FREE MOVEMENT OF WORKERS IN THE EU AND OCCUPATIONAL PENSIONS: CONFLICTING PRIORITIES? BETWEEN CASE LAW AND LEGISLATIVE INTERVENTIONS

MARION DEL SOL* AND MARCO ROCCA**

Abstract

The European Union appears to be promoting at the same time both cross-national mobility of workers and an increased role for occupational pensions. There is, however, a potential tension between these two objectives because workers risk losing (some of) their pension rights under an occupational scheme as a consequence of their mobility. After long negotiations, the EU has addressed this issue through a minimum standards Directive. Shortly before the adoption of this Directive, the Court of Justice also delivered an important decision in the same field, in the case of Casteels v British Airways. By analysing the resulting legal framework for safeguarding pension rights under occupational schemes in the context of workers' mobility, we argue that the application of the case law developed by the Court of Justice in the field of free movement of workers has the potential to offer superior protection compared to the Directive. We also highlight the fact that the present legal framework seems to afford a much fuller protection to the intra-company cross-national mobility of workers employed by multinational companies, while also seemingly favouring mobility for highly specialised workers.

1 INTRODUCTION

This article explores the interaction between two areas of intervention of the European Union (EU) namely the free movement of workers and occupational pensions. The former is a well-known (and developed) area of EU law, forming one of the fundamental pillars upon which the European construction has been built. The latter area has been growing in importance particularly over the

* Dr Marion Del Sol is Professor of Law at the University of Rennes 1 (France). Address: Faculté de droit et de science politique 9, rue Jean Macé 35042 Rennes cédex, France; email: marion.del-sol@univ-rennes1.fr

** Dr Marco Rocca is a Research Fellow at the University of Verona (Italy) and a Lecturer at the Université Catholique de Louvain, Université de Liège and the Université Libre de Bruxelles, Belgium, Address : Université Catholique de Louvain, Faculté de Droit, Place Montesquieu 2, b.te L2.07.01, 1348, Louvain-la-Neuve, Belgium ; email : marco.rocca@uclouvain.be

last twenty years, although this has mainly been due to its 'financial' aspects.[1] As we show in this Introduction, different policies of the EU are now explicitly aimed at increasing both mobility and the use of occupational pensions. We argue, however, that promoting both workers' mobility and the use of occupational pensions necessarily engenders a tension that the EU has only recently started to address.

The aim of this article is to explore this tension. By comparing the case law of the Court of Justice on free movement of workers with the (relatively) recent Directive 2014/50 on the minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights, we highlight the different protections offered by these two sets of instruments. In doing so we also consider the potential for a mutually reinforcing dialogue (or for a conflict) between the two. Furthermore, we assess the kind of 'mobility' implicitly envisaged by the present state of EU law, which appears to provide incentives only to certain kind of international mobility.

In this article, we refer to concepts, such as 'waiting period'[2] and 'vesting period'[3], which are relevant for the specific issue of the interaction between workers' mobility and occupational pensions. Definitions of these concepts are provided by Directive 2014/50. The 'portability' of occupational pensions was, in its turn, defined by the 2005 proposal[4] as 'the option open to workers of acquiring and retaining pension rights when exercising their right to freedom of movement or occupational mobility'.[5] Finally, we deviate slightly from the terminology of Directive 2014/50 by using the concept of 'occupational pensions' in lieu of 'supplementary pensions'. The meaning, however, should be understood to be identical.

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1 As opposed to the more 'social' one. See on this point the Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on the activities and supervision of institutions for occupational retirement provision' COM(2014) 167 final: 'The EESC disagrees with the approach to IORPs purely as financial market institutions, which fails to acknowledge and respect their specific circumstances. IORPs are institutions which perform an important social function'.

2 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, Article 3.

3 *Ibidem*.

4 Proposal for a Directive of the European Parliament and of the Council on improving the portability of supplementary pension rights, COM/2005/0507 final.

5 *Ibidem*, Article 3.

The article is structured as follows. In the rest of this Introduction we present the two potentially conflicting aims pursued by the EU, namely promoting workers' mobility and occupational pensions. In Section 2 we provide a brief account of Directive 2014/50, which also covers the protracted negotiations which ultimately led to its adoption. Section 3 deals with the interaction between the case law of the Court of Justice on free movement of workers (including the situation of frontier workers) and occupational pensions. We also look to the role of multinational companies and pan-European pension schemes in underpinning workers' mobility. In Section 4 we draw some conclusions on the different pathways to marrying workers' mobility and occupational pensions which emerge from the encounters between EU legislation and the case law of the Court of Justice.

1.1 The EU and Occupational Pensions

The competencies of the European Union in the field of social protection are, as is well known, quite limited.[6] The EU cannot directly act in order to harmonise national retirement systems. That being said, demographic as well as economic considerations have brought to the fore the objective of promoting the convergence of these national systems.[7] This process of convergence, mainly carried out through the Open Method of Coordination,[8] sees occupational pensions as a fundamental piece of the puzzle. Thus, these 2nd pillar pensions have been made the object of specific attention from EU institutions, aimed at increasing their importance – although their importance varies widely from one Member State to the other. This has been mainly achieved through competences devoted to the internal market, by, for instance, providing the framework for the management of these instruments in transnational situations (on the basis of the freedom to provide services)[9] as well as by ensuring the protection of the rights of the affiliated.[10] Hence, the

6 See Article 153 TFEU, as well as the case law of the Court of Justice reaffirming in multiple occasions the competence of Member State as regards the organisation of social security systems.

7 *Green Paper - Supplementary Pensions in the Single Market*, COM (97) 283 final, 10 June 1997; *Joint report by the Commission and the Council on adequate and sustainable pensions*, March 2003; White Paper - *An Agenda for Adequate, Safe and Sustainable Pensions*, COM (2012) 55 final, 12 December 2012. See Coron (2007).

8 Cornilleau, Sterdyniak and Math (2007).

9 For a political science analysis, see Coron (2003).

10 See Muller (2008).

EU has, so far, mainly understood the phenomenon of occupational pensions through the institutions in charge of their management.[11]

The diversity of occupational pensions regimes and their uneven presence across Member States, clearly represents a challenge for the intra-European mobility of workers. Indeed, the choice of moving from one Member State to another to take up work for the acquisition and preservation of pension rights in the context of an occupational pension regime is by no means neutral. The issue then turns into one of the free movement of workers.

1.2 Free movement of workers

Free movement of workers has been one of the fundamental pillars of the European integration since its very beginning. Although the provision guaranteeing this right has been dubbed the 'Cinderella provision',[12] with respect to the other fundamental freedoms guaranteed by the Treaties, one cannot overlook its importance both in economic and social terms. Indeed, both the Spaak[13] and Ohlin Reports[14] referred to the importance of the free movement of labour for the establishment and effectiveness of the common market. Since then, a fundamental rights rationale joined the economic one even before the shift towards a 'European citizenship' approach.[15] Such an evolution is perfectly embodied by the Opinion of AG Jacobs in the *Bettray* case.[16] Referring to the Third Recital of the Preamble to Regulation 1612/68,[17] the Advocate General affirmed that 'labour is not, in Community law, to be regarded as a commodity', so that the fundamental rights of workers should take precedence 'over satisfying the requirements of the economies of the Member States'.[18]

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11 These can have very different legal structures. This has an impact on the application of different sets of rules. Hence, when the retirement scheme is organised by an insurance company, such a company will be covered by Directives on insurance. On the other hand, an institution for occupational retirement provision will be covered by Directive 2003/41 of 3 June 2003.

12 Barnard (2012: 143).

13 *Report of the Heads of Delegations to the Foreign Ministers at the Messina Conference*, 21 April 1956.

14 *Social Aspects of European Economic Co-operation. Report by a Group of Experts*, Studies and Reports, New Series, No. 46 (Geneva, ILO, 1956)

15 O'Leary (2011: 506).

16 CJEU, 344/87, 31 May 1989, *Bettray v Staatssecrataris van Justitie*, ECLI:EU:C:1989:226.

17 Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

18 Opinion of AG Jacobs in *Bettray*, paras 28-29.

That being said, the promotion of labour mobility by the European institutions focuses on an economic rationale. European employment guidelines proposed by the Commission and adopted by the Council have referred to the need to ensure mobility under the heading of 'enhancing the functioning of labour markets'[19] or 'increasing labour market participation and reducing structural unemployment'.[20] Workers' mobility between Member States remains, however, relatively low, with around 10 million European citizens of working age (or the 3 per cent of the total workforce) having moved to another Member State.[21] This number is in fact surpassed by third-country nationals who have moved to the EU.[22]

The lack of sufficient labour mobility has been identified as one of the weaknesses of the Eurozone, depriving the countries that have adopted the Euro of yet another tool to respond to asymmetric (economic) shocks.[23] Seen from this perspective, it is perhaps unsurprising that the Directive on supplementary pension rights[24] was finally adopted during a period of economic crisis and widespread (and asymmetric) unemployment.[25] In another rather *cliché* development, case law preceded the adoption of a legislative instrument.[26] On this occasion, the Opinion of A.G. Kokott warned against the obstacle to workers' mobility created by the unfavourable treatment of occupational pension rights.[27] We will come back to this decision in Section 3.

2 THE PORTABILITY DIRECTIVE THAT WASN'T

The first proposal for a portability directive in the field of occupational pensions was tabled by the Commission in 2005.[28] This was to mark the beginning of an 'extremely long and convoluted

19 European Council, *Guidelines for the employment policies of the Member States*, COM(2010) 193 final, p 21.
20 European Council, *Guidelines for the employment policies of the Member States*, COM(2015) 98 final 3.
21 European Commission, *EU Employment and Social Situation Quarterly Review, Recent Trends in the Geographical Mobility of Workers in the EU*, Luxembourg, 2014, p. 4.
22 Canetta, Fries-Tersch and Mabilia (2014: 6).
23 See for instance Krugman (2012) referring to the seminal paper by Mundell (1961).
24 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, hereinafter 'Supplementary Pension Rights Directive' or 'Directive 2014/50'.
25 A correlation highlighted by Guardiancich (2015a).
26 Court of Justice, 11 November 2010, C-379/09, *Casteels v British Airways plc*, ECLI:EU:C:2011:131.
27 Opinion in *Casteels*, para. 45.
28 Proposal for a Directive of the European Parliament and of the Council on improving the portability of supplementary pension rights, COM/2005/0507 final, hereinafter '2005 Proposal'.

process'[29] which ultimately led to the adoption of the Directive on supplementary pension rights after almost ten years of negotiation.[30] Though the reasons for this difficulty are multifaceted, the main obstacle was undoubtedly the important differences between national systems of occupational pensions.[31]

In order to briefly sketch 'the story before the story', it is worth remembering that occupational pensions have long been excluded by the European regime for the coordination of social security.[32] In fact, after a tentative extension of this regime to (mandatory) occupational schemes operated by the Court of Justice,[33] the European legislator chose to explicitly limit the coordination to schemes finding their source in a statutory instrument.[34] Instead, Directive 98/49[35] provided minimal safeguards for the supplementary pension rights of mobile workers. However, the protection for mobile workers was limited to the preservation of acquired rights and to the guarantee of receiving payment in their new state of residence.[36] The only category of workers singled out for cross-border membership of an occupational pension scheme was that of posted workers.[37]

The proposal introduced by the Commission in 2005 aimed at addressing the shortcomings of this situation. Concerning acquisition, the proposal provided that the minimum age (for joining a scheme and/or for acquiring pension rights) should not be higher than 21, with a maximum waiting period of one year and a maximum vesting period of two years.[38] The proposal was particularly ambitious on transferability, by providing for the possibility for the worker to transfer their acquired rights to another scheme.[39] Providers were also obliged to reimburse the contributions of

29 Guardiancich (2015b: 87).
30 Three contributions, written at the three different stages of these negotiations provide a comprehensive picture of the process: Kalogeropoulou (2006). Oliver (2009) and Guardiancich, note 29 above.
31 Guardiancich, note 29 above: 75 and ff.; Haverland (2007).
32 Put in place by Regulation 1408/71, then replaced by Regulations 883/2004 and 987/2009.
33 Court of Justice, 30 June 1966, Case 61/65, *Vaassen-Göbbels v Management of the Beambtenfondsvoor het Mijnbedrijf*, ECLI:EU:C:1966:39. See Baugniet (2014: 91).
34 This was later confirmed by the Court of Justice in the case C-35/97, 24 September 1998, *Commission v France*, ECLI:EU:C:1998:431.
35 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.
36 See Kalogeropoulou, note 30 above: 96.
37 Directive 98/49, Article 6.
38 2005 Proposal, Article 4.
39 *Ibidem*, Article 6. Member State had however the possibility to exempt unfunded schemes (Recital 10).

workers not qualifying for pension rights (i.e. those who did not fulfil the conditions of age, waiting or vesting periods) at the moment of their exit from the scheme.[40]

The 2007 proposal[41] marks the shift from portability to minimum requirements. Hence, the issues related to transferability were not addressed. The possibility of reimbursement was also narrowed.[42] On acquisition, the amended proposal maintained the maximum waiting period of one year and the minimum age of 21. Vesting periods based on the worker's age were differentiated: a maximum of one year for those over 25 years, and a maximum five years for the others. Finally, dormant rights received specific attention. These should be treated 'fairly', with the proposed Directive providing a series of examples of fair treatment.[43]

2.1 The compromise

The text ultimately adopted following the new proposal of 2013 continued along the path of diminishing ambitions. On the issue of acquisition, the Directive is relatively similar to its previous version, confirming the minimum age of 21 plus a combined total duration of waiting and vesting periods of three years.[44] Concerning preservation of acquired rights and reimbursement rules, the Directive did not change much of the previous 2007 version.[45] Importantly, the Directive is not retroactive, thus applying only to contributions and pension rights acquired after its implementation.

At the end of the day, what started as a 'portability Directive' ended up as a Directive on minimum requirements. The thorny issue of transferring an actuarially fair value of pension rights from one Member State to the other was left undecided, as was the possibility of cross-border membership and the effect of the still existing 'waiting plus vesting' periods for highly mobile workers. The initial proposal met with strong opposition precisely because of the uneven impact that the provisions on portability would have had on different schemes. In particular, by excluding the

40 *Ibidem*, Article 4.
41 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, hereinafter '2007 Proposal'.
42 2007 Proposal, Article 4(d).
43 *Ibidem*, Article 5(1).
44 Directive 2014/50, Article 4(1)(a).
45 *Ibidem*, Articles 4(1)(c) and 5.

transfer for unfunded schemes, the proposals would have entailed the risk of a unidirectional flow of capital away from the countries characterised by funded schemes.[46] The question of the cost of portability also played a role in the opposition to the proposal.[47]

Beyond the actual content summarised above, a further element differentiates the proposals. This is the choice of the legal basis operated by the Commission, an element which is potentially relevant in the context of the present article. So, with the final (2013) proposal, the legal basis was changed from Article 48 TFEU, dealing with the coordination of social security, to Article 46 which, in conjunction with Article 45, covers the broader scope of free movement of workers.

As highlighted by O'Leary[48] (writing about the coordination of social security) there is a potential tension between rights and principles stemming from the Treaties and the detailed secondary legislation adopted to implement these same rights. This issue is explored in Section 3.

2.2 A limited right to information

A more specific (but fundamental) topic in the field of occupational pensions is that of information for affiliated workers.[49] Once again, different regimes across Europe are characterised by considerable diversity in terms of the forms that this information might take.[50] As such, it is not surprising that Directive 2014/50 only devotes one Article to the information for both active and dormant members.[51] Reflecting Recital 25 of the Directive, the closing paragraph of Article 6 states that: 'The obligations under this Article shall be without prejudice to and shall be in addition to the obligations of the institutions for occupational retirement provision under Article 11 of

46 Pension providers from The Netherlands were particularly concerned by this risk, so much so that the Dutch government actually threatened to veto the proposal. See Mabbett (2009: 787).

47 See for instance the press statement by the European Federation for Retirement Provision of 20 October 2005, available at: https://www.eerstekamer.nl/eu/documenteu/persbericht_efrp_en/f=/vh6fn2qw94uz.pdf .

48 O'Leary, note 15 above: 545.

49 Or their representatives.

50 One should not forget that, beyond the differences *between* Member States, a number of different methods for the provision of information can co-exist in the same Member State.

51 The Article also deals with the provision of information in the case of survivor's benefits, which we will not cover.

Directive 2003/41/EC'.[52] Thus, an intertextual reading of the instruments is necessary in order to obtain the whole picture of information rights.

As regards the content, Directive 2003/41 (Article 11) covers different types of information. On the one hand, it deals with general aspects, such as annual accounts and annual reports, and investment policy principles of the scheme. On the other, more specific aspects are also covered, such as exits and options for payment. Finally, the same Article provides for the rights to information of members[53] that are the focus of our attention in this context. An Institution for Occupational Retirement Provision (IORP) must hence inform the member of the level of acquired rights in case of cessation of employment. They must also provide information about the possibilities for transfer of acquired rights to another institution.

In the framework of Directive 2014/50, obligations concerning information focus on the consequences of mobility, both for active[54] and dormant members (Article 6). For the former, the aim of the Directive is to provide them with information concerning the impact of cessation of employment on their pension rights under the occupational scheme. This covers acquired rights, conditions for acquisition, treatment of dormant rights and methods for the assessment of vested rights.[55] In the likely scenario of the absence of a possibility for portability, an active member will probably become a dormant one after his or her mobility. He or she will then be entitled to information about dormant rights, covering their value or assessment as well as their future treatment.

Obligations stemming from Directive 2014/50 will then complement those established by Directive 2003/41. In the context of mobility, this entails a substantial increase in the information

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52 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 (so-called 'IORP Directive').

53 In the case of a defined benefits (DB) scheme, the information about the projected level which should be attained by the benefits. In the case of defined contributions (DC) schemes information covers eventual options of allocation (together with a description of risks and costs associated with every option).

54 ' Workers whose current employment relationship entitles them or is likely to entitle them, after fulfilling any acquisition conditions, to a supplementary pension in accordance with the provisions of a supplementary pension scheme', Article 3(c) of Directive 2014/50.

55 The Article also provides that '[w]here the scheme allows early access to vested pension rights through the payment of a capital sum, the information provided shall also include a written statement that the member should consider taking advice on investing that capital sum for retirement provision'.

content. That said, the actual impact on the workers' protection should be assessed in light of the methods for delivering this information. In this sense, Article 6 proposes a narrow conception of information.[56] Multiple elements highlight the limits and the lack of ambition of the Directive on this point.

On the one hand, it is regrettable that, in formulating Article 6, the European legislator opted for the communication of information 'upon request'.[57] This characteristic is particularly problematic in the context of the communication of the value of dormant rights (or the assessment thereof). In practice, there is no obstacle hindering the automatic provision of yearly information to dormant members. Similarly, automatic information could also have been established for active members. In the case of externalised regimes, employers could have been given an obligation to signal the cessation of the employment relationship to the managing institution, in order to trigger the transmission of the necessary information (on the effects of the cessation and the treatment of dormant rights) to the member. The necessity of a specific request by the worker could have been limited to those instances where the worker requires this information *before* the actual cessation of employment takes place.

On the other hand, paragraph 3 of Article 6 only requires that '[i]nformation shall be provided clearly, in writing, and within a reasonable period of time'. In terms of the 'quality' of the information, the degree of detail seems more limited than that provided by Directive 2003/41, which mandates the provision of 'detailed and substantial information'.[58] Thus, this weaker provision does not seem to guarantee information sufficient for the member to have a clear and complete picture of his or her situation with respect to the pension regime. By referring to Article 38 of the proposal for a so-called IORP II Directive,[59] the legislator might have required information to be provided 'written in a clear manner, using clear, succinct and comprehensible language, avoiding the use of jargon and avoiding technical terms where everyday words can be

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56 It is also worth highlighting the absence of precision concerning the subject of the obligation of providing the information. Member States are themselves called to ensure that the information can actually be obtained. Each transposition will then have to adapt to the specific national situation in identifying the entity concerned.

57 This choice mirrors the one adopted in the IORP Directive, Article 11(4).

58 Directive 2003/41, Article 11(4).

59 Which provides the principles concerning provision of information. See proposal for a Directive on the activities and supervision of institutions for occupational retirement provision (recast), COM(2014) 167 final – 2014/0091 (COD).

used instead'.[60] The extent of 'reasonable' delay for the provision of information is also left undecided, allowing Member States to set a ceiling (once a year) for the provision of information.

Thus, while the actual content of the information is adapted to the needs of the mobile worker, the method for delivering this information remains far from satisfactory.[61] The necessity of a specific request clearly clashes with the complexity of pension regimes and with the potential impact of the mobility itself (hence, the cessation of employment) on pension rights. In light of this, it is only on request that the given worker will obtain the necessary information to assess such an impact. Directive 2014/50 seems, therefore, to depict the profile of a worker who is already aware of the importance of considering the impact of mobility on his or her pension rights. Highly mobile workers engaged in international careers are probably those who stand to profit from this Directive, insofar as they are already used to assessing the pros and cons of every mobility decision. Moreover, these same workers should *prima facie* be able to profit from the information covered by the requirements set by the Directive, by exercising individual choices to compensate eventual shortfalls caused by the treatment, for instance, of dormant rights. All in all, the information requirements set by Directive 2014/50 seem to point to a rather 'golden' (or 'high-skilled') kind of mobility.

3 WORKERS' MOBILITY, OCCUPATIONAL PENSIONS AND THE COURT

In looking at the legal basis of Directive 2014/50, we argue that the Court of Justice is not bound to consider the free movement of workers as sufficiently guaranteed by the provisions of the Directive. The CJEU has sometimes provided an interpretation of secondary legislation heavily inspired by the legal basis of such legislation.[62] Moreover, secondary legislation is always subject to a 'constitutionally oriented' interpretation in light of primary law, which can sometimes border

60 The recast proposal is in fact extremely precise. It specifies that information shall be 'presented in a way that is easy to read, using characters of readable size'.

61 Member Statas are, however, free to adopt or maintain more favourable provisions dealing with the right to information. The Directive also feature a non-regression clause which states that the transposition the Directive shall not be used as a reason for reducing existing rights (including rights to information).

62 For example, in the context of the Posting of Workers Directive (Directive 96/71) with the controversial decisions C-341/05, 18 December 2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809. and C-346/06, 3 April 2008, *Dirk Rüffert v Land Niedersachsen*, ECLI:EU:C:2008:189. See Davies (2008).

on the *contra legem.*[63] This is even more relevant in the context of the free movement of workers since it has been repeatedly found to have direct effect both in vertical and horizontal situations.[64]

The Court of Justice has developed its case law on the basis of situations where workers' mobility had an impact, whether direct or indirect, on his or her occupational pension. Some of these decisions arose in connection with the situation of a frontier worker, which is particularly relevant both in terms of the number of workers potentially concerned and for its connection with fiscal issues.

3.1 Frontier workers

Frontier workers[65] represent a specific case of intra-European mobility. Their situation has important implications both in terms of social security and fiscal considerations. Frontier workers are, in fact, subject to the fiscal regime of the Member State in which they reside. This can have an impact on retirement schemes that take into account the fiscal situation of the workers, amounting to an indirect discrimination. The Court of Justice has been confronted with these kinds of situations, which have been decided on the basis of rules dealing with workers' mobility in the EU.[66]

In *Commission v Germany* (2009)[67] the Court had to consider the German *Riester* legislation. More specifically, it had to decide on the incentives to instruments for private pensions, as well as for the acquisition of a house. These incentives were, however, limited to persons who were completely covered by the German fiscal system. Such a condition had the effect of excluding frontier workers working in Germany but residing in a neighbouring Member State. The CJEU

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63 See the interpretation of the Directive on Transfer of Undertakings (Directive 2001/23/EC) in light of the freedom to conduct a business protected by the EU Charter of Fundamental Rights (Article 16), in case C-426/11, 18 July 2013, *Alemo Herron*, ECLI:EU:C:2013:521. A similar approach has also been proposed by A.G. Wahl in case C-201/15, *AGET Iraklis* (though the Court ultimately did not follow it), concerning the Collective Redundancies Directive (Directive 98/59).

64 See Case 41-74, 4 December 1974, *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133, and C-281/98, 6 June 2000, *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, ECLI:EU:C:2000:296. On this point see, in general, Barnard, note 12 above: 157.

65 Workers who pursue their occupation in the territory of a Member State, while residing in the territory of another Member State.

66 Notably Article 45 TFUE and Regulation 1612/68, replaced by Regulation 492/2011.

67 Court of Justice, Case C□269/07, 10 September 2009, *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:2009:527.

found these measures to be in breach of the free movement of workers enshrined in the EU Treaties, as 'mobile' workers were treated less favourably on the basis of their mobility.[68] This followed the approach proposed by the Commission in the infringement procedure.[69] Moreover, the Court condemned the German law as it denied 'cross-border workers the right to use the subsidised capital for the acquisition or construction of an owner-occupied dwelling unless it was situated in Germany',[70] in light of the fact that frontier workers would be more frequently interested in acquiring such a property in the Member State of their residence.

This decision provides a few interesting points for analysis. First, fiscal incentives for complementary retirement regimes cannot ignore the situation of the specific worker, in particular the effects stemming from the worker's mobility. Fiscal incentives must therefore be considered together with the eventual awarding of social advantages.[71] Second, as we saw before, the action of the EU Commission can have an important impact on occupational pensions through indirect avenues. Thus, the mobility of frontier workers warrants the scrutiny of the Commission because of its transnational aspect, a scrutiny which then expands to fiscal measures.

In fact, the situation of frontier workers is also specific in that they might well spend their entire career in a situation of 'mobility' without further changing Member States. As such, conditions for the acquisition of pension rights in the country in which they carry out their work is of paramount importance for their future retirement. At the same time, frontier workers are most likely to receive their pension in a transnational situation, which again brings under the spotlight the conditions for the (transnational) payment of retirement benefits.

A second important decision must be mentioned in this context, notably the *Erny* decision of 2012.[72] The case was brought by Mr. Erny, a French citizen residing in France and working in Germany, against his employer, the Daimler group. It dealt with the method for calculating a salary integration in the framework of a scheme of part-time work prior to retirement set up by a company

68 *Commission v Germany* (2009), para. 116.
69 *Ibidem*, para. 70.
70 *Ibidem*, para. 85.
71 Coursier (2009), Lhernould (2006: 551).
72 Court of Justice, C-172/11, 28 June 2012, *Georges Erny v Daimler AG – Werk Wörth*, ECLI:EU:C:2012:399.

agreement. In particular, the calculation took into account the German income tax rate, which was lower than the French one, resulting in a lower amount (after tax) for the French resident.[73]

The decision is interesting as it brings retirement schemes established by collective agreement inside the scope of Article 45 TFUE,[74] while also applying the principle of equal treatment for mobile workers after taxes. Social actors are therefore required, in the same vein as public authorities, to respect of the non-discrimination principle, so that comparable situations are not treated differently and different situations are not treated in the same way (as in the case of Mr. Erny). Dispositions of a collective agreement breaching such a principle, '[i]n accordance with Article 7(4) of Regulation No 1612/68', are null and void.[75] Hence, collective agreements (whether at company or sectoral level) establishing occupational retirement plans must take into account the situation of mobile workers in general, and frontier workers in particular, in order to avoid treating them in a less favourable way.

A combined reading of these decisions is necessary. The conclusion is that the Court of Justice clearly approaches workers' mobility in the field of occupational pensions by applying the principles of non-discrimination and of equal treatment of mobile workers, considering their social and fiscal aspects. However, one should keep in mind that both decisions dealt with frontier workers, whose situation remains specific, especially from the point of view of fiscal rules.

3.2 Free movement of workers and the Casteels case

Turning to the broader topic of workers' mobility, the decision delivered by the Court of Justice in the *Casteels* case represents the necessary starting point for our analysis.[76]

Mr. Casteels worked for British Airways since 1974, moving between different countries during his career (notably Belgium, France, Germany, and Belgium once again). At the point of retirement, British Airways refused[77] to take into account, for the purposes of awarding Mr.

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73 *Erny*, para. 14.

74 On the basis of the well-known *Bosman* line of cases. See Court of Justice, C-415/93, 15 December 1995, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman*, ECLI:EU:C:1995:463.

75 *Ibidem*, para. 52.

76 For a more detailed analysis, see Bollen-Vanderboorn and Stevens (2012).

77 A stance eliciting *per se* some bewilderment from the Commentators, see Ellison (2012).

Casteels the pension benefits that stemmed from the company's supplementary pension, the time during which he had been working in Germany. This was on the basis that the period of employment in Germany (slightly less than 3 years) was short of the vesting period.[78] For this period, Mr. Casteels would only be able to claim the reimbursement of his own contributions. The Labour Court of Brussels, which had to decide on the action brought by Mr. Casteels, stayed the proceedings and asked whether the decision of British Airways (and the underlying collective agreement upon which the employer's decision was based) was compatible with Articles 39 and 42 EC (now Articles 45 and 48 TFEU).

The Court of Justice did not consider the issue from the point of view of Article 48 TFEU, finding that this Article could not be given direct effect because of its lack of precision as to the extent of the content of the protection.[79] Instead, it analysed the case exclusively from the point of view of the free movement of workers (Article 45 TFEU).

The Court hence assessed the application of the vesting period provided by the German collective agreement through its standard approach of restriction/justification.

The measure was found to be a restriction to the free movement of workers. This was on the basis of the case law covering non-discriminatory restrictions.[80] The existence of such a restriction was also confirmed by the 'financial losses' as well as by the 'adverse effect on [the mobile workers'] supplementary pension rights' stemming from the application of the vesting period.[81] The Court then went on to look for a justification for such a restriction. In this process, the objective of retaining staff loyalty put forward by British Airways was discarded, as Mr. Casteels had in fact been employed by the same employer after exercising his right to free movement.[82] The decision of the Court was thus that the years of service completed in Germany by Mr. Casteels had to be included in calculating the benefits of his supplementary pension.[83]

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78 *Casteels*, paras 6-10.
79 *Casteels*, paras 14-18.
80 'Article 45 TFEU militates against any measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by European Union nationals of the fundamental freedoms guaranteed by the Treaty', *ibidem*, para 22 and cited case law.
81 *Ibidem*, para 29.
82 *Ibidem*, para 32.
83 *Ibidem*, para 36.

The obvious question stemming from this decision deals with its applicability beyond the specificities of Mr. Casteels' situation.[84]. This is particularly relevant for two different sets of reasons. The first one is rather evident: Directive 2014/50 is relatively recent and not retroactive, hence leaving all past claims to be resolved on the basis of the provisions of free movement of workers. Second, as we saw above, the same Directive does not cover several areas of potential litigation (transferability and cross-border membership, for instance) and leaves in place other possible obstacles to free movement (such as waiting and vesting periods of up to 3 years).

The applicability to a broader set of situations stems from several elements of the decision. In the first place, the fact that the Court reached its verdict on the basis of primary law, so that a contested measure just needed to be liable to hinder free movement of workers (even in a non-discriminatory way) to be scrutinised. Moreover, the measure whose application sparked the *Casteels* case is a rather common one, namely a vesting period. Such measures are in fact still allowed[85] under the new Directive. It is also worth stressing that, in the context of first pillar pensions, the Court has considered that the simple loss of part of an individual's pension rights can hinder the free movement of workers.[86] Thus, once the breach (hence, the restriction) has been identified, its justification might prove relatively complicated. This is because the Court of Justice consistently refuses justifications based on economic arguments.[87] Hence, justifications based on the costs of allowing (for instance) aggregation of periods and/or transfer of contributions would not be accepted by the Court of Justice.

At the same time, it is important to keep in mind the elements which militate in favour of a narrow reading of *Casteels*.

The first important element comes straight from the wording of the decision. The CJEU explicitly refers to 'the years of service completed by a worker *for the same employer* in establishments of

84 Baugniet, note 33 above: 307 and ff. has thoroughly analysed several hypothetical scenarios in his doctoral dissertation.

85 See the summary of Directive 2014/50 above.

86 Court of Justice, C-187/15, 13 July 2016, *Joachim Pöpperl v Land Nordrhein-Westfalen*, ECLI:EU:C:2016:550, para. 41.

87 For example, see *Erny*, para. 48.

that employer situated in different Member States' [88] (emphasis added). This very specific circumstance has further implications. On the one hand, it dictates the choice of the comparator for the analysis of the Court. Indeed, the situation of Mr. Casteels is compared with that of another British Airways worker who had not exercised his or her right to free movement,[89] and not, as the employer argued, with a worker of British Airways who changed employer while remaining in Germany.[90] Furthermore, the continued relationship with the same employer also doomed to failure the justification put forward by British Airways based on the objective of ensuring staff loyalty.[91] Finally, in *Casteels* the Court of Justice considered the consent provided by Mr. Casteels to its transfer to another establishment of the *same employer* located in another Member State as falling outside the definition of voluntary departure.[92] It seems likely that moving to a different Member State in order to take up work for a different employer would instead fall into such a definition.

A second *caveat* comes from the role of the *Graf* exception.[93] In the *Graf* case the Court established a so-called *de minimis* test,[94] by ruling that an event might be 'too uncertain and indirect a possibility […] to be capable of being regarded as liable to hinder freedom of movement for workers'.[95] As Barnard puts it: 'non-discriminatory measures which do not substantially hinder access to the market fall outside Article 45 TFEU'.[96] This was brought up by British Airways in *Casteels* in order to shield the application of the vesting period from the effects of the free movement of workers. Though the A.G. devoted a few paragraphs to answering (negatively) this exception.[97] the Court decided not to mention it in its decision. It is interesting to consider the interaction of such an exception with Directive 2014/50. The new legislation could in fact play a role in convincing the Court[98] that periods of employment falling short of the maximum 'vesting

88 *Casteels*, para 36. This point has also been highlighted by Bollen-vanderboorn and Stevens, note 76 above: 77.
89 *Casteels*, para. 23.
90 See the Opinion of A.G. Kokott in *Casteels*, paras 47-51.
91 *Casteels*, para. 32.
92 *Ibidem*, para. 35.
93 C-190/98, *Graf*, 27 January 2000.
94 See Syrpis (2007: 110).
95 *Graf*, para. 25.
96 Barnard, note 12 above: 224).
97 Opinion of A.G. Kokott in *Casteels*, paras 57-60.
98 Thanks also to the persuasive power of its *democratic imprimatur*, as highlighted by Kilpatrick (2012: 7).

plus waiting' period allowed by the said Directive could indeed be presumed as 'too uncertain and indirect' under *Graf*.

3.3 The concentration road to portability?

It has been argued that Directive 2014/50 does not offer much added value with respect to the case law of the CJEU, and specifically with respect to the *Casteels* decision.[99] This should be nuanced in light of the multiple roles that legislative intervention can play even while codifying the already existing case law[100] in terms of providing structure, detail, certainty, adaptation and consolidation. That said, it remains rather striking to notice that the protection granted by *Casteels* to mobile workers goes, to some extent, beyond that of Directive 2014/50, as analysed above.

Apart from the issues addressed in the previous Section, it is worth highlighting a second question arising from this situation. In doing so we leave aside for a moment the applicability of *Casteels* in a broader set of situations in order to focus on the wording of the decision.

On this basis one might argue that, in order to enjoy the right to free movement to its full extent, a worker should work for a multinational company. Indeed, going much beyond the minimum rights protected by the Directive (which was not applicable *ratione temporis*) Mr. Casteels was *de facto* able to aggregate employment periods spent in different Member States in the context of the pension scheme organised by his employer.[101] Such a solution is actually closer to the much more developed coordination system for statutory pensions than to the one established by the Directive on supplementary pension rights.

This conclusion is not particularly striking if one considers the longstanding 'alliance' between EU integration and multinational companies. These have often played the role of private actors in the decentralised enforcement of EU law, and hence in its judicial construction.[102]

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99 Ellison, note 77 above: 327 points out that 'more interestingly, from a legal viewpoint, the decisions seem to make almost redundant the need for a European Directive on cross-border vesting drafts for which have been circulating the Commission and Parliament for several years'.

100 See Kilpatrick, note 98 above: 6-7.

101 Baugniet, note 33 above: 306.

102 See Scharpf (2010: 221), Kelemen (2011: 27-28).

This 'concentration road to portability' can also be spotted in the attempts at creating an additional regime for pan-European pension providers.[103] Such a possibility was explored in the public consultation launched by EIOPA,[104] and received a mixed reaction.[105] However, the approach remains alive. This can be testified by the creation of the RESAVER instrument, a pan-European fund addressed to a highly mobile workforce (namely, academic researchers).[106]

4 CONCLUSIONS

A Directive establishing minimum requirements – as opposed to one providing for portability – seems to represent the most advanced compromise possible at European level at this time. Also, the ambition of the EU to act in the field of occupational pensions on the basis of a 'social' rationale seems very limited. However, the consequences of workers' mobility on occupational pensions are very real. Both the Directive, lack of ambition notwithstanding, and the case law of the Court of Justice are proof of this situation.

In conclusion, we wish to highlight three main points that are worth keeping in mind when looking at the future of the EU legal framework for occupational pensions.

First of all, observers and stakeholders should keep an eye on the discrepancies (and hence, the potential conflict) between Directive 2014/50 and the case law of the Court of Justice, embodied in the *Casteels* decision. On the one hand, the new piece of legislation might have a dampening effect on the application of free movement provisions in the field of occupational pensions. Essentially, the Directive would become the yardstick upon which to measure the compatibility with the Treaties. This kind of dynamic already exists in the field of occupational pensions, with legislative intervention to exclude non-statutory scheme from the coordination regime set up for social security,[107] an approach promptly upheld by the Court.

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103 So-called '29th' or '2nd regime'; see EIOPA, *Final Report on Public Consultation No. CP-15/006 on the creation of a standardised Pan-European Personal Pension product (PEPP)*, April 2016.

104 European Insurance and Occupational Pensions Authority, see https://eiopa.europa.eu/about-eiopa .

105 See Investment and Pensions Europe, *EIOPA finalises vision on pan-European personal pensions*, 3 February 2016, available at: https://www.ipe.com/pensions/pensions/eiopa-finalises-vision-on-pan-european-personal-pensions/10011758.fullarticle .

106 On the RESAVER instrument, see Degoli (2018), in this Issue.

107 See *supra* Section 2 and note n° 33.

On the other hand, the CJEU might still be called to decide on one of the areas left outside the scope of Directive 2014/50, such as waiting/vesting periods of less than three years or a request for the cross-border transfer of the value of vested rights. A *Barber*-like moment,[108] with the CJEU delivering a ground-breaking decision on one of these aspects on the basis of the free movement of workers might rekindle the ambitions of the European legislator. This mutually reinforcing loop between negative and positive integration would confirm a recurring characteristic of the evolution of EU integration.[109] Moreover, the exclusion of retroactivity for Directive 2014/50 (another necessary compromise on the way to its adoption) will leave the door open for further litigation to be decided exclusively on the basis of primary law provisions for many years to come. Hence, the case law of the CJEU on topic here at stake might yet feed on this exclusion, with potentially far reaching economic implications for both workers and pension providers.

Our second point stems from the first scenario sketched above, that is, from the scenario where Directive 2014/50 effectively represents the framework for the issue at stake. The decision in *Casteels* would thus be interpreted as a narrow exception to this regime, on the basis, we argue, of the identity of the employer. Such a scenario would provide an incentive for highly mobile workers to be employed by multinational companies, in order to enjoy the full extent of mobility in the field of their occupational pensions. This could be coupled with the creation of pan-European schemes, allowing mobility for workers moving between different employers (established in different Member States) affiliated to the same scheme. Such an 'integration through concentration' would hence sidestep the difficulties of finding a compromise at EU level that were painfully highlighted by the history of Directive 2014/50. Apart from the uncertainty of such a dynamic, made apparent by some answers to the EIOPA consultation mentioned above,[110] this would entail another pernicious effect in the form of job lock. An employee enjoying (close to) full portability thanks to the fact of being employed by the same multinational employer or of being employed by employers contributing to the same pan-European scheme would find it extremely costly to move away from such a situation.

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108 See the case C-262/88, 17 May 1990, *Barber v Guardian Royal Exchange Assurance Group*, ECLI:EU:C:1990:209.

109 See Majone (2005: 156-157.)

110 See *supr*a Section 3.3.

The present configuration of the legislation – and this is our final point – also (implicitly) proposes a rather specific 'profile' of a mobile worker. In particular, the Directive seems more likely to offer useful instruments to safeguard pension rights of 'engaged members', i.e. highly-mobile *and* highly-skilled workers, as we highlighted while dealing with the provision of information in Section 2.2. In this sense, it is remarkable that just a year after the adoption of the Directive, EIOPA has identified the automatic delivery of information as 'good practice' on individual transfers,[111] whereas the Directive only requires provision of information *on request* of the leaving member. All in all, though the Directive represents a step forward in terms of minimum harmonisation in the field of occupational pensions,[112] its role in promoting workers' mobility in the EU will probably be very limited.

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111 See EIOPA, *Final Report on Good Practices on individual transfers of occupational pension rights*, 2 July 2015 at 24.

112 While also having a significant impact on the functions of occupational pensions in several Member States. See Guardiancich (2016: 1316).

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