

L'EUROPE

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Update on ...

The European semester: A new monitoring cycle from March to July

Even more than with the Green Paper, the new European economic governance initiated in January 2011 allows a European doctrine to be expressed in the pension area.

Starting in 2011, with the “European semester”, as part of the European economic governance adopted by the Finance Ministers of the European Union on September 7, 2010, the Member States will transmit to European authorities their programmes for stability (or convergence) as well as their national reform programmes by **end April** and not in December as before.

As part of a new monitoring cycle, the Commission will publish an Annual Growth Survey (AGS), starting in **January 2011** (see p2).

Thus a new calendar: the European Council lists economic challenges facing the EU **each year** and determines strategic policy orientations.

Taking this into account, the Member States submit medium term budget strategies along with stability and convergence programmes. They also outline national reform programmes, indicating measures to be taken to strengthen policies in areas such as employment and social insertion. All of the programmes are submitted simultaneously in **April**.

In **July** of each year, in function of programmes submitted in April, the European Council and the ECOFIN Council (Economic and Financial Ministers) will make their assessments known before the Member States finalise their budgets for the following year.

The “European semester” represents one of the first initiatives of the working group of European President Herman Van Rompuy on EU economic governance. The Council has described it as an

instrument of budgetary discipline and as part of the European 2020 strategy. Olli Rehn, the Commissioner for Economic and Monetary Affairs has qualified the “European semester” as “a first step towards stabilising public finances.”

In France, in compliance with article 14 of the December 28, 2010 law for public finance programming, the Government will present a project for a stability programme to Parliament for debate and vote at least two weeks before transmitting it to the European Commission.

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GREEN PAPER ON PENSIONS

A white paper and a revision of the IORP directive announced for end 2011

On March 7, 2011, the European Commission published a report based on consultations for the Green Paper for "Adequate, Viable and Safe Pension Systems in Europe" (*see Europe en Bref 2/2010*) and announced a White Paper on Pensions for the third quarter of 2011.

A revision of the 2003 Directive of 2003 on supervision of institutions for occupational retirement provisions (IORP) will be the Commission's first initiative to clarify legal uncertainties concerning cross border activities of IORPs.

The question of applying the provisions of Solvency II, especially the quantitative requirements has been posed. The European Parliament thinks that a solvency scheme for IORPs should take into account their particular nature (i.e. legal conditions, length of engagements, etc).

In the Green Paper of July 2010, the Commission brought up 14 questions concerning the key challenges for future pensions, especially the role of Europe in supporting the efforts of Member States in making pensions "adequate, viable and safe".

A resolution of the European Parliament was adopted and more than 1,700 entities or persons voiced an interest (*see box*).

According to the Commission, the "holistic" approach was received positively. Most of the responses estimated that the framework for action of the European Union in retirement matters should remain the Open Method of Coordination.

The Stability and Growth Pact appeared as the main instrument for a European policy on pensions even though everyone insisted on the fact that competence in the area remains in the hands of the States.

The key elements cited by the Commission:

- A multi-pillar approach with prefinanced elements appears preferred all the while respecting the constraints of the Stability Pact; especially those concerning fiscal advantages linked to private pension schemes.
- The principle of postponing the effective age of retirement is linked to the capacity of the

labour market for maintaining older workers in their jobs and hiring younger generations earlier.

- The portability of pensions is widely understood as safeguarding rights, with transferability of rights being rejected almost unanimously. Concerning this topic, setting up a European "tracking service" for recovering pension rights was approved massively.
- The standardisation of rules for supervision applicable to private pensions no matter who the operator or scheme had a mixed reception, rather badly by the representatives of pension fund companies and rather well by those of potential beneficiaries (workers, pensioners, women and young people) and insurance firms.

In this respect, the distinct character of the label "pension" defined according to determined criteria (biometric risk, security standards and elements of solidarity) was defended.

Among the 1,700 reactions, some 350 came from public bodies (governments and national parliaments) and private entities (representatives of unions, employers and the pension industry). Also to be noted were more than 1,000 responses from British pensioners residing in Canada, furious over exclusion from adjustments to their pensions. It should be noted that Britain has restricted its interpretation of measures for free movement of persons to those living within the Community.

ECONOMIC GOVERNANCE

The first annual growth survey targeting budgetary stability

While the Commission carries on consultations for the Green Paper on Pensions it is also sending a clear message to the Member States in its yearly growth analysis that aims to accelerate stabilization of public finances and encourage reforms, especially in the area of pensions.

The first annual growth survey, issued in the form of a communication of January 10, 2011, suggested 10 initiatives for adoption by the European Council and served as a basis for the Member States to submit in mid-April their national commitments within the context of their stability and convergence programmes (*see Update on... p1*).

In a communication of January 10, 2011, called "Advancing towards a global response to the crisis" the Commission expressed its doctrine concerning reforms to be taken:

- Pension system reform: *“those Member States who have not yet raised the retirement age, linking it to life expectancy, should do so.”... “They must give priority to reducing early retirement systems”... “encourage development of supplementary private savings in order to increase pensioners revenues”*. Moreover, the Commission will re-examine the directive concerning pension funds and submit new measures within the context of a follow-up to the 2010 Green Paper.
- Review unemployment benefits to ensure they provide incentives to find jobs.: *“the Member States should... compensate those unemployed who return to work or encourage them to pursue an independent activity”... “guarantee the financial appeal of work by making the level of taxes on salaries coherent”... “adjust the system of unemployment insurance to economic cycles by reinforcing protection in case of economic downturn”*.
- Reconcile security and flexibility: the Member States are asked to *“reduce over protection of workers benefiting from permanent contracts and offer protection to those who have been excluded from or live on the fringes of the work force”*.
- Remove obstacles to cross border services especially those on line: *“the Member States should apply fully the directive on services”, “it is necessary to progress in the area of taxation to put an end to tax treatments that penalize cross border trade and investment”*.

☞ Annual review of expansion – progress in the European Union's share of the global response to the crisis – 12.01.2011 COM (2011) 11 final

Stability programmes

Introduced by the Stability and Growth Pact as a means for multilateral surveillance of economic policies, the stability programmes (or convergence programme for non-Member States of the Euro-zone) have been in place since 1999 and project the medium-term state of public finances.

These stability programmes are based on article 121 of the Treaty on the Functioning of the European Union (TFEU) relative to economic policy coordination and Regulation n°1466/97 of July 7, 1997 relative to reinforcement of surveillance of budgetary positions as well as surveillance of economic policies.

Social security account administration makes up the aggregate examined in the light of European

norms on public finances and includes the AGIRC and ARRCO supplementary schemes.

The nomenclature applied is that established by Community Regulation n° 2223/96 of June 1996 relative to the European system of national and regional accounts within the Community that define “1995 European Accounting System”.

Social Security administrations constitute a sub-sector of public administrations (sub-sector 1314). The SSA sector includes the mandatory basic Social Security schemes, Health establishments, **the mandatory supplementary pension schemes** and the unemployment insurance scheme.

The SSA sector differs from that of social protection in that it does not include mutual associations or provident funds. The last two are considered as financial organisations (S12) and included in the sector of “insurance companies and pension funds” (S125).

FINANCIAL SERVICES

The new European Insurance and Occupational Pensions Authority (EIOPA) establishes two interest groups

The new European Authority Insurance and Occupation Pensions Authority (EIOPA) (*see Europe en Bref n°2/2010*) has established two interest groups, one for the insurance industry and a second for occupational pensions.

These two consulting committees have replaced the consulting panel of the former CEIOPS and are intended to facilitate setting up technical working groups starting in the 2nd quarter of 2011.

The consulting group for the pension industry is made up of representatives of the industry, of beneficiaries and consumers and of the Social Partners as well as university experts from several Member States (Régis de Laroullière, Henri Lourdelle and Bruno Gabellieri have been selected by the EIOPA for France).

The EIOPA (European Insurance and Occupational Pensions Authority) is located in Frankfurt and was set-up in 2011 as part of an overhaul of financial supervision. It exercises regulatory powers. (*see Europe en Bref n°1/2010*)

COMPETITION

The Court of Justice of the European Union (CJEU) judges compulsory affiliation to AG2R legal.

A judgment of March 3, 2011 in the case of AG2R *Prévoyance* confirms the conclusions of the Advocate General (*see Europe en Bref n°2/2010*) in validating a collective agreement for compulsory membership in a supplementary healthcare scheme for all of the undertakings within a sector, with no possibility of exemption. The reasoning leading to the decision follows that of a European judge already expressed (notably in the judgments *Albany*, *Brentjens*, *Drijvende Bokken* of September 21, 1999) and confirms the exclusive right to manage a scheme offering an enhanced degree of solidarity for an organisation **qualified as an undertaking providing a service of general economic interest**.

It is noted that **the national jurisdiction of referral is nevertheless invited by the Community judge to verify the circumstances in which AG2R was designated** and the negotiating margin allotted to the organisation. It remains to be determined if competition was organised among insurers to confer what can be qualified in these conditions as an exclusive right to manage a scheme for reimbursing healthcare expenses in the sense of the Treaty's economic rules (article 106 §2).

The points to be retained:

1. The endorsement at issue leading to making membership compulsory in a appointed organisation is the result of collective negotiation and can not be suspected of arrangements or concerted practices prohibited by the economic regulations of article 101 of the Treaty (ex article 81): **by its object and nature, the agreement contributes to improving the working conditions of employees** and allows them to cope with expenses linked to illness, work accidents or maternities that they could not meet on their own.
2. A fortiori, the public authorities do not eliminate the useful effect of the ban on arrangements covered by article 101 (ex-81) of the Treaty in making obligatory such an agreement.
3. AG2R *Prévoyance* having, in return for a single rate, the obligation of insuring all of the employees of the concerned enterprises, **independent of the risk**

incurred and without regard for the size of the enterprise or a worker's remuneration, fulfils a **social objective** and manages a scheme representing a **high level of solidarity**.

4. Nevertheless the social function and high level of solidarity displayed are not sufficient to exclude the **notion of undertaking**.
5. Despite the fact that AG2R *Prévoyance* was chosen **on the basis of financial and economic considerations from among other undertakings with whom it is in competition** in the market for provident services, the attribution of exclusivity is not contrary to Community law.
6. **Entitled to exclusivity**, AG2R *Prévoyance* cannot be accused of abusive practices under the meaning of article 106 §1 (ex-86) **unless it can be shown that it is clearly not up to satisfying demand and the services provided do not correspond to the needs of the enterprises concerned**.
7. It has been demonstrated on the other hand that **the constraints relative to the general economic interest** to which AG2R *Prévoyance* is subject renders the service provided less competitive and **justifies the exclusive rights granted with no possible exemption of membership**. According to the judge, the elimination of a transfer clause and the right to exclusivity could lead to a defection of members having an interest in joining another organisation for comparable guarantees at lower cost, while an increasing share of the "bad risks" will lead the appointed organisation to "*no longer accomplish its mission within acceptable economic conditions*".

☞ AG2R c/ *Beaudout Père et Fils SARL* March 3, 2011 Aff ; C-437/09

STATE AID

The European Commission considers as incompatible aid rules in favour of collective contracts

A decision of January 26, 2011 was notified by the Commission to France on the subject of **favourable tax treatments, qualifying them as State aid** in the sense of article 107 of the Treaty:

- On the one hand, tax exemptions for companies relevant to **activities linked to "solidarity and responsible" health insurance contracts** that benefit organisations providing

such contracts (mutual associations, provident institutions and insurance companies).

- On the other hand, tax deductions for endowments with equalisation provisions relating to **collective supplementary insurance contracts with designation clauses**.

In both cases, the anti-trust services of the European Commission have decided that they represent State aid. This is particularly the case of favourable tax treatment for contracts with designation clauses, which are considered as corresponding to an **economic advantage, and not compensation for a public service in the general economic interest**.

Under examination, the three conditions required by article 107 §2 of the Treaty to justify State aid are not met. Thus the condition for full transfer of the advantage to the consumer is not demonstrated.

As regarding collective agreements, the Commission estimated that the social character of the measure was not evident and above all, **“the high degree of market concentration in the hands of the provident institutions”** in the present context represented a “de facto” discrimination in their favour. In this respect, the competitive approach in appointing an insurance organisation was not judged effective by the Commission’s services.

In addition, for the Commission, the measure is **out of proportion** insofar as it doesn’t include group contracts covering the same risks outside appointment.

It must be emphasised that this decision is not considered in contradiction with jurisprudence of the CJEU that recently established (*AG2R c/ Beaudout p. 4*), in line with the *Albany* judgment that benefits provided within the context of this appointment by the Social Partners is a **service of general economic interest**.

Indeed, for the Commission, State aid in the form of **compensation for a public service in the sense of article 106 §2 of the Treaty** supposes that the tax savings enjoyed by the organisation are **strictly justified** by the additional cost of providing a public service, the latter not being fully demonstrated.

☞ Commission decision of 26.01.2011 concerning State aid n°c50/2007

MEN-WOMEN EQUALITY

The Court of Justice puts an end to separate rates effective December 21, 2012

The *Test Achats* judgment of March 1, 2011 calls for all insurance contracts, **including life insurance**, as of December 21, 2012 to strictly respect the principles of equality for men and women in matters of premiums and benefits.

The judge thus invalidated at the request of a Belgian consumer organisation a clause of Belgian law authorising Member States to make an exception to the principles of equality for men and women in goods and services when gender constitutes a **determining factor in the evaluation of risk on the basis of actuarial data and pertinent and precise statistics**.

For the judge, taking into account an inseparable and unalterable characteristic of the insured (such as gender or ethnic origins but not age) in the evaluation of a risk of illness or accident is incongruous and represents a fundamental discrimination contrary to the principles of the European Treaty.

The Advocate General who pleaded for the decision points out that the US Supreme Court came to the same conclusion concerning pension insurance in 1978.

Concerning **life expectancy**, the Court relied on a line of argument according to which economic and social elements as well as behavioural factors (such as sports or occupational activities, eating habits, addictions, etc.) are decisive in determining group profiles and are shared indiscriminately by men and women.

The Advocate General reminded that the *Neath* judgment of December 22, 1993 and the *Coloroll Pension Trustees* judgment of September 28, 1990, rendered in the wake of the *Barber* judgment of May 17, 1990, specified that the strict equality of remuneration of article 119 (now 157 of the European Treaty) applies solely to salary contributions to occupational pension schemes. The determination of employer contributions adjusted according to actuarial criteria was left aside.

☞ *Test-Achat judgment of March 1, 2011 – Aff C-236/09*

MOBILITY

The European Court sanctions obstacles to mobility linked to vesting delays

The *Casteels* judgment of March 10, 2011 concerns a British Airways employee who worked in various establishments of the company in different Member States, including three years in Germany. (see *Europe en Bref 2/2010*).

A member of the firm's supplementary scheme for three years, Mr. Casteels found himself confronted with a *vesting* delay for acquisition of pension rights in the Dusseldorf establishment's scheme that was governed by a collective agreement.

The Court confirmed that article 48 of the Treaty that establishes Community regulations for coordination couldn't be evoked by an individual as such. However, article 45 of the Treaty opposes any measure susceptible of hampering or making less attractive occupational mobility.

In the present case, the German collective agreement was judged *unfavourable to employee mobility in that it concerns an accepted transfer and not a voluntary departure*. The resulting prejudice in these conditions of a loss of supplementary pension rights is considered unjustifiable.

The European judge consequently invited the national judge to verify if the collective agreement in question *takes into account the years of service carried out for the same employer at various operating sites of the employer in the Union in virtue of the same overall work contract and if the employee was actually transferred*, the two conditions necessary for satisfying Mr. Casteels' demand.

Between *social security coordination* limited to legal social security systems (or made mandatory by law) and an extremely limited directive on preservation of rights in an occupational pension scheme, this ruling opens conditions, admittedly limited, for an aggregation of periods within conventional schemes subject to rules of duration of acquisition.

CROSS BORDER HEALTH CARE

Directive on patients rights for cross border care adopted

The European Parliament adopted the directive on cross border healthcare on January 19, 2011.

It takes into account, based on article 95 of the Treaty concerning the internal market,

jurisprudence resulting from the *Kohll* and *Decker* rulings of 1998 along with the *Smits* and *Peerbooms* and *Vanbraeckel* rulings of 2001, allowing *reimbursement for healthcare outside the State of membership on the basis of free provision of services* outside the scope of social security coordination.

The new text clarifies and outlines rules for reimbursement of healthcare received outside the State of membership and sets conditions under which States may require prior authorisation that limit the patient's range of choice.

The text excludes long term care (since discussions are underway in this area), organ transplants (due to the waiting lists and sizeable investments necessary in this area) and programmes for public vaccinations.

The principle is that the State of membership cannot require prior authorisation for reimbursement of health care costs except in limited cases:

- Care subject to planning necessities within the territory of the State,
- Care implying a hospital stay,
- Care resorting to highly specialised and costly infrastructures,
- Care provided by a contractor "*that may arouse fears due to the quality and reliability of the service*".

A patient may thus opt for care in another State either in virtue of the directive or in virtue of social security coordination but in any case the payment for expenses is limited to the actual cost of the treatment.

☞ *Directive relative to the application of rights of patients for cross border health care*

EUROPE 2020

Five main objectives

Entitled "*A strategy for intelligent, sustainable and inclusive growth*" the Europe 2020 strategy has five main objectives to guide the Member States in their national initiatives:

- *Raise the employment rate from 69% to 75%* of the population, particularly increasing the participation of *women*,
- Accentuate *research and development* so that cumulated public and private investment represent 3% of GDP,
- Reach the so-called "20/20/20" objectives in the area of *climate and energy*, "reducing Greenhouse gas emissions by 20% in comparison to 1990 levels, bring to 20% the share of renewable sources of energy in our

final energy consumption and move towards a 20% rise in energy efficiency”.

- Improve **education levels** with at least 40% of the population aged 30 to 34 with higher education diplomas or the equivalent and combat school dropouts by reducing their rate to less than 10%.
- Reduce to 20 million the number of persons confronting the risks of **poverty and exclusion**.

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