arguments, the Labour Foundation believes that the Commission's proposal is not acceptable to the Netherlands, as it is not an effective means of achieving the intended objective and it overlooks the essential requirements for a sound and balanced system of transfer, as it constitutes a threat in particular for the few pension systems in the EU with fully funded second-pillar pensions. Moreover, the draft Directive poses a serious threat to the principle (of great importance in the Netherlands) that the content of occupational pension schemes is a primary responsibility of the social partners, as part of the terms of employment policy. Lastly, the Foundation is opposed to the draft Directive due to its very limited substantive scope and its failure to help remove tax obstacles.

The Foundation realises that it is taking a hard and uncompromising position with these critical and in some cases repudiating remarks. It therefore asks the cabinet to present these critical views in further consultations in Brussels, and to indicate in good time that, unless the Directive is amended on a number of points critical to the Netherlands, the Dutch government will not hesitate to use its veto right as necessary.

The Foundation believes the Dutch government should give extra attention to ensuring that, in further proceedings, full clarity is obtained about the implications of the Directive for the Dutch pensions system, as these implications were underestimated in a number of other directives.

#### *Remarks on specific provisions*

1. Article 5(1) states that member states 'shall adopt the measures they deem necessary in order to insure a fair adjustment of dormant pension rights so as to avoid that outgoing workers are penalised.' The Foundation notes that this

wording offers legal scope to enforce the right to index dormant pension rights. Due to the legal obligation in the Netherlands to treat dormant pensions and payable pensions in the same way, this would lead to the reasonable indexation of dormant pensions and payable pensions as a legal right. Although the Foundation is in favour of the indexation of payable pensions and dormant pensions, it considers it absolutely improper for the government to recognise any rights in this manner. The content of pension schemes, including indexation policy, is and should remain a matter for the social partners!

2. With regard to Article 6(3), the Foundation believes that the last part of this provision, in which the receiving pension fund is obliged to preserve the transferred rights at least to the same extent as dormant rights, in accordance with the provisions of Article 5(1), is even less acceptable. To the Foundation, this provision appears to stipulate that transferred pension rights should develop in a way at least equal to the development of dormant pension rights under the pension fund from which the rights were transferred, and to which Article 5(1) (criticised by the Foundation) would apply. Another interpretation is that the development of the dormant rights at the receiving pension fund would apply as a lower limit. Apart from the administrative impossibility of implementing such a provision, the Foundation believes this would in fact be a very peculiar endeavour, in view of the objective of avoiding any loss of pension rights. However, the Commission may consider this grounds to further amend Article 5(2) to make it a right to satisfactory indexation for dormant pension rights and payable pension rights, which would pose a serious threat to the Dutch system.
3. Pursuant to Article 6(4), administrative costs may be charged for a European transfer of pension rights. In fact, such costs could be charged by both the original and the receiving pension schemes. The Labour Foundation points out that under Dutch law, such costs may not be charged for the transfer of pension rights. The fact that the provision aims to ensure such costs are not disproportionate to the duration of membership in the pension scheme from which the rights are being transferred does not remove the risk that relatively high costs could still be charged in some cases.
4. With respect to Article 9, the Foundation makes a number of remarks. First, it considers the deadline of 1 July 2008 to be too soon, and inconsistent with the extension of 60 months with regard to compliance with the maximum membership period stipulated in Article 4(d). The Labour Foundation believes the date of commencement should clearly be set no earlier than 1 July 2013. With regard to Article 9(3), the Foundation notes that the exemption for second-pillar pay-as-you-go systems (e.g., in France) and book reserve systems (e.g., in Germany) also undermines the objective of a Portability Directive. It means that the Directive will only be relevant in a few member states, including the

Netherlands, even though the Dutch transfer system is established in law and has been in operation for over a decade. European citizens are surely not waiting anxiously for a directive of such limited scope!

For the record, the Foundation has sent copies of this letter to the Standing Committee for Social Affairs and Employment of the House of Representatives and to the European Parliament.

Yours sincerely,

LABOUR FOUNDATION

E.H. Broekema  
Secretary