



Social Protection Reform Project  
中国欧盟社会保护改革项目

### 1.4.3. – SOCIAL INSURANCE

#### FOR MIGRANT WORKERS

#### Component 1

#### MOVING WITHIN THE EUROPEAN UNION

The European Union, now composed of 28 Member States, was from its inception in the middle of the XXth century designed in a way that would facilitate workers' and personal mobility across member States – while preserving their social security rights and rights in course of acquisition. In fact, Europe as a compendium of States with each their social security specificities – some schemes are contributory, others are not, some are funded, others pay as you go, some are public, others are private, some have basic pensions and individual accounts, others do not, some are benefits' defined, others are contributions' defined, some benefits are means tested, other are not, some are indexed on prices, others on wages, others in an ad hoc or composite manner, some are rich, other far less affluent, some are places of immigration, others of emigration or have floating populations in both directions ... – managed to find practical solutions that might be a source of inspiration for China confronted to similar questions regarding mobility across a great number of pooling areas with greatly diversified social and economic conditions.

This Note, based on works accomplished by Mr. Bill Birmingham under the (2006-2011) first EU-China Social Security reform Project details the rules applicable throughout Europe for social security protection of mobile persons, while drawing some useful comparisons with the Chinese situation.

The Treaty of Rome establishing the then European Economic Community, now the European Union, included provision to remove barriers to the free movement of nationals of Member States who seek employment (and self-employment) in another Member State. This provision has been extended to apply to nationals of all acceding States, but Accession Treaties have included transitional provisions to enable existing Member States to postpone the application of the free movement provisions in relation to nationals of accession States for a limited period. Thus certain existing Member States have transitionally not applied the principle of free movement to the ten new Member States, but other States have applied the free movement provisions from the date of their access.

For the purpose of removing barriers to free movement of workers the Treaty of Rome included the following Article:

“The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependents: (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; (b) payment of benefits to persons resident in the territories of Member States.”

Under this provision, the EEC Council adopted Regulations 1408/71 and 574/72 to co-ordinate the social insurance systems of the respective Member States with the intention of removing implicit barriers to free movement. This paper outlines these provisions of the Regulations, in particular as they apply to the benefits covered by the Chinese social insurance schemes. They apply to migrant workers of all Member States, including those that have placed temporary restrictions on free movement.

Neither the Treaties establishing the European Union, nor the social insurance Regulations, require Member States to harmonise their social insurance systems. The Regulations provide only for co-ordination between the respective regimes.

The contribution rates, the contribution and other conditions for entitlement to pensions and other benefits and the rates of benefit vary considerably between Member States. Each Member State has enacted its own social insurance legislation, conditions of entitlement and rates of benefit. Most Member States have adopted a system of social insurance contributions, but Denmark pays benefits from tax revenue. Nor are Member States required to provide all the benefits to which the Regulations apply - the Netherlands, for instance, does not provide a specific benefit for industrial injuries and occupational diseases - but where a Member State does provide a benefit to which the Regulations apply, the State must apply the Regulations in respect of workers who have been subject to its legislation and that of another Member State.

#### ***Coverage of the Regulations***

Regulations 1408/71 and 574/72 apply to employed and self-employed persons who have been subject to the social insurance legislation of at least one EU Member State and also to members of their family in respect of medical benefits in kind (i.e. health treatment), survivors' benefits and family benefits. They also apply to the spouses and family members of such workers who have been subject to Member States' social insurance legislation. Persons covered by the Regulations are subject to the same obligations and enjoy the same benefits under a Member State's social insurance legislation as the nationals of that Member State.

#### ***Contribution liability and the legislation to which a person is subject***

The Regulations provide that an employed or self-employed person is subject to the social insurance legislation of only one Member State. This means that a person who works in a Member State other than the one in which he is permanently resident cannot be required simultaneously to contribute to the social insurance regime of both Member States. It also means, however, that such a person has the right to participate under the legislation of one of those states in order to maintain his contribution record. With limited exceptions, a person employed or self-employed in a Member State is subject to the social insurance legislation of that Member State, even though he may be permanently resident in another Member State or, if he is employed, the registered office or place of business of his employer is in another Member State. Special rules apply if a person works in more than one Member State. Mariners are subject to the legislation of the Member State whose flag the ship carries and civil servants are subject to the legislation of the Member State for which they work. The major exceptions to the principle that a person is subject to the Member State in which he is employed are the following:

- A person who is employed in one Member State, but who is posted to work in another for a period not exceeding 12 months, remains subject to the legislation of the State from which he is posted, unless he is sent to replace someone else whose posting has finished. This period can be extended for up to a further 12 months, if the work cannot be completed within the original 12 months due to unforeseen circumstances.
- Two or more Member States may come to an agreement that a worker (or category of workers) who works in one of the states may remain subject to the legislation of another state in which he is not employed where it is in his interest to remain subject to that other state's legislation.
- Where a person is subject to the legislation of one Member State because he is employed or self-employed there, he may additionally pay contributions voluntarily to the social insurance regime of another state for the purpose of acquiring entitlement to old age, invalidity or survivor's pensions under that state's legislation.

By analogy, if applied in China, the effect of the regulations would be that a worker, whose hukou was in one province and municipality, but who went to work in another province or municipality, would be subject to, and entitled to participate in, the social insurance system in the place where he worked, but during that employment would not participate in the social security system in the

location of his hukou, unless his employment in that other province and municipality was for less than 12 months.

### **The “Aggregation” Provisions**

Benefits under the Regulations are awarded under “aggregation” provisions. For short term benefits, such as sickness and maternity benefits, this means that the social insurance institution of the Member State to whose legislation the worker was last subject must aggregate insurance, employment or residence periods, as appropriate, to determine entitlement to benefits. Only that institution will pay benefit. However, for long-term benefits, such as old age pensions, a system of “aggregation and apportionment” applies. Under this the institutions of each of the Member States to whose legislation the worker has been subject must aggregate those periods to determine a notional benefit entitlement, but then pay to the pensioner at least the proportion of the national benefit that the period under its legislation bears to the aggregate.

### **Old Age and Survivor’s Pensions**

#### **Acquisition of entitlement**

Where a person has been an employed or self-employed person subject to the legislation of more than one Member State, his entitlement to old age pension, and after his death the entitlement of his widow or her widower to survivor’s pension, is determined as follows.

If the legislation of a Member State requires a claimant to old age (or widow’s or widower’s) pension to meet prescribed conditions as to length of residence or years or number of contributions, the EU Regulations require that state to take into account, where necessary, contributions or periods of residence that took place in any other Member State. This is to ensure that a migrant worker who has worked in more than one Member State is not deprived of entitlement to the pension because either he has not paid enough contributions in any of those states to meet the minimum necessary for entitlement under its legislation, or he can qualify only for a reduced aggregate entitlement because he meets the requirement in one state but not another, or because the entitlement arising in each state is less than he would have received if he had remained throughout in only one state.

Under the EU Regulations each Member State to whose social insurance legislation the person has been subject (except a state to whose legislation he was subject for not more than 12 months) must calculate the pension payable under its legislation as follows:

1. Each Member State to whose legislation the person was subject must firstly calculate the person’s pension entitlement under its legislation alone.
2. If the entitlement is not the maximum payable under its legislation, each Member State must then aggregate the social insurance (contribution or equivalent) periods the person completed under the legislation of all Member States (whether before or after they became Member States).
3. Each Member State must then calculate what the pension entitlement would have been under its own legislation if the aggregate period had all been completed under its own legislation.
4. Each Member State must then calculate the proportion of the aggregate that was completed under its own legislation and apply that proportion to the notional amount payable under the previous paragraph.
5. Each Member State must then pay the higher of the amount calculated under paragraph 1 or paragraph 4.

Thus a worker who has been employed or self-employed in more than one Member State will normally receive a pension from each of those states at least in proportion to the period under its insurance bears to the notional entitlement that would have arisen if the whole of the working life had been spent under its social insurance legislation. The worker can also receive a pension from a Member State at a rate below the minimum threshold for entitlement under its own legislation alone.

However, if the notional amount calculated at paragraph 3 above is still less than the minimum needed to qualify for a state’s pension entitlement, e.g. because the majority of the person’s working life was spent in a non-EU country, no pension will be payable under that state’s legislation. If the period during which an individual was employed or self-employed in a particular

Member State was less than 12 months, the Regulations provide that that state is not required to pay a pension.

Examples A person works and pays contributions for 40% of his working life in Great Britain, 30% in France and 30% in Germany. He would be entitled to 40% of the pension that would be payable in Great Britain if he had throughout paid contributions in Great Britain, 30% of the pension that would be payable in France if he had throughout paid contributions in France and 30% of the pension that would be payable in Germany if he had throughout paid contributions in Germany.

A person works and pays contributions for 95% of his working life in Great Britain and 5% in Ireland. He would not qualify for any pension under Irish legislation alone. He would be entitled to 100% of the pension payable under the legislation of Great Britain as he satisfies the conditions for a full pension under British legislation and to 5% of the pension that would be payable in Ireland if he had throughout paid contributions in Ireland.

A person works and pays contributions for 10% of his working life in Great Britain, 10% in Ireland and 80% in China. He would not be entitled to a pension under the legislation of either Great Britain or Ireland because the aggregate of his British and Irish contributions would be insufficient to give entitlement to a pension under the legislation of either.

Similar provisions apply to invalidity pensions, except in certain cases where entitlement under a Member State's legislation does not depend on the satisfaction of contribution or residence periods. In such cases, where the individual has been subject to the legislation only of Member States where entitlement does not depend on satisfaction of such conditions, only the Member State in which the incapacity that was followed by the invalidity first occurred is liable to pay invalidity benefit in accordance with its own legislation. Thus, if the worker has been subject only to the legislation of one or more of the Czech Republic, Denmark, Ireland, Cyprus, Netherlands, Poland, Portugal, Sweden and the United Kingdom (and limited categories in France, Hungary and Italy), the state in which the incapacity occurred is liable to pay an invalidity pension. If, however, the worker has at any time been subject to the legislation of any other Member State, the aggregation and apportionment provisions apply as for old age and survivor's pensions.

However, there are restrictions to ensure that beneficiaries do not acquire several benefits of the same kind in respect of the same compulsory insurance period other than under the aggregation and apportionment provisions described above.

By analogy, if applied in China, the effect of the regulations would be that a worker, who had worked and participated in the social insurance scheme throughout his working life, but for 30% of his working life in a municipality in Hebei province, 30% in a municipality in Guangdong province and 40% in Beijing, would be entitled from the Hebei province municipality, from the Guangdong province municipality to

30% of the pension that would have arisen if the whole of his employment had been in that municipality, and from Beijing to 40% of the pension that would have arisen if the whole of his employment had been in that municipality. However, if the system applied in China it is likely that it would apply only to the social pooling element and that the individual account element would apply on the basis of 2nd pillar arrangements in Europe (see below).

### **Exportability of pensions**

Where a person covered by the Regulations is entitled to invalidity, old age or survivor's benefits payable under the legislation of one Member State, whether under its own legislation alone or as a result of the aggregation and apportionment arrangements described above, that benefit is payable to a non-national or a person resident in another Member State at the rate payable to a national of that Member State or to a person resident in that Member State without any reduction due to the person's nationality or place of residence. This provision applies also to indexation increases of benefit.

Examples A person entitled to a pension as a result of contributions paid during employment in Germany moves to, or lives in, Spain at or after retirement. He is entitled to receive his German pension in Spain at the rate in euros (€) that it would be payable if he still lived in Germany.

A person entitled to a pension as a result of contributions paid during employment in Great Britain moves to, or lives in, Ireland at or after retirement.

He is entitled to receive his British pension in Ireland in euros (€) at the rate that it would be payable in UK pounds (£) if he still lived in Great Britain. (This means that the pension payable in euros (€) in Ireland may fluctuate as a result of exchange rate fluctuations between the £ and €.)

See below if a pensioner requires sickness or maternity benefits.

By analogy, if applied in China, the effect of the regulations would be that a retiree, who was entitled to a pension as a result of working and contributing in a municipality in Guangdong province, returned on retirement to live in Hunan province would be entitled to draw the Guangdong pension in Hunan province. This matches the current situation in China.

### **Unemployment Benefit**

Unlike in respect of other benefits, the circumstances in which a migrant worker can benefit from the Regulations to qualify for unemployment benefit in a Member State other than that in which he was last employed are restricted.

A Member State whose legislation makes the acquisition of entitlement to unemployment benefit subject to the completion of periods of insurance or employment must take into account periods of insurance or employment completed as an employed person in another State. However, this applies only where the unemployed person was last employed or insured in the state where he claims unemployment benefit. Thus, a person who leaves employment in one Member State cannot then go to another Member State and claim unemployment benefit there by seeking to require the latter to take account of insurance or employment in the state in which he was previously employed. If the rate of unemployment benefit is based on the individual's previous earnings, the Member State must take account only of earnings received in that state, not in respect of earnings in any other state.

(Exceptionally, if the person's employment in that state was for less than 4 weeks, the benefit must be based on a notional amount that would have been received by someone undertaking the same or similar work.)

There are two exceptions to the restrictions described above.

The first exception applies where a person was resident in a state other than the one in which he was last employed. A frontier worker - i.e. a person who lives in one state, but works in another, returning home daily or at least weekly - may claim unemployment benefit in his home state at its expense as if he had been employed there. A wholly unemployed worker, other than a frontier worker, may claim

unemployment benefit under the legislation of the state where he lives at its expense, as if he had last been employed there, except for periods when he is entitled to the unemployment benefit of the state in which he was last employed. However, if the unemployed worker is only partially or intermittently unemployed, he may claim unemployment benefit in the state where he was last employed at that state's expense, as if he were resident there.

The second exception applies where a wholly unemployed person goes to another Member State to seek employment. If that person satisfies the conditions for entitlement to unemployment benefit in the state where he was previously employed, he may continue to receive that state's unemployment benefit for up to 3 months in the state to which he goes to seek employment if he has been in receipt of unemployment benefit for at least four weeks before going to the other state - a Member State may reduce the length of time required - and he registers within 7 days with the employment agency of the state to which he goes and becomes subject to its control provisions. Nevertheless, the individual may make use of this provision only once in each period of unemployment. Thus, he cannot go to seek employment in one Member State, then, having failed to find work, return home and then try to draw unemployment benefit in another state to which he goes to try to find employment.

Where the unemployment benefit of one state is payable by another state under this provision, the first state must reimburse the state that pays the benefit.

By analogy, if applied in China, the effect of the regulations would be that a person, who is entitled to unemployment insurance benefit in a municipality in, for instance, Shanxi province, could continue to draw that unemployment benefit for up to 3 months in Beijing, if he went to Beijing to seek employment.

See below the effect of the regulations if an unemployed person requires sickness or maternity benefits.

### ***Accidents at Work and Industrial Diseases***

An employed or (where the state provides benefits for the self-employed) self-employed person who suffers an accident at work or contracts an occupational disease at a time when he is resident in a Member State other than the State to whose social insurance legislation he is subject is entitled to:

- medical benefits (i.e. health treatment) provided by the social insurance institution in the state where he resides on behalf of the institution of the state to whose legislation he is subject (which must reimburse the former); and
- cash benefits provided by the social insurance institution of the state to whose legislation he was subject at the time of the accident or onset of the disease (or, if both institutions agree, by the institution of the place of residence on behalf of the other) or
- If he is a frontier worker (see above), benefits provided by the social security institution of the state where the accident occurred or disease was contracted.

If the beneficiary moves temporarily or permanently to the state where the accident occurred or disease was contracted, he becomes entitled to benefits from that state's social insurance institution even he has received benefits before the move.

By analogy, if applied in China, the effect of the regulations would be that a worker, with a hukou in Tianjin who was subject to the work injury insurance system in Beijing and suffered a work injury in Beijing, would be entitled to medical treatment in Tianjin at the expense of the Beijing social insurance agency and entitled to cash benefits payable by the Beijing social insurance agency.

An employed or (if the state provides benefits for the self-employed) self-employed person who has suffered an accident at work or contracted an occupational disease and who:

- is temporarily resident in a state other than that liable to provide benefits; or
- has become entitled to benefits provided by the social insurance institution of a state and is then authorised by the institution either to return to the Member State of his permanent residence or to transfer his place of permanent residence to another Member State (nb Authorisation may be refused only if the movement would be detrimental to the person's health or treatment); or
- is authorised by the institution to go to another Member State to receive treatment for his condition (nb Authorisation may not be refused if the person cannot obtain the appropriate treatment in the state where the institution is situated), will be entitled to:
  - medical benefits provided by the social insurance institution in the state where he is temporarily or permanently resident in accordance with its own legislation as though he had been insured with that institution, but only for the period covered by the legislation of the state from which he was originally entitled to benefit (which must reimburse the former); and
  - cash benefits provided by the social insurance institution of the state to whose legislation he was subject at the time of the accident or onset of the disease (or, if both institutions agree, by the institution of the place of residence on behalf of the other).

If a Member State provides benefits when an accident occurs while a person is travelling, the institution in that state must provide benefits if the accident occurs while travelling in another Member State as if it had occurred in its own state.

Similarly, if a state's legislation provides for the cost of transporting a person to hospital or to his place of residence, it must meet the cost of transporting the person to the equivalent location in the state where the person lives.

Where a worker contracts an industrial disease after having worked in more than one Member State in employment likely to give rise to that disease, any benefits to which he and his survivors become entitled are to be provided only by the social insurance institution in the last such Member State.

Where entitlement under a Member State's legislation requires that the worker has been engaged in such an employment for a specified period, or for the condition to have been first diagnosed in that state, the social insurance institution in that state must take into account any equivalent period in any other Member State and a diagnosis determined in another Member State.

Exceptionally, where the disease contracted is sclerogenic pneumoconiosis, instead of the last Member State being liable, the cost of the cash benefits must be divided among the states in which the worker has been employed in such employment on a pro rata basis.

If an industrial disease is aggravated after the worker has been in receipt of benefit for an industrial disease,

- if the worker has not been engaged in employment in another Member State likely to cause or aggravate the disease, the institution of the state where the benefit was awarded must meet the additional cost of benefits resulting from the aggravation; or
- if the worker has been engaged in employment in another Member State likely to cause or aggravate the disease, the institution of the state where the benefit was awarded must continue to meet the cost of benefits resulting from the initial disability, but the institution in the state where the aggravation occurred must meet the cost of the excess.

### ***Sickness and Maternity Benefits***

A Member State whose legislation makes the acquisition of entitlement to sickness or maternity benefits benefit subject to the completion of periods of insurance or employment must take into account periods of insurance or employment completed in another Member State. However, this applies only where the person was last employed or insured in the state where he claims benefit.

An employed or self-employed person who resides in a Member State other than the one from which he is entitled to receive benefits because he had last been employed or insured there is entitled to receive in the state where he lives:

- medical benefits provided by the health or social insurance institution in the state in which he is resident as if he were insured with that institution; and
- cash benefits provided by the social insurance institution of the state to whose legislation he was last subject (or, if both institutions agree, by the institution of the place of residence on behalf of the other).

If he is temporarily in the state from which he is entitled to receive benefits or moves to reside there, he will be entitled to receive benefits from the social insurance or health institution there, even if he received benefits in the other state where he was living. Frontier workers may obtain benefits in the state where he was last employed as well as in the state where he resides. These provisions apply also by analogy to members of the worker's family to the extent that they are entitled to benefits under the legislation of the state where the worker was last employed.

By analogy, if applied in China, the effect of the regulations would be that a worker, who returns to live where his hukou is, but has entitlement to health benefits under the social security institution of Shanghai would be entitled to health benefits under the social insurance agency of the hukou location, but at the expense of the Shanghai social insurance agency.

An employed or self-employed person who meets the conditions of a Member State for sickness or maternity benefits and:

- whose medical condition requires medical benefits while temporarily in another Member State (taking into account the length of stay and nature of the benefits); or
- who has become entitled to benefits provided by the social insurance institution of a state and is then authorised by the institution either to return to the Member State of his permanent residence or to transfer his permanent residence to another Member State (nb Authorisation may be refused only if the movement would be detrimental to the person's health or treatment); or
- is authorised by the institution to go to another Member State to receive treatment for his condition (nb Authorisation may not be refused if the person cannot obtain the treatment in the state where the institution is situated within an appropriate period), will be entitled to:

- medical benefits provided by the social insurance institution in the state where he is temporarily or permanently resident in accordance with its own legislation as though he had been insured with that institution, but only for the period covered by the legislation of the state from which he was originally entitled to benefit (which must reimburse the former); and
- cash benefits provided by the social insurance institution of the state to whose legislation he was subject at the time of the accident or onset of the disease (or, if both institutions agree, by the institution of the place of residence on behalf of the other).

These provisions apply also by analogy to members of the worker's family.

If a worker's right to a prosthesis, a major appliance or substantial medical benefits has been accepted by the health or social insurance institution of one Member State before the worker becomes subject to the social insurance legislation of another Member State, the first state must meet the cost.

An unemployed person who was previously employed or self-employed and who is receiving the unemployment benefit of one Member State while seeking work in another and who satisfies the conditions of the first Member State for entitlement to sickness or maternity benefits shall be entitled, but normally only for the period for which unemployment benefit would be payable, to:

- medical benefits that become necessary during his stay in the second state provided by the social insurance institution of the state where in accordance with its own legislation as though he had been insured with that institution, but only for the period covered by the legislation of the state from which he was originally entitled to benefit (which must reimburse the former); and
- cash benefits provided by the social insurance institution of the state to whose legislation he was subject at the time of the accident or onset of the disease (or, if both institutions agree, by the institution of the place of residence on behalf of the other).

If, however, an unemployed worker receives unemployment benefits at the expense of the social insurance institution of the Member State in which he resides, instead of from the institution of the state where he was last employed, he will become entitled to the sickness or maternity medical and cash benefits of the state that has been paying the unemployment benefit.

If a pensioner who lives in one Member State is entitled to an old age, survivor's or invalidity pension from more than one Member State, including the state in which he lives, the health or social insurance institution of that state is liable for sickness and maternity benefits as though the pensioner received his pension only from that state.

If, however, a pensioner who lives in one Member State is entitled to an old age, survivors or invalidity pension from more than one Member State, but not including the state in which he lives, he is entitled to:

- medical benefits provided by the institution of the state where he lives as though he was a pensioner under its legislation, but reimbursed by the liable social insurance institution; and
- cash benefits, where appropriate, provided by the liable social insurance institution.

The liable institution is the institution of the Member State to whose social insurance legislation the pensioner was subject for the longest period. Analogous provisions apply to members of the pensioner's family.

### **Other benefits**

The Regulations also make provision for other benefits for which there is no Chinese equivalent, such as death grants and family benefits.

In brief, where a state provides for a death grant, insurance periods completed under all Member States must be aggregated to determine entitlement. In addition a death occurring in another Member State is treated as occurring in the state from which the death grant is payable.

Family benefits, e.g. benefits for children and orphans, are payable under the legislation of the state in which the worker is employed or self-employed. If, however, the worker resides in a different Member State under whose legislation a higher rate would be payable, that state must pay a supplement of the excess over the benefit paid by the state where the worker is employed.



Analogous provisions apply where an individual is entitled to a pension from one Member State while resident in another.

### **Administrative Arrangements**

The Regulations introduce standard forms which are designed identically in the language of each EU Member State. These forms are sent between the social insurance institutions of the relevant Member States providing details of an individual's name, address, insurance record, benefit claim and award and other relevant information. Thus if the Estonian authorities wished to exchange data about a retiree with the Maltese authorities, the Maltese, who do not speak Estonian, would be able to know what information was being provided as information provided in a particular box on the form would be the same in the Estonian and Maltese versions of the form. This enables each Member State to take account of periods of insurance and benefits received under the legislation of every other Member State to whose legislation an individual has been subject.

It also means that a claimant to a social insurance benefit who has been subject to the legislation of more than one Member State is required to make a claim only to the institution of the state in which he resides or was last employed to receive the appropriate benefits from every state from which he has an entitlement.

### **Institutions for occupational retirement provision**

The EU has adopted two Directives, which Member States must implement in the field of occupational pensions (analogous to enterprise annuities in China, but in many cases the provisions are similar to those applicable to social insurance individual accounts).

#### **Directive 98/49/EC**

This Directive is intended to safeguard the supplementary pension (equivalent to enterprise annuity) rights of employed and self-employed persons who move between EU Member States and sets out certain rights and obligations for scheme members.

The principal provisions are as follows:

- A person who leaves a scheme because he moves to another Member State must not be treated differently to a person who leaves the scheme but remains in the Member State, as far as his or her vested rights are concerned. "Vested pension rights" means any entitlement to benefits obtained after fulfilling the conditions required by the rules of a supplementary pension scheme and, where applicable by national legislation.
- Member States must take the necessary measures to ensure that benefits under supplementary pension schemes are paid to members and former members as well as others (e.g. survivors) holding entitlement under such schemes in all Member States.

Examples A worker, who has worked for an employer for at least 2 years for an employer in Great Britain and has been a member of the employer-sponsored pension scheme throughout that period, leaves that employment and goes to work for an employer in Germany. He will be entitled on retirement to the same pension from his former pension scheme as he would have received if he had taken up employment with another employer in Great Britain

A retired former employee who during his employment was a member of a supplementary pension scheme in the Netherlands moves to Spain on retirement.

He will be entitled to the pension from that scheme at the same rate as he would have received if he had stayed in the Netherlands.

By analogy, if applied in China, the effect of the directive would be that a worker, who has an individual account under the social insurance agency in, for example, a municipality in Sichuan province, but moves to work in Chongqing, is entitled to retain the right to the accrued individual account under the Sichuan municipality on the same basis as if he had remained in another employment in the municipality or another municipality in Sichuan province.

The Directive also provides that a worker posted by his employer to work in another Member State should have the right to continue to contribute to the supplementary pension scheme in the state from which he was posted, for as long as he remains subject to that state's social insurance scheme.

However, the Directive does not provide for aggregation of periods for the purpose of acquiring pension rights nor does it give the right for a person to keep pension entitlements by transferring them to a new scheme in the state to which he has moved to take up employment.

#### **Directive 2003/41/EC**

This Directive lays down rules for the operation in Member States of what it calls “institutions for occupational retirement provision” . These are institutions, other than social insurance institutions, that operate on a funded basis and are, and must be, established separately from any sponsoring enterprise or other employer(s) for the purpose of providing retirement benefits (including benefits on death, disability or cessation of employment) 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.

The Directive lays down rules, which Member States must adopt, for the operation of such institutions, including their registration in the state where they are established, a requirement for annual audited accounts and reports and the provision of information to participants and beneficiaries. The institutions must produce (and at least every 3 years review) a statement of investment principles, covering such matters as the investment risk measurement methods, the risk management processes implemented and the strategic asset allocation with respect to the nature and duration of pension liabilities. This must be made available, together with other specified information, including actuarial valuations and reports, to the national pensions regulator and to the participants. The Directive also lays down rules on investment in accordance with the “prudent person” principle. The Directive also makes provision for cross-border activities. Member States must make provision for enterprises and other employers established in one Member State to sponsor an institution for retirement provision in another and vice versa.

However, before this may occur, the pensions regulator in the state where the institution is established must have authorised it to accept sponsorship by an employer in another Member State and require it to apply conditions laid down by the regulator in the state where the sponsoring enterprise is established.

Example An enterprise established in Belgium wishes to sponsor an institution for retirement provision established in the Netherlands. If the institution is authorised by the Dutch pensions regulator, the Belgian employer and employees may pay contributions to the Dutch institution and on retirement acquire pension entitlement from that institution. However, the Dutch institution must satisfy the Belgian social and labour law conditions for the Belgian members and will be subject to supervision by the Dutch pensions regulator.

#### **Protecting pension rights of persons who leave an employer**

Although there is no EU-wide requirement for Member States to adopt most of the following provisions, some of the following arrangements apply in most Member States to ensure that a person who changes employer has his pension rights protected:

1. Periods of employment (or self-employment) and payment of contributions in relation to the respective employments count towards the same pension scheme.

This is a standard procedure for state social insurance schemes, but may also apply to enterprise schemes established, not by a single employer, but by a group, for instance, as in Holland where industry-wide occupational pension schemes, e.g. for the textile industry, are common.

2. If another company takes over the former employer or the enterprise is transferred, the new employer may, or in some cases, must, continue to maintain the pension arrangements (excluding social insurance provisions) provided under the former employer. If not, they must provide analogous provisions. Council Directive 2001/23/EC requires EU Member States to adopt legislation to ensure that employees’ rights are maintained on the transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger. Member States may exclude employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes from the scope of the implementing legislation. However, if so, they must adopt 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 in respect of rights conferring on them immediate or prospective entitlement to old age benefits and survivors' benefits under such schemes.

3. It is possible for a trade union to establish a pension scheme for members and for it to enter an agreement with all employers for whom its members work to contribute to the scheme on behalf of its members. Thus, if a trade union member changes employer, he continues to accrue rights in the trade union's pension scheme. This system occurs in Spain.

4. An employee may take out a pension contract with an insurance company which will accept contributions not only from the employee to be paid into his individual account, but will also accept contributions from his employer. Thus, both the former and the new employer may pay contributions into the employee's individual account in respect of the respective periods of employment.

5. The rights that have accrued to an employee in a defined benefit scheme for the period until the employee leaves the employment are preserved in that scheme for payment from pension age. To avoid loss in value due to inflation for the period between leaving the employment and the pension coming into payment, the rights may be revalued in line with an inflation index (possibly subject to a ceiling).

Thus, for example, a civil servant, whose pension is based on a percentage of final salary for each year of participation, but who leaves the civil service some time before pension age, would receive a pension based on the percentage of his salary for the year before he leaves the civil service multiplied by the number of years of participation. This amount could be increased until pension age by the revaluation coefficient.

6. The rights that have accrued to an employee in a defined contribution individual account during the period before the employee leaves the employment are preserved in that individual account and continue to be invested and to receive investment income, even though no further contributions are paid. The amount that has accrued by pension age is used to provide a pension or to purchase an annuity.

7. It is possible to transfer the rights accrued in the member's previous scheme or individual account to a new scheme or individual account. How this is accomplished depends on the type of scheme from which the rights are transferred and that to which they are transferred.

a) If the transferring scheme and receiving scheme are both defined contribution schemes with individual accounts, the amount of the individual account in the former can be transferred to an individual account in the latter (possibly subject to the administrative cost of the transfer);

b) If the transferring scheme is a defined benefit scheme, whether funded or pay-as-you-go, and the receiving scheme is a defined contribution scheme, the amount to be transferred is the cash equivalent of the actuarial value of the rights that have been built up until the transfer and that amount is transferred to the individual account of the new scheme.

c) If the transferring scheme is a defined contribution schemes with individual accounts, but the receiving scheme is a defined benefit scheme, the amount of the individual account in the former will be transferred to the latter, but the value of the rights acquired in the receiving scheme by the sum transferred is determined actuarially on the basis of what value would have been acquired from that cash amount.

d) If both schemes are defined benefit schemes, the amount to be transferred is the cash equivalent of the actuarial value of the rights that have been built up until the transfer and the value of the rights acquired in the receiving scheme by the sum transferred is determined actuarially.

By analogy, if applied in China, the effect of the directive would be that a worker with an individual account who moved to work for another employer in possibly another municipality or province would have the right to have that individual account preserved in the former location, with the account continuing to accumulate income, or possibly to have the option of having the individual account transferred to the new location.

Bill Birmingham, 2010