

Devetzi (Ed.)

# Minimum Income in Old Age

a legal comparison  
of selected European countries



SAKKOULAS PUBLICATIONS  
ATHENS - THESSALONIKI



**Minimum Income in Old Age**  
a legal comparison of selected European countries



**Devetzi (Ed.)**

**Minimum Income in Old Age**  
a legal comparison of selected European countries



**SAKKOULAS PUBLICATIONS**  
ATHENS - THESSALONIKI

2023



SAKKOULAS PUBLICATIONS S.A.  
ATHENS - THESSALONIKI

**Athens**

- 23, Ippokratous Str. - 106 79 Athens  
Tel.: (+30 210) 33.87.500, Fax: (+30 210) 33.90.075
- 29, K. Loukareos Str. - 11475 Athens  
Tel.: (+30 216) 1000.730

**Thessaloniki**

- 1, Fragon Str. - 546 26 Thessaloniki  
Tel.: (+30 2310) 535.381, Fax: (+30 2310) 546.812
- 42, Ethnikis Aminis Str. - 546 21 Thessaloniki  
Tel.: (+30 2310) 244.228, 9, Fax: (+30 2310) 244.230  
<http://www.sakkoulas.gr> • e-mail: [info@sakkoulas.gr](mailto:info@sakkoulas.gr)

*All rights reserved. No part of this publication may be reproduced, stored in retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior written permission of the publisher.*

*This publication is financed by the German Academic Exchange Service DAAD through funds from the Federal Foreign Office of Germany within the framework of the collaborative project "Social Security Coordination and Migration – Recent trends and developments through the comparative law lens: a German-Greek perspective."*

© 2023



ISBN: 978-960-648-794-1

## LIST OF CONTRIBUTORS

**Olga Angelopoulou** is a member of the Athens Bar Association since 1997 and a Mediator at the Organisation of Mediation and Arbitration since 2011. She has obtained her PhD with distinction from the Law School of the Athens University, with her doctoral thesis on the subject: "The obligatory character as a characteristic element of Social Insurance" (Ant. N. Sakkoulas, 2003). In 1998, she was a guest at the Max-Planck Institute of Foreign and International law in Munich. She has participated in numerous research groups in matters of social protection in Greece and abroad and has worked as a Lecturer at the Law School of the Athens University and at the Department of Social and Educational Policy of the Peloponnese University. She has written numerous articles and contributions in matters of social security law.

**Effrosyni Bakirtzi** is senior legal researcher and project officer at the European Centre of Expertise in the field of labour law at Goethe University in Frankfurt and lecturer in postgraduate programmes at the University of Applied Sciences in Fulda in Germany. Her work experience includes academic positions at the KU Leuven in Belgium supporting the work of the European Institute of Social Security (EISS) in the field of comparative social security law and at the University of Applied Sciences in Fulda as coordinator of a bilateral academic project on social security coordination and migration. She was a doctoral research fellow in the interdisciplinary doctoral research project on social rights at the University of Kassel and the University of Applied Sciences in Fulda in Germany.

**Stamatia Devetzi** is full Professor of Social Security Law at the University of Applied Sciences in Fulda, Germany. She studied law in Athens, Rome and Osnabrück, has a diploma in law from the Law Faculty of University of Athens (1994) and a PhD from Osnabrück University (1998). After working as a legal expert with the German Pensions Insurance Institution (1998-2003), in 2003 she became professor in Fulda. From 2011-2016 she was delegated as professor for Public Law and European Social Security Law at Osnabrück University, Faculty of Law. She has been active in teaching and research in the fields of Social Security, European Law and Law Compari-

son for over 20 years. She is member of the advisory board of FNA (Research Institute of the German Pensions Insurance).

**Thomas Erhag** is full Professor of Public Law at the School of Business, Economics and Law at Gothenburg University (Sweden). His research focuses on the relationship between EU internal market law and national welfare law. He is currently working as a judge at the Administrative Court of Gothenburg.

**Elias Felten** is a full Professor for Labour Law and Social Security Law at the Department for Labour and Economic Law at the Paris Lodron University of Salzburg (Austria). From 2017-2022 he was head of the Department of Labour Law and Social Security Law at the Johannes Kepler University of Linz. He received the *venia legendi* in the year 2015 and his doctorate of law in the year 2009. He is a member of the scientific advisory board of the Max-Planck-Institute for Social Law and Social Policy and of the European Institute for Social Security. With regard to the field of European Social Security Law he takes part in the EU project "Provision of legal expertise in the field of free movement of workers and social security coordination and dissemination of knowledge in this field – (MoveS)" as a national expert. His fields of expertise reach from national and European (especially collective) labour law to trade union rights, anti-discrimination law and Austrian social insurance law as well as to European social security law.

**Leszek Mitrus** is full Professor at the Chair of Labour Law and Social Policy at the Jagiellonian University in Kraków (Poland). He is the national expert of the European Labour Law Network. From September 2016 to March 2018, Mitrus was a member of the Commission for Codification of Labour Law in Poland. He has authored around 140 publications on Polish, European and international labour law and social security law. Among these publications are books on the free movement of workers, EU directives on employment contracts and the impact of European labour law on the Polish legal system. He is also the co-author of commentaries on the Treaty on the Functioning of the European Union, the Charter of Fundamental Rights of the European Union and the Polish Labour Code.

**Frans Pennings** is Professor of Labour Law and Social Security Law at the Utrecht University School of Law. His research and teaching focuses on labour law and social security law, with a special interest in international standards and European law. He has produced numerous publications on



these topics. Pennings was one of the editors of the *European Journal of Social Security*. He obtained an honorary doctorate from the Gothenburg University in 2014.

**María Salas Porras**, Doctor of Law, is full Professor at the Department of Labour Law and Social Security, University of Malaga, Spain, where she teaches graduate classes (Masters and PhD). Her research activity, which focuses primarily on migration, gender, public employment policies, social economy, European labour law and comparative labour law, has taken her to Brazil, Switzerland, Portugal, Malta, Italy, Bulgaria and Romania.

**Hans-Joachim Reinhard** has been a Research Fellow at the Max-Planck Institute for Social Law and Social Policy. Since 2000 he is also Head of the Commission for the Admission of Medical Practitioners to the Public Health System in Bavaria, and since 2010 Professor for Social and Private Law at the University of Fulda. He had been awarded the Heinrich-Lünendonck-Medaille and the Unterfränkischer Gedenkjahrpreis for his Ph.D. thesis. He was also awarded the Medal of Honour of the Association of Lawyers in Latin America for his merits concerning the scientific exchange between Europe and Latin America on Social Security Law.

**Eufrasia Sena** graduated in Law at University of Napoli "Federico II" (1997), where she obtained a PhD in "Law of economic and labour relations" (2002) and a Specialization in "Administrative Law and Administrative Science" (2003) too. Since 2005 she is researcher in Labour Law at the University of Napoli "Parthenope", where she teaches Labour Law and Social Security Law. She is also member of the Editorial Board of the journal "Il diritto del mercato del lavoro". She is the junior National Expert for Italy in the ICF-ECE Network supporting the EU Commission in the field of Labour Law. She is author of several publications about Labour law, Social security law and Trade Unions Law.

**Paul Schoukens** is full professor at the KU Leuven (Faculty of Law). He is heading the department of labour and social security law. As from March 2015 he is holding the Instituut Gak chair International and European Social Security Law at Tilburg University. His research and education interest lie primarily at (Comparative, International, and European) social security (law). He is Secretary-General of the European Institute of Social Security and Academic Director of the specialised Master programme Social Secu-

riety in Europe. At the Faculty of Law (Leuven) he is responsible for student and staff mobility.

**Yves Stevens** is full professor at the University of Leuven and academic director of this university for the campus of the city of Antwerp. He is a graduate of the Universities of Namur (French speaking), Leuven (Dutch speaking), Brussels (ULB – French speaking) and London (Queens college). He holds a PhD in law from the University of Leuven. He teaches social law and is the coordinator of the specialized pension law program. He is also the Chair of the editorial board of the Belgian Journal for Social Security.

**Anna Tsetoura**, PhD, LLM KU Leuven, BA Aristotle University of Thessaloniki, is a member of the Hellenic Open University's Associate Teaching Staff. She has lectured at various Greek universities as well as at the National School of Judges on topics including European social security law, social insurance and social institutions, retirement and pension systems, health care, civil society and social policy financing. She has also participated in national and European research programmes on improving social protection. Her research interests focus on the protection of social rights, the sustainability of social security systems, pensions and health, comparative social law, international and European social protection policies and social justice.

## TABLE OF CONTENTS

LIST OF CONTRIBUTORS.....	V
ACKNOWLEDGEMENTS.....	XI
1. <i>Stamatia Devetzi</i> : Introduction .....	1
2. <i>Yves Stevens and Paul Schoukens</i> : Minimum income in old age - The case of Belgium: plea for a universal income for pensioners?..	11
3. <i>Elias Felten</i> : The Austrian compensatory supplement - a crucial social benefit for safeguarding minimum income in old age.....	39
4. <i>Hans-Joachim Reinhard</i> : The new basic pension supplement in Germany .....	49
5. <i>Maria Salas Porras</i> : The situation of retired and displaced elderly people in Europe. A review of legal mechanisms to fight poverty from the Spanish perspective.....	69
6. <i>Eufrasia Sena</i> : Minimum income in old age: The case of Italy.....	103
7. <i>Anna Tsetoura</i> : Guaranteed minimum pensions under the Regu- lation of Coordination on social security systems: The case of Greece .....	119
8. <i>Olga Angelopoulou</i> : Ongoing crises and limits to the reductions of social security rights: The case of Greece.....	165
9. <i>Thomas Erhag</i> : Guaranteeing a minimum income in old age: The case of Sweden .....	181
10. <i>Frans Pennings</i> : Minimum income in old age in the Netherlands..	207
11. <i>Leszek Mitrus</i> : Minimum income in old age: The case of Poland ....	229
12. <i>Effrosyni Bakirtzi</i> : Minimum income in old age: A human rights perspectives and approach.....	241
13. <i>Stamatia Devetzi</i> : Minimum income in old age: Comparative as- pects and European law issues.....	263



## ACKNOWLEDGEMENTS

In June 2022 a conference was organised in Fulda. Experienced researchers and university teachers gathered to discuss questions on minimum income in old age from a comparative and European law perspective. The papers of the participants were the first drafts of the chapters of this book.

The conference took place with the financial support of FNA (Forschungsnetzwerk Alterssicherung, Germany) and DAAD (German Academic Exchange Service) and was part of a bilateral university partnership between Fulda and Thessaloniki with a research and teaching project in the field of social security coordination and migration ([www.sosec.eu](http://www.sosec.eu)). We are very thankful for the generous support. We would also like to thank the authors who have contributed their chapters to this book for their commitment to the topic as well as the vivid and inspiring discussions during the conference.

The book would not have occurred without the engagement and organisational skills of the coordinator of the project, Effrosyni Bakirtzi.

A special acknowledgment goes to our language editor, Niki Rodousakis, for her quick, thorough and careful editing of our chapters – thank you very much!

Fulda, November 2023

Stamatia Devetzi



## INTRODUCTION

---

Stamatia DEVETZI

The Charter of Fundamental Rights of the European Union protects the rights of the elderly (Article 25), and recognises their right to independence and participation in social and cultural life. Principle 15 of the European Pillar of Social Rights underscores the right to adequate pensions and dignified old age. More precisely, it ascertains that workers and self-employed persons have the right to a “pension commensurate to their contributions and ensuring an adequate income” and that “everyone in old age has the right to resources that ensure living in dignity”.

In its Pension Adequacy Report of 2021, the European Commission emphasises that as the share of older persons in society increases, their well-being will be key to achieving the target set in the Pillar Action Plan to significantly reduce the number of people at risk of poverty or social exclusion.<sup>1</sup> The Commission supports national efforts to ensure adequate pensions and minimum income by analysing the suitability of pensions, i.e. a) whether the current level of pensions help maintain the income of EU citizens for the duration of their retirement, and b) whether they prevent and mitigate the risk of poverty in old age.<sup>2</sup>

Minimum old-age benefits can be an important adequacy safeguard, especially for those who have had short careers or earned low incomes. Member States have introduced various minimum income schemes, which are often non-contributory and needs-based.<sup>3</sup>

According to the Commission: “Efforts aimed at strengthening anti-poverty safeguards in national pension systems continued, with a focus on

- 
1. The target is to reduce the number of people at risk of poverty or social exclusion by at least 15 million by 2030: European Commission, 2021 Pension Adequacy Report: Current and future income adequacy in old age in the EU, p. 8.
  2. European Commission, 2021 Pension Adequacy Report, p. 22.
  3. European Commission, *op. cit.*, p. 15

improving minimum income guarantees for low-income pensioners".<sup>4</sup>

There is no comprehensive international convention on the rights of older persons, but there are currently several initiatives at United Nations (UN) level. Discussions of the Open-Ended Working Group of Ageing (OEWGA) within the UN Department of Economic and Social Affairs on Aging (OEWGA) on minimum income in old age concern topics such as economic (in)security of older persons and its implications for the right to social security.

The main focus of this publication is to present and discuss *how* selected European countries provide for minimum income guarantees for the elderly. The key questions this study sought to address were: Do national social security policies adequately address the issue of old-age poverty and social exclusion? Are national (pension) benefits being provided to guarantee older persons' minimum income protection and if so, how are they constructed? Have any reforms been adopted recently? What criteria do "minimum pension benefits" or "minimum income protection for the elderly" in European countries hinge on? What role can the human right to adequate social security and financial support in retirement play in addressing the challenges of old-age poverty and social exclusion? To what extent do human rights of the elderly pose limitations to the reforms of national legislation on minimum income in old age and pensions?

This book also focusses on the European or European social security law dimension of minimum income provisions for the elderly. European citizens who move within the European Union after retirement (may) face pension income insecurity or pension inadequacy. How does the "free movement of pensioners" align with Regulation (EC) 883/2004 on the coordination of social security systems,<sup>5</sup> on the one hand, and residence clauses in the Member States, on the other?

The legislation of many Member States provides for supplementary pension benefits or benefits that aim to guarantee minimum income protection for the elderly. Moreover, Regulation (EC) 883/2004 includes a se-

---

4. European Commission, *op. cit.*, p. 63.

5. Regulation (EC) 833/2004 of the European Parliament and Council on the coordination of social security systems [2004] OJ L166/1; Regulation (EC) 987/2009 of the European Parliament and of the Council of 16 September 2009, laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems [2009] OJ L284/1.



ries of provisions on pension benefits, including, inter alia, a “supplement” which pensioners who relocate may be entitled to in their new country of residence.

In this regard, the distinction between pension as a social security benefit and as a special non-contributory benefit to ensure adequate income protection for the elderly becomes relevant. Considering that the benefits related to old-age minimum income protection are usually connected to the criterion of residence, the concept of residence within European law becomes crucial as well. An extended discussion has already taken place on the residence criterion under Regulation 883/004 and under the Directive 2004/38, as well as their interrelationship in the context of several social security cases brought before the Court of Justice of the European Union.<sup>6</sup> The recent trend in case law has intensified the schism in the quality of protection enshrined in Directive 2004/38 between citizens who are economically active and those who are not. The case of the elderly is rather unique, however: in most cases, they *were* economically active, but no longer are.

It could be argued that EU social security law provides extensive social protection for (relocating) pensioners. However, relevant provisions that award a “pension minimum benefit”, “a minimum pension”, “old-age minimum guaranteed income” or “supplementary benefits to the basic pension” must first exist in the national laws. Secondly, national legislation must determine whether these benefits are “social security”, “social assistance” or “special non-contributory benefits”; such a distinction is important with reference to the potential “export” of these benefits to other countries, but also to calculate the amount of the benefit.<sup>7</sup>

Against this backdrop and for the purposes of our study, additional questions addressed included: How are “minimum pension benefits” coordinated for pensioners who relocate to other Member States? How

---

6. CJEU *Brey* (C-140/12), ECLI:EU:C:2013:565, on pensioners; *Dano* (C-333/13), ECLI:EU:C:2014:2358 and *Alimanovic* (C-67/14), ECLI:EU:C:2015:597, on the interrelationship between the Coordination Regulation and Dir. 2004/38 concerning jobseekers/persons who have not yet reached State pension age.

7. Case *Zaniewicz-Dybeck*, C-189/16, ECLI:EU:C:2017:946. The Court decided that the Swedish guaranteed pension should not be calculated in accordance with Articles 52 and 56, but in accordance with Article 58 of Regulation 883/2004 (former Articles 46, 47 and 50 of Regulation 1408/71). Consequently, the question was whether this pension is no longer exportable according to the wording of Article 58.

are the EU's social security coordination provisions on pensions and in particular on pension supplements interpreted and applied by the Member States? Is any national case law available? Furthermore, how is the criterion of residence being applied by Member States with reference to "minimum pension benefits" or "minimum income protection for the elderly"?

Many colleagues have contributed to make this study possible, sharing their national experiences, highlighting the key issues of discussion as a starting point for the comparative legal analysis and addressing the European law questions and human rights perspective presented above.

*Yves Stevens'* and *Paul Schoukens'* chapter sheds light on minimum income in old age in Belgium. The first part of their chapter presents an overview of the Belgian pension system and discusses the pension insurance system's (initial) target groups, namely the three main professional groups: (i) employees, (ii) self-employed persons, and (iii) civil servants. It also examines the relevance of the country's social assistance pension scheme (IGO/GRAPA). This scheme is a residual and universal, means-tested guaranteed minimum pension for those whose income falls below the minimum level of subsistence. The second part of the chapter explores the minimum pension benefits provided by the three different pension insurance schemes (for workers) in more detail, providing insights into the different approaches introduced over the years to set the guaranteed minimum pension, which –unlike the social assistance pension– is not means tested. The requirements and calculation methods have been extensively refined in recent years to align the pension system with new forms of work (e.g. part-time, fixed-term work and self-employment). The third part delves into the discussed minimum income protection schemes for pensions in light of the current European social security regulations, specifically in relation to principles such as non-discrimination (gender and nationality) and to specific coordination rules established in Regulation 883/2004 (such as the principle of aggregation of insurance periods and assimilation of facts). Starting from the complexity of guaranteeing minimum protection within the Belgian pension system, this chapter reflects on the need to (further) simplify minimum income protection and to disentangle minimum social assistance pensions more clearly from minimum protection as provided by Belgium's social pension insurance schemes.

In his chapter on Austria, *Elias Felten* focusses on the most important social benefit for safeguarding minimum income in old age, namely the “compensatory supplement” (“Ausgleichszulage”). In a first step, he analyses the benefit, which “tops up” pensions that remain below a certain threshold, usually due to past periods of low income and/or interruptions in employment. The classification of this benefit under European law is then discussed. The compensatory supplement has been classified as a “special non-contributory benefit” under Regulation 883/2004. This classification raises a number of complex legal issues: the question of habitual *and* lawful residence in Austria, the issue of export of another special benefit connected to the “compensatory supplement” (the so-called “premium”) and its compatibility with other benefits, such as the long-term care benefits.

The most recent measure introduced in Germany to fight poverty among the elderly is the “basic pension supplement”, which was introduced on 1 January 2022. Before analysing this benefit in more detail, *Hans-Joachim Reinhard* first provides an overview of the German pension system, which is still dominated by the Bismarckian concept of social security. He then describes the (common) pension benefits and gives examples for their calculation. The different types of minimum income in Germany are presented next. The focus is on the new “basic pension supplement”. Because it is often referred to as the “basic pension”, it is widely assumed that it is a guaranteed minimum income for the elderly. The term is misleading, however: it is actually a supplement for pensioners who have had long careers with insufficient “earnings points”. After elaborating on the requirements for this benefit, the author reviews several crucial issues: from a national perspective, these issues include the complicated calculation formula, the high administrative burden, the exclusion of low-income workers and the moderate financial outcome. From a European perspective, the accumulation of insurance periods, the omission of salaries earned abroad, or the different taxation systems are problematic.

A review of legal mechanisms to fight poverty in old age from the Spanish perspective is presented by *María Salas Porras*. She first highlights important European measures to prevent poverty in old age, such as Art. 25 of the Charter of Fundamental Rights of the European Union, Principle 15 of the European Pillar of Social Rights, the Green Paper on Aging or the Recovery and Resilience Mechanism. Relevant CJEU cases are discussed as well. The second part of her chapter focusses on the interventions the

Spanish legislator has introduced to mitigate poverty risk in old age. The measures associated with contributory pensions are the “minimum pension supplement” and the “pension supplement to reduce the gender gap”. Subsequently, non-contributory pensions are reviewed: the requirements for eligibility are the applicant’s status of residence and income. Measures for the elderly have also been developed by the Autonomous Communities in Spain. The author argues that the impulses the EU Regulations give and the interpretation of European jurisprudence have bolstered the application of national constitutional principles that already existed prior to Spain’s EU membership. They have driven the development of different types of measures that aim to either directly or indirectly guarantee both the protection of minimum income for the elderly, as well as a dignified life and their participation in social and cultural life.

The Italian case is presented by *Eufrasia Sena*. The chapter first provides an overview of the protection of the elderly within Italy’s social security system. The chapter briefly describes the Italian pension system and explains an Italian “peculiarity”, the “trattamento di fine rapporto”. The traditional measure for supporting poor elderly people is the social allowance, which is provided to persons at risk of poverty who have an income below a minimum threshold. The most recent legislation on income support is discussed as well: a “citizenship income” and “citizenship pension” have been introduced; the latter targets people aged 67+ years; it is a measure intended for families that find themselves in a situation of economic hardship. The last part of the chapter discusses minimum protection for the elderly and residence clauses in Italian legislation, in addition to jurisprudence from a European law perspective.

The case of Greece is examined in two separate chapters. *Anna Tsetoura* focusses on questions related to European social security coordination law, before presenting recent Greek measures that ensure minimum subsistence. The author argues that for the purposes of application of Regulation 883/04, it is crucial to determine whether a benefit is considered a social security benefit. She then analyses the CJEU’s case law on benefits that guarantee minimum income in old age and criticizes the vagueness of case law on “special non-contributory benefits”. The guaranteed minimum pension under Art. 58 Regulation 883/83 is described as well. The latest developments in Greek legislation and jurisprudence are discussed in the chapter’s final part. To ensure minimum protection, the Greek legislator has abandoned measures targeted exclusively at the

group of pensioners and has instead adopted social assistance measures that target the entire population.

In the next chapter on Greece, *Olga Angelopoulou* focusses on cut-backs in social security rights during crises. In the aftermath of Greece's debt crisis, harsh measures were introduced, including reductions and the abolition of social security benefits and massive pension cuts. Intense discussions at the academic and judicial level are underway to define limitations to the deterioration of social security in general. The author criticises that according to Greek case law, nearly all cuts were considered legitimate; only very few restrictive measures were declared to be contrary to the Constitution. This turns the notions of "decent standard of living" or "adequacy of pensions" into very vague concepts; the question "how minimum can minimum income be?" has not been answered satisfactorily.

Two chapters on countries with residence-based systems follow, namely Sweden and the Netherlands. *Thomas Erhag's* chapter on Sweden analyses recent legal changes to benefits in the Swedish pension system, which guarantee minimum income in old age. The first part of the chapter discusses the purpose of different residence-based pension benefits and describes how changes related to these benefits have challenged the pension system's overarching principles. The author explains the Swedish pension system and outlines the "guarantee pension", which secures a minimum pension by supplementing benefits provided by the income-related public pension scheme. Two other state-financed support measures are also targeted at low-income pensioners: the "housing supplement" and the "maintenance support for the elderly". The second part of the chapter addresses the impact of Regulation 883/04 and case law on residence-based pension benefits in Sweden with a focus on the CJEU's judgment in case C-189/16. The interpretation of this judgement by the Swedish legislator is problematic for pensioners who have or intend to make use of their right to free movement within the EU.

The second country in our study with a residence-based pension system is the Netherlands. *Frans Pennings* first describes the Dutch pension system. Inspired by the Beveridge report, the AOW (General Old-Age Pensions Law) has preserved its most important characteristics for decades: the AOW insures all residents in the Netherlands as well as non-residents employed in the country and who are subject to Dutch income tax regulations. The AOW pension, which is a social security benefit, guarantees a minimum income of 70 per cent of the statutory net minimum wage. Sub-

sequently, the supplement scheme for persons with an income under the AOW pension rates is analysed. This scheme is of particular relevance for persons with insurance gaps whose income is lower than the guaranteed minimum income. Unlike the AOW pension, this supplement is means-tested. Furthermore, additional income provisions for the elderly such as intensive health care or non-medical care are discussed. The author also addresses the (European law) question of the exportability of these benefits – as well as the question about what rights persons who relocate to the Netherlands after retirement age are entitled to.

The final country report deals with Poland. *Leszek Mitrus* describes the Polish retirement system and presents the minimum income conditions for elderly persons. The chapter outlines the former retirement scheme that applies to persons born before 1949, and the current one that covers individuals born from 1949 onwards. The conditions that must be met to qualify for an old-age pension under both schemes are depicted, as are the criteria to determine the amount of the benefit. Special reference is made to statutory guarantees for minimum old-age pensions and exceptions to it. The legislator has introduced new non-contributory benefits for elderly persons, i.e. the so-called 13th and 14th old-age pension payments, as well as a supplementary parental benefit for individuals who have raised at least four children and do not have sufficient means of subsistence. The abovementioned benefits are also analysed from the perspective of EU social security coordination rules, and the rights of non-economically active EU citizens who relocate to another Member State.

The next chapter by *Effrosyni Bakirtzi* discusses the human rights' perspective of minimum income in old age. Such minimum income would ideally consist of a guarantee against poverty in old age, especially for those who face an increased risk of poverty in old age, e.g. due to income inequalities, in-work poverty or mobility. Although there is no comprehensive international convention safeguarding the rights of older persons, certain provisions could be relevant for their rights and more specifically for minimum income in old age. The chapter provides an overview of existing international and regional human rights instruments that are relevant for minimum income in old age and their role in addressing the issue of old-age poverty and social exclusion.

The study concludes with a chapter on comparative aspects and European law issues by *Stamatia Devetzi*. It introduces a typology of the systems of minimum income for the elderly in the countries included in this

book; trends and tendencies in the design of minimum income provisions are reflected on as well. The types of minimum income measures provided for the elderly vary considerably between the selected EU Member States. Three major types of minimum income for the elderly can, however, be distinguished: 1) various types of pensions or guarantees *within* (i.e. *as part of*) a country's pension system; 2) (special) non-contributory income guarantees targeted *only* or *especially* at the elderly, and 3) residual/general social allowance schemes. In a second step, the author discusses European law questions and challenges. One "challenge" is the paradoxical effect of CJEU case law on "minimum benefits" paid under Regulation (EC) 883/2004. Another question concerns the classification of certain minimum benefits for the elderly as "special non-contributory benefits", which are usually not "exportable" to other EU Member States. Moreover, the linking of minimum income benefits for the elderly to residence conditions or minimum periods of prior residence in one country may violate EU coordination law. Finally, the relationship between EU coordination law and Directive 2004/38 and its effects on minimum income for the elderly is worth discussing as well.





# **Minimum income in old age - the case of Belgium: plea for a universal income for pensioners?**

## **Disentangling minimum protection and social insurance**

---

Yves STEVENS, Paul SCHOUKENS

### **1. Setting the scene**

#### *1.1. Overview of Belgium's pension system*

Belgium's pension system is made up of public, occupational and private pension schemes.

The public pension scheme is earnings-related and is supplemented by a means-tested social assistance pension scheme. The public pension scheme covers three different groups of professionally active persons: (i) employees (4.5 million), (ii) self-employed persons (1.1 million), and (iii) civil servants, including teachers (0.7 million). Different pension rights and calculation methods apply to the different groups. Additional special pension schemes exist for specific categories of workers, such as miners, air-crew of civil aviation, professional journalists and commercial seafarers.

Employees, self-employed persons and civil servants are compulsorily insured. To be eligible for a full pension, the individual must have accrued a given number insurance periods (in principle, 45 years) and reached the statutory retirement age of 65 years (to be gradually increased to 67 years by 2030). The individual's final pension income depends his/her previous earnings, insurance record and marital status. For employees and self-employed persons' pension, the income replacement rate equals 60 per cent (single) of their annual pensionable income during a year (adjusted average earnings), or 75 per cent (household). Civil servants receive a fixed income replacement rate of 75 per cent of their last salary, regardless of marital status. Employees and self-employed persons' pensions are indexed to changes in the consumer price index. The pensions of civil servants are indexed to the wage scale of their (previous) classification. The following table presents data on average monthly pension amounts:

Average monthly pension amount (2021) (single household - 60%)			
	Employee	Self-employed	Civil servant
♂	1233	985	2020
♀	961	466	1930

A means-tested 'guaranteed minimum income for elderly persons' is provided for all persons aged 65+, whose pension and other income fall below a given threshold.

There are three types of occupational pension schemes in Belgium: (i) company schemes, (ii) industry-wide schemes, and (iii) individual pension plans. The contribution rates to the occupational pension schemes are usually specified in the scheme's rules and regulations. The majority of schemes are employer-financed, with social security contribution rates ranging between 0.5 per cent and 1 per cent for employees with an income below the social security ceiling, and between 4 per cent and 5 per cent for employees with an annual income above that ceiling (EUR 64,176.39 in 2022). Benefits are paid out as either annuities or lump-sum payments (usually, a lump-sum is paid out).

Private pension schemes refer to individual savings accounts offered by insurance companies and banks. They are subsidised up to a specific ceiling for all Belgian citizens.

### ***1.2. The narrative of the Belgian public pension system: earnings-related pension insurance is supplemented by social assistance (guaranteed minimum pension)***

Public pension schemes pursue two major goals.<sup>1</sup> The first goal is to

---

1. The double objective of income replacement and poverty alleviation is found in most pension schemes across the European Union (EU). The notion that pensions should do more than simply alleviate poverty is a policy principle pursued by the EU and its Member States. The 2018 Pension Adequacy Report prepared jointly by the Social Protection Committee and the European Commission analyses the adequacy of current and future pensions, i.e. how sufficient pensions are in maintaining pensioners' income after retirement and in preventing old-age poverty (European Commission, The 2018 Pension Adequacy Report: Current and Future Income Adequacy in Old Age in the EU,

reduce poverty among the elderly (i.e. pension schemes have a poverty relief dimension, which is covered within the scope of either a social assistance pension or pension insurance (in the form of a minimum pension benefit). The second goal is the substitution of an adequate share of the worker's income after retirement (i.e. pension schemes have an insurance dimension, which is covered by contributions). These two dimensions underpin the two basic global principles of pension design: (i) social assistance for all, and (ii) social insurance for those who have paid social security contributions throughout their careers.

Belgium's public pension schemes are largely based on the social insurance dimension targeted at employees, self-employed persons and civil servants. This approach is commonly known as the *Bismarckian* approach and allows for a categorial distinction based on social security contributions paid throughout an employee's career. In other words, traditional forms of paid labour play a crucial role in the Belgian social security system. Labour and social security are traditionally closely intertwined. The payment of social security contributions based on the employee's salary (or generally income from work) is one of the foundations of Belgium's welfare state. An economic profitability calculation applies to social insurance (equivalence between income from work and level of benefit): this means it is a *quid pro quo* system that entails an element of proportionality: the longer an individual works (i.e. the longer his/her insurance period is), the higher the benefit he/she will be entitled to. These principles are increasingly being challenged by alternative forms of work, such as domestic labour or non-economic labour, and more recently by new forms of work in the platform economy and the rise of part-time and fixed-term work (i.e. an increase in flexible forms of work, often resulting in a reduction of working hours).<sup>2</sup> This calls for a rethinking of the relationship between labour and social insurance within the scope of the earnings-related pension scheme, considering that the underlying principles of equivalence and proportionality are being challenged. There is a growing concern that new and alternative forms of work

---

Brussels, 2018, p. 188). The double aim is often referred to by economists as 'poverty relief' and 'consumption smoothing'. See, for example, F. CHYBALSKI, 'Poverty Alleviation and Consumption Smoothing in European Pension Systems: Convergence or Divergence?' *Argumenta Oeconomica*, 2018, 40(1): pp. 181–202.

2. J. WERBROUCK and Y. STEVENS, "De vierde industriële revolutie: impact op sociale bescherming", *Tijdschrift voor Sociaal Recht - Revue de Droit Social*, 2019, 129-150.

are not adequately protected, i.e. that those who work outside traditional employment relationships will not be eligible for a minimum pension benefit. The guaranteed minimum pension primarily aims to prevent poverty, and is independent of any economic calculation.

The means-tested 'guaranteed minimum income for the elderly' is a social assistance benefit. This is commonly referred to as the 'Beveridgian' part of the pension system as it covers all residents and hence provides universal protection. Yet the guaranteed minimum income for the elderly is not part of the social insurance pension scheme as it applies a means test. It is thus essentially a (means-tested) social assistance benefit that guarantees pension beneficiaries a minimum level of subsistence. It provides universal basic protection for all in need, irrespective of the amount of (social security) contributions they have paid.<sup>3</sup> Poverty alleviation measures for the elderly are financed through direct taxes (these measures are known as "La garantie de revenus aux personnes âgées" (GRAPA) in French and "inkomensgarantie voor ouderen" (IGO) in Dutch).

To be eligible for the pension assistance benefit (IGO/GRAPA), the claimant must have reached 65 years of age and be a resident in Belgium. The means test takes the applicant's assets as well as those of other household members (spouse, children, grandchildren, etc.) into account to determine the amount of the social assistance benefit. Any income that exceeds the respective threshold is deducted from the amount of pension assistance. Certain types of income are, however, either fully or partially exempt from the means test (e.g. alimony is fully exempt and professional income is exempt at 25 per cent).

An IGO/GRAPA beneficiary is awarded a predetermined monthly amount. The basic benefit amount is increased by 50 per cent for IGO/GRAPA beneficiaries who live in a single person household, considering that the cost of living is higher for single persons than for individuals who live in a multi-person household.

The pension assistance benefit (IGO/GRAPA) differs from the guaranteed minimum pension provided within the scope of an (earnings-related) pension insurance scheme; the latter are not subject to a means test, for

---

3. In 2002, Robin Blackburn described this fundamental division as deriving from 'two distinct traditions, the puritan notion of industry, prudence and individual responsibility, on the one hand, and the baroque idea of a well-ordered public space and beneficent, universal power, on the other'. Robin Blackburn, *Banking on Death* (Verso 2002) 34.

example. The amount of the guaranteed minimum pension is usually higher than that of the (minimum) social assistance pension, and is provided to individuals who can prove a minimum contribution period. The following section focusses on the guaranteed minimum pension benefits provided by the different earnings-related pension insurance schemes (i.e. for employees, self-employed persons and civil servants).

## **2. Guaranteed minimum pension benefits in Belgium's pension insurance schemes**

### ***2.1. Overview***

Belgium's current systems of minimum protection and guaranteed minimum pensions is quite complex. There is no single guaranteed minimum pension scheme. Several guaranteed minimum pensions schemes exist that are intertwined. The existence of several such schemes is rooted in the country's history. Guaranteed minimum pension schemes evolved within Belgium's three major statutory pension systems (for employees, self-employed persons and civil servants) based on their particular necessities and specificities. Different minimum pension regulations apply within these three main schemes and the calculation methods used to determine the amount of the guaranteed minimum pension differ as well.<sup>4</sup> In addition to these complex schemes, a pension assistance benefit (IGO/GRAPA) is available for the elderly to prevent them from falling into poverty.

### ***2.2. Three basic methods of calculation***

The range of guaranteed minimum pension schemes in Belgium indicates that the current landscape within and between the different schemes is disharmonious. The pension system is further bogged down by the different methods of calculation.

#### ***2.2.1. First method of calculation***

The first method of calculation applies to employees and self-employed persons.<sup>5</sup> It guarantees that the retirement pension of an employee who

---

4. Miners, aircrew of civil aviation, professional journalists and commercial seafarers are not included. Other sets of minimum regulations apply to them.

5. The most important rules are stipulated in Article 152 of the Law of 8 August 1980,

has worked for at least two-thirds of a full career (45 years) may not fall below a given amount, the 'guaranteed minimum pension'. The annual guaranteed minimum pension amount for 2022 is EUR 22,985 (household) and EUR 18,393.83 (single). Achieving the threshold of two-thirds of a full career is often challenging in particular for female employees. Consequently, the law provides that periods of part-time employment (156 worked or equivalent days) shall also be included in the calculation of a pro rata pension amount, with the employee's effective periods of employment expressed in full time equivalents (see below). It is important to note that in the calculation, one year of full-time employment equals 312 days. The first method of calculation consists of both a rigid and a flexible component. A distinction is also made between careers as a 'regular' employee and mixed careers, which consist of periods of employment and self-employment.

The rigid component of an employee's full career requires each calendar year of employment to consist of at least 208 full-time day equivalents over an initial employment period of 30 years. After the 31<sup>st</sup> career year, each calendar year counts as at least 52 full-time day equivalents; once these minimum contribution periods have been reached, a pension rate in relation to the employee's effective career years is guaranteed: the guaranteed minimum amount is multiplied by the employee's career breaks, whereby the nominator consists of the number of effective periods of employment and the denominator of the maximum number of career years (45) that apply in the scheme for employees (e.g. 42/45 after a 42-year career). In July 2022, the Belgian government decided to reduce the requirement of an initial 30-year career to 20 years. The detailed conditions for fulfilling these 20 years are still being debated in the Belgian parliament (autumn 2022).

The flexible component of the first method of calculation can be more easily met by those who worked in flexible employment relationships (part-time, fixed-term, etc.). The calculation for reaching the 156 full-time equivalent days per calendar year during the initial 30-year period of employment differs slightly. The amount of the guaranteed minimum pension is obtained by multiplying the full amount (specified above) by a fraction. This fraction consists of the total number of days worked or so-called as-

---

Royal Decree of 22 September 1980, Article 33 of the Special Law of 10 February 1981, and Article 1, Royal Decree of 17 February 1981 and Royal Decree of 14 February 2003.

simulated periods (periods during which the employee did not work but accrued pension rights) throughout his/her career. All full days of employment and assimilated periods are aggregated. This total of days and hours is then converted into full-time day equivalents and is further divided by 312. The result of this division is the numerator. The denominator is used to calculate the pension amount within the scope of the employee's pension scheme. A pro rata amount of the total duration of the employee's career is thereby obtained. The days included in the calculation of the guaranteed minimum pension are strictly limited to the employee or self-employed person's personal performance of work. The (former) spouse's insurance periods can no longer be included; a divorced spouse used to be able to invoke the insurance periods his/her partner had accumulated during their years of marriage (common insurance periods) when claiming a minimum pension.

The first calculation method is also applied to mixed careers (periods of employment and self-employment). The rigid component of an employee's mixed career requires proof of two-thirds of a full career based on years of self-employment supplemented by years of employment, each consisting of at least 208 or 52 (after the 31<sup>st</sup> career year) full-time equivalent days. If this criterion is met, the full amount of the mixed guaranteed minimum pension is multiplied by the employee's career breaks. The flexible component requires proof of two-thirds of a full career based on years of self-employment, supplemented by years of employment, each of which must consist of at least 156 full-time equivalent days. The full amount of the mixed guaranteed minimum must in that case be multiplied by a fraction of the numerator which is equal to the number of employed full-time equivalent days, divided by 312. The pension amount reflects the denominator of this.

### *2.2.2. Second method of calculation*

The second method of calculation, which was introduced in July 1997, is the so-called minimum entitlement per career year.<sup>6</sup> This method is only relevant for 'regular' employees. It is primarily intended to correct for the low wages paid in the past, and is an important compensation mechanism, in particular for women.

---

6. The regulations are established in Art. 8 of the Act on Modernisation of Employees' Pensions and the Royal Decree of 21 March 1997.

When the employee's salary –if necessary, converted into periods of full-time employment– is less than EUR 29,093.99 (2022) in a given year(s), the employee's pension for that particular year(s) will be calculated on the basis of that amount, provided that the individual meets a number of conditions:

1) he/ she must prove employment (as an employee) of at least 15 calendar years (equivalent and assimilated periods such as periods of sick leave and unemployment are included).

2) For each of these years, the period of employment must correspond to at least one-third of full-time work (104 days of full-time work or assimilated periods). Proof of this period of employment is regulated in the employment regulations in case of early retirement;

3) the employee cannot claim an annual pension amount that is higher than EUR 24,250.69 (household) or EUR 19,400.54 (single) (2022). In other words, if the standard pension calculation yields an amount that is higher than these specific thresholds, no year of employment will be increased to the minimum annual entitlement.

If these conditions are met, the employee's pension is in principle calculated on the basis of an annual amount of EUR 26,351.11 EUR instead of the employee's real salary during that year.

This amount is, however, not always fully included in the calculation. A distinction is made between the periods under consideration because the regulation has changed so often since 1997. Four periods are distinguished. In each case, the different periods of employment are reviewed to determine which regulation is applicable to which period.

### *2.2.3. Third method of calculation*

A different method of calculation applies to civil servants. A civil servant's pension is initially calculated in a 'straightforward' way, i.e. the "usual" way. The specific rules may differ, however, depending on type of civil service contract. Consequently, this "straightforward" or "usual" calculation may actually become quite complicated if the individual was covered by different pension schemes throughout his/her career (e.g. following a change in administration and the civil servant's career path).

If the pension calculated in a "straightforward" way falls below a certain threshold referred to as the "guaranteed minimum pension amount", a supplement is added to reach the guaranteed minimum amount. The "guaranteed minimum pension amount" thus essentially consists of a sup-



plement. Civil servants who have reached the statutory retirement age (65 years) or whose length of service amounts to 42 years are eligible for this supplement. Civil servants who are incapacitated for work and consequently retire may also be eligible for the supplement, irrespective of their age or length of service. The guaranteed minimum pension amount is only added to pensions provided within the scope of so-called “main posts”. A post is considered a “main post” if the individual’s service time represents at least 50 per cent of a full-time post in a similar service. In concrete terms, many civil servants are excluded from the guaranteed minimum pension supplement because they do not meet the condition of having been employed in such a ‘main post’. Moreover, the amount of the supplement varies depending on the reason for retirement, i.e. age or seniority, incapacity for work, and the civil servant’s marital status (i.e. married, single, widowed, divorced or separated).

### *2.3. Some figures on guaranteed minimum pensions*

In November 2021, the guaranteed minimum pension of employees (single) who has completed a full career (45 years) was EUR 1,352.44. The amount of the guaranteed minimum pension is reduced if the individual’s career is less than 45 years. In principle, the same monthly gross amount of EUR 1,352.44 is provided to self-employed persons. The 45-year careers of the average employee are usually supplemented by assimilated periods of 30 per cent (including periods of unemployment, time credits, parental leave, unemployment with a company surcharge, etc.). This scheme does not apply to self-employed persons, however. The monthly amount of IGO/GRAPA for a single person is currently EUR 1,207.88. IGO/GRAPA does not depend on years of employment or on assimilated periods.

### *2.4. Bogged down complexity*

All of the historical choices explain the current minimum pension landscape in Belgium. Apart from these historical or even organic origins, the system can simply no longer be justified. The system and its schemes are disharmonious within and between themselves. It is bogged down in technically detailed schemes using different calculation methods. The guaranteed minimum pension schemes for the different categories of employees are trapped between the pension system’s insurance philosophy and the social assistance component (IGO/GRAPA).

Pensioners who have reached a similar level of seniority or have a similar history of social security contributions are often treated differently under the current system. The range of acquired rights based on different calculation methods have led to a stalemate, with no legislator willing to address or modify the pension system's legal and economic complexity. The problem is intensifying due to the increasing number of employees with mixed careers, further muddling the different calculation methods to determine the amount of the guaranteed minimum pension.

### 3. Effects of European regulations and case law

The EU's social security regulations have been developed both in terms of coordination<sup>7</sup> and harmonisation (the latter is restricted to the principle of equal treatment between men and women).<sup>8</sup> While the rules on coordination are targeted at persons who use(d) their right to free movement within the EU, the Directive on Equal Treatment guarantees equal treatment between men and women as regards access to social security schemes and/or entitlement to social security benefits.

The statutory pension schemes are part and parcel of Belgium's social security system and hence fall within the scope of these EU regulations. The pension schemes, including the guaranteed minimum pension and the social assistance pension, is covered by EU Regulation 883/2004 on the coordination of social security schemes for individuals who use their right to free movement within the EU. Consequently, in accordance with the principle of protection of acquired rights<sup>9</sup>, pensions are in principle exportable to other Member States if the insured person decides to move (e.g. if he/she returns to his/her (EU) country of origin). Moreover, the

---

7. Regulation (EC) 833/2004 of the European Parliament and Council on the coordination of social security systems [2004] OJ L166/1; Regulation (EC) 987/2009 of the European Parliament and of the Council of 16 September 2009, laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems [2009] OJ L284/1.

8. Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L6/24.

9. Regulation (EC) 833/2004 of the European Parliament and Council on the coordination of social security systems [2004] OJ L166/1, Art. 7.

principle of rights in the course of acquisition<sup>10</sup> applies to insured persons, while any prior insurance periods accrued in another Member State unlock entitlement to a pension benefit. The latter principle may be relevant for reaching the minimum thresholds that apply in the respective guaranteed minimum pension schemes for employees, self-employed persons and civil servants. The (Belgian) pension assistance benefit (IGO/GRAPA) is treated as a special non-contributory benefit, meaning, among others, that the country of residence is responsible for guaranteeing a minimum benefit in case the individual's (pension) income remains below the minimum level of subsistence.<sup>11</sup>

In addition to the coordination rules, the guaranteed minimum (pension) schemes must also respect the harmonisation principle of equal treatment between men and women as stipulated in EU Directive 79/7 (on statutory social security). In other words, men and women must be guaranteed access to the same pension entitlements without any direct or indirect discrimination. This also applies to the pension assistance benefit (IGO/GRAPA).<sup>12</sup>

Within the scope of the EU's social security regulations (coordination and equal treatment), Belgium's guaranteed minimum (pension) schemes have not been subject to recent (major) case law of the European Court of Justice (CJEU). In a recent case before the Belgian Constitutional Court, the compatibility of prior residence requirements with the fundamental right to social security as well as with the EU coordination regulation (Article 6) was reviewed. The Belgian government has (re)introduced the requirement of prior residence in Belgium for individuals who apply for IGO/GRAPA to limit access by non-Belgian citizens to the social assistance benefit. This restriction to entitlement has been evaluated for its compatibility with the standstill clause (specified in Article 23 of the Constitution: Right to social security) and with the coordination principle, namely that periods of insurance can be counted together (protection of rights in the course of acqui-

---

10. Regulation (EC) 833/2004 of the European Parliament and Council on the coordination of social security systems [2004] OJ L166/1, Art. 6.

11. Regulation (EC) 833/2004 of the European Parliament and Council on the coordination of social security systems [2004] OJ L166/1, Art. 70.

12. Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L6/24, Art. 3-4.

sition).<sup>13</sup> Several CJEU decisions on (foreign) pension schemes are of relevance for Belgium's minimum pension schemes. CJEU case *Bogusława Zaniewicz-Dybeck*<sup>14</sup> dealt, among others, with the question how to include foreign-earned income in the application of the means-/ income test applied in the guaranteed minimum pension schemes (comparable to the method used in the Belgian *IGO/GRAPA*) (see Section 3.2.). In CJEU case *Violeta Villar Laiz*<sup>15</sup>, the rules of the method of calculation applied to periods of part-time employment were assessed in terms of their compatibility with Directive 79/7 (equal treatment between men and women). The Court's decision is of relevance for the Belgian minimum pension schemes, in particular for the specific rules that have been developed for part-time employees to reach the required minimum thresholds to unlock entitlement to the guaranteed minimum pension (see Section 3.3.).

### ***3.1. Minimum residence conditions in the social assistance scheme (IGO/GRAPA)***

The Belgian legislator amended the entitlement requirements for social assistance in 2017, including for the *IGO/GRAPA* pension benefit. Apart from the traditional means test and residence requirement, the legislator introduced a minimum period of prior residence in Belgium for entitlement to *IGO/GRAPA*. An *IGO/GRAPA* beneficiary must have resided in Belgium for at least 10 years prior to applying for the benefit, of which 5 years must have been continuous. The legislator justified this amendment by asserting that the pension budget could thereby be better monitored, because a disproportionate number of non-Belgian citizens were applying for the social assistance pension benefit compared with individuals who had lengthy social security contribution periods within the Belgian pension system, and to fight fraudulent claims for pension assistance, which may arise following family unifications with the sole purpose of obtaining the (pension) benefit.

---

13. Regulation (EC) 833/2004 of the European Parliament and Council on the coordination of social security systems [2004] OJ L166/1, Art. 6.

14. Case C-189/16 *Bogusława Zaniewicz-Dybeck* ECLI: EU: C:2017:946.

15. Case C-161/18 *Violeta Villar Laiz* ECLI: EU: C:2019:382.

The amendment is essentially justified by the aim of strengthening the bond between IGO/GRAPA beneficiaries with Belgium's social security system. It furthermore seeks to improve the monitoring of the development of costs of the social assistance pension scheme, since longer periods of prior residence usually lead to a higher amount of work-related contribution periods, thus automatically reducing the amount of IGO/GRAPA (social assistance) pensioners will be entitled to. Moreover, this entitlement requirement seeks to limit abuse, i.e. to prevent individuals from settling in Belgium with the sole purpose of obtaining social (assistance) benefits. Reference has been made to the fight against 'social tourism'. Finally, the legislator sought to prevent situations in which individuals who have never resided or worked in Belgium are entitled to a benefit that exceeds the amount an employee has paid in social security contributions to support the Belgian social security system.

This 'prior residence' provision has been challenged before the Constitutional Court as violating constitutional clauses that guarantee equal treatment and non-discrimination (Articles 10 and 11 of the Belgian Constitution) and the right to social security (Article 23 of the Belgian Constitution); apart from these constitutional clauses, the 'prior residence' entitlement requirement has been considered to be in breach of the EU's co-ordination rules which guarantee the protection of rights in the course of acquisition (for those who fall under the scope of application of Regulation 883/2004).

In its judgment (16/9) of 23 January 2019, the Belgian Constitutional Court<sup>16</sup> determined that the 'prior residence' provision breaches Articles 10-11 and 23 of the Constitution. The Constitutional Court stated that it was impossible to prove that a 10-year period of residence in Belgium, of which at least 5 years must have been continuous, during any stage of the IGO/GRAPA beneficiary's life actually gave rise to a bond between him/her and Belgium and its social security system. The Court furthermore claimed that the 'prior residence' requirement would not prevent 'social tourism' or ensure that the beneficiary contributes to the financing of Belgium's social security system. Moreover, according to the Court, the absence of the contested requirement of prior residence could not explain an increase in the costs of IGO/GRAPA, considering that Par-

---

16. *Ligue des droits de l'homme v Belgium*, app no 6/2019 (Belgian Constitutional Court, 23 January 2019).

liament has pointed to other factors as well, such as population ageing and changes in pension legislation. The Court therefore concluded that the substantial reduction in the level of protection introduced by the contested 'prior residence' provision was not justified on grounds relating to the general interest of the Belgian population.

In its ruling, the Constitutional Court also referred to the European coordination regulations. It mentioned CJEU case law which in the past has found that social assistance schemes may fall under the Regulation's material scope<sup>17</sup> if a clear link exists between the social assistance scheme and one of the contingencies listed in Article 3, and when the individual has a subjective right to the respective benefit. Based on these considerations, a benefit such as IGO/GRAPA clearly falls within the (material) scope of Regulation 883/2004. Consequently, the Court ruled that the 'prior residence' provision was in breach of Article 4 of Regulation 883/2004, i.e. all insurance periods accrued by individuals in other Member State(s), who are covered by the scope of the Regulation, should be included in addition to periods of residence in Belgium to determine entitlement to social assistance benefits.

Furthermore, a benefit such as IGO/GRAPA shall be treated as a special non-contributory benefit.<sup>18</sup> According to the seventh recital of the preamble, such benefits shall only be provided in accordance with the legislation of the individual's or his/her family members' country of residence, where appropriate, taking into account periods of residence in another Member State(s) without discrimination on grounds of nationality.

Because the contested provision does not take periods of residence in another EU Member State(s) into account without a distinction of the beneficiaries, it is incompatible with Article 6 of Regulation 883/2004. Neither does it justify the substantial reduction in the level of protection of pensioners. Consequently, the Constitutional Court annulled the (new) prior residence clause introduced by the Law of 27 January 2017.

---

17. Regulation (EC) 833/2004 of the European Parliament and Council on the coordination of social security systems [2004] OJ L166/1, Art. 3.

18. Council Regulation (EEC) 1247/92 amending Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community [1992] OJ L136/1, recital 3.

### ***3.2. Calculation of the income threshold for entitlement to the guaranteed minimum pension for individuals who have worked abroad***

The *Zaniewicz-Dybeck*<sup>19</sup> ruling dealt with the question which pension calculation method to use when an individual, who accrued contribution periods in several EU Member States, applies for a guaranteed minimum pension. The CJEU also addressed the question how to apply the means test in such a situation. This case involved the Swedish guaranteed minimum pension. The fact that the claimant's previously earned income and the related pension benefit differed considerably in the two countries involved, namely Sweden and Poland, was a relevant factor in the case. To apply a pro rata calculation (to determine the pension amounts to be paid by each country), the two countries had to first calculate the claimant's theoretical pension amount (which is based on full contribution periods which are considered to have been fully paid in his/her country of origin). To determine whether the claimant was entitled to the Swedish guaranteed minimum pension, the question which of the wages and salaries should be used in the calculation of the pension benefit was of relevance. As the claimant's Polish wages and salaries were significantly lower than a comparable Swedish salary, it could affect entitlement to the Swedish guaranteed minimum pension. Although the former coordination regulation (No. 1408/71)<sup>20</sup> was applied in this case, the questions dealt with by the Court and its decision influence the current coordination rules (laid down in Regulation 883/2004).

The case concerned a Polish pensioner who had left Poland at the age of 40 years to take up work in Sweden. He had worked in Poland for a total of 19 years and in Sweden for 23 years. He submitted his pension application to the Swedish Pension Service.

Article 45 of Regulation No. 1408/71 provides that periods during which an employee or self-employed person paid social security contributions or was insured in another Member State must be taken into consideration by the Pension Service in the Member State paying the pension benefit. Either a pro rata assessment is carried out or the regulations of

---

19. Case C-189/16 Bogusława Zaniewicz-Dybeck ECLI: EU: C:2017:946.

20. Regulation (EEC) No. 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L149/2.

the institution paying the pension shall be applied to periods of employment in another Member State(s): the pensioner shall be entitled to the higher amount of the two.<sup>21</sup> If the pensioner's total pension is lower than the guaranteed minimum pension of the country of residence in which he/she retires, that country shall provide the pensioner with supplementary benefits up to the amount of the guaranteed minimum pension of the other country.

The Swedish pension system provides for a proportional pension, a supplementary pension and a guaranteed minimum pension which pensioners who reside in Sweden may be entitled to if their income is below a specific amount. The pensioner's full pension income determines his/her eligibility to the supplementary and/or proportional pension.

Mr. Zaniewicz-Dybeck applied for a Swedish guaranteed minimum pension in 2008, which was rejected by the Swedish Pension Service. It had applied the pro rata calculation provided for in Article 46(2) of the Regulation for the periods during which Mr. Zaniewicz-Dybeck had been insured in Poland. The Swedish Pension Service concluded that Mr Zaniewicz-Dybeck's earnings-related pension exceeded Sweden's minimum threshold, which meant that he was not entitled to a guaranteed minimum pension. Mr. Zaniewicz-Dybeck brought a claim before the Swedish administrative court, asserting that the free movement of workers was being hampered by the fact that a pro rata calculation was used to determine the amount of pensions, including periods of employment (i.e. insurance) completed in countries where pensions are far lower than in Sweden. As a result, these periods are calculated at a lower rate than if they had been completed in Sweden.

It was unclear to the Swedish administrative court how the guaranteed minimum pension was to be calculated. According to the court, the question arises whether Article 46(2) and Article 47(1)(d) of Regulation No. 1408/71 should be applied to the calculation of the pension benefit and if so, whether it is possible in accordance with the Regulation's provisions to grant a notional pension value that corresponds to the average value of the periods of contributions accrued in a Member State other than Sweden when determining the basis for the calculation of such a pension. If

---

21. Regulation (EEC) No. 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L149/2, Art. 46.



the response is negative, the referring court questioned whether the calculation of the guaranteed minimum pension should take the old-age pensions paid by other Member States into account.

In its arguments, the CJEU claimed that a minimum benefit is provided for in Article 50 of Regulation 1407/71 “where the legislation of the state of residence provides a special guarantee for those who benefit from social security benefits, to ensure a minimum income above the level of benefits to which they would be entitled only on the basis of the periods to which they were insured under a security scheme and their benefits”<sup>22</sup>. The guaranteed minimum pension represents such a minimum benefit. Since the Regulation does not require Member States to provide for such a minimum benefit, Articles 46 or 47 do not apply, while Article 50 of the Regulation does. A method of calculation for Sweden’s guaranteed minimum pension based on Articles 46 and 47 was therefore rejected by the Court, but had to be calculated on the basis of Article 50 of the Regulation.

In reply to the second question, the Court argued that in view of the answer to the first question, Article 50 also provides that the actual amount of old-age pension(s) the individual receives from other Member States must be taken into account. Consequently, Article 50 of the Regulation does not rule out the legislation of a Member State that requires the competent institution to take account of all old-age pensions an individual receives from one or more Member States when calculating the amount of a minimum benefit such as the guaranteed minimum pension.

A minimum benefit such as Belgium’s IGO/GRAPA is thus governed by Article 58 of Regulation 883/2004. The amount of the benefit the beneficiary of a pension shall be entitled to may thus not be lower in the Member State of residence under whose legislation the benefit is payable to him/her, than the minimum benefit established by that legislation for a period of insurance or residence equal to all periods taken into account for the payment in accordance with the coordination regulation. It is possible, however, to take the amount of pension paid by another Member State into account. Any other decision would mean that the individual could benefit from double payments.

---

22. Case C-189/16 *Bogusława Zaniewicz-Dybeck* ECLI: EU: C:2017: 946.

### ***3.3. Guaranteed minimum pension and equal treatment between men and women***

The social security contribution periods of women are often more fragmented than those of men. Their careers are often interrupted (suspended) and they have longer periods of part-time employment. This is largely due to the unpaid care activities women take up, which in turn affects their accrued (pension) insurance periods. Consequently, this may affect their entitlement to the guaranteed minimum pension. As mentioned above, the requirement of the Belgian guaranteed minimum pension schemes to meet minimum periods of contributions may be problematic for employees with irregular periods of employment. This is particularly true for part-time workers and/or workers who are primarily employed under fixed-term contracts (and hence only have intermittent periods of employment). As the majority of such (part-time/fixed-term) employees are women, the applicable threshold for minimum social security contribution periods could ultimately be deemed as indirectly discriminatory.

A recent CJEU ruling<sup>23</sup> on the discriminatory effects of the calculation of part-time employment periods to determine the amount of pensions in Spain may be of relevance for the Belgian pension system. In the respective case, the claimant (Ms. Laiz), who had worked in Spain, applied for an old-age pension (in Spain). She was entitled a pension, but the amount of the pension was calculated by multiplying a basic amount by a coefficient of 53 per cent because she had periods of part-time employment. Laiz requested the basic amount to be multiplied by a coefficient of 80 per cent, i.e. the percentage used for full-time employees. She argued that the system of the 'reduction coefficient' was indirectly discriminatory, because more women than men worked in part-time employment relationships.

The CJEU argued that according to the referring court, Spanish law has adverse effects on part-time employees compared to full-time workers; only in some cases are the effects actually neutralised, where the reduction factor linked to part-time employment is greater than or equal to two-thirds of completed periods of full-time employment.

Furthermore, the referring Spanish court stated that the detrimental effect of the national system on the calculation of pensions in case of part-time employment mostly affects women, since, according to the *Institi-*

---

23. Case C-161/18 *Violeta Villar Laiz* ECLI: EU: C:2019:382.

*tuto Nacional de Estadística* (National Institute of Statistics, Spain), 75 per cent of part-time employees were women in the first quarter of 2017.

Accordingly, the referring Spanish court concluded that the provisions at issue in the main proceedings resulted in indirect discrimination on the ground of sex, in breach of Article 4(1) of Directive 79/7 and Article 21 of the Charter. The national law provisions, according to the referring court, did not appear to serve a legitimate social policy objective or, at the least, were not proportionate to such an objective.

To determine whether such a law constitutes indirect discrimination, it must be recalled that the underlying concept must be understood the same way in the context of Directive 79/7 as in the context of Directive 2006/54.<sup>24</sup> According to Article 2(1)(b) of Directive 2006/54, the law's provisions are an indirect discrimination on the ground of sex in a situation where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

In this regard, Spain's National Institute of Social Security (INSS) and the Spanish government argued that a proportional reduction in pensions in cases of part-time employment is an expression of a general social policy objective pursued by the national legislature, since such a correction is essential in a social security system that relies on contributions. Such a reduction must be made in the light of the principle of social security contributions in combination with the principle of equal treatment between part-time and full-time workers. In case of part-time employment, it can be objectively justified that the pension reflects the fact that lower social security contributions were paid for fewer working hours.

Accordingly, the application of a reduction factor relative to part-time employment goes beyond what is necessary to attain that objective. This applies to the group of workers engaged in short part-time work, that is to say less than two-thirds of comparable full-time work, a reduction in the amount of retirement pension that is greater than that which would result

---

24. Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23; Case C-451/16 *MB* ECLI: EU: C:2018:492, paragraph 34.

from merely applying a *pro rata temporis* calculation of periods of gainful employment. The group of part-time workers with limited working hours (i.e. those with a career of less than two-thirds of comparable full-time work) should not receive a lower pension than if their periods of employment had simply been based on a *pro rata temporis* calculation, which is the CJEU's stated benchmark.

Does the Belgian system of calculating guaranteed minimum pensions have a discriminatory effect on women? The different calculation methods used are complex. The different methods of calculation and their underlying logic diverge considerably. The underlying principles applied by each of the guaranteed minimum pension schemes lack transparency. Hence, it becomes more challenging to assess potential grounds that may justify indirect discriminatory effects of the rules that are applied. On the other hand, the different calculation methods were specifically introduced to address the challenges faced by part-time workers and to ease the entitlement requirements for a guaranteed minimum pension. Contrary to the Spanish case, there is no additional reduction in the pension amount in Belgium, which goes beyond the *pro rata temporis* effect of the pension calculation method. Emphasis here is on access to benefits (minimum threshold of contribution periods), which was deliberately redesigned so part-time and fixed-term workers can more easily meet the minimum entitlement requirements. Due to the adaptation of existing rules –which were initially developed for 'regular' workers– to the needs of part-time and fixed-term employees, the application of rules has been equalised. Thereby, the difference in the level of benefits does not go beyond the *pro rata* logic (equivalence) underlying (pension) insurance.

#### 4. Need for reform

The current financing of guaranteed minimum pensions is mixed. IGO/GRAPA is fully financed through taxes, as is the guaranteed minimum pension of civil servants. The guaranteed minimum pension of employees is primarily financed through social security contributions, and by alternative financing (mainly VAT) and other taxes. That of self-employed persons is mostly financed through taxes, some alternative financing as well as through social security contributions.<sup>25</sup> No detailed analyses on the actual

---

25. FEDERALE OVERHEIDSDIENST SOCIALE ZEKERHEID, "Vade Mecum van de gegevens van de sociale bescherming in België 2020 – statistisch gedeelte", Brussel, FOD SZ,

amounts from different forms of financing are available. Only aggregated figures are available. There are several reasons for this, the most important being the existing system of “universal” or “integral” financing of social security schemes, whereby it is unclear which payment ends up where. The purpose of the universal financing system, which was introduced in the 1990s, was to end the fragmented approach to social security contribution payments (scheme by scheme), which was complicating compliance by employers and employees with the system of contribution payments and frequently resulted in a series of decisions to reallocate funds from schemes with a positive budget to those with a negative one. After this universal approach was introduced, redistribution of financing between schemes became less transparent. It therefore does not come as a surprise that some refer to the Belgian social security system as the “black box” of the state budget.<sup>26</sup>

No data are available on the legal disparity between social security assistance and insurance costs or the relationship between the financing of different minimum pension schemes. These schemes evolved historically and were largely created ad hoc. Despite this rather organic creation and development, no study has ever been carried out in Belgium on how to ideally finance these schemes or to better structure them legally. The problem of legal and economic complexity has intensified for the following three reasons.

The first reason is the increasing number of people with mixed careers. Lifetime employment in one professional category as an employee, self-employed person or civil servant is decreasing.<sup>27</sup> A growing number of

---

2021, 225 p. (download link (in Dutch)).

26. L. LAMBERT en P. VAN CUTSEM, “Analyse van de financiering van de sociale zekerheid en de evolutie ervan: de noodzaak van een structurele en duurzame herfinanciering van de sociale zekerheid”, CM informatie 278, 2019, p. 17 (download link (in Dutch)).

27. SERVICE FÉDÉRAL DES PENSIONS, *Statistique annuelle des bénéficiaires de prestations 2020*, FPD, Brussel, 2021, p. 238 (download link (in French)). In January 2020, there were 2 187 220 beneficiaries of a retirement and survivors’ pension in Belgium in one or more schemes (employees, self-employed persons and civil servants). Of these, a total of 786 987 had a mixed career (417 004 (employees and self-employed persons), 313 034 (employees and civil servants), 10 372 (self-employed and civil servants) and 46 568 (employees, self-employed persons and civil servants)). In 2020, 35 per cent of pensioners already had a mixed career. This number is increasing due to the rising number of active people with mixed careers.

people are changing jobs or combining different types of jobs. When such persons retire, the many different rules and regulations on guaranteed minimum pensions need to be calculated and “calibrated” within the different schemes.

The second reason is the inclusion of a very high number of assimilated periods in the calculation. Periods such as unemployment, sickness, invalidity, early leave, career interruptions, etc. are counted as periods of employment. No social security contributions were paid during these assimilated periods, i.e. social solidarity covers these periods. Assimilated periods make up 30 per cent of an average pension.<sup>28</sup> These periods were thus not truly “insured” because no social security contributions were paid. Studies on assimilated periods show that they are mostly advantageous for women and blue collar workers.<sup>29</sup> If the system of assimilated periods did not exist, these groups would face even higher poverty levels. In this regard, social insurance aims to alleviate poverty, hence there is a clear link here between social insurance and social assistance. The financial flows within the current system are untransparent and the effect of each of the different schemes on poverty rates among the elderly is unclear.

The third reason is the factual dilution of the amount of minimum and maximum pensions. The difference between the minimum and maximum pensions thus becomes difficult to explain. For example, the minimum pension for a full career as a self-employed person in November 2021 was EUR 1,379 (single) while the equivalent maximum pension was EUR 1,562 (single). This maximum requires the full payment of social security contri-

---

28. In 2020, pension expenditure (without taking additional miscellaneous pension rights into consideration) amounted to EUR 15.3 billion, of which EUR 8.0 billion or 52.31 per cent was paid to men, and EUR 7.3 billion or 47.69 per cent were paid to women. A breakdown by pension type provides a different picture: (1) retirement pensions amounted to EUR 13.9 billion or 90.74 per cent of total pension expenditure. Of this, EUR 7.9 billion or 57.14 per cent were paid to men and EUR 5.9 billion or 42.86 per cent to women; (2) survivors’ pensions amounted to EUR 1.4 billion or 9.26 per cent of total pension expenditure. Of this, EUR 71.4 million or 5.04 per cent were paid to men and EUR 1.3 billion or 94.96 per cent to women. These average amounts per scheme are purely mathematical and do not tell us anything about the average amount paid per pensioner. In 2020, 31 per cent of total pension expenditure covered so-called assimilated periods for which no social security contributions had been paid into one of the basic pension schemes (see [pensionstat.be](http://pensionstat.be) for all details).

29. H. PEETERS and H. LARMUSEAU, “Gelijkgestelde periodes in de pensioenopbouw bij werknemers”, *Over.werk : tijdschrift van het Steunpunt WSE.*, 2005, 111-115.

butions while the minimum pension amount does not. The dilution of the contributory aspect is clear: whether an employee pays social security contributions or not throughout his/her career does not have a significant impact on his/her level of protection. The system's complexity and inefficiency thus makes it difficult to persuade self-employed persons to pay social security contributions to a so-called solidarity system.

The problem Belgium's pension system faces is not only the inexplicable fact that it continues to uphold the minimum pension amounts for the different categories of employees as well as the different regulations, but also the lack of a common view or denominator within and between the schemes that cover both social insurance and social assistance. It would make sense from a legal and economic view to disentangle one from the other within the social security system.

In our opinion, there is an oversupply of guaranteed minimum pensions in both social (pension) insurance schemes (i.e. assimilated contribution periods and different minimum pension benefits) and social (pension) assistance (IGO/GRAPA). Their impact on poverty alleviation needs to be analysed to determine whether similar results could be achieved with a more straightforward system of guaranteed minimum pensions.

A recalibration is necessary both from a human dignity perspective (guaranteed access to minimum benefits) and from a transparency and legal certainty perspective (security and societal support). The guaranteed minimum pension should be the same for all and should not depend on any previous periods of employment. The differences in employment periods and types of careers should only apply to the 'insurance component' of pensions. In our opinion, the introduction of a minimum income in the different pension schemes should be based on universal goals and rules. Differentiated minimum pensions contradict the notion of social solidarity, aimed at providing equal protection for all in society, regardless of their (previous) status or social category.

This idea of rooting minimum income in equal treatment and universal rights is increasingly being advocated by academics and (some) policymakers. Cantillon, for example, argues in favour of a general renewal of the social contract.<sup>30</sup> Pieters suggests eliminating the guaranteed minimum pension within the scope of earnings-related pension insurance

---

30. B. CANTILLON, "Pleidooi voor een vernieuwd sociaal contract", *Belgian journal for social security*, 2020/2, pp. 407-422 (Full text link).

schemes and to instead invest in better and more accessible social assistance pensions.<sup>31</sup> The World Bank recently announced that it has replaced its approach to the multi-pillar system with a five pillar system, which includes a non-contributory 'zero pillar' to incorporate social assistance with the aim of alleviating poverty, demonstrating a need to disentangle social assistance from the social insurance dimension.<sup>32</sup>

Disentangling the different schemes and creating a universal guaranteed minimum pension scheme can be justified on the basis of:

- overall societal relevance. This implies improving the financial situation of the elderly in an ageing Belgian welfare state. Any society must consider how to provide for those who cannot or at least insufficiently provide for themselves. The state, employers and financial institutions all play a role in this regard;
- the aim to increase the uniformity of entitlements and calculations of minimum pensions. A universal scheme would significantly simplify the pension system. It has become increasingly difficult to justify the existence of different schemes and regulations in Belgium from an equal treatment and human rights perspective in view of universal social protection. In addition, the legal complexity and procedures reflect the fact that Belgian pension legislation is an unprecedented patchwork of rules and regulations;
- an aim to increase transparency. Uniformity would lead to more transparency in the country's pension system. The current system's complexity has led to a large degree of opacity. The structure of the existing minimum pension schemes is highly ambiguous. Even experienced and qualified professionals state the obvious: the situation is far too complex and creates obscurity where transparency is required,<sup>33</sup>

---

31. D. PIETERS, *Onze sociale zekerheid: anders en beter*, 2010, Pelckmans, Kalmthout, 2010, p. 160.

32. R.HOLZMANN and R. HINZ et al., *Old Age Income Support in the 21st Century*, The World Bank, NY, 2005, p. 246 (Full text link).

33. On several occasions, the Belgian Pensions Ombudsman has pointed out that action is required. For example, the latest annual report of 2020 states: "The Pensions Ombudsman also recommends that when IGO/GRAPA is no longer available due to an increase in the pension (e.g. increase of minimum pension), the allocation of IGO/GRAPA should be automatically re-examined at the next increase of the IGO/GRAPA amount. The Pen-



- an aim to respond to increased awareness of equality and non-discrimination.<sup>34</sup> A progressively universal view of social protection has made it more difficult to justify the different rules and procedures on guaranteed minimum pension schemes in a country such as Belgium from an equality and human rights perspective;
- an aim to improve public acceptance of the pension system by avoiding confusion about the social assistance and social insurance components, which prevents bizarre consequences such as an implicit convergence between the minimum and maximum pension amounts. The current system is cracking at the seams.

An alternative system could consist of a main pension layer that is universal in design (a flat rate pension for all residents/ citizens), underpinned by a social assistance pension if the pensioner's income does not reach a defined minimum level of subsistence (e.g. due to a limited period of residence in the country). The income-related pension scheme for the professional groups could be provided in a second layer. This approach would, however, necessitate a radical overhaul of Belgium's pension insurance system, which at present is mainly an earnings-related system. This system would need to shift towards a universal social insurance pension scheme. This approach would more easily guarantee access to a basic minimum benefit by all.

## 5. Conclusion

The minimum income protection schemes for pensioners in Belgium has developed into a complicated set of guaranteed minimum pension schemes. Aside from including assimilated periods (periods 'assimilated' to periods of employment), and a residual social assistance pension, a complex system of minimum pension benefits has evolved within the different pension schemes. The complexity generated, among others, by

---

sions Ombudsman points out that this aspect could become very topical in view of the planned adjustments of pensions to prosperity. More generally, the Pensions Ombudsman reiterates his double suggestion to periodically examine the allocation of IGO/GRAPA and to launch an information campaign to raise awareness about IGO/GRAPA. See: BELGIAN PENSION OMBUDSMAN, *Annual report 2020*, ombudsman-pensioenen.be, Brussels, p. 204 (reference found on p. 4; Full text link).

34. J. VAN LANGENDONCK, Y. JORENS, F. LOUCKX en Y. STEVENS, *Handboek Socialezekerheidsrecht*, Antwerp, Intersentia, 2020, p. 744 (see chapter on social security and equality, pp. 31-35).

applying three divergent methods of calculation can partially be explained by the extension of the guaranteed minimum pension scheme to new (more flexibly organised) forms of work, and partially by not limiting protection to its essential role, namely guaranteeing minimum protection within the scope of the earnings-related social insurance scheme to those who paid social security contributions, i.e. were employed, for a given (minimum) amount of years. The various minimum protection schemes do not only run in parallel, in some cases they even conflict with one another in terms of the amount of benefit and conditionality. The redistribution logic underlying the various schemes (i.e. those related to social insurance and to social assistance) have become interwoven. Apart from a continuous blurring of the underlying redistribution logic, the schemes are characterised by a high degree of (regulatory) complexity, jeopardising transparent application of the minimum protection schemes. Ultimately, it could be argued that there are simply too many different types of minimum protection schemes in Belgium and that they deliver too little for those pensioners who are truly in need. Due to the current complexity, simple questions, such as whether the Belgian guaranteed minimum income is in line with leading European legal principles in social security law, cannot be answered.

Different layers of minimum protection have evolved over the decades in Belgium, targeting different groups in need and resulting in approaches that risk interfering with one another and muddling the redistribution logic. This may undermine the justification grounds for the current minimum protection schemes over time and even the basic policy objectives that initially justified the social corrections made to the different pension insurance scheme to the benefit of disadvantaged population groups. The current situation calls for a renewed vision on how to guarantee minimum protection for pensioners, which is both transparent in its approach and socially just for those (most) in need. Some of the existing guaranteed minimum pension schemes may need to be revised based on a universal approach and some may even need to be abolished. By eliminating some of the obsolete measures, the focus could shift towards moving more means towards a coherent universal basic pension scheme, supplemented by an earnings-related pension, that provide more effective protection for all. Hence, the different schemes need to be disentangled both in legal and economic terms. This fundamental approach, however, calls for strong

political will, as well as a policy vision that dares to unite the needs of current and future generations of pensioners.

## Bibliography

### *Books and journal articles*

- Blackburn, R (2002), "Banking on Death", *Verso*, 550 p.
- Cantillon, B (2020), "Pleidooi voor een vernieuwd sociaal contract", *Belgian journal for social security*, 2020/2, 407-422 (Full text link).
- Chybalski, F (2018), "Poverty Alleviation and Consumption Smoothing in European Pension Systems: Convergence or Divergence?" *Argumenta Oeconomica*, 40(1): 181–202.
- Holzmann, R and Hinz, R et al. (2005), "Old Age Income Support in the 21st Century", *The World Bank*, NY, , 246 p. (Full text link).
- Lambert, L and Van Cutsem, P (2019), "Analyse van de financiering van de sociale zekerheid en de evolutie ervan: de noodzaak van een structurele en duurzame herfinanciering van de sociale zekerheid", *CM informatie* 278, 17p. (download link (in Dutch)).
- Peeters, H, and Larmuseau, H (2005), "Gelijkgestelde periodes in de pensioenopbouw bij werknemers", *Over.werk : tijdschrift van het Steunpunt WSE*. 111-115.
- Pieters, D, Schoukens, P (2022), *Inleiding tot het Belgische socialezekerheidsrecht*, Acco, Leuven, 106 p.
- Pieters, D, *Onze sociale zekerheid: anders en beter*, 2010, Pelckmans, Kalmthout, 2010, 160p.
- Werbrouck, J and Stevens, Y (2019), "De vierde industriële revolutie: impact op sociale bescherming", *Tijdschrift voor Sociaal Recht - Revue de Droit Social*, 2019, 129-150.
- Belgian Pension Ombudsman, *Annual report 2020*, ombudsmanpensioen.be, Brussels, 204 p. (reference found on page 4; Full text link).
- Van Langendonck, J, Jorens, Y, Louckx, F and Stevens, Y (2020), *Handboek Socialezekerheidsrecht*, Antwerpen, Intersentia, 744 p.

### *Other documents*

- European Commission, The 2018 pension adequacy report: Current and future income adequacy in old age in the EU, Brussels, 2018, 188 p.

Federale Overheidsdienst Sociale Zekerheid, "Vade Mecum van de gegevens van de sociale bescherming in België 2020 – statistisch gedeelte", Brussel, FOD SZ, 2021, 225 p. ([download link](#) (in Dutch)).

Service Fédéral Des Pensions, Statistique annuelle des bénéficiaires de prestations 2020, FPD, Brussel, 2021, 238 p. ([download link](#) (in French)).

# **The Austrian compensatory supplement (*Ausgleichszulage*)**

## **A crucial social benefit for safeguarding minimum income in old age**

---

Elias FELTEN

### **1. Introduction**

The Austrian pension system follows the so-called Bismarckian model. This, in a nutshell, means that entitlement to old-age pensions as well as to disability pensions is contingent on the completion of a certain number of insurance periods.<sup>1</sup> For an individual to be eligible for an old-age pension, he/she must have reached the statutory retirement age, which still differs for men (65 years) and for women (60 years), but will gradually be equalised between 2024 and 2033. Insurance periods are acquired during periods of (self-)employment, provided that the income earned from such employment exceeds a specific threshold (so-called "*Geringfügigkeitsgrenze*"). If the individual's income remains beneath this threshold, he/she is only covered by accident at work insurance.<sup>2</sup> An insured person's level of income is decisive for determining his/her amount of pension contributions, and thus also for the amount of pension he/she will receive once he/she fulfils the qualifying period. The conceptual design of the Austrian pension system can be summarised with a simple formula: the higher an individual's income and the number of his/her insurance periods, the higher his/her later pension amount.

Consequently, persons with a low income and/or interruptions in employment will receive a lower old-age pension than those with a high income and continuous employment. Some pensions may be too low to actually meet the pensioner's basic needs. Employees with low qualifications and skills, and especially women, who interrupted their employment or only worked part time because they took care of children or of elderly

---

1. Cf General Pension Act (*Allgemeines Pensiongesetz/APG*), 4 and 6.

2. General Social Insurance Code (*Allgemeines Sozialversicherungsgesetz/ASVG*), 5 (1) (2).

persons, are particularly at risk. The Austrian legislator introduced a compensatory supplement to address this specific problem –the so-called “*Ausgleichszulage*”– for pensioners who habitually and lawfully reside in Austria.<sup>3</sup>

## 2. The compensatory supplement (“*Ausgleichszulage*”)

Entitlement to the compensatory supplement, according to Section 292 of the General Social Insurance Act (ASVG), is reserved for pensioners who receive an old-age or disability pension which, in addition to net income from other sources, remains below a certain threshold (the so-called “*Ausgleichszulagenrichtsatz*”).<sup>4</sup> In 2023, the threshold for a single person is EUR 1,110.26. The difference between an individual’s pension income and the threshold determines the amount of the pensioner’s compensatory supplement.<sup>5</sup> The compensatory supplement thus “tops up” pensions that are inadequate to meet the beneficiary’s basic needs and to safeguard his/her independence in old age by providing a minimum income.<sup>6</sup>

The threshold for entitlement to the compensatory supplement is based on the cost of living in Austria. Hence, the threshold for the compensatory supplement rises with the increase in the cost of living; this does not occur automatically, however, and is based on a political decision, which is particularly problematic in times of high inflation. The threshold for entitlement to the compensatory supplement thus defines the minimum subsistence level. In fact, the amount of social assistance (“*Bedarfsorientierte Mindestsicherung*” or “*Sozialhilfe*”), the last social safety net for those most at risk of poverty, is linked to the “*Ausgleichszulagenrichtsatz*”.<sup>7</sup> Persons in need, whether economically active or inactive, are, according to the legislation of the States (*Bundesländer*), entitled to social assistance up to the maximum amount of the “*Ausgleichszulagenrichtsatz*”,

---

3. General Social Insurance Code (Allgemeines Sozialversicherungsgesetz/ASVG), 292.

4. Cf General Social Insurance Code (Allgemeines Sozialversicherungsgesetz/ASVG), 293.

5. Pfeil W (2019) § 292. In: Mosler R, Müller R and Pfeil W (eds) *Der SV-Komm.* Wien: Manz. Rz 2.

6. Pfeil W (2019) § 292. In: Mosler R, Müller R and Pfeil W (eds) *Der SV-Komm.* Wien: Manz. Rz 1.

7. Pfeil W (2019) § 292. In: Mosler R, Müller R and Pfeil W (eds) *Der SV-Komm.* Wien: Manz. Rz 3.

if they do not have sufficient resources to meet their basic needs.<sup>8</sup> Hence, social assistance benefits can only be claimed following an evaluation of an individual's income and material resources, such as immovable property.<sup>9</sup> By contrast, pensioners are entitled to the compensatory supplement irrespective of access to any other means, provided that their pension does not exceed the mentioned threshold; just income from other sources is considered for the calculation.<sup>10</sup>

On the one hand, the compensatory supplement has elements of a social assistance benefit because it fulfils a basic need, yet on the other hand it differs substantially from a social assistance benefit because it is not means-tested *strictu sensu*, but only income-tested and at the same time, is directly linked to entitlement to a pension benefit.<sup>11</sup>

The question therefore arose whether the compensatory supplement qualifies as a social assistance or a social insurance benefit under national legislation. The answer to this question is important for constitutional reasons: the States (*Bundesländer*) have legislative competence to define social assistance benefits, while the Federal State (*Bund*) is competent for regulating social insurance benefits. The Austrian Constitutional Court determined that the compensatory supplement is an integral part of the mandatory pension insurance scheme because it is directly linked to entitlement to a pension benefit and must therefore be considered a social insurance benefit.<sup>12</sup> This qualification does not, however, contradict the legal requirement that only pensioners who reside in Austria are entitled to the compensatory supplement. The residence requirement is a legitimate aim considering that the compensatory supplement guarantees a minimum level of subsistence based on the living costs in the place of residence.<sup>13</sup>

---

8. Cf Principle Act on Social Assistance (*Sozialhilfe-Grundsatzgesetz*), 5.

9. Cf Principle Act on Social Assistance (*Sozialhilfe-Grundsatzgesetz*), 3 (3).

10. Cf General Social Insurance Code (*Allgemeines Sozialversicherungsgesetz/ASVG*), 292 (3).

11. Pfeil W (2019) § 292. In: Mosler R, Müller R and Pfeil W (eds.) *Der SV-Komm.* Wien: Manz. Rz 4.

12. G 165/08 [2009] VfSlg 18885/2009 (VfGH).

13. G 165/08 [2009] VfSlg 18885/2009 (VfGH).

### 3. Classification under European Union law

The Austrian Constitutional Court's assessment is interesting not only with regard to the question of legislative competence, but also for the compensatory supplement's classification under European Union law. The differentiation between social security and social assistance benefits is decisive for the application of Regulation 883/04. In fact, the Coordination Regulation even goes one step further and recognises a third category in between these two types of benefits, namely the so-called "special non-contributory benefits".<sup>14</sup> The compensatory supplement, from the outset, was considered a special non-contributory benefit within the meaning of the Coordination Regulation due to its special nature. For this reason, the supplement was included in Annex IIa of Regulation 1408/71 and has been included in Annex X of Regulation 883/04.

The European Court of Justice (ECJ) confirmed in the *Skalka* case that the compensatory supplement must be classified as a "special benefit" within the meaning of the Coordination Regulation, because it tops up an old-age or disability pension, on the one hand, while on the other, it safeguards a minimum level of subsistence for persons whose pension is inadequate.<sup>15</sup> Furthermore, compensatory supplements are "non-contributory", considering that they are not financed by the beneficiary's contributions, but from the Federal State budget. The classification as a special non-contributory benefit thus implies that the compensatory supplement is not subject to the export obligation and can be limited to pensioners who reside in Austria only.<sup>16</sup>

## 4. Three specific problems

### 4.1. *The residence problem*

According to national legislation, entitlement to the compensatory supplement is contingent on residence in Austria. Initially, only habitual residence in Austria was required for entitlement to the compensatory

---

14. Regulation (EC) No. 883/2004 of the European Parliament and of the Council on the coordination of social security systems [2004] OJ L166/1, art 70; cf also Vonk G (2020) *Von der Ausgleichzulage zur Mindestpension?*. In: Brameshuber E, Friedrich M and Karl B (eds.), *Festschrift Franz Marhold*, Wien: Manz, 857 ff.

15. Case C-160/02 *Skalka* ECLI:EU:C:2004:269.

16. Case C-160/02 *Skalka* ECLI:EU:C:2004:269.



supplement. In 2010, however, the legislator modified this requirement and introduced a more restrictive approach. Claimants must now prove that they habitually *and* lawfully reside in Austria.<sup>17</sup> This modification was introduced due to an ongoing political discussion about supposed ‘pull factors’ of the Austrian welfare state for so-called “social tourists” who move to Austria from another Member State with a less generous social security system. Hence, the criterion of habitual residence was extended by the requirement of lawful residence in Austria. At the same time, the requirements for being granted the right of residence under the Settlement and Residence Act (*Niederlassungs- und Aufenthaltsgesetz*) were tightened. Persons who do not pursue employment in Austria are only entitled to reside in Austria for periods of more than three months if they can prove that they have sufficient resources of their own and are not dependent on social assistance benefits or the compensatory supplement during their stay.<sup>18</sup> The Austrian legislator thereby aims to prevent persons who receive a minimum pension from another Member State from moving to Austria, and from applying for the compensatory supplement by invoking the principle of equal treatment and thus acquiring the right of residence in Austria. However, the concept of residence in Regulation 883/04, which is decisive for entitlement to non-contributory special benefits, is not contingent on formal legal requirements as explicitly stated in Art. 11 of Implementing Regulation 987/2009<sup>19</sup>, because it only aims to ensure the establishment of a genuine link between the beneficiary of a special non-contributory benefit and the respective Member State.

It is therefore not very surprising that the ECJ was asked to issue a preliminary ruling on whether entitlement to the compensatory supplement can be made contingent on proof of lawful residence in Austria. The Court’s decision in the famous *Brey* case<sup>20</sup> is well-known:

Firstly, special non-contributory benefits may be classified as social assistance in the sense of the Residence Directive 2004/38; this is especially

---

17. PFEIL W (2019) § 292. In: MOSLER R, MÜLLER R and PFEIL W (eds.) *Der SV-Komm.* Wien: Manz. Rz 12.

18. Settlement and Residence Act (*Niederlassungs- und Aufenthaltsgesetz*), 51 (1).

19. Regulation (EC) No. 987/2009 of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems [2009] OJ L284/1.

20. Case C-140/12 *Brey* ECLI:EU:C:2013:565.

true for the compensatory supplement, considering that it is a benefit intended to ensure a minimum means of subsistence for beneficiaries with an inadequate pension. Secondly, the fact that a national of another Member State, who is not economically active, may be eligible to the compensatory supplement due to his/her small pension, could represent an unreasonable burden on the host Member State's social assistance system, and he/she may therefore be excluded from the right of residence. However, thirdly, the competent national authorities cannot draw such conclusions without first conducting an overall assessment of the specific burden the granting of a benefit would actually place on the social assistance system as a whole, with reference to the individual's personal circumstances.<sup>21</sup>

The latter outcome left the Austrian administration puzzled. How should such an overall assessment be carried out in practice? The astonishment was even greater when the ECJ asserted in the *Dano* case<sup>22</sup> and later in the *Alimanovic* case<sup>23</sup> that such an overall assessment was not required for a German special non-contributory benefit, but that the mere fact that a person applied for social assistance benefits sufficed to conclude that he/she might represent an unreasonable burden for the host Member State's social assistance system and that the claimant could therefore be excluded from entitlement to the special non-contributory benefit. This supposed change in jurisdiction led the Austrian Supreme Court to conclude that neither the Residence Directive nor the Coordination Regulation require an overall assessment to determine whether an individual might pose a burden to the social security system, and that the mere fact that a person applies for the compensatory supplement suffices to deny him/her the right of residence and, by extension, the compensatory supplement.<sup>24</sup> In other words, the requirement to conduct an overall assessment specified in the ECJ's *Brey* case is no longer applied to the compensatory supplement. Yet the conclusion of the Austrian Supreme Court does not sound particularly convincing<sup>25</sup> because a comparison of

---

21. Case C-140/12 *Brey* ECLI:EU:C:2013:565.

22. Case C-333/13 *Dano* ECLI:EU:C:2014:2358.

23. Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597.

24. 10 ObS 15/16b [2016] SSV-NF 30/34 (OGH).

25. In this sense, NIKSOVA D (2017) Zugang zu Sozialleistungen für wirtschaftlich nicht aktive Unionsbürger. *Zeitschrift für Arbeits- und Sozialrecht*, 307.

the *Brey* case with the *Dano* and *Alimanovic* cases could put the Austrian Supreme Court's approach into question with good reasons. Mrs *Dano* and Mrs *Alimanovic* were both –although capable of working– economically inactive, whereas Mr *Brey* was a pensioner, who had been economically active his entire life prior to retirement. This represents a significant difference as it relates to the proof of the burden test.<sup>26</sup>

#### 4.2. Export of benefits

Aside from residence, the Austrian compensatory supplement raises questions about the export obligation, even though the ECJ confirmed its classification as a special non-contributory benefit in *Skalka*.<sup>27</sup> The reason why the issue of export of benefits arises again is the Austrian legislator's introduction of a new benefit in 2020: a premium on the compensatory supplement, the so-called "*Ausgleichszulagenbonus*".<sup>28</sup> The Austrian legislator thereby sought to respond to the political allegation that only the amount of pension but not the number of insurance periods is decisive for entitlement to the compensatory supplement. This would result in a discrimination of persons with a long, but fragmented history of employment, which in particular applies to women, compared to those who have only fulfilled the minimum qualifying period for an old-age or disability pension. For this reason, recipients of the compensatory supplement with a long history of insurance periods, namely at least 30 years, are entitled to a premium (approx. EUR 150) if they habitually and lawfully reside in Austria.<sup>29</sup> This means that the premium itself does not directly hinge on a specific need to prove sufficient means of subsistence but rather depends on the number of the beneficiary's insurance periods. In other words, the premium follows the logic of social insurance benefits and not that of social assistance benefits. Or to use the words of the Coordination Regulation, it is a contributory benefit directly linked to the risk of old age or disability.

---

26. Also Pfeil W (2020) Von der Ausgleichszulage zur Mindestpension?. In: BRAMESHUBER E, FRIEDRICH M and KARL B (eds), Festschrift Franz Marhold, Wien: Manz: 372.

27. Case C-160/02 *Skalka* ECLI:EU:C:2004:269.

28. General Social Insurance Code (Allgemeines Sozialversicherungsgesetz/ASVG), 299a.

29. General Social Insurance Code (Allgemeines Sozialversicherungsgesetz/ASVG), 299a.

That is why the requirement of habitual and lawful residence for entitlement to the premium to the compensatory supplement is being questioned by Austrian academia;<sup>30</sup> and rightly so! The concept of the premium does not correspond to the classification of a special non-contributory benefit. This might be the reason why it has so far been excluded from Annex X of Regulation 883/04. There is no doubt, however, that the premium should be subject to the export obligation in accordance with Art. 7 Regulation 883/04 and should therefore not be linked to the requirement of proving habitual and lawful residence in Austria.

#### **4.3. Compatibility with other benefits**

The hybrid character of the compensatory supplement creates further problems with regard to entitlement to long-term care cash benefits (*Bundespflegegeld*). Entitlement to *Bundespflegegeld* primarily requires entitlement to a so-called "basic benefit" ("*Grundleistung*"), i.e. a pension benefit.<sup>31</sup> However, mere residence in Austria may constitute entitlement to *Bundespflegegeld*, provided that Austria is the competent Member State in accordance with the rules of Regulation 883/04 (cf. Section 3a BPGG).<sup>32</sup> This specification and reference to Regulation 883/04 was a direct response of the Austrian legislator to an Austrian Supreme Court decision. In 2014, the Supreme Court dealt with the question whether a person who resides in Austria is entitled to the long-term cash benefit/*Bundespflegegeld* if he/she does not receive an Austrian pension ("*Grundleistung*") but only a special non-contributory benefit, such as the compensatory supplement.<sup>33</sup> The competent Austrian Pension Insurance Carrier denied that such an entitlement existed, arguing that Austria as the Member State of residence is not the competent Member State for health care cash benefits (according to Regulation 883/04) in situations like the one at stake. The applicant ought to claim long-term care benefits from the Member State paying out the pension in line with the rules of Regulation

---

30. PFEIL W (2019) § 299a. In: MOSLER R, MÜLLER R and PFEIL W (eds) *Der SV-Komm.* Wien: Manz. Rz 12; NIKSOVA D (2017) Zugang zu Sozialleistungen für wirtschaftlich nicht aktive Unionsbürger. *Zeitschrift für Arbeits- und Sozialrecht*, 309; MAZAL W (2017) Die Problematik der erhöhten Ausgleichszulage. *Zeitschrift für Arbeits- und Sozialrecht*, 243.

31. Federal Cash Benefit Act (*Bundespflegegeldgesetz*), 3.

32. Federal Cash Benefit Act (*Bundespflegegeldgesetz*), 3a.

33. 10 Obs 36/14p (2014) SSV-NF 28/39.

883/04. The Austrian Supreme Court ruled, however, that in light of the ECJ's decision in *Hudzinski and Wawryzniak*,<sup>34</sup> a person who meets all requirements according to national law cannot be denied a benefit just because Austria is not the competent Member State according to European Union law.<sup>35</sup> That would infringe on individuals' freedom of movement. The Austrian Supreme Court therefore concluded that although Austria was not the competent Member State for providing health care benefits to the claimant, the *Bundespflegegeld* must be granted to persons who habitually and lawfully reside in Austria and receive a pension from another Member State as well as the compensatory supplement from Austria.<sup>36</sup>

The law was amended in 2015 in response to this ruling and to reiterate that Austria does not have any obligation to pay benefits in cases in which another Member State is competent according to the rules of Regulation 883/04. Now, a person who resides in Austria can only claim *Bundespflegegeld* if Austria is also the competent Member State in accordance with Regulation 883/04.<sup>37</sup> The underlying objective is to prevent the application of the *Hudzinski* ruling.<sup>38</sup> In 2016, the Austrian Supreme Court confirmed –not very convincingly<sup>39</sup> and without asking the ECJ for a preliminary ruling– that this new legislation is in line with the ECJ's jurisdiction.<sup>40</sup> Consequently, a person who habitually and lawfully resides in Austria but who receives a pension benefit from another Member State is no longer entitled to *Bundespflegegeld*, even if he/she receives a compensatory supplement in accordance with Austrian legislation and thus proves existence of a genuine link to Austria.

## 5. Concluding remarks

The hybrid nature of the compensatory supplement raises a number of different and complex legal issues that are all ultimately linked to the

---

34. Case C-611/10 *Hudzinski and Wawryzniak* ECLI:EU:C:2012:339.

35. 10 ObS 36/14p (2014) SSV-NF 28/39.

36. 10 ObS 36/14p (2014) SSV-NF 28/39.

37. Federal Cash Benefit Act (*Bundespflegegeldgesetz*), 3a.

38. Case C-611/10 *Hudzinski and Wawryzniak* ECLI:EU:C:2012:339.

39. Cf in detail Felten E (2017) Export von Pflegegeld nur bei Zuständigkeit nach der VO 883/2004?. *Das Recht der Arbeit*, 316.

40. 10 ObS 83/16b (2016) SSV-NF 30/80.

problem of classification. Even though EU law provides for a specific category of special non-contributory benefits that lie somewhere between social assistance and social insurance, the legal consequences of this classification are still not entirely clear. The mere clarification that the export obligation does not apply does not suffice to address the challenges this category of benefits creates in practice, as the Austrian example clearly demonstrates. This is highly problematic because recipients of special non-contributory benefits are among those who need them the most and are dependent on social solidarity. Therefore, a common effort should be made to modernise the current rules on special non-contributory benefits. In this regard, a possible revision of Regulation 883/04 is a missed opportunity.

### **Bibliography**

- Felten E (2017) Export von Pflegegeld nur bei Zuständigkeit nach der VO 883/2004?. *Das Recht der Arbeit*, 312-317.
- Mazal W (2017) Die Problematik der erhöhten Ausgleichszulage. *Zeitschrift für Arbeits- und Sozialrecht*, 243-246.
- Niksova D (2017) Zugang zu Sozialleistungen für wirtschaftlich nicht aktive Unionsbürger. *Zeitschrift für Arbeits- und Sozialrecht*, 305-310.
- Pfeil W (2019a) § 292. In: Mosler R, Müller R and Pfeil W (eds) *Der SV-Komm.* Wien: Manz.
- Pfeil W (2019b) § 299a. In: Mosler R, Müller R and Pfeil W (eds) *Der SV-Komm.* Wien: Manz.
- Pfeil W (2020) Von der Ausgleichzulage zur Mindestpension?. In: Brameshuber E, Friedrich M and Karl B (eds), *Festschrift Franz Marhold*, Wien: Manz: 367-379.
- Vonk G (2020) The EU (non) co-ordination of minimum subsistence benefits: what went wrong and what way forward?. In: Brameshuber E, Friedrich M and Karl B (eds), *Festschrift Franz Marhold*, Wien: Manz, 855-865.

# The New Basic Pension Supplement in Germany\*

---

Hans-Joachim REINHARD

## 1. The German pension system

The German pension system was introduced by then-Chancellor Bismarck in the 1880s<sup>1</sup>. Initially, Bismarck had developed a system that was to include the entire population and grant basic protection against the risk of invalidity. It was presumed that by the time the insured person reached the age of 70 years, he/she was too old to continue working – this rationale underpins the roots of today's retirement pension. The liberal party in the German Parliament at the time, the Reichstag, voted against taking a holistic approach. Thus, Bismarck had to restrict his basic protection system to the group of blue-collar workers. He did not choose this target group because it was the most vulnerable. In fact, he saw the emerging workers' movement as a political hazard. Hence, the implementation of a social security system was the appropriate tool to ban left-wing political parties and trade unions. These institutions had created insurance systems since the 1850s based on the mutual objective of providing assistance to workers in need and their dependants and they were gaining increasing political influence.

This Bismarckian concept continues to dominate the German pension system and its principal structure. The German statutory pension system (*Gesetzliche Rentenversicherung*) is a social security system for employees (remunerated employment). In 1911, a parallel system with similar benefits was developed for white collar workers. Self-employed persons were – apart from some small groups – never integrated into the system. Civil servants refused to be integrated into the system because their own system

---

\* The translation of both German laws as well as extracts of rulings of German courts contained in this chapter are by the Author and are not official translations.

1. THUROW Constantin (2006) *Von Bismarck bis heute - Zur Geschichte der Sozialversicherung in Deutschland*, GRIN, München.

(*Beamtenversorgung*)<sup>2</sup> was far more generous and offered, aside from the statutory pension system, a guaranteed minimum pension in old age. Civil servants do not pay social security benefits, i.e. their insurance system is fully financed through taxes. Similar rules apply to judges and military staff. Freelancers (*freie Berufe*) also refused to join the statutory pension system. They created their own professional pension schemes for the liberal professions (*berufsständische Versorgungswerke*).<sup>3</sup> While the statutory pension system is financed by a pay-as-you-go scheme, the professional pension schemes for the liberal professions preferred capital accrument as a source of financing. Professional pension schemes for the liberal professions are mandatory for lawyers, notaries, physicians, architects, engineers, pharmacists, dentists, veterinaries, certified accountants, tax consultants, etc. Due to their capital-based financing system, minimum income in old age for beneficiaries is not an essential component of their range of benefits.

Germany's statutory pension, which is codified in Book 6 Social Code (SGB VI), therefore only includes 85 per cent of the population. Moreover, a systematic trap excludes in particular women from the system, preventing them from acquiring entitlements to an old age pension: the mini job threshold. Salaries up to EUR 520<sup>4</sup> per month (marginal employment: *geringfügige Beschäftigungen*) can be excluded from social security contributions, which means that such employees do not acquire pension entitlements. Until 2013, employees with a salary of less than EUR 450 were automatically excluded from the system but could opt-in and pay contributions to a compulsory social protection scheme. In early 2013, the system was revised and so-called mini-jobbers have to now explicitly opt out if they do not want to be covered by the system. Unfortunately, many women still choose to opt-out, preferring larger cash-on-hand payments instead of building up pension benefits for old age.

---

2. WALTHER Steffen (2014) Reformen der Beamtenversorgung aus ökonomischer Perspektive, Diss. Speyer, Deutsches Forschungsinstitut für öffentliche Verwaltung Speyer, Speyerer Forschungsberichte 277, Speyer.

3. LEPELMEIER Dirk Lepelmeier, ROTH Helmut Roth (2009), Berufsständische Versorgungseinrichtungen in der Bundesrepublik Deutschland - Alters-, Invaliditäts- und Hinterbliebenenversorgung mit Sicherheit, Tradition und Modellcharakter für die Zukunft, Uhlenbruch, Bad Soden.

4. Until 1 October 2022, the threshold was only EUR 450.



The German statutory pension system is primarily financed on a pay-as-you go basis. Yet, about one-third of the costs are tax-financed. In 2021, the Federal Grant (*Bundeszuschuss*) contributed around EUR 79 billion.<sup>5</sup>

## 2. Benefits

For insured persons (both sexes) born in or after 1964, the regular retirement age is 67 years. For those born between 1952 and 1963, the regular retirement age is gradually increasing from 65 to 67 years. Early retirement is possible at age 63 for employees with an insurance period of 35 years (*langjährige Versicherte*). However, a deduction of 3.6 per cent applies for each year of retirement prior to the statutory retirement age (maximum 14.4 per cent). This deduction continues to apply even after the pensioner has reached the statutory retirement age. Early retirement is possible without any deductions at the age of 63 years for employees who have an insurance period of 45 years (*besonders langjährige Versicherte*).<sup>6</sup>

Benefits are strictly earnings-related and proportional to the employee's former salary. Double income equals double pension entitlements while half an income equals half of pension entitlements. The reference point for the calculation is the statistical gross average salary of all insured persons (*statistisches Bruttodurchschnittsentgelt aller Versicherten*). This reference point is determined annually by the Federal Statistical Bureau (*Statistisches Bundesamt*) and published in the Federal Law Gazette. For 2023, it amounts to EUR 43,142.<sup>7</sup>

Year by year, individual income is set in relation to the respective reference point for that year. The result is expressed as 'earnings points' (*Entgeltpunkt* or *Rentenpunkt*). Some examples illustrate this calculation:

- In 2023, Mr A's gross income is EUR 50,000 (EUR 4,166.66 per month). Thus, he acquires  $\text{EUR } 50,000 / \text{EUR } 43,142 = 1.1590$  earnings points for 2023.

---

5. <https://de.statista.com/statistik/daten/studie/7031/umfrage/bundeszuschuesse-an-die-rentenversicherung-seit-1950/>

6. Early retirement age is also gradually increasing. For insured persons born in 1964 or later, it will be 65 years.

7. § 3 Verordnung über maßgebende Rechengrößen der Sozialversicherung für 2023 (Sozialversicherungsrechengrößen-Verordnung 2023).

- Mr B earns minimum wage of EUR 12 per hour. He works 40 hours per week, all year long. This results in an annual gross income of EUR 480 per week and EUR 24,960 per year (EUR 2,080 per month). At the end of the year, he has  $\text{EUR } 24,960 / \text{EUR } 43,142 = 0.5786$  earnings points for 2023.
- Mrs C's gross income is EUR 10,000 (EUR 833.33 per month) because she works part time. She thus acquires  $\text{EUR } 10,000 / \text{EUR } 43,142 = 0.2318$  earnings points for 2023.

The value of the earnings point is set annually on 1 July in line with the increase in wages. Since 1 July 2022, the value of 1 earnings point has been set to EUR 36.02 in western Germany and EUR 35.52 in eastern Germany (former GDR). This difference in value between western and eastern Germany was attributable to the different wage levels and disappeared likely disappear in 2023, 33 years after the country's reunification (now EUR 37,60).

On the date of retirement, all earnings points accrued during the employee's career are added and multiplied by the earnings point value.<sup>8</sup>

Assuming that in the examples mentioned above all three persons worked for a total of 40 years at the same income level in relation to the annual average income of all insured persons:

- Mr A will receive  $40 * 1,1590 * \text{EUR } 36,02 = \text{EUR } 1,669.89$  per month
- Mr B will receive  $40 * 0,5786 * \text{EUR } 36,02 = \text{EUR } 833.65$  per month
- Ms C will receive  $40 * 0,2318 * \text{EUR } 36,02 = \text{EUR } 333.98$  per month

These amounts are gross amounts and a minimum of 10.8 per cent<sup>9</sup> is deducted for compulsory sickness insurance and long-term care insurance. Thus, our pensioners will have a disposable income of:

- Mr A: EUR 1,489.54 per month
- Mr B: EUR 743.62 per month
- Ms C: EUR 297.91 per month

Pensions are generally taxable. In our example, it is likely that only Mr A would have to pay income taxes on his pension. A total annual amount of EUR 10,908 is exempt from income taxes as a tax-free mini-

---

8. In case of early retirement, the result is multiplied by an additional factor (*Zugangsfaktor*) which reflects the annual deduction for early retirement.

9. The exact percentage depends on the sickness insurance company which may request an additional contribution (*Zusatzbeitrag*) of up to 1 per cent. Persons who never had own children have to pay an additional 0.25 per cent for long-term care insurance.

imum subsistence level (*steuerfreies Existenzminimum/Grundfreibetrag*).<sup>10</sup> If Mr B and Ms C do not have other sources of taxable income, their pension will be far below the tax-free minimum subsistence level. The figures above reveal that even Mr A, whose income was 15.9 per cent above the average income, will receive a pension that is not particularly generous. And Mr B, who worked for the statutory minimum wage for 40 years, will only receive a pension amounting to 77 per cent of the tax-free minimum subsistence level.

The situation is even worse for survivors. If the individuals in our example die, the surviving spouse will receive a survivors' pension of 55 per cent, meaning that the partner of

- Mr A. will receive: EUR 819.25
- Mr B. will receive: EUR 408.99
- Ms C will receive: EUR 163.85

These amounts are clearly not sufficient for a decent standard of living.

### 3. Poverty thresholds

The German Federal Statistical Bureau has evaluated the poverty threshold for single and multi-person households.

At-risk-of-poverty threshold in EUR/year <sup>11</sup>		
	Survey year	
	2020	2021
Single household	EUR 15,605/year EUR 1,300.41/month	EUR 15,009/year EUR 1,250.75/month
Two-person household		EUR 1,721.00 /month
Two adults with two children under 14 years	EUR 32,770/year EUR 2,730.83/month	EUR 31,520/year EUR 2,626.67/month

10. <https://www.bundesfinanzministerium.de/Content/DE/Downloads/Steuern/14-existenzminimumbericht.html>

11. <https://www.destatis.de/EN/Themes/Society-Environment/Income-Consumption-Living-Conditions/Living-Conditions-Risk-Poverty/Tables/eu-poverty-threshold-risk-mz-silc.html>

Although Mr A's pension is above the poverty threshold, in case he has a partner with a low or no income, the couple's household income falls under the poverty threshold. Germany's labour market is skewed towards men in full-time employment and women in part-time employment. Assuming Mr A and Ms C are a couple, their household income would fall under the poverty threshold, despite the fact that they have both worked for 40 years. In case Ms C is married to Mr B, who earned minimum wage, their household income falls well below the poverty threshold of EUR 1,721 per month for a couple without children.<sup>12</sup>

Statistics reveal that poverty threatens 16.3 per cent of all persons aged 65 years and older and 17.5 per cent of pensioners. The figure for women is 1.7 per cent higher than for men. Poverty risk in eastern Germany is 2.8 per cent higher than in the western part of the country.

#### 4. Types of minimum income

The fight against poverty has been on the political agenda for decades, but the figures above confirm that success has been limited. Various types of social security benefits seek to eliminate or to at least alleviate poverty by providing for a minimum level of subsistence.

##### ***4.1. Grundsicherung für Arbeitsuchende (basic protection for jobseekers) SGB II***

Basic protection was introduced for jobseekers in 2005. It is codified in Book 2 of the Social Code (SGB II) and commonly known as *Hartz IV*. In a revision of 1 January 2023, it was renamed into *Bürgergeld* (citizen income), and access to this benefit has been facilitated.

This law targets employable persons between the ages of 15 years to retirement age. A person who is entitled to a statutory retirement pension is, however, excluded from this benefit.<sup>13</sup>

##### ***4.2. Grundsicherung [Sozialhilfe] (social assistance) SGB XII***

Unemployable persons from the age of 0 to retirement age may be entitled to social assistance benefits according to Book 12 Social Code

---

12. <https://www.wsi.de/de/armut-14596-armutsgrenzen-nach-haushaltsgroesse-15197.htm>

13. §§ 7 Abs. 1 Nr. 1, 7a SGB II.

(SGB XII).<sup>14</sup> The eligible amount equals the benefits provided under SGB II but the prerequisites for entitlement differ.

Old age pensioners and disabled persons may also be eligible for benefits under SGB XII (*Grundsicherung im Alter und bei Erwerbsminderung*). The amounts are comparable to those provided under SGB XII and SGB II, but the earnings limit for the income- and means-test differ. The benefit is only payable to elderly persons who permanently reside in Germany; foreigners must have had a valid residence permit for at least five years. Only in very exceptional cases are such benefits payable to Germans who live abroad. Migrants who settle in Germany with the sole purpose of receiving social assistance benefits are not entitled either.

## 5. Grundrentenzuschlag (basic pension supplement) SGB VI<sup>15</sup>

The most recent measure introduced on 1 January 2022<sup>16</sup> to fight poverty among the elderly is the basic pension supplement. In political debates it was often referred to as 'basic pension' (*Grundrente*), an expression that led the public to believe that it is a guaranteed minimum pension for the elderly. The term is misleading, however. The benefit is a supplement only for pensioners who have had a relatively long career but did not accrue sufficient earnings points.<sup>17</sup>

---

14. §§ 41-43 SGB XII.

15. BRALL, Natalie / HOENIG, Ragnar / KERSCHBAUMER, Judith (2021), *Die Grundrente - 100 Fragen und Antworten zum Grundrentenzuschlag*, Bund-Verlag Frankfurt; DÜNN Sylvia, BILGEN Claudia, HECKENBERGER Sophie-Charlotte (2020), *Das Grundrentengesetz*, DRV pp. 325-346; GLOMBIK Manfred (2022), *Die Grundrente*, DVP pp. 72-75; HESSE Werner (2021), *Die neue Grundrente für langjährig Versicherte in: Paritätischer Gesamtverband (ed.), ohne Verlag, München*; LEPIORZ Hubert (2020), *Die neue Grundrente*, rv pp. 136-139, 179-181; RULAND, Franz (2021), *Die Grundrente - Voraussetzungen, Berechnung, Verfahren und Versorgungsausgleich*, NZS pp. 241-250; SCHEWE Petra (2021), *Der neue Grundrentenzuschlag: Anspruchsvoraussetzungen - Berechnung - Verhältnis zu anderen Leistungen*, Walhalla Fachverlag, Regensburg; SCHMIDT Sylvia (2021), *Die neue Grundrente, Zuschlag an Entgeltpunkten für langjährige Versicherung, aktuelles Recht für die Praxis*, Beck, München.

16. § 76g SGB VI.

17. This term is even used in the caption of the explanatory leaflet of the German Statutory Pension Scheme, [https://www.deutsche-rentenversicherung.de/SharedDocs/Downloads/DE/Broschueren/national/grundrente\\_zuschlag\\_zur\\_rente.pdf?\\_\\_blob=publicationFile&v=1](https://www.deutsche-rentenversicherung.de/SharedDocs/Downloads/DE/Broschueren/national/grundrente_zuschlag_zur_rente.pdf?__blob=publicationFile&v=1)

The supplement is managed by the Statutory Pension Scheme (*Gesetzliche Rentenversicherung*).<sup>18</sup> It is not paid from contributions but is tax-financed,<sup>19</sup> and is income- but not means-tested. It is paid automatically without the need of any formal application but fraudsters have already tried to phish data from pensioners.<sup>20</sup>

### a. Requirements

The requirements for entitlement to this supplement are quite rigid.

#### (1) An insurance period of at least 33 years

The first requirement is an insurance period of minimum 33 years (396 months), the so-called *Grundrentenzeiten*. This period must cover a period of compulsory insurance (e.g. remunerated employment). Periods of child care or care for next-of kin count as compulsory insurance periods. Periods of unemployment, on the other hand, are excluded. In cases in which an insured person does not meet the requirement of 33 years of compulsory insurance he/she is not entitled to any supplementary benefit, even if his/her income was low throughout his/her career. There is no proportional reduction, e.g. a lower supplement for a 30-year career only.

#### (2) Income threshold

The second requirement is the income threshold. Only those insured months are taken into account where the average salary was at least 30 per cent of the average salary of all insured persons. This in 2023 is a minimum annual income of EUR 12,942.60 (EUR 1,078.55 per month), a salary that many part-time workers, notably women, do not earn. If an employee's salary falls below this threshold, no entitlement exists at all, not even on a proportional quota. Moreover, there is no additional compensation for persons with a long career (e.g. of 40 years) as long as the 33 years of earning at least the minimum income are not proved. Consequently, low-income workers who are most in need are often excluded from the supplement.

---

18. MATLOK Dana (2021), Das Grundrentengesetz und seine Umsetzung am Beispiel der Deutschen Rentenversicherung Bund rv pp. 71-73.

19. The Federal Grant (*Bundeszuschuss*) was increased, OLG Koblenz, Beschluss vom 04.03.2022 - 7 UF 46/22, BeckRS 2022, 3462 Rn. 10.

20. OHNE ANGABE (2021), Grundrente wird automatisch gezahlt - Achtung Trickbetrug - Fragebögen zur Grundrente sind Fälschungen, NachrDRV HE 2021, Nr 1, 12.

*b. Benefit*<sup>21</sup>

## (1) Doubling individual earnings points

In a first step, individual earnings points for each month are doubled (e.g. 0.3 earnings points translate into 0.6 earnings points). There is, however, a limit of 0.8 earnings points (80 per cent of the average salary). This limit of 80 per cent applies after 35 insurance years. In case the insurance period ranges from between 33 years (396 months) and 35 years (420 months), the upper limit is progressive. The upper limit is proportionally increased for each insurance month over 396 months from 0.6 earnings points (60 per cent) until the upper limit of 0.8 earnings points (80 per cent) is reached after 420 months. A longer insurance period (e.g. 450 months) does not alter the upper earnings limit of 80 per cent.

## (2) Deduction of 12.5 per cent

In a second step, 12.5 per cent is deducted from the doubled value. This means that for an insurance period of 33 years, 0.3 earnings points are doubled to 0.6 earnings points and then reduced by 12.5 per cent to 0.525 earnings points. The purpose of this 12.5 per cent reduction is to prevent potential adverse effects for those with long insurance periods. A person who has acquired 0.6 earnings points based on his/her period of employment should have a slightly higher pension than a pensioner who receives the supplement.

In 2023, the maximum supplement is EUR 441.<sup>22</sup> According to the Ministry of Labour and Social Affairs, 1.1 million pensioners receive the supplement. The average supplement being paid out is EUR 88.<sup>23</sup>

*c. Income test*<sup>24</sup>

The pension supplement is subject to an income test. If the pensioner's income exceeds a given limit, the supplement is reduced. The income limit for a single person is EUR 1,317, and EUR 2,055 for a couple. If

---

21. BERDYSZ Uwe (2021), Der Grundrentenzuschlag - Wie wird die Höhe ermittelt?", Kompass/KBS Nr 3/4: pp. 3-11.

22. The maximum is 12.25 earning points (0,4 x 35 - 12,5%).

23. <https://www.deutsche-rentenversicherung.de/DRV/DE/Rente/Grundrente/grundrente.html>

24. KIRSCHBERGER Silke (2021), Der Grundrentenzuschlag - Was bedeutet die Einkommensprüfung?, Kompass/KBS Nr 5/6: pp. 7-16.

the pensioner's income exceeds the limit, 60 per cent of the excess is taken into account.

- For example: a single person has an income of EUR 1,367.
- The pension supplement is reduced by  $\text{EUR } 1,367 - \text{EUR } 1,317 = \text{EUR } 50 * 60 \text{ per cent} = \text{EUR } 30$ .  
If the pensioner's income exceeds EUR 1,686 / EUR 2,424, 100 per cent is taken into account.
- For example: a couple has a household income of EUR 2,574.
- The pension supplement is reduced by  $\text{EUR } 2,574 - \text{EUR } 2,424 = \text{EUR } 150 * 100 \text{ per cent} = \text{EUR } 150$ .

## 6. Critical issues

### a. *Critical issues from a national perspective*

This law was heavily criticised in the political debate and its conformity with the German Constitution was questioned.

#### (1) Complicated calculation formula

First of all, the formula for calculating the pension supplement is very technical and many insured persons do not understand the calculation.

#### (2) High administrative burden

Furthermore, the administrative burden for the statutory pension system and the tax administration is very high. Within the scope of the political process, the statutory pension system sought to circumvent this additional burden, arguing that all statutory pensions are paid without an income test. It is not statutory pension system's task to prove insured persons' financial needs. This should be the task of the administrative bodies dealing with social assistance benefits because they have to screen the individuals' financial situation.<sup>25</sup> The legislator, however, did not act on this proposal, stating that social assistance recipients are still stigmatised and that the supplement is strictly linked to entitlement to a statutory pension.

#### (3) Proof of income

But how does the statutory pension system obtain the relevant income data? The insured person can, of course, provide the necessary data, as is the case with other social benefits. According to the legislator, however, this is not a suitable solution in a digitalised world. The deci-

---

25. <https://docplayer.org/219072486-Stellungnahme-der-deutschen-rentenversicherungsbund.html>



sion was made for tax data from the tax authorities to be automatically transferred to the statutory pension system. The outcry was enormous. Some saw a violation of tax information privacy while others feared data misuse. Last but not least, a constitutional question arose as well. The statutory pension system is covered by federal law whereas tax administration falls under the responsibility of the federal states (*Länder*). These questions were addressed and an automatic annual update between the tax authorities and the statutory pension system takes place. Yet not all problems have been resolved. Many pensioners are not required to file a tax declaration because their annual income is below the taxable subsistence level. This might be a minor problem because pensioners whose income lies below this threshold can probably claim the pension supplement. But for the calculation of the reduction, information on the individual's exact income is decisive.

#### (4) Proof of income abroad

Pensioners who live abroad usually do not file a tax declaration in Germany. Thus, they have to directly inform the statutory pension scheme about their income. Even if they have a foreign tax assessment, it is not automatically comparable since each country has its own tax regulations. Specifically, income in old age is taxed differently in various countries.

The same is true for social security contributions (e.g. for health care). In many countries, pensioners do not pay social security contributions, while in others they have to pay the full contribution rate. The most striking issue is that the tax year and the pension year are not synchronous. Normally, a tax declaration is filed at the end of the year for the previous year whereas pensions are paid for the current year when the pensioner's income might be lower. This might result in a discrepancy between real and accountable income. Moreover, pensions are raised each year on 1 July, and pensions and entitlement to the supplement must be recalculated.

#### (5) Exclusion of low-income workers

The most critical aspect is the exclusion of low-income workers.<sup>26</sup> As explained above, only insurance months during which an income of at least 30 per cent of the average income of all insured persons are consid-

---

26. IRION Andreas (2020) Grundrente demütigt Rentenbeiträge aus Minijobs, Übersehene Anreizumkehr-Schwelle der Grundrente bei 1.352 € schafft Gestaltungsmöglichkeiten bei Minijobs, BAV, Versorgungsausgleich, Pflegepersonen und mehr, rv 2020, 173-178.

ered. It is difficult for part-time workers or so-called “mini jobbers” to meet this criterion. Part-time work or a mini job may count for the minimum of 33 years of compulsory insurance but only those months in which the individual earned an income of at least 30 per cent of the average income will grant him/her additional earnings points.

- For example: Ms C has earned an income of at least 30 per cent for 30 years. Later, she worked for three years in a compulsory insured part-time job or in a mini job with an income of 25 per cent of the average income. Thus, she completed 33 years of compulsory insurance and is entitled to the pension supplement. Despite this, only 30 years are taken into account to calculate the amount of the supplement, i.e. she is not entitled to the full supplement. This method puts more women at a disadvantage because their periods of insurance are more frequently interrupted by part-time work than is the case for male employees. This could be considered indirect discrimination under EU law.<sup>27</sup>

#### (6) Moderate financial outcome

Any increase in pensions is generally very moderate. In 2023, the maximum supplement amount is EUR 441 and is paid when the individual’s pension is EUR 504.28. This provides the pensioner with a total monthly amount of EUR 945.28. This is not too bad at first glance. When deducting 10.8 per cent for health insurance and long-term care insurance, the total pension amount ends up being EUR 843.18. For pensioners with a pension payment of less than EUR 504.24, the pension supplement is lower and thus the total amount available to them is even less.

#### (7) Social assistance benefits in excess of the pension supplement

Given that our pensioner whose pension is EUR 843.18 has no other source of income, he/she might be entitled to social assistance benefits.<sup>28</sup> The basic amount of such social assistance is EUR 502 + costs for

---

27. In a recent decision, the CJEU ruled that it might be indirect discrimination if women statistically have lower access to benefits than men, cf. REINHARD Hans-Joachim (2023), *Mittelbare Diskriminierung aufgrund des Geschlechts/Vereinbarkeit mehrerer Renten wegen vollständiger Berufsunfähigkeit/Mittelbare Diskriminierung anhand statistischer Daten*, Anm. zu EuGH v. 30.06.2022, C-625/20, ZESAR 1: pp. 41-48.

28. HOENIG Ragnar, KERSCHBAUMER Judith, WENNING Paula (2021), *Grundsicherung und Grundrente*, AiB Nr 7/8: pp. 38-40.

heating and housing (e.g. EUR 380). Entitlement to social assistance benefits is EUR 882.<sup>29</sup> This means that even the highest possible supplement will not suffice to preclude social assistance benefits. Nevertheless, it is not advisable for a pensioner to claim social assistance benefits. They are income- and means-tested while the pension supplement is only income-tested. A high amount of savings in a bank account, properties or stocks are irrelevant for entitlement to the pension supplement, a point that has also been heavily criticised. A pensioner who earns some additional income by cleaning houses, for example, will lose part of the supplement whereas a pensioner who sells his/her high valued stocks in the stock exchange can spend the entire amount without jeopardising entitlement to the supplement.<sup>30</sup>

Moreover, coordination between the pension supplement and the payment of social assistance benefits does not always correspond. It may happen that a pensioner receives the supplement but loses his/her social assistance benefits<sup>31</sup>, despite the fact some exemptions do apply.<sup>32</sup>

#### (8) Inclusion of the partner's income

Another crucial factor is that not only the pensioner's income but also his/her partner's income is taken into account. As a rule, a retirement pension is an individual entitlement and is paid because the individual has completed periods of remunerated and insured employment. The new law breaks with this dogma and involves the partner's income in the calculation of the pensioner's pension amount. As a result, the pensioner may meet the requirement of a period of 33 years of insured employment with a low salary of 30 per cent of the average income, yet does not receive a single penny as a pension supplement because his/her partner has an income beyond the defined threshold.

---

29. Social assistance benefits would also cover the costs for health insurance and long-term care insurance.

30. Sales are not taxable if there is a one-year delay between a purchase and sale.

31. REIN Christopher (2022), Die Grundrentennachzahlung im System des SGB XII - wie gewonnen, so zerronnen?, ZfF pp. 62-65.

32. There are uncertainties about the constitutionality of these exemptions, cf. RULAND Franz (2022), Zur Verfassungswidrigkeit der Freibetragsregelungen in §§ 82 Abs. 4 und 82a SGB XII SGB pp. 389-394.

## (9) Distinction between married and unmarried couples

The best option a pensioner in the above situation can do is get a divorce, as only the income of a spouse (i.e. married) is relevant. Unmarried couples count as single persons, even if they share a household – this is another clear deficiency of this law.

## (10) Exclusion of other pension systems and mixed careers

Last but not least, the tax-financed pension supplement is only available for pensioners covered by the statutory pension system. Pensioners covered by other German pension systems, e.g. occupational pension systems, cannot benefit from the supplement. The same applies to mixed careers (e.g. pensioners who were covered by the statutory pension system for 20 years and by a professional pension schemes for the liberal professions for 13 years). Compulsory periods outside the statutory pension system count for the required 33-year period of compulsory insurance.<sup>33</sup> The amount of the supplement, however, is only calculated on the basis of insurance years in the statutory pension scheme.

## (11) Insecurity in case of divorce

Under German law, in case of divorce, pension entitlements are divided between partners (*Versorgungsausgleich*).<sup>34</sup> Although experts have warned that this issue will need to be addressed, the legislator has not mentioned what happens with the supplement in case of divorce. Some courts have ruled that it is not part of the division of the pension because the supplement is a tax-financed benefit; other judgements have included the pension supplement as part of the person's retirement pension. The Federal Court of Justice (*Bundesgerichtshof*) has not issued a decision on this, and numerous unsolved cases are pending.<sup>35</sup>

---

33. LORENZ-SCHMIDT Sabine (2021), "Grundrente - auch nach Beschäftigung im öffentlichen Dienst?", ZTR pp. 310-318.

34. OLG Hamm, Beschluss vom 12. Oktober 2022 – II-13 UF 78/22 –, juris, FamRZ 2023, 124-125; OLG Bamberg, Beschluss vom 2. November 2022 – 2 UF 136/22 –, juris, FamRZ 2023, 125; dissenting opinion OLG Koblenz, Beschluss vom 04.03.2022 – 7 UF 46/22, BeckRS 2022, 3462 Rn. 10; Ruland, NZS 2021, 241, 248.

35. BACHMANN Edda, BORTH Helmut (2020), Die neue Grundrente der gesetzlichen Rentenversicherung und ihre Auswirkungen auf den Versorgungsausgleich FamRZ pp. 1609-1615; BORTH Helmut (2022), Grundrente und Versorgungsausgleich: Durchführungshindernisse aufgrund einer gesonderten Einkommensanrechnung - zugleich Anmerkung zu OLG Frankfurt, FamRZ 2022, 1351, OLG Nürnberg, FamRZ 2022, 1353 sowie OLG Braunschweig, FamRZ 2022, 1354, FamRZ pp. 1341-1344.

*b. Critical issues from a European perspective*

## (1) Accumulation of insurance periods

Under European law, insurance periods are accumulated.<sup>36</sup> Compulsory insurance periods in statutory pension schemes abroad are taken into account when calculating the minimum 33-year compulsory insurance period. The German statutory pension system can easily retrieve this information from the foreign pension authority.

## (2) Disregard salaries earned abroad

However, coordination law does not refer to salaries that are subject to contributions. This is why the German pension system cannot know whether any of the salaries earned abroad were above the 30 per cent average income or not. Hence, the German pension system accumulates the insurance periods (e.g. 30 years in France and 3 years in Germany). The pension supplement is then calculated on the average of the 3 years of work in Germany. The pensioner will thus receive the pension supplement (albeit only a very low amount) even if his/her salary in France exceeded the ceiling of 80 per cent.

## (3) Different taxation systems

Pensioners who live abroad may be eligible for the pension supplement as well. Under German tax law, the supplement is tax-free.<sup>37</sup> In other countries, it is probably taxed as retirement income.

## (4) No coordination with guaranteed minimum pensions from other Member States

Nearly all Member States provide some form of guaranteed minimum pension but calculate it in a different manner.<sup>38</sup> Since no coordination takes place, some pensioners might be falling through the cracks.

---

36. EICHENHOFER, Eberhard (2019) Grundrente und EU-Recht, ZESAR pp. 359-364; KLOPSTOCK Barbara (2020), Die Grundrente im Lichte des europäischen Koordinierungsrechts, Teil I, NJW pp. 3279-3283.

37. § 3 Nr. 14a EstG (Income Tax Act), as amended by Jahressteuergesetz 2022; DORN, Katrin (2022), Referentenentwurf des JStG 2022 vorgelegt, DB pp. 1931-1933; HÖRSTER Ralf (2022), Entwurf eines Jahressteuergesetzes 2022, Überblick über die wichtigsten vorgesehenen Änderungen des EstG und des UstG, NWB pp. 2744-2756.

38. REINHARD Hans-Joachim (2021), Mindestrente in Deutschland und Frankreich im Vergleich in: Alpay Hekimler (ed.) Festschrift für Otto Kaufmann Armağanı, Legal Hukuk Kitapları Serisi: 655, Legal Yayıncılık, Istanbul, S. 629-647.

### (5) Difficulty calculating income-tested pensions

In some Member States, certain types of pensions, notably invalidity pensions or survivors' pensions, are income-tested. If the pensioner's income exceeds a given ceiling, his/her entitlement to that pension is affected. Under European law, the different pension schemes must inform each other about the relevant pension income. In view of the annual recalculation process for the pension supplement, the foreign pension scheme may have to recalculate the amount of the benefit as well, which is an additional administrative burden.

## 7. Conclusion

The new law on the basic pension supplement in Germany is a botched political compromise.<sup>39</sup> Left-wing parties intended to implement it without *any* income- or means test. Conservatives, on the other hand, wanted an income *and* means test. The result is a complicated formula and a pension supplement that feigns to be a guaranteed minimum pension for the elderly. Yet it excludes those who are most at risk of falling into poverty and favours those who had a relatively stable income during their extended working careers. It is not an appropriate substantial measure for fighting poverty in old age. Last but not least, the pension supplement does not prevent that many beneficiaries again have to apply for social assistance benefits and are stigmatised.<sup>40</sup>

## Bibliography

Bachmann E and Borth H (2020), Die neue Grundrente der gesetzlichen Rentenversicherung und ihre Auswirkungen auf den Versorgungsausgleich FamRZ, 1609-1615

---

REINHARD Hans-Joachim (2022), Ingreso Mínimo Vital in Spanien: Eine Lücke wird geschlossen, ZIAS 2: pp. 305-315.

39. STAIGER Martin (2019), Grundrente: Vermurkster Kompromiss, Blätter für deutsche und internationale Politik, 12/19, <https://www.blaetter.de/ausgabe/2019/dezember/grundrente-vermurkster-kompromiss>

40. KLAMMER Ute (2020), Rentenpolitik zwischen Rollenbildern und Respekt: Verletzen Grundrente & Co die Grundprinzipien der Gesetzlichen Rentenversicherung - oder helfen sie vielmehr, ihr Sicherungsversprechen einzulösen? In: Florian Blank, Markus Hofmann, ua (eds.), Neustart in der Rentenpolitik, Analysen und Perspektiven, Nomos Verlagsgesellschaft, Baden-Baden.

- Berdysz U (2021), Der Grundrentenzuschlag - Wie wird die Höhe ermittelt?", *Kompass/KBS* Nr 3/4: 3-11
- Borth H (2022), Grundrente und Versorgungsausgleich: Durchführungshindernisse aufgrund einer gesonderten Einkommensanrechnung - zugleich Anmerkung zu OLG Frankfurt, *FamRZ* 2022, 1351, OLG Nürnberg, *FamRZ* 2022, 1353 sowie OLG Braunschweig, *FamRZ* 2022, 1354, *FamRZ* 1341-1344
- Brall, N / Hoenig, R / Kerschbaumer, J (2021), *Die Grundrente - 100 Fragen und Antworten zum Grundrentenzuschlag*, Bund-Verlag Frankfurt
- Brosius-Gersdorf F (2019). Aktuelle verfassungsrechtliche Probleme der Rentenversicherung, *SGb*, 509-518
- Dorn, K (2022), Referentenentwurf des JStG 2022 vorgelegt, *DB*, 1931-1933
- Dünn S / Bilgen C / Heckenberger S (2020), Das Grundrentengesetz, *DRV* pp. 325-346
- Eichenhofer, E (2019) Grundrente und EU-Recht, *ZESAR*, 359-364
- Glombik M (2022), Die Grundrente, *DVP* 72-75
- Hesse W (2021), Die neue Grundrente für langjährig Versicherte in: Paritätischer Gesamtverband (ed.), ohne Verlag, München
- Hoenig R (2020), Der Abstand der Rente zur Grundsicherung Eine rentenpolitische Forderung aus sozial- und verfassungsrechtlicher Sicht in: Gerhard Igl, Dagmar Felix (eds.), *Sozialrecht und Sozialpolitik in Europa* Band 44, Diss. Universität Hamburg, Fakultät für Rechtswissenschaft, Lit, Berlin
- Hoenig R / Kerschbaumer J / Wenning P (2021), Grundsicherung und Grundrente, *AiB* Nr 7/8: 38-40
- Hörster R (2022), Entwurf eines Jahressteuergesetzes 2022, Überblick über die wichtigsten vorgesehenen Änderungen des EStG und des UstG, *NWB*, 2744-2756
- Irion A (2020) Grundrente demütigt Rentenbeiträge aus Minijobs, Übersehene Anreizumkehr-Schwelle der Grundrente bei 1.352 € schafft Gestaltungsmöglichkeiten bei Minijobs, *BAV*, Versorgungsausgleich, Pflegepersonen und mehr, *rv* 2020, 173-178
- Kirschberger S (2021), Der Grundrentenzuschlag - Was bedeutet die Einkommensprüfung?, *Kompass/KBS* Nr 5/6: 7-16
- Klammer U (2020), Rentenpolitik zwischen Rollenbildern und Respekt: Verletzen Grundrente & Co die Grundprinzipien der Gesetzlichen Rentenversicherung - oder helfen sie vielmehr, ihr Sicherungsversprechen einzulösen? In: Florian Blank, Markus Hofmann, ua (eds.), *Neustart in*

- der Rentenpolitik, Analysen und Perspektiven, Nomos Verlagsgesellschaft, Baden-Baden
- Klopstock B (2020), Die Grundrente im Lichte des europäischen Koordinierungsrechts, Teil I, NJW pp. 3279-3283
- Köhler-Rama T (2019), Zur Debatte über die Grundrente - Ist die Kritik berechtigt?, SozSich 2019, 166-170
- Krampe A (2022), Fachausschuss "Sozialpolitik, soziale Sicherung, Sozialhilfe", NDV pp. 459-460
- Leopold D (2020), Anforderungen an neue Gesetze aus der Sicht der Verwaltung Drei „heiße Eisen“ warten in der Rentenversicherung auf eine praxistaugliche Umsetzung WzS, 71-72
- Lepelmeier D and ROTH H (2009), Berufsständische Versorgungseinrichtungen in der Bundesrepublik Deutschland - Alters-, Invaliditäts- und Hinterbliebenenversorgung mit Sicherheit, Tradition und Modellcharakter für die Zukunft, Uhlenbruch, Bad Soden
- Lepiorz H (2020), Die neue Grundrente, rv, 136-139, 179-181
- Lorenz-Schmidt S (2021), "Grundrente - auch nach Beschäftigung im öffentlichen Dienst?", ZTR 310-318
- Marburger D (2021), Neue Grundrente ab 1.1.2021, ZfF 118-121
- Matlok D (2021), Das Grundrentengesetz und seine Umsetzung am Beispiel der Deutschen Rentenversicherung Bund rv, 71-73
- Rein C (2022), Die Grundrentennachzahlung im System des SGB XII - wie gewonnen, so zerronnen?, ZfF, 62-65
- Reinhard H-J (2021), Mindestrente in Deutschland und Frankreich im Vergleich in: Alpay Hekimler (ed.) Festschrift für Otto Kaufmann Armağanı, Legal Hukuk Kitapları Serisi: 655, Legal Yayıncılık, Istanbul, 629-647
- Reinhard H-J (2022), Ingreso Mínimo Vital in Spanien: Eine Lücke wird geschlossen, ZIAS 2: 305-315
- Reinhard H-J (2023), Mittelbare Diskriminierung aufgrund des Geschlechts/Vereinbarkeit mehrere Renten wegen vollständiger Berufsunfähigkeit/Mittelbare Diskriminierung anhand statistischer Daten, Anm. zu EuGH v. 30.06.2022, C-625/20, ZESAR 1: 41-48
- Ruland F (2019), Der Kompromiss der Koalition zur Grundrente - der Vorschlag bleibt verfassungswidrig, ineffizient und ungerecht, NZS 881-887
- Ruland F (2020), Die Verfassungswidrigkeit der Grundrente, Gutachten zur Verfassungsmäßigkeit bzw -widrigkeit des Entwurfs eines Grund-



- rentengesetzes (BR-Drucks 85/20 - BT-Drucks 19/18473, in: Initiative Neue Soziale Marktwirtschaft (INSM) ed., KUV - Kölner Universitätsverlag, Köln
- Ruland F (2022), Die Pläne der Ampelkoalition zur Rentenpolitik, DRV, 10-20
- Ruland F (2022), Zur Verfassungswidrigkeit der Freibetragsregelungen in §§ 82 Abs. 4 und 82a SGB XII SGB, 389-394
- Ruland, F (2021), Die Grundrente - Voraussetzungen, Berechnung, Verfahren und Versorgungsausgleich, NZS, 241-250
- Ruland, F (2022), Die neue Grundrente - Zuschlag an Entgeltpunkten für langjährige Versicherung, SGB, 580
- Schewe P (2021), Der neue Grundrentenzuschlag: Anspruchsvoraussetzungen - Berechnung - Verhältnis zu anderen Leistungen, Walhalla Fachverlag, Regensburg
- Schmidt S (2021), Die neue Grundrente, Zuschlag an Entgeltpunkten für langjährige Versicherung, Aktuelles Recht für die Praxis, Beck, München
- Staiger M (2019), Grundrente: Vermurkster Kompromiss, Blätter für deutsche und internationale Politik, 12/19, <https://www.blaetter.de/ausgabe/2019/dezember/grundrente-vermurkster-kompromiss>
- Thurow C (2006) Von Bismarck bis heute - Zur Geschichte der Sozialversicherung in Deutschland, GRIN, München
- Wagner G (2020), Der Grundrenten-Plan der großen Koalition - Praktische und konzeptionelle Probleme und Möglichkeiten, SGB, 65-72
- Walther S (2014) Reformen der Beamtenversorgung aus ökonomischer Perspektive, Diss. Speyer, Deutsches Forschungsinstitut für öffentliche Verwaltung Speyer, Speyerer Forschungsberichte 277, Speyer



# **The situation of retired and displaced elderly people in Europe. A review of legal mechanisms to fight poverty from the Spanish perspective**

---

María SALAS PORRAS

## **1. Introduction**

This introductory chapter reviews population ageing –a phenomenon that has implications for Spain as well– from various perspectives. According to data published by Eurostat in April 2022<sup>1</sup>, 6.7 million people out of a total of 9.8 million pensioners residing in Spain and who have reached full retirement age, receive retirement benefits, amounting to EUR 7,807.9 million.<sup>2</sup>

Spain's situation is not exceptional when we compare it with the European Union (EU) average or with that of its neighbouring countries. With the exception of Greece and Portugal, where the number of pensioners who have reached full retirement age does not exceed 2 million, Italy has 15 million, France 16.7 million and, alarmingly, Germany has 19.6 million pensioners who have reached full retirement age and receive retirement benefits.<sup>3</sup> In other words, Eurostat's 2019 projection that the percentage of people aged 80+ would multiply by 2.5 times between 2019 and 2020, namely from 5.8 per cent to 14.6 per cent, has materialised.<sup>4</sup>

The focus in debates on minimum income in old age is not so much on the fact that we have succeeded in exponentially increasing people's life expectancy, but rather on the mechanisms –if any– that guarantee economic support for this particular population segment. According to the

---

1. See Annexes II and III.

2. See Annex IV.

3. See Annexes II and III.

4. See Annex I.

OECD's report "Pensions at a Glance 2021", the elderly are at a higher risk of poverty, which is directly correlated with their increase in age. While countries such as Spain<sup>5</sup>, Denmark, France and Greece have managed to reduce the risk of poverty of this population segment, other countries, including Poland, Sweden, Czechia and Finland, show discouraging data. If we add to this the fact that according to data from Spain's social security administration<sup>6</sup> nearly 500,000 pensions are calculated based on the international scale of pensionable remuneration, the present study is particularly timely, given that the risk of poverty in old age is bound to rise. A United Nations (UN) report of March 2021 urges the EU to "integrate ageing into all its policies".<sup>7</sup> Policies aimed at supporting and guaranteeing the freedom of movement and residence are particularly important as they allow EU citizens to exercise a right that essentially defines them as Europeans. True EU citizenship cannot exist if there are obstacles to the freedom of movement and residence; reflecting on these freedoms and what they imply for pensioners<sup>8</sup> is therefore of particular relevance.

Against this background, we discuss the current situation in Spain, specifically the legal measures adopted to prevent poverty among the elderly, with a special focus on intra-Community displacement. This study consists of two sections. The first one presents the legal and regulatory framework applicable at the EU level to protect the elderly from falling into poverty. The second section reviews the relevant policies and measures that have been introduced at the national level. Finally, conclusions are drawn and implications presented.

---

5. In this report, Spain is an example of a country where a reversal of poverty levels towards younger population segments has occurred.

6. Data provided by Díaz Morillo (2021) La consideración jurídica de la pensión extranjera a efectos del complemento de mínimos. *e-Revista Internacional de la Protección Social*, VI(2): 49, footnote 23. Article available at <https://dx.doi.org/10.12795/e-RIPS.2021.i02.03>.

7. The inverted commas have been extracted from the section "Global View of Human Stories" published by the UN and available at <https://news.un.org/es/story/2021/03/1489612>, accessed on 16 May 2022.

8. A study on the effects of displacement in case of early retirement has been published by Juan Ignacio Del Valle de Joz (2021) La aplicación de las normas de coordinación a las prestaciones de prejubilación. *e-Revista Internacional de la Protección Social*, VI(1): 52-78, available at <https://dx.doi.org/10.12795/e-RIPS>.

## 2. Community measures to prevent poverty in old age

The right of the elderly to lead a dignified and independent life and to participate in social and cultural life is a right that must inform all policies and measures adopted at the EU and Member State level. This is rooted in Article 25 of the Charter of Fundamental Rights of the European Union, which has been legally binding since 2009 in accordance with Art. 6.1 of the Treaty on European Union.

To effectively maintain dignity and security in old age, relevant measures must be adopted in all dimensions (economic, political, legal, social, administrative, etc.). EU interventions will be as varied as the assumed perspectives of approximation. The EU draws on different competences and capacities depending on the nature of each intervention. The combination of these two elements, namely the existence of different approaches and of different capacities to implement them, yields a plurality of measures and interventions that are presented here by way of example only.

We first review the monitoring reports prepared annually by the European Commission to reinforce the application of the Charter of Fundamental Rights.<sup>9</sup> These reports highlight the weaknesses and strengths of measures adopted by the EU and by its Member States to fight income poverty in old age.

The most recent report of October 2020, which includes the Council's conclusions, emphasises that digitalisation must be used as a tool to fight poverty and social exclusion, both of which are generated by the lack of digital skills among elderly populations. The pandemic has exacerbated this problem. To this end, based on the principle of subsidiarity that applies in this field, the report calls on Member States and the European Commission to "provide adequate social protection for the elderly, especially the most vulnerable among them, to prevent and prevent situations of poverty".

---

9. The report for the year 2020, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Strategy to strengthen the application of the Charter of Fundamental Rights in the EU, page 12, is available at <https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=celex%3A52020DC0711>, last accessed on 17 May 2022.

With the specific objective of fighting poverty among the elderly, the Council issued recommendations<sup>10</sup> in 2016, rooted in the Europe 2020 Strategy<sup>11</sup> (approved in 2010) to pursue a comprehensive approach. The Europe 2020 Strategy, under the heading “inclusive growth”, highlighted the importance of collecting information on whether the Member States’ social security systems are adequately equipped to achieve this goal, whether their social security systems are sustainable, and how access to social health protection and long-term care can be improved.

One consequence of this report was the inclusion of the fifteenth principle in the European Pillar of Social Rights<sup>12</sup>, which recognises the right of workers (employees and self-employed persons) to a retirement pension which, depending on their contributions, guarantees an adequate income in old age. We should pause and reflect on the necessity of defining the notion of adequacy which translates into enabling the elderly to live a dignified life without discrimination, especially in terms of gender. Guidelines on the principle of adequacy are necessary at the European level to help Member States streamline their approaches and for European jurisprudence to be able to interpret the relevant norms in different Member States. The specific initiatives the European Commission introduced were based on the Action Plan<sup>13</sup> of the aforementioned Pillar, and have contributed to the Green Book on Aging<sup>14</sup> and a number of reports on the adequacy of pensions published in 2021.<sup>15</sup>

---

10. The full text can be downloaded from <https://ec.europa.eu/social/main.jsp?langId=en&catId=751&furtherNews=yes&newsId=2564>, accessed on 17 May 2017.

11. The Conclusions of the European Council adopted in March 2010 based on which the Europe 2020 Strategy was developed and is available at <https://data.consilium.europa.eu/doc/document/ST-7-2010-INIT/es/pdf>, accessed on 17 May 2022.

12. The content of the Pillar is available at [https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/European-pillar-social-rights-20-principles\\_es](https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/European-pillar-social-rights-20-principles_es), accessed on 17 May 2022.

13. The content of this Action Plan is available at <https://op.europa.eu/webpub/empl/european-pillar-of-social-rights/en/>, accessed on 17 May 2022.

14. The text can be downloaded from [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12722-El-change-demographic-en-Europa-Libro-Verde-sobre-el-aging\\_es](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12722-El-change-demographic-en-Europa-Libro-Verde-sobre-el-aging_es), accessed on 17 May 2022-.

15. These reports can be downloaded from <https://op.europa.eu/en/publication-detail/-/publication/4ee6cadd-cd83-11eb-ac72-01aa75ed71a1>, accessed on 17 May 2022.

Section 4.3 of the Green Paper on Aging reiterates the importance of Member States maintaining adequate, fair and sustainable pension schemes, bearing in mind the demographic challenges Europe is currently facing. The EU's old-age dependency ratio in 2040 will only remain at the same level as in 2020 if people work up to the age of 70 years. Pension schemes must be set up to also include workers who cannot work up to such a high age. To this end, the proposed measures should be both a guarantee that the pension scheme will cover all types of economic activity, i.e. self-employed persons and workers in atypical employment relationships in addition to regular employees, and that pension benefits, minimum pensions, pensions based on residence and on social assistance are specifically aimed at the needs of the elderly. Moreover, the focus should be on developing a pan-European product of individual pensions.

Regulation 2019/1238<sup>16</sup> advocates an "individual pension product that will have a long-term retirement nature", that is "simple, secure, affordable, transparent, consumer-friendly, portable across the Union<sup>17</sup>, and will "complement the existing systems in the Member States"<sup>18</sup>. The pension product can be arranged between a natural person, an association or a financial company authorised to distribute it. An in-depth investigation of this proposal exceeds the scope of this chapter, however, and will be therefore left for further research.

Reports on pension adequacy raise an important issue that will be briefly addressed here. The 2021 report urges Member States to restructure their social security systems to ensure that part-time workers –the majority of who are women– and those who temporarily suspend work to reconcile their professional with their personal life, are also guaranteed a decent standard of living in retirement.<sup>19</sup> This recommendation has not

---

16. Published in DOUE L 198/1 of 25 July 2019.

17. We refer here to the European Social Security Pass, which aims to establish a European social security number to serve as a "wallet" of the social security contributions made by citizens in any EU country. It is a digital solution to the problems generated by the confirmation or verification of contributions made by citizens who wish to exercise their right to the freedom of movement and establishment. More information is available at <https://ec.europa.eu/social/main.jsp?catId=1545&langId=en>, accessed on 17 May 2022.

18. The inverted commas are taken from recital 8 of the Regulation.

19. Additional information on the data used by the EU, see pages 82 to 84 of the aforementioned report.

left Spain indifferent. Secondly, we will discuss the definition of “adequate pension”, which shall provide a benchmark for Member States to test the sustainability and suitability of their social security schemes. The 2018 report discusses the concept of adequacy based on three criteria, namely protection against poverty, maintenance of income and the duration of retirement.

The concept of adequacy from the perspective of insured workers relates to whether the risk of poverty in old age is mitigated or even prevented. To determine whether this criterion is met, the needs of this particular group needs to be assessed and whether their pension income sufficiently covers their expenses.

The second criterion that determines whether an individual’s pension income is adequate is the maintenance of income. In this regard, we need to assess whether the individual’s current standard of living can be maintained after retirement. To measure this criterion, the worker’s income before and after retirement can be compared or, as a proxy, the income of the older retired population can be compared with that of younger people in employment.

Finally, the duration of retirement refers to the amount of time a pensioner will spend in retirement, and depends on each individual group of workers within the generic group of the elderly. This third criterion also hinges on the ability of retired persons to effectively deal with the changes they are faced with during their retirement years. New needs continuously arise, including the need for care, deterioration of health, the need to adapt the home, etc.

Other EU interventions, specifically those under the so-called Recovery and Resilience Mechanism approved by Regulation 2021/241, overlap with these three criteria.

Although the Recovery and Resilience Mechanism was established by the EU to address the socio-economic and health crisis triggered by the COVID-19 pandemic, we include it in this chapter, which reviews the measures introduced by the EU and its Member States to promote protection against poverty in old age, because it seeks to fill the existing gap of financial instruments in the EU intended to support the implementation of reforms and public investments in response to challenges related to – among others– with the European Pillar of Social Rights (recital 17). In this sense, as previously pointed out, the Pillar specifically endorses the strengthening of Member States’ social protection systems, an objective



that complements the generic aims of the Recovery Mechanism, i.e. promoting Member States' economic, institutional as well as social resilience.

What makes this Mechanism so unique is that it proposes the financing of investments in solid social infrastructure (para 28). On the one hand, it provides financial support to Member States if their requests specifically fall under the European Pillar of Social Rights. On the other hand, it entails an assessment and evaluation tool to determine whether the Member States requests meet the requirements for financial support. In other words, it turns the Pillar of Social Rights into a transversal variable in the decision to grant financial support to Member States, i.e. the Pillar's principles must be evident in the Member State's request for financial support and the achievement of those principles must be measurable (recital 42). Hence, the culture of evaluation of public policies pursued by the EU pays special attention to the promotion of rights covered by the European Pillar of Social Rights, in a fair balance with economic, productive and environmental sustainability objectives. The establishment of such prerequisites for Member States to be awarded financial support in combination with the design of common indicators to report on progress made as well as a procedure to evaluate and monitor proper implementation of funds granted through the Mechanism (recital 63 of Regulation 2021/241), indicates the emergence of a noteworthy instrument. This chapter contributes to the discussion on this specific European project. Social resilience will play an essential role in this project – if the COVID-19 crisis has taught us anything, it is precisely that countries need to strengthen their capacity to deal with economic, environmental and social emergencies in a fair, sustainable and inclusive way (Art. 2.5 of Regulation 2021/241).

Although the Recovery and Resilience Mechanism was approved in February 2021, Member States continued to submit requests for financial support to fund their recovery up to 12 months later. The European Pillar of Social Rights and principle 15, which specifically refers to the fight against poverty in old age, are 'soft law tools', but the fact that they are being linked to financial mechanisms (as discussed above) implies that they carry some weight (not least because of the economic benefits associated with them), and they could therefore gradually develop into coordination formulas reminiscent of harmonization, as was the case of active employment policies.

Finally, before we conclude this section, we will review the EU's key instrument that guarantees the fulfilment of obligations included in the

aforementioned Article 25 of the Charter of Fundamental Rights, namely Regulation 883/04.

In line with its normative nature and doctrinal research<sup>20</sup>, Recitals 4 and 45 of Regulation 883/04 stipulate that the coordination<sup>21</sup> of national social security schemes should not be considered an end in itself, but a necessary means for achieving a greater legal right: the effective exercise of the freedom of movement of workers on European territory. This objective is supported by the existing interpretation of jurisprudence<sup>22</sup>, reflected, among others, in case C-551/16.<sup>23</sup>

The claimants in case C-551/16 were no longer in employment but were recipients of a retirement benefit when they moved to another EU country. Their case was therefore covered by the Regulation, specifically by Chapter 5, which is devoted to old-age and survivors' pensions. Among the ten articles of Chapter 5, Art. 58 is of particular relevance for the focus of our study, i.e. the articulation of mechanisms that prevent or reduce situations of poverty in later stages of life. This precept is based on the premise that the recipient of a retirement benefit has contributed to the pension schemes in at least two Member States, one of which shall be his or her country of residence. Once this condition is met, the provision establishes two obligations for determining the minimum amount of retirement benefit: it must necessarily be equal to that provided to nationals of the respective Member State, and the amount of the minimum pension supplement must be equal to the minimum reference level in the country of residence.

Chapter 5 provides for a formula, albeit indirectly, to guarantee aging with dignity. The focus may indeed be on the freedom of movement, but

---

20. CRISTINA SÁNCHEZ-RODAS NAVARRO (2017) (In)suficiente fundamento legal para la propuesta de reforma del Reglamento 883/04 presentada por la Comisión Europea el 13.12.2016. e-Revista Internacional de la Protección Social, 2(2): 1.

21. Only few studies have been published on the specific terminology used to define the accommodation process between social security systems under Regulation 883/04. One noteworthy example is Miranda Boto (2008) *El Estadio Previo: Algunos Problemas Terminológicos de la Seguridad Social Comunitaria*. In VV.AA *El Reglamento Comunitario. Nuevas Cuestiones. Viejos Problemas*, Laborum, Murcia, pp. 11-28.

22. See Brey ECLI:EU:C:2013:565, para 43 and Commission / United Kingdom, ECLI:EU:C:2016:436, para 67.

23. J. KLEIN SCHIPHORST VS. RAAD VAN BESTUUR, ECLI:EU:C:2018:200 para 43.

it also entails measures related to pensions, even if only incidentally. The formulas presented in Art. 52 of the Regulation can be used to calculate the amount of pension benefit. We are not referring so much to the calculation of the theoretical and real amount<sup>24</sup>, but to the inclusion of insurance periods, employment, self-employment or periods of residence covered under the legislation of Member States<sup>25</sup> (Art. 6 of Regulation 883/04). In this context, we highlight the fundamental role European jurisprudence plays in the application and interpretation of this Regulation in general and, with special reference to Chapter 5, we aim, by way of example and covering the last five years, to present a more complete typology and scope of EU interventions to prevent poverty in old age.

Case C-866/19<sup>26</sup> explicitly dealt with insurance periods which the State paying the retirement benefit must include in its calculation of the pensioner's retirement income. The CJEU concluded that the competent institution in the respective Member State had to include all insurance periods in the calculation of the retirement benefit's theoretical amount, including those covered under the legislation of other Member States, while the calculation of the benefit's real amount had to only include periods of insurance covered by the legislation of the respective Member State.

Additional insights into insurance periods that must be included in the retirement income calculator are provided below.

---

24. A comprehensive study has been carried out by ANDRÉS TRILLO GARCÍA (2019) *El convenio especial para inmigrantes y su incidencia en la determinación de la base reguladora en las pensiones calculadas a prorrata en aplicación del Reglamento CE 883/04. Comentarios a la Sentencia del Tribunal de Justicia de la Unión Europea de 28 de junio de 2018, asunto C-2/17 Crespo Rey*. *Revista de Derecho de la Seguridad Social. Laborum, Estudios de Doctrina Judicial*, 18(1): 181.

25. An in-depth study on contribution periods to retirement pensions has been carried out by JAVIER FERNÁNDEZ-COSTALES MUÑIZ (2019) *La aplicación de los reglamentos comunitarios y los convenios bilaterales de Seguridad Social. En torno a la prestación por jubilación del trabajador migrante en el territorio de la Unión Europea. El nuevo criterio interpretativo en la materia generado por la Sentencia del Tribunal Supremo (Sala de lo Social, Sección 1ª) núm. 146/2018, de 14 de febrero*. *Revista de Derecho de la Seguridad Social. Laborum, Estudios de Doctrina Judicial*, 20(3): 116.

26. Case SC and Zakład Ubezpieczeń Społecznych I Oddział w Warszawie ECLI:EU: C:2021: 865 para 37.

In case C-769/18<sup>27</sup>, a claim was filed by a French citizen who had successively worked as a civil servant in Germany and in France. She drew her retirement income from France. However, the period during which she had cared for her disabled daughter had been excluded from the calculation of her total contribution period. During that period, the claimant had been a beneficiary of German integration assistance for children and young people with mental disabilities. This financial support is similar to that parents in France, who are raising a child with special needs, are entitled to. The CJEU ruled that such financial assistance could not in terms of its material application be framed within the context of Art. 3 of Regulation 883/04, but falls under the provisions of Art 5. b) of the Regulation. Hence, the Court left it to the French authorities to decide on whether this period would be included in the claimant's retirement payment.

In case C-447/18<sup>28</sup>, the CJEU dealt with benefits paid to high-level athletes and inclusion of these benefits in the calculation of their accrued retirement income. In this specific case, the benefits at issue had been awarded to high-level athletes who had represented the host Member State in international sport competitions and who had achieved exceptional results. According to the CJEU, this particular benefit had not been provided to the beneficiaries with the exclusive intent to provide financial assistance but to compensate them for not being able to fully integrate in the labour market during the years dedicated to high-performance sport. Moreover, the benefit was associated with social prestige and was paid for exceptional performance in sport. The Court therefore concluded that this type of benefit was to be excluded from the calculation of "old-age benefit" covered by Art. 3.1.d) of Regulation 883/04 and was consequently excluded from the scope of the article's application.

Similar to the previous case, the CJEU ruled in case C-517/16<sup>29</sup> that the classification of the competent national authority based on Art. 9, para 1 of Regulation 883/04 on a social benefit associated with one of the social security branches listed in Art. 3, is not definitive, but must be referred to the CJEU for a preliminary ruling. The similarity with the previous case is

---

27. Case *Caisse d'assurance retraite et de la santé au travail d'Alsace-Moselle and SJ and Minister chargé de la Sécurité sociale* ECLI:EU:C:2020:203.

28. Case *UB and Generálny riaditeľ Sociálnej poisťovne Bratislava* ECLI:EU:C:2019:1098.

29. Case *Stefan Czerwiński and Zakład Ubezpieczeń Społecznych Oddział w Gdańsku* ECLI:EU: C:2018:350.

the Court's rejection of an old-age benefit which the competent Polish authority made available based on its interpretation of the concept of "temporary pension". This type of pension had been defined by the Polish authority as a pre-retirement benefit and not an old-age benefit. The CJEU's analysis of the requirements and objectives of such types of pension shed light on the CJEU's understanding of what types of benefits are to be considered 'old-age pension' and are therefore covered by Regulation 883/04.

Limits such as the one just mentioned, which are established in the case law of Member States, are undoubtedly one way of influencing or intervening to guarantee a decent standard of living for the elderly. The following cases dealt with precisely these limitations.

On the one hand, in joined cases C-95/18<sup>30</sup> and C-96/18<sup>31</sup>, the Court reviewed whether the legislation of a Member State, which required migrant workers to join and contribute to that State's social security system, even though that State is not competent to grant entitlement to an old-age pension, complied with EU law. The Court concluded that such legislation is contrary to Community law.

Case C-2/17<sup>32</sup> involved the Spanish State and the Swiss Confederation, which is part of the European Economic Area and the CJEU's rulings in matters of coordination of social security schemes have implications for Switzerland as well. The dispute dealt with the Spanish provision that requires migrant workers who conclude a special agreement with the Swiss social security system to pay the minimum contribution base. When calculating the theoretical amount of the worker's retirement pension, the Spanish Institute of Social Security (hereinafter INSS) equates the period covered by this agreement with an equivalent period of contributions in Spain and only takes the contributions paid within the framework of said agreement into consideration for the calculation of the worker's retirement pension. Prior to exercising the right to freedom of movement, the worker had paid contributions to the Spanish social security system exceeding the minimum contribution base. In other words, workers who made use of their right to freedom of movement had the option of paying contributions in excess of the minimum contribution base. The Court

---

30. Case *Sociale Verzekeringsbank and F. van den Berg and H. D. Giesen* ECLI:EU: C:2021:891.

31. Case *Sociale Verzekeringsbank and C. E. Franzen* ECLI:EU:C:2021:891.

32. Case *National Social Security Institute (INSS) and Jesús Crespo Rey* ECLI:EU:C:2018:511.

declared that the Spanish legislation contravened the Agreement on the Free Movement of Persons between the European Community and its Member States, on the one hand, and the Swiss Confederation, on the other. Consequently, Spanish jurisprudence has radically changed and now guarantees economic support for migrant workers.

Finally, we would like to close this section with reference to case C-189/16<sup>33</sup>, which was a preliminary ruling on minimum pension supplements regulated in Section 2 of Art. 58 of Regulation 883/04, a legal instrument which, as previously pointed out, is a direct EU intervention to guarantee adequate retirement pensions. The dispute involved Sweden and Poland. The claimant had worked in her native country for 19 years, and later resided in Sweden for 24 years, having worked in Sweden for a total of 23 years. In 2005, Mrs Zaniewicz applied for a guaranteed pension from the Swedish government, which was rejected because she had not included the retirement pension she was receiving from Poland in the calculation for eligibility to a guaranteed pension. The “Swedish guaranteed pension” aims to ensure basic protection for persons who earned a low or no income. It is a tax-financed, residence-based benefit and the amount is determined on the basis of the retirement pension(s) the applicant receives from other sources and decreases in accordance with their retirement income, supplementary pension and other benefits. The Court deemed that that the guaranteed pension is a minimum guaranteed benefit and that according to Art. 58.2 of Regulation 883/04, the State of residence shall determine whether entitlement to this minimum guaranteed benefit is met based on all retirement pensions the person concerned receives from one or more Member States.

The nature of the legal instruments reviewed thus far, corroborated at Community level by the CJEU’s rulings, contributes to the prevention and eradication of poverty among the elderly. As the Community’s competence in social security matters is limited to supporting, coordinating and complementing Member States’ social security systems, it can only promote collaboration between Member States, even though its interventions are more incisive when it comes to the exercise of freedom of movement and establishment. Hence, any attempts to prevent and end poverty in old age assume different depths, with clear examples of harmonization (Regulation 2019/1238, which creates a pan-European pension product), Regu-

---

33. Case Boguslawina Zaniewicz-Dybeck and Pensionsmyndigheten ECLI:EU:C:2017:946.

lation 883/04 and the jurisprudence that interprets it, as well as the approval of the Recovery and Resilience Mechanism which, in our opinion, could be an important starting point for a profound reform in the field of social protection. However, the road ahead is long and at the time of writing, only little information on any progress made is available.

We can infer from the first section of this chapter that Member States' solutions –if any– to provide decided support for a decent guaranteed retirement income and to ensure that the elderly residing on their territory do not fall into the abyss of poverty, differ. The second section of this chapter explores the measures introduced in Spain to fight old-age income poverty.

### **3. Pensioners in Spain: legal instruments to guarantee their financial support**

This second section focuses exclusively on the interventions the Spanish legislator has introduced to mitigate poverty risk in old age, paying special attention to those who have exercised their right to freedom of movement and establishment in another EU Member State, using the example of Spain as their country of destination.

Spain has been a member of the EU since 1986, i.e. it must observe the EU's regulatory provisions and jurisprudence, which are reflected in Spain's legal instruments.

We distinguish between different areas of study determined by the nature of the respective measure –contributory and non-contributory– and the normative competence of the political-administrative level of reference – state and regional. Hence, this second section has a tripartite structure.

#### ***3.1. Measures associated with contributory pensions: minimum pension supplement and other measures***

The most important set of measures aimed at preventing poverty in old age in Spain is undoubtedly found in Royal Decree 8/2015, which approves the Consolidated Text of General Social Security Law<sup>34</sup> (hereinafter LGSS). The Decree regulates not only old-age pensions (ex-Art. 204 et

---

34. Published in BOE nº 261, of 31 October, LGSS.

seq.), but also the minimum pension supplement which falls under Art. 58.2 of Regulation 883/04.

To be eligible for an old-age pension, which is defined as a lifetime pension provided to individuals who are no longer engaged in gainful employment<sup>35</sup> and have reached legal retirement age, namely 67 years of age, the applicant must have a minimum contribution period of 15 years, of which two at least must fall within the 15 years immediately preceding the commencement of entitlement to the old-age pension. Article 205 LGSS postulates the possibility of reducing the retirement age to 65 years if the individual's total contribution period amounts to 38 years and six months. Involuntary early retirement is possible in two scenarios regulated in Art. 207: (i) if the employment contract is terminated for objective, technical, economic, organisational or production reasons or (ii) due to death, retirement or incapacity of the employer. Voluntary early retirement is covered in the subsequent article. Retirement age in case of involuntary early retirement can be reduced by four years, but the applicant must have a minimum contribution period of 33 years. In such cases, a 'penalty' or reduction coefficient is applied which is inversely proportionate to the number of remaining months until the applicant reaches the minimum age for ordinary retirement. Voluntary early retirement is possible if the age difference to the legal retirement age, i.e. 67 or 65 years, is maximum two years, while the minimum contribution period must be equal to 35 years; hence, greater reduction coefficients apply for voluntary early retirement, and the amount of the applicant's pension must be greater than the amount of guaranteed minimum pension, which he/she would be eligible for if he/she reached the age of at least 65 years. If this requirement, stipulated in Art. 208.1.c) LGSS, is not met, the early retirement formula cannot be applied.

Although only a brief overview of this retirement pension subsystem<sup>36</sup>

---

35. Old age benefits for self-employed persons, who have not been included in this study, are regulated in Decree 2530/1970, of 20 August, which regulates the Special Social Security Scheme of Self-employed Persons (BOE nº 221, of 15 September).

36. Comprehensive studies have been conducted by Spanish labour law experts, e.g. by Márquez Prieto, whose study takes a conceptual perspective instead of being exegetical only as is usually the case, and has become a reference point despite the passing of years. See *Seguridad Social y protección social: un enfoque conceptual*, Servicio de Publicaciones de la Universidad de Málaga, Colección Estudios y Ensayos, nº 72, 2000; page 169 is of particular relevance for our study.



has been presented here, the main ideas presented above demonstrate that the conditions imposed by the legislator related to age, contribution periods and equivalence in terms of perceptions must be continuously revisited to preserve the social security system's economic viability; this requirement is far from the more altruistic objective of preventing those who are no longer engaged in gainful employment from falling into the poverty trap, and continues to carry absolute weight in national as well as in the jurisprudence of the European Court of Justice.<sup>37</sup> These regulatory provisions, which stipulate the general conditions for access to the pension system, are not specifically aimed at ensuring dignity and security in old age, but intentional indications that point in this direction are nonetheless evident.

The first indication relates to a recent regulatory amendment which has a direct impact on pensions, namely the calculation of pensions of part-time workers, regulated in Art. 248.3 LGSS.<sup>38</sup> This amendment was influenced by the CJEU's ruling in C-161/18<sup>39</sup> of 8 May 2019, which was subsequently adopted by the Spanish Constitutional Court in Ruling No. 91/2019 and RD 950/2018, which introduced the new wording in the aforementioned article.

In the main proceedings, the plaintiff, Mrs Villar Láiz, filed a claim against the National Social Security Institute (INSS) and the General Social Security Treasury (TGSS) regarding the calculation of her retirement pension. Her regulatory base was calculated using a coefficient of 53 per cent, reflecting the fact that she had worked only part time during most of her career. She claimed that the INSS had to apply a coefficient of 80 per cent and treat her work periods as full time work because the calculation formula being used was discriminatory, not only against her as a part-time

---

37. As an example, see Case A. and the Latvijas Republikas Veselības ministrija ECLI:EU:C:2021:595. Although the main dispute dealt with the Latvian government's refusal to enroll an Italian citizen who was residing in Latvia in its health care system, it is interesting to note that the CJEU highlighted that the Latvian administrator had the right to demand financial compensation from the Italian citizen to cover some of the costs generated for the Latvian health care system.

38. An in-depth study was carried out in 2019 by Toscani Giménez entitled *Los problemas del acceso a la pensión de jubilación de los trabajadores temporales y a tiempo parcial. Comentario a las STJUE de 8 de mayo de 2019 y STC 91/2019, de 3 de julio*. *Revista de Derecho de la Seguridad Social*. Laborum, Estudios de Doctrina Judicial, 21(4): 163-170.

39. ECLI:EU: C:2019:382.

worker but also against women in general, a very high percentage of who work part time. Mrs Villar Láiz claimed that the calculation used by the INSS generated indirect discrimination. Her argument and proposal were dismissed by the INSS and the TGSS. Consequently, the request for a preliminary ruling was submitted to interpret Directive 79/7/EEC on the progressive application of the principle of equality in matters of social security. The CJEU ruled that Art. 4, para 1 of Council Directive 79/7/EEC of 19 December 1978 must be interpreted as precluding the legislation of a Member State, such as that at issue in the main proceedings, according to which the amount of the retirement pension in the contributory modality of a part-time worker is calculated by multiplying a regulatory base, determined on the basis of the wages received and the contributions paid, by a percentage that depends on the duration of the contribution period. A partiality coefficient equivalent to the relationship between the part-time day worked and the day worked by a comparable full-time worker is applied to this period. This period is increased by a coefficient of 1.5. The contradiction between EU and Spanish law derived from the fact that the Spanish regulation put female workers, in particular, at a disadvantage over male workers. Hence, the retirement pensions of part-time workers, regardless whether they have exercised their right to freedom of movement and establishment, are now guaranteed at a percentage comparable to that of full-time workers, thereby reducing the risk of poverty after retirement.

The leading doctrinal research<sup>40</sup> indicates that temporary workers should be treated similarly to part-time workers because –at least in Spain– the majority of temporary workers are female. This particular issue has not yet, however, been the subject of judicial review, neither at the national nor at Community level.

Secondly, another preliminary ruling submitted by Spanish courts to the CJEU can be seen as another step towards consolidating a decent guaranteed retirement income in Spain, although it only tangentially affects pensions. Reference is made here to STJUE, which resolved joined cases C-398/18 and C-428/18<sup>41</sup>, both brought against the Spanish legal

---

40. See Daniel Toscani: "Los problemas del acceso a la pensión de jubilación...", op. cit., pp. 168-170.

41. Case Bocero Torrico and Case Jörg Paul, Konrad Fritz Bode ECLI:EU: C:2019:1050.

system, represented by the INSS and the TGSS<sup>42</sup>. The two cases had similar characteristics. The claimants in both cases had applied for voluntarily early retirement after having worked in Spain and Germany, and had accrued retirement benefits in both countries. The INSS and TGSS's rejection of the application for voluntary early retirement was based on the fact that only the amount of the workers' real pension payable by Spain was included in the calculation of their early retirement pension, thus excluding any contributions they had made to the German pension system. Bearing this fact in mind, the amount of the claimants' minimum monthly pension would not, due to their family situation, correspond to the amount they would be eligible for if they worked until reaching the age of 65 years as stipulated in Art. 208.1.c) LGSS. The INSS and TGSS's rejection implied that the workers were not eligible for the minimum pension supplement reserved for persons who have not yet reached legal retirement age, thus keeping them in the labour market. The CJEU interprets Regulation 883/04, specifically Art. 5a) as meaning that pension benefits accrued in the country of citizenship and those accrued in other Member States are to be considered equivalent benefits.

This interpretation provides clear guidance on the calculation of pensions and contribution periods for both general and ordinary old-age pensions, for voluntary early retirement pensions, as well as for persons who have exercised their right to freedom of movement and establishment and who apply for voluntary early retirement. The Spanish administration now explicitly recognises this calculation for pensions, which is used in all other EU Member States as well.

This section examines the measures adopted by Spain to ensure a decent guaranteed retirement income at the contributory level, which calls for a review of how the minimum pension supplement regulated in Art. 58 of Regulation 884 is calculated. It should be noted that the right to a decent guaranteed retirement income enjoys constitutional protection in Art. 41 and Art. 50 CE. Specifically, these provisions ensure that the elderly receive an adequate pension that guarantees a decent standard of living. The content of these provisions is also reflected in Art. 59 LGSS. It has been subject to modifications based on Law 11/2020 on the General State

---

42. It has been analysed by Vicente Palacio (2020) *Jubilación anticipada voluntaria y libertad de circulación. Sobre el alcance de la "pensión a percibir" como requisito para el acceso a la jubilación anticipada y voluntaria*. *Revista de Jurisprudencia Laboral*, 2: 1-11.

Budget for the year 2021<sup>43</sup>, which aligns Spanish national regulations with Community jurisprudence.

The objective of the minimum pension supplement is not to replace the pensioner's income, but to alleviate a need<sup>44</sup> and, consequently, the requirements for access to this supplement must be reviewed annually.<sup>45</sup>

Two requirements must be met to be eligible for the minimum pension supplement. The quantitative requirement is proof that the pensioner's needs cannot be covered by his or her pension, which is directly related to the type of incomes that must be included in this calculation. The second qualitative requirement is the applicant's place of residence.

Residence as a condition *sine qua non*<sup>46</sup> to be eligible for the minimum pension supplement applies to applications submitted on or after 1 January 2013, the date indicated in Law 27/2011,<sup>47</sup> which amended Art. 51.3 LGSS regulating the concept of residence for eligibility to benefits and minimum income supplements. Residence in Spain must be 'habitual', that is "when stays abroad do not exceed ninety calendar days throughout each calendar year, or when absence from the territory is justified due to illness". In addition to the fact that the latter condition –absence due to illness– is based on the uncompromising application of the CJEU's jurisprudence established in case C-255/13<sup>48</sup>, leading doctrinal research<sup>49</sup> interprets the requirement of residence very broadly, i.e. stays in other EU Member States, the European Economic Area and in Switzerland are not

---

43. Published in the BOE nº 341, of 31 December.

44. The ruling of the Spanish Supreme Court of 22 April 2010, ECLI:ES: TS:2010:2381 should be read in this sense.

45. Rivera Sánchez asserts these exact terms on page 77 of his 2015 study *Los suplementos de las pensiones inferiores a la mínima en el Sistema de Seguridad Social*. *Revista de Derecho de la Seguridad Social*. Laborum, Estudios de Doctrina Judicial, 4(3).

46. Several studies on the legitimacy of this requirement are available, including that of Sánchez-Rodas Navarro (2020) *La aplicación en España del Convenio Hispano-Marroquí de Seguridad Social a la luz del Acuerdo Euromediterráneo y del Reglamento (CE) 1231/2010*. *Cuadernos de Derecho Transnacional*, 12(1): 323.

47. Law 27/2011, of 1 August, on updating, adaptation and modernisation of the social security system, published in BOE No. 184, of 2 August.

48. Case I. and the Health Service Executive ECLI:EU:C:2014:1291.

49. See the study of María Alexandra Díaz Mordillo: "La consideración jurídica de la pensión extranjera...", *op. cit.*, page 51.

considered stays abroad. Residence in the Spanish territory as such does not need to be verified, but according to RD 523/2006<sup>50</sup>, it is assumed that in-depth inquiries will be carried out on the basis of the Residence Data Verification System.

Finally, proof that the pensioner's needs cannot be covered by his or her pension justifies applications for the minimum pension supplement and allows for a differentiation between the two requirements, i.e. residence and financial need.

On the one hand, the applicant must prove his or her need for the supplement annually; the applicable threshold is determined by the Law on the General State Budget. For 2022, Art. 44 of Law 22/2021, of 28 December, stipulates that pensioners with an annual retirement income equalling or less than EUR 7,939 /year are eligible for the minimum pension supplement. This amount moves upward under specific conditions: (i) when a dependent spouse lives with the applicant and is economically dependent on him/her because he/she him-/herself is not a pension beneficiary, or (ii) when the sum of both pensions does not exceed EUR 9,260 annually. In addition, pensioners are eligible for the minimum pension supplement "by differences", a term coined by doctrinal research<sup>51</sup>, which denotes the possibility of providing the maximum amount for reaching the guaranteed minimum pension, regardless of the applicant's starting point. In other words, it suffices if the amount of the applicant's pension is lower than the established poverty threshold, meaning he/she does not have to prove any "difference" to be eligible for the minimum pension supplement.

On the other hand, the type of income that must be included in the calculation to determine whether the poverty threshold is exceeded must be clearly defined. Accordingly, the first section of the aforementioned Art. 59 LGSS defines recipients of the minimum pension supplement as beneficiaries of contributory pensions paid by the social security system, i.e. private funds and non-contributory pensions are excluded from the defini-

---

50. Of 8 April, which removes the requirement to provide a registration certificate as proof of domicile and residence in the administrative procedure of the general State administration and its related or dependent public bodies, published in BOE No. 110, of 9 May 2006.

51. María Alexandra Díaz Mordillo: "La consideración jurídica de la pensión extranjera...", op. cit., page 47.

tion; persons who do not earn an income from work, capital, economic activities or other capital gains; or persons who receive an income from said sources, but the amount does not exceed the threshold established annually by the Law on the General State Budget. What we are interested in, however, is how beneficiaries of old-age pensions who are originally from another EU Member State, are treated.<sup>52</sup>

The Spanish legislator has standardised a situation which, according to leading doctrinal research<sup>53</sup>, raises important questions about the application of the principle of non-discrimination based on nationality stipulated in Art. 21 of the Charter of Fundamental Rights. Accordingly, if retirement benefits accrued in another Member State are taken together with those accrued in Spain to estimate the pensioner's total insurance periods and to calculate the minimum pension supplement, the Spanish legislator must view the insurance periods as being concurrent. Otherwise, the pension benefits from other Member States the pensioner is entitled to will be considered income from work when calculating the maximum threshold for eligibility for the minimum pension supplement. That is, in the first case, the applicant would be eligible for the minimum pension supplement while in the second case, the calculation would be less favourable.

As already pointed out, Law 11/2020<sup>54</sup> addresses this distinction and in Art. 42 provides that "foreign public pensions related to any public social security scheme" must be considered as being concurrent with the national pension. One condition raised in doctrinal research<sup>55</sup>, which is also

---

52. Applicants from third countries, that is, from non-EU Member States, have been excluded here to limit the scope of this chapter. Studies on this subject are, however, available, for example the study mentioned in the previous footnote.

53. See, among others, Jorge Serena Garralda (2020) *La prestación percibida por un pensionista de un fondo de pensiones extranjero es rendimiento de trabajo y computa en el derecho y en la cuantía al complemento por mínimos a cargo de la seguridad social*. *Revista Aranzadi Doctrinal*, 6, and Villar Cañada (2020) *La determinación de las rentas computables a efectos del reconocimiento del derecho a complementos por mínimos*. *Comentario a la Sentencia del Tribunal Supremo 728/2019, de 23 de octubre*. *Estudios financieros. Revista de trabajo y seguridad social: Comentarios, casos prácticos: recursos humanos*, 445: 179-187.

54. This rule establishes in Art. 12 that the aforementioned modification will be applicable to pensions commenced on or after 1 January 2021.

55. See Díaz Mordillo: "La consideración jurídica de la pensión extranjera...", *op. cit.*, pp. 60-62.

quite controversial, calls for a solution that pivots around the monitoring of this imposition by the internal social security regulations and comparing pension benefits identified as eligible by national legislation and those covered in Art. 3.5 of Regulation 883/04.

Lastly, it may be worth considering whether this approach should be exported to other Member States, which, in our opinion, deserves an affirmative answer for two reasons. One reason is the strict interpretation called for in Recital 37 of Regulation 883/04, Annex X. Accordingly, the minimum income guarantee is considered a special non-contributory cash benefit, but only for persons with disabilities (Law 13/ 1982, of 7 April<sup>56</sup>), which is why it should not be inferred for the minimum pension supplement. On the other hand, the second reason as argued in doctrinal research, is the fact that this benefit has a supplementary characteristic, which implies that it shares the same contributory nature as the pension it supplements.<sup>57</sup> Moreover, the CJEU's own jurisprudence<sup>58</sup> has shown that benefits of a complementary, supplementary or accessory nature to the contingencies explicitly covered by EU regulations on the coordination of social security systems may very well be considered social security benefits provided to beneficiaries based on a legally defined situation.

Art. 60 LGSS is another legal instrument that guarantees adequate pensions in Spain. It aims at reducing the gender gap in terms of access to decent pensions in light of the European Council Report of 2021 on adequate pensions. The benefit, enshrined in Art. 60 LGSS, compensates female workers who interrupted their careers to care for minors and who consequently do not have access to an adequate pension, putting them at an obvious disadvantage. This provision was not without criticism due to its configuration, wording and manifest discrimination of males, since it reserved eligibility for a pension supplement for women only who had exercised their right to conciliation of family and work life. This instrument had to therefore be amended to extend coverage to the other half of the active population, given that the number of men who interrupt their careers to care for children is on the rise. The non-existence of the possibility

---

56. This is the Law on Social Integration of the Disabled, published in BOE No. 103, on 30 April.

57. María Alejandra Díaz: "La consideración jurídica de la pensión extranjera...", *op. cit.*, page 51.

58. Case Caisse pour l'avenir des enfants and FV and GW, ECLI:EU:C:2020:269.

for men to access this benefit triggered a debate on a new version of Art. 60 LGSS, underpinned by the CJEU's ruling in case C-450/18<sup>59</sup> and the subsequent regulatory reform introduced in RD 3/2021.<sup>60</sup> Now, both men and women whose contribution periods are reduced –also as a result of permanent disability or widowhood– will be entitled to a pension supplement for each child they cared for, provided that the other parent does not submit a request for the same supplement, i.e. provided that it has not been recognised for the other parent.

This supplement applies to contributory pensions commenced on or after 4 February 2021, although cases of partial retirement are excluded. It is incompatible with any other supplement, and the minimum amount is set at EUR 378 per year and child, although this amount will be updated in accordance with the re-evaluation of pensions for up to a maximum of four children, a limit that makes little sense considering that large families are those that need the supplement most. The supplement's validity will continue to apply as long as the gender gap of over 5 per cent continues to persist to the detriment of access by women to contributory pensions – a fact that also makes little sense considering that men can apply for it as well.

Regardless of the criticism the configuration of this recently presented supplement<sup>61</sup> has raised in doctrinal research, we would like to reflect on the possibility of exporting it to other Member States, considering that it is a supplement to contributory pensions, i.e. its nature as being complementary to pensions and as an exportable product make it conducive for adoption in other Member States, provided that the requirements of Art. 5 of Regulation 883/04 are met, that is, that the supplement can be incorporated into the reference legal system.

---

59. Case WA and INSS ECLI:EU:C:2019:1075.

60. This Royal Decree was published in BOE No. 29, of 3 February, anticipating the modification in its First Additional Provision.

61. We only cite as examples the essays of Gala Durán (2021) *El nuevo complemento de pensiones contributivas para la reducción de la brecha de género: ¿lo que mal empieza, mal acaba?* *Temas Laborales: Revista andaluza de trabajo y bienestar social*, 158: 121-159 and Kahale Carrillo (2021) *El complemento de pensiones para la reducción de la brecha de género*. In Selma Peñalva, Alejandra (Coord.) *El impacto de género en una sociedad cambiante. Una visión multidisciplinar*, Thomson Reuters Aranzadi, Cizur Menor, pp. 157-170.



Finally, we would like to discuss Law 39/2006<sup>62</sup> which, despite referring to measures that are explicitly excluded from those that can be exported in accordance with Annex X of Regulation 883/04, introduces a series of measures aimed at guaranteeing the independence of elderly persons and promoting their social inclusion. Indeed, it is not a measure to prevent poverty per se, but aims to fight another face of poverty by providing specialized and technical assistance to guarantee a decent standard of living for the elderly and to promote their participation in social and cultural life, as postulated in Art. 25 of the Charter of Fundamental Rights. In the following section, we explore how this assistance is configured normatively in Spain.

Those who are in a situation of dependency according to the Regulation, and who have resided in Spain for at least five years which must fall within the years immediately preceding the date of application for a supplement applies to all territories where European regulations are enforced, as is the case for provisions on non-contributory pensions. The financial requirement, that is, whether the applicant's pension exceeds a certain level of income, shall be calculated on the basis of four components, namely: (i) the applicant's income, (ii) his or her assets, (iii) the applicant's age, and (iv) type of service requested, which may only be provided by professionals. The range of services covered is quite broad, ranging from telecare services to applications for admission to a care centre for persons in a situation of dependency without neglecting their needs in the home, their personal care or admission to day and night care centres. The Regulation provides for the possibility to substitute such services with financial assistance in case access to or the provision of aforementioned services is not possible. The amount of assistance will depend on the degree of the applicant's dependency and capacity.

The main components of the Law of Dependency are presented here, but another level of coordination of such measures is assumed by the Autonomous Communities. In this regard, the measures provided by State authorities represent the minimum level of intervention. The Autonomous Communities are responsible for developing and providing additional protective measures. We will return to this issue in a separate section.

---

62. This is the Law for the Promotion of Personal Autonomy and Care for People in a Dependent Situation (BOE No. 299, 15 December).

## *2.2. Measures associated with non-contributory pensions*

Non-contributory retirement pensions are covered in Arts. 369 to 372 LGSS<sup>63</sup> and provide pensioners who are not beneficiaries of a contributory pension with financial assistance, complimentary medical treatment and social services. The export of such measures to other Member States' legal systems is excluded in line with Annex X of Regulation 883/04. The requirements for eligibility –as in the case of the minimum pension supplement– are status of residence (as a legal requirement) and the applicant's income, which must be below the maximum income threshold and must be verified annually. The applicant must be aged 65+, a requirement that is not explicitly stipulated for access to the minimum pension supplement, but which is understood as deriving from the fact that the beneficiary has reached the age for eligibility to contributory old-age pension.

As regards the status of residence, two conditions must be met: the first condition is of a quantitative nature, namely the applicant must have resided in Spanish territory or in the territories of EU Member States<sup>64</sup> for a 10-year period between his or her 16<sup>th</sup> birthday and his or her date of application for a retirement pension, of which two years must fall within the years immediately preceding the date of application. The second condition relates to how compliance with this requirement is demonstrated. In this sense and given the plurality of definitions used by the Spanish legislator to refer to the concept of residence, there is some legal discussion about the fact that a registration certificate is not considered sufficient for

---

63. Other reference regulations that must be consulted to better understand the legal-regulatory system are RD 375/1991, which develops the principles of the LGSS; Order PRE/3113/2009 that dictates application rules of RD 375; RD 65/2022, which establishes the minimum and maximum amounts of contributory and non-contributory pensions for 2022, and Title IV of Law 22/2021 on the General State Budget, which increases the provisions of RD 65/ 2022 by 3 per cent.

64. For an invaluable example of reflections provided in this regard, see Sánchez-Rodas, 2021 on page 63 of her *El requisito de la residencia legal y los elementos delimitadores del sujeto protegido*. In AA.VV. *Seguridad Social para todas las personas. La protección de la seguridad social a las personas en situación de vulnerabilidad económica y fomento de su inclusión social. A propósito del trigésimo aniversario de la inclusión en el sistema de seguridad social de prestaciones no contributivas (1990-2020): V Congreso Internacional y XVIII Congreso Nacional de la Asociación Española de Salud y Seguridad Social*, Ediciones Laborum, Murcia.

third-country nationals<sup>65</sup>, although it suffices for Spanish citizens and, by extension, for Community citizens.

The applicant can demonstrate his or her need for assistance based on lack of income or of a sufficient income, which must be evaluated annually. In 2022, this amount has been determined at EUR 5,899.60 /year for each individual applicant.<sup>66</sup>

Finally, incompatibility with non-contributory disability pensions, assistance pensions, minimum income guarantee subsidies and third-party assistance must also be mentioned here. The Minimum Vital Income<sup>67</sup> is not deemed an incompatibility nor is it reviewed in our study since, as leading doctrinal research<sup>68</sup> has shown, retirement is excluded as a condition of this benefit.

### ***3.3. Measures developed by the Autonomous Communities***

Spain has communicated to the European Community the non-exportation of measures implemented at the regional level, which cover health care and /or aim to complement or guarantee pensioners' minimum income. Therefore, although measures may exist at the regional level that aim to guarantee a basic income and thus an adequate pension, it must be clarified from the outset that these cannot be transferred to other Member States as long as Spain's policy is not modified.

---

65. On the discussion on jurisprudence and doctrinal research, we recommend pages 53 and 54 of the aforementioned study by Cristina Sánchez "El requisito de la residencia legal...".

66. These amounts increase proportionally to the number of dependents in the reference family unit. If two people live in the household, the amount is EUR 10 029.32 /year; if three people live in the household, the amount is EUR 14 159.04 /year and in the case of four people, it is EUR 18 288.76 /year. These amounts are increased if those who live together are parents or children: for a two-member household, it is EUR 25 073.30 /year; for 3 members, it is EUR 35 397.60 /year and for 4 members, EUR 45 721.90 /year.

67. Stipulated in Law 19/2021, of 20 December, which was published in its original version in BOE nº 304, of 21 December. The various successive modifications have not modified the non-compliance of pensioners by age.

68. As a reference, see Monereo Pérez and Rodríguez Iniesta (2021) Nuevas medidas de Seguridad Social relativas a la reducción de la brecha de género, reforma del Ingreso Mínimo Vital y otras a favor de determinados colectivos (A propósito del RD-Ley 3/2021, de 3 de febrero). Revista de Derecho de la Seguridad Social. Laborum, Estudios de Doctrina Judicial, 27(2): 11-23.

Among the 17 Autonomies Communities in Spain, only five have legislative bodies that guarantee a basic or minimum income for pensioners. These include the Communities of Extremadura<sup>69</sup>, Madrid<sup>70</sup>, Murcia<sup>71</sup>, Navarra<sup>72</sup> and País Vasco<sup>73</sup>. The conditions that apply in these Communities reflect those that are in effect for non-contributory retirement pensions at the national level.

In this sense, the nature of non-contributory pensions is explicitly recognised as subsidiary. Secondly, residence in the regional territory of reference is a requirement, although no minimum time of residence is established. Residence in the respective territory can be demonstrated in a number of ways. Finally, the applicant must be over the age of 65 years and may not be the recipient of a pension or other similar benefit.

The Autonomous Communities may also grant subsidies to compensate health care-related expenses. This is the case, for example, of an initiative adopted in the Canary Islands<sup>74</sup>, which stipulates that beneficiaries are persons insured as pensioners under the social security system, who possess a health card issued by the Canary Islands Health Service and have an income of less than EUR 18,000 /year. The expenses that are subject to compensation include medical treatment prescribed by medical staff of the public health care system and medicines purchased in pharmacies or care provided on the territory of the Canary Islands. Hence, although the requirement of residence as such is not explicitly required, it is de facto present.

---

69. Decree 142/2013, of 31 July, which approves the Extremadura Basic Income for Insertion (DOE nº 147, of 31 July).

70. Law 15/2001, of 27 December, which approves the Minimum Income for Insertion in the Community of Madrid (BOCM nº 310 of 31 December).

71. Law 3/2007, of 16 March, on Basic Income for Insertion in the Region of Murcia (BORM No. 83, of 12 April).

72. Foral Law 15/2016, of 18 November, approving the Guaranteed Income in Navarra (BON No. 223 of 18 November).

73. Law 8/2008, of 2 July, which modifies the Law against Social Exclusion and the Charter of Social Rights Law (BOPV No. 127 of 4 July).

74. Approved by Decree 78/2019, of 14 May, published in the BOC No. 93, of 16 May.

In addition to the Canary Islands<sup>75</sup>, Asturias<sup>76</sup>, Islas Baleares<sup>77</sup> and Murcia<sup>78</sup> also provide different forms of assistance to ensure that the elderly and others in need can remain living with their families and in their social environment. The social services provide various forms of assistance, such as domestic help, psychological support and rehabilitation with the aim of ensuring the beneficiary's autonomy. These measures should not be confused with assistance to ensure the beneficiary's independence, which are configured on a less technical or professional level and intend to provide support for families in need. The eligibility criteria include the level of the beneficiary's personal autonomy, his or her family situation, options available in their own home or in the environment of their place of residence as well as their financial situation, which some Autonomous Communities, such as Murcia, use to determine the amount of the Minimum Interprofessional Salary or a percentage of this as a maximum amount.

Such personal assistance benefits have recently been the subject of doctrinal reflection<sup>79</sup>, especially in terms of exporting them to other Member States. It is expected that this will be the case sooner rather than later as long-term care has been incorporated<sup>80</sup> into Regulation 883/04. In this regard, the range of reports of the European Commission, referred to in the first section of this study, points to the idea of long-term care as one of the essential parameters to determine whether pensions dependent on age are in fact adequate.

---

75. Decree 5/1999, of 10 February, which regulates the provision of home help services (BOC No. 19, of 12 February).

76. Decree 42/2000, of 28 May, which regulates home help (BOPA No. 126, of 1 June).

77. Order of 2 October 2000, which regulates home help service (BOIB nº 126, of 14 October).

78. Order of 25 January 2010, which regulates financial assistance for elderly people to cover their care in the family and community environment (BORM No. 26, of 2 February).

79. We would, in particular, like to highlight the study of Fernando Jimeno Jiménez (2021) *La coordinación de las prestaciones de asistencia personal en el Derecho de la Unión Europea*. e-Revista Internacional de la Protección Social, VI(1): 79-95.

80. The proposal to reform Regulation 883 promoted by the Parliament and Council is aimed at this task. See COM (2016) 215 final. 2016/0397 (COD), accessible on the web <https://ec.europa.eu/social/BlobServlet?docId=16784&langId=en>, accessed on 23 May 2022.

#### 4. Conclusions

Although advances have been made to address the problem of poverty in old age and the social exclusion it entails, continued steps need to be taken on the path already travelled. The interventions introduced at the European and national level cannot be considered inadequate, but rather as incomplete. Yet just as any social phenomenon is complex, a multiple and interdisciplinary approach needs to be taken to deal with this issue. Hence, in our opinion, joining efforts to achieve a convergence of all spheres which can simultaneously feed off each other and promote each other in an interconnected way is indispensable. To foster this dynamic, new areas of action need to be linked with one another.

This is precisely what we are witnessing in Spain. The impulses the EU Regulations give and the interpretation of European jurisprudence have bolstered the application of national constitutional principles, which existed prior to Spain's EU membership, and have driven the development of different types of measures that aim to either directly or indirectly guarantee both the protection of minimum income for the elderly, as well as a dignified life and their participation in social and cultural life. One example of this is the legal instrument of the retirement pension itself, either as a contributory or non-contributory mechanism, the new formula for its calculation for part-time workers as a result of the Villar Láziz ruling, the minimum pension supplement, recently modified by Law 11/2020, the pension supplement to reduce the gender gap (reconfigured based on the CJEU's interpretation in case C-450/18), and, finally, other forms of care for the elderly with the aim of promoting their autonomy and ensuring dignity and security in old age, for example, personal assistance benefits introduced by Law 39/2006 or the compensation of costs associated with medicinal treatment ordered at the regional level, to which we should add the provisions of minimum non-contributory income. Although only the contributory retirement pension and the supplement to reduce the gender gap are exportable according to the current wording of Regulation 883/04, it might be feasible to extend this possibility to the other three instruments mentioned here. Not only because this has been an express request from Parliament and the Council since 2016, but also because the criteria that need to be met for access to these benefits—at least in Spain—are easily salvageable or simply do not exist if we apply strict European legal criteria. This, for example, is the case for the minimum pension sup-

plement, which is identical to the nature of the supplementary pension. Or for the residence requirement, which in the Spanish doctrine is understood as a condition that applies to nationals of third countries only, not for Community citizens in accordance with the most recent European rulings, which bring Spanish legislation closer to the dynamics of coordination of these mechanisms by offering relevant interpretation criteria.

## Bibliography

- Burriel Rodríguez-Diosdado, P (2021) Las obligaciones de las personas beneficiarias del Ingreso Mínimo Vital: las infracciones y sanciones previstas y su posible incidencia en la coordinación de prestaciones de la Seguridad Social a nivel europeo. *e-Revista Internacional de la Protección Social*, V(2): 94-114.
- European Commission: Green Paper on Ageing, Brussels, 27.1.2021, COM(2021) 50 final.
- European Commission and Social Economy Committee: 2021 Pension adequacy report, vol. 1, disponible en <https://op.europa.eu/en/publication-detail/-/publication/4ee6cadd-cd83-11eb-ac72-01aa75ed71a1>.
- Del Valle de Joz, J I (2021): La aplicación de las normas de coordinación a las prestaciones de prejubilación. *e-Revista Internacional de la Protección Social*, VI(1): 52-78.
- Díaz Morillo, M A (2021) La consideración jurídica de la pensión extranjera a efectos del complemento de mínimos. *e-Revista Internacional de la Protección Social*, VI(2): 43-65.
- Fernández-Costales Muñiz, J (2019) La aplicación de los reglamentos comunitarios y los convenios bilaterales de Seguridad Social. En torno a la prestación por jubilación del trabajador migrante en el territorio de la Unión Europea. El nuevo criterio interpretativo en la materia generado por la Sentencia del Tribunal Supremo (Sala de lo Social, Sección 1ª) núm. 146/2018, de 14 de febrero. *Revista de Derecho de la Seguridad Social. Laborum, Estudios de Doctrina Judicial*, 20(3):105-125.
- Gala Durán, C (2021) El nuevo complemento de pensiones contributivas para la reducción de la brecha de género: ¿lo que mal empieza, mal acaba?. *Temas Laborales: Revista andaluza de trabajo y bienestar social*, 158: 121-159.
- Jiménez Rojas, F (2021) Pilar Europeo de Derechos Sociales y Seguridad Social. Pensión de jubilación de trabajador español emigrante tempo-

- ralmente en Suiza. e-Revista Internacional de la Protección Social, VI(2): 101-125.
- Jimeno Jiménez, F (2021): La coordinación de las prestaciones de asistencia personal en el Derecho de la Unión Europea. e-Revista Internacional de la Protección Social, VI(1): 79-95.
- Kahale Carrillo, D T (2021) El complemento de pensiones para la reducción de la brecha de género. In Selma Peñalva, Alejandra (Coord.): El impacto de género en una sociedad cambiante. Una visión multidisciplinar, Thomson Reuters Aranzadi, Cizur Menor, pp. 157-170.
- Márquez Prieto, A (2000) Seguridad Social y protección social: un enfoque conceptual, Servicio de Publicaciones de la Universidad de Málaga, Colección Estudios y Ensayos, nº 72.
- Miranda Boto, J M (2008) El Estadio Previo: Algunos Problemas Terminológicos de la Seguridad Social Comunitaria. In VV.AA.: El Reglamento Comunitario. Nuevas Cuestiones. Viejos Problemas, Laborum, Murcia.
- Monereo Pérez, J and Rodríguez Iniesta, G (2019) El trabajo a tiempo parcial y su discriminación por la Seguridad Social (A propósito de la STC 91/2019, de 3 de julio). Revista de Derecho de la Seguridad Social. Laborum, Estudios de Doctrina Judicial, 20(3), pp. 11-22.
- Monereo Pérez, J and Rodríguez Iniesta, G (2021) Nuevas medidas de Seguridad Social relativas a la reducción de la brecha de género, reforma del Ingreso Mínimo Vital y otras a favor de determinados colectivos (A propósito del RD-Ley 3/2021, de 3 de febrero). Revista de Derecho de la Seguridad Social. Laborum, Estudios de Doctrina Judicial, 27(2) pp. 11-23.
- Ojeda Avilés, A (2021) Las sentencias sobre pensiones europeas del magistrado Aurelio Desdentado. Revista de Derecho de la Seguridad Social. Laborum, Estudios de Doctrina Judicial, extraordinary number, pp. 109-118.
- Rivera Sánchez, J R (2015) Los suplementos de las pensiones inferiores a la mínima en el Sistema de Seguridad Social. Revista de Derecho de la Seguridad Social. Laborum, Estudios de Doctrina Judicial, 4(3), pp. 75-99.
- Sánchez-Rodas Navarro, C (2017) (In)suficiente fundamento legal para la propuesta de reforma del Reglamento 883/2004 presentada por la Comisión Europea el 13.12.2016. e-Revista Internacional de la Protección Social, 2(2).

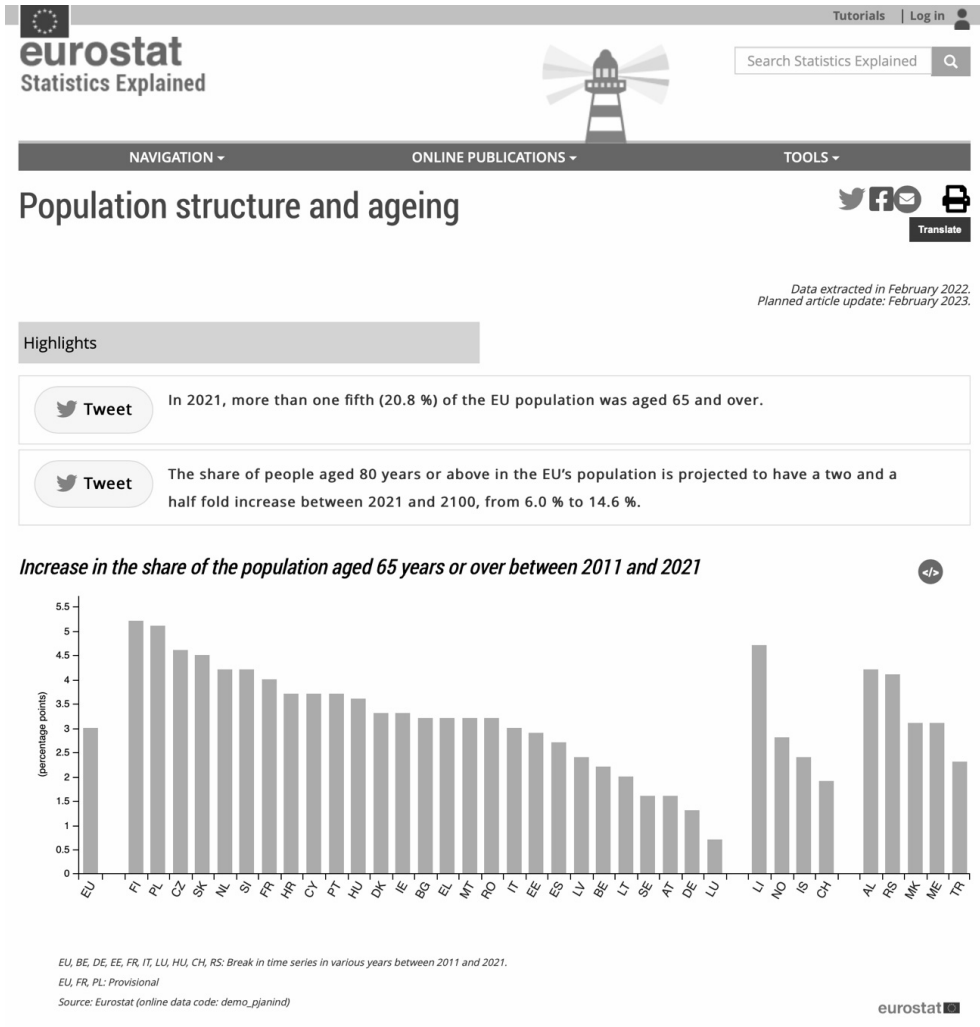


- Sánchez-Rodas Navarro, C (2020) La aplicación en España del Convenio Hispano-Marroquí de Seguridad Social a la luz del Acuerdo Euro-mediterráneo y del Reglamento (CE) 1231/2010. Cuadernos de Derecho Transnacional, 12(1): 319-345.
- Sánchez-Rodas Navarro, C (2021) El requisito de la residencia legal y los elementos delimitadores del sujeto protegido. In AA.VV.: Seguridad Social para todas las personas. La protección de la seguridad social a las personas en situación de vulnerabilidad económica y fomento de su inclusión social. A propósito del trigésimo aniversario de la inclusión en el sistema de seguridad social de prestaciones no contributivas (1990-2020): V Congreso Internacional y XVIII Congreso Nacional de la Asociación Española de Salud y Seguridad Social, Ediciones Laborum, Murcia, pp. 49-71.
- Serena Garralda, J (2020) La prestación percibida por un pensionista de un fondo de pensiones extranjero es rendimiento de trabajo y computa en el derecho y en la cuantía al complemento por mínimos a cargo de la seguridad social. Revista Aranzadi Doctrinal, 6.
- Toscani Giménez, D (2019) Los problemas del acceso a la pensión de jubilación de los trabajadores temporales y a tiempo parcial. Comentario a las STJUE de 8 de mayo de 2019 y STC 91/2019, de 3 de julio. Revista de Derecho de la Seguridad Social. Laborum, Estudios de Doctrina Judicial, 21(4).
- Trillo García, A R (2019) El convenio especial para inmigrantes y su incidencia en la determinación de la base reguladora en las pensiones calculadas a prorrata en aplicación del Reglamento CE 883/2004. Comentarios a la Sentencia del Tribunal de Justicia de la Unión Europea de 28 de junio de 2018, asunto C-2/17 Crespo Rey. Revista de Derecho de la Seguridad Social. Laborum, Estudios de Doctrina Judicial, 18(1).
- Vicente Palacio, M A (2020) Jubilación anticipada voluntaria y libertad de circulación. Sobre el alcance de la "pensión a percibir" como requisito para el acceso a la jubilación anticipada y voluntaria. Revista de Jurisprudencia Laboral, 2.
- Villar Cañada, I M (2020) La determinación de las rentas computables a efectos del reconocimiento del derecho a complementos por mínimos. Comentario a la Sentencia del Tribunal Supremo 728/2019, de 23 de octubre. Estudios financieros. Revista de trabajo y seguridad social: Comentarios, casos prácticos: recursos humanos, 445.

## Web references

- European Council: Estrategia Europa 2020, <https://data.consilium.europa.eu/doc/document/ST-7-2010-INIT/es/pdf>, last accessed on May 17, 2022.
- European Council: Conclusions on "Combating Poverty and Social Exclusion: an integrated approach" (2016), disponibles a través de la web <https://ec.europa.eu/social/main.jsp?langId=en&catId=751&furtherNews=yes&newsId=2564>, last accessed on May 17, 2022.
- European Council: Conclusiones de 9 de octubre de 2022, disponibles a través de la web: <https://data.consilium.europa.eu/doc/document/ST-11717-2020-REV-2/en/pdf>, last accessed on May 17, 2022.
- European Strategy to Reinforce The Application Of The Charter Of Fundamental Rights Of The Eu: <https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=celex%3A52020DC0711>, last accessed on May 17, 2022.
- Eurostat: Statistics on pensioner population [https://ec.europa.eu/eurostat/databrowser/view/spr\\_pns\\_ben/default/table?lang=en](https://ec.europa.eu/eurostat/databrowser/view/spr_pns_ben/default/table?lang=en), last accessed on May 16, 2022.
- Eurostat: Statistics on the aged population [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Population\\_structure\\_and\\_ageing/es&oldid=510186](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Population_structure_and_ageing/es&oldid=510186), last accessed on May 16, 2022.
- INSS: "Complemento a mínimos" <https://www.seg-social.es/wps/portal/wss/internet/Pensionistas/Revalorizacion/30458>, last accessed on May 17, 2022.
- OECD: "Pensions at a Glance 2021", disponible a través de la web <https://www.oecd-ilibrary.org/docserver/ca401ebd-en.pdf?expires=1652727525&id=id&accname=guest&checksum=C18DB3B7D57BD9EE5AC7B665AF794D74>, last accessed on May 16, 2022.
- European Pillar of Social Rights: web [https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles\\_es](https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles_es), last accessed on May 17, 2022.
- Action Plan of the European Pillar of Social Rights: <https://op.europa.eu/webpub/empl/european-pillar-of-social-rights/en/>, last accessed on May 17, 2022.

## Annex I



Source: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Population\\_structure\\_and\\_ageing](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Population_structure_and_ageing), accessed on 16 May 2022.



## The case of Italy\*

---

Eufrasia SENA

### 1. Protection for the elderly in the Italian social security system

The elderly are not a homogeneous group; they are characterised by a number of demographic, cultural, social and economic variables that change over time.<sup>1</sup> Within this framework, Italian policies in support of the elderly aim to achieve a balance between protection of their capacity for work (by promoting, in particular, flexible work, but also by providing the possibility of cumulating income from both employment and their pension) and to regulate pensions, which have traditionally been the backbone of the Italian social security system.<sup>2</sup>

One group of elderly persons are those who have remained wholly outside the labour market and have not acquired pension rights that ensure adequate means of subsistence and are therefore at risk of poverty, a situation that is exacerbated during crises. Moreover, elderly persons who move within the European Union after retirement might be at a disadvantage: they might be eligible to a non-contributory benefit in their country of origin, which they could lose out on if they move to another country, while the option of applying for a similar benefit in their new country of residence may be contingent on specific (local) social assistance regulations and, in particular, on the types of available benefits and the criterion of residence established in national law.

---

\* The translation of both Italian laws as well as extracts of the rulings of Italian courts contained in this chapter are the author's.

1. BOZZAO P (2017) Anzianità e uscita dal lavoro: connessioni previdenziali, tra interferenze e resistenze del sistema multilivello. *Variazioni sui temi di diritto del lavoro*. 1: 73-112,
2. D'ONGHIA M (2019), Le prestazioni pensionistiche a tutela della vecchiaia nel prisma dei principi costituzionali tra vecchie questioni e nuovi bisogni. In: Canavesi G., Ales Edoardo (Eds.), *La vecchiaia nella tutela pensionistica*, Giappichelli, Torino: pp. 1- 13.

European Union (EU) law links EU nationals' social security to free movement within the EU, stipulated in Article 48 of the Treaty on the Functioning of the European Union<sup>3</sup>, indicating that the protection of migrant workers is essentially a means for increasing the internal market's efficiency.<sup>4</sup> Moreover, social security is one of the areas of shared competence between the Member States and the EU pursuant to Article 151 of the Treaty on the Functioning of the European Union and, as provided for in Article 153, EU legislation "*shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof*". Article 34 of the Charter of Fundamental Rights establishes the right to "*social security benefits and social services*" for workers who reside or move within the Union, "*in accordance with the rules laid down by Community law and national laws and practices*". The consequence is that European regulations have basically left the substantive and procedural differences between Member States untouched, which continue to independently regulate the conditions for access to benefits.<sup>5</sup>

The Italian social security system is based on Article 38 of the Italian Constitution, which clearly distinguishes between "*assistenza*" (social assistance) and "*previdenza*" (social security).<sup>6</sup> Article 38, para 1 covers different types of social assistance which all residents, i.e. not only Italian nationals but third-country nationals as well, are entitled to; certain requirements do apply, however. Article 38, para 2 focusses on social security benefits reserved exclusively for workers, employees and self-employed persons.

The right to a pension following a long period of gainful employment and contribution payments falls into the category of social security and is therefore exportable when the pensioner moves to another country. Any

---

3. "The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers".

4. GIUBBONI S (2012) Diritti e solidarietà in Europa, Bologna: Il Mulino.

5. CHIAROMONTE W. FERRARA M.D. Previdenza. In Panzera C Rauti A (eds.) (2022) Dizionario dei diritti degli stranieri. Napoli: Editoriale Scientifica, pp. 521-542.

6. Art. 38 of the Italian Constitution:

"Every citizen unable to work and without the necessary means of subsistence is entitled to welfare support.

Workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment".

other measure provided for persons at risk of poverty falls into the category of social assistance and is therefore not exportable.<sup>7</sup>

Social assistance has a generic function in terms of protecting vulnerable people based on the principle of solidarity (Art. 2 of the Italian Constitution<sup>8</sup>), while social security fulfils the specific function of protecting workers. This distinction has diminished over time to merge into a more general category of protection for all citizens, but differences remain, at least in terms of financing, since social security benefits are financed from contributions paid by workers and employers, while the costs of social assistance are borne exclusively by the State and therefore, necessarily collide with expenditure limits imposed on public finances due to budgetary constraints. Thus, while a worker is entitled to receive a pension following a period of gainful employment and which is based on his or her total contributions, persons who did not work (or who do not have sufficient qualifying periods) are at risk of poverty because they lack access to adequate means of subsistence.<sup>9</sup>

## 2. The Italian pension system

In Italy, workers' pensions have, since 1996, been calculated on the basis of contributions (contributory system), that is, the amount of a worker's pension is exclusively calculated on the basis of the contributions he/she paid during his/her periods of gainful employment.<sup>10</sup> Before 1996, the amount of

- 
7. Article 38 of the Constitution must be read together with Art. 3, which establishes the principle of formal and substantial equality before the law and that it is the duty of the Italian Republic to *"remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country"*.
  8. Art. 2 of the Italian Constitution:  
*"The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled"*.
  9. On differences between *previdenza*, *assistenza*, *sicurezza* and welfare, see ALES E AND OTHERS (2021), *Diritto della sicurezza sociale*, Milano: Giuffrè: 3 ff..
  10. On the Italian pension system, see ALES E CANAVESI G (eds.) (2019), *La vecchiaia nella tutela pensionistica*, Giappichelli, Torino; CASILLO R (2016) *La pensione di vecchiaia. Un diritto in trasformazione*. Napoli: ESI; PESSI R (ed.) (1995) *La riforma del sistema previdenziale*. Padova: CEDAM.

a worker's pension was based on the remuneration he/she had earned during his/her final years of employment. This scheme was very expensive, however, and its financial sustainability hinged on the balance between active and retired workers. The remuneration-based scheme, together with a lower statutory retirement age, created a major financial imbalance over time, reinforced by the country's demographic development, namely the progressive ageing of the population, as well as by changes in the labour market, which is increasingly characterised by discontinuity of work.

A series of reforms have therefore been introduced since the 1990s, progressively raising both the statutory retirement age and the contribution requirements, while modifying the calculation mechanism linking pensions with contributions paid by workers.

The current contributory system links the contributions paid by workers and their employers during their periods of gainful employment with the pension amount he/she will receive: the contributions that have been set aside are converted into a pension based on transformation coefficients calculated on the basis of the worker's retirement age and his/her life expectancy. The reform regulated the transitional period, in particular to guarantee that those who were already working at the time of its entry into force were not disadvantaged. The transition from the salary-based to the contribution-based system was completed in 2011, i.e. the new system began to apply to all persons who retired from 1 January 2012 onwards.

The statutory retirement age has, since 2019, been set at 67 years; 20 years of social security contributions must have been paid to be entitled to an ordinary pension.<sup>11</sup> Early retirement options are possible for workers who meet certain contribution requirements and are eligible for a pension before reaching the statutory retirement age. For instance, women with a total qualifying period of 41 years and 10 months and men with a total qualifying period of 42 years and 10 months may claim an early retirement pension. Other forms of early retirement pension have been tested over the years, but they remained in force for limited periods of time.<sup>12</sup>

---

11. Are valid not only labour contributions, but also those paid for purchasing of university contribution years, military service (compulsory for men until 2005), maternity and unemployment insurance.

12. Describing all measures provided by Italian legislation that allow for early retirement goes beyond the scope of this chapter, also because some of them might be amended in coming years.



If a worker does not meet the minimum contribution requirement, his/her statutory pension age rises to 70 years, with a minimum of 5 years of contributions.

EU and non-EU workers who have completed insurance periods in both Italy and other Member States can claim pension payments within an international scheme. Residents in Italy enrolled in a social security management scheme for private employees managed by INPS (the Italian National Institute for Social Security), who have completed insurance periods in other EU countries, must submit a pension application to INPS. Residents in Italy who are not enrolled in an INPS social security management scheme, but have accrued insurance periods in other EU countries, must submit their pension application directly to the foreign institution(s). Residents in an EU State who have completed insurance periods, among others, in Italy, must submit their pension application to the institution in their current country of residence, which will submit it to INPS. According to EU law, some pension benefits are non-exportable and can only be provided in the Member State of residence in accordance with the criteria laid down by the legislation of that State.

One of the benefits that is not exportable is Italy's pension supplement. In Italy, the amount of a person's pension depends exclusively on his/her qualifying contributions; a guaranteed minimum pension is only provided for pensioners who contributed to the former salary-based system, which, as previously mentioned, ended in 1996, although pensions were calculated based on a mixed system until 2011. The guaranteed minimum pension (or rather, pension supplement) does not apply to pensions calculated exclusively under the current contribution-based system (that is, for those who entered the labour market in or after 1996).<sup>13</sup>

In 2022, pensioners with an annual income of less than EUR 6,816.55 (EUR 524.35 over a period of 13 months) are entitled to a pension supplement of up to EUR 524.35 per month. If the pensioner is married, the threshold increases and the household income is considered. The amount

---

13. The pension supplement should not be confused with the "*minimale contributivo*" (minimum amount for social contribution), i.e. the minimum wage used as a basis for calculating social security and insurance contributions to be paid to the social security institution by the employer. On the pension supplement, see: PERSIANI M (2012) *Diritto della previdenza sociale*. Padova: CEDAM 242-245.

the pensioner is entitled to is equal to the difference between his/ her pension and the guaranteed minimum income.

Although the guaranteed minimum pension includes an increase in the person's pension amount, including old-age or early retirement pensions, it is nonetheless considered to be a social assistance benefit. It is not based on the pensioner's total qualifying contributions, but on his/ her real income. Hence, the guaranteed minimum pension cannot be exported if the Italian pensioner moves to another EU country (in some cases, the guaranteed minimum pension is exportable in line with specific international agreements, if the pensioner moves outside the EU, for example).

### **3. An Italian peculiarity: the *t.f.r.* (*trattamento di fine rapporto*)**

According to Art. 2120 of the Italian Civil Code, when an employment relationship ceases for any given reason (retirement, dismissal, resignation, end of fixed-term contract, death), the worker is entitled to the "*trattamento di fine rapporto*" (t.f.r.). This is not a social security benefit, but part of the employee's salary set aside by either the employer or by INPS, depending on the company's size), and paid out to the employee when his/her employment relationship ceases. It is a typical feature of the Italian employment relationship and its purpose is to guarantee a means of subsistence for those who lose their job (e.g. in case of retirement or for other reasons), and supports the worker while he/she looks for a new job, for example.

All employees are entitled to the t.f.r., regardless of their type of contract and even if they were dismissed for cause. To calculate the t.f.r.'s amount, a fee equal to the amount of the employee's annual salary is divided by 13.5, with approximately one month's pay added for each year of service. This amount is revalued annually at a compound rate of 1.5 per cent, to which a rate of 75 per cent is added to this increase based on the consumer price index for households of blue- and white collar workers as determined by Istat (Italian Statistic Institute).

Although the t.f.r. is a form of deferred payment, which is paid out when the employment relationship ceases, it also has a social security function, especially in the case of employees who have spent their entire or most of their career working for the same employer. The t.f.r. can thus be described as something of a compulsory savings plan.

The employee may request an advance on the amount he/she has accrued to pay for health care costs (e.g. therapies and extraordinary surger-

ies), to purchase his/her first home or a home for his/her children, or to cover expenses incurred during periods of parental leave or training. Certain limitations apply, however, to prevent liquidity problems for the companies: an employee may only apply for an advance on the *t.f.r.* amount he/she has accrued if he/she has worked for the same employer for at least 8 years; the sum requested may not exceed 70 per cent of the employee's accrued amount, and he/she can only request an advance once. A guarantee fund has been set up at INPS to ensure payment of *t.f.r.* in the event of employer bankruptcy or liquidation.

Employees have the option of allocating their *t.f.r.* shares to a pension fund. They can independently select the respective pension fund, but if they do not choose one within 6 months, membership in a given pension fund will occur automatically and the worker's *t.f.r.* shares will be fully transferred to the fund. Employees are entitled to a supplementary pension if they meet the requirements. If, on the other hand, the employee opts to remain in the traditional scheme, the *t.f.r.* will be paid out as capital once his/her employment relationship ceases.

#### 4. Income protection for the elderly: the social allowance

The traditional measure for supporting poor, elderly people is the social allowance, which was created in 1969. At that time, it was referred to as "social pension" and was quite different from what it is today.

Today, the social allowance is a financial benefit paid upon request to both Italian and foreign citizens (namely EU citizens registered in the registry of their municipality of residence; non-EU citizens who are family members of EU citizens; non-EU citizens with an EU residence permit; and foreign nationals or stateless persons who have political refugee status), who are at risk of poverty and who have an income that is below the minimum threshold determined by law annually.<sup>14</sup> Payment of the social allowance is borne fully by the State. To be eligible, the recipient must be 66 years and 7 months (the applicable age may be periodically adjusted in accordance with life expectancy). The amount for 2023 is EUR 503.27 for a total period of 13 months. The income threshold for eligibility is EUR 6,542.51 annually for a single applicant and EUR 13,085.02 annually for an

---

14. Act 335/1995: "the calculation of income does not consider the payment of severance pay or its advance, any arrears or the value of the home".

applicant who is married. This amount is reduced by up to 50 per cent if the beneficiary moves to a State-funded institution.

Social allowance applicants must be residents in Italy at the time of application and must continue living in Italy for as long as they receive the allowance. Moreover, the recipient must have continuously resided in Italy for nearly 10 years. If the recipient moves abroad, he/she will lose entitlement to the benefit.

Other specific benefits are provided in case of so-called civil disability, i.e. if the situation of economic hardship is related to of the respective disability. In such cases, the law provides for financial assistance that is not linked to an age requirement, but is exclusively linked to the recipient's state of health and aims to support people without social security contributions (or alternatively, to support workers who have become incapacitated for work; if the incapacity for work is not connected with the performance of work, the worker is entitled to a contributory invalidity pension). Upon reaching the age of 67 years, the possibility to continue working declines, even in abstract terms, and financial assistance for "civil" disability therefore turns into a social allowance.

## **5. The most recent legislation on income support: citizenship income and citizenship pension**

After the "Onofri Report" was published in 1998 on behalf of the government, increased attention was paid to the problem of poverty in general, and to poverty among the elderly, in particular. It proposed a reform of the Italian welfare system, which was based, among others, on a comparison to welfare systems of other European countries.

Over the years, various support measures to alleviate poverty, especially among the elderly, have been tested, such as the "Social Card", a prepaid card that was automatically recharged every two months, and contained a sum of EUR 80, divided into two times EUR 40 per month, which could be used to purchase basic necessities. It was only implemented for a few years and was given to people aged 65+.

The first measure of basic income was the *Reddito di inclusione* (R.E.I.), created in 2017. It consisted of a financial benefit, provided monthly through an electronic payment card, as well as through a personalised programme to support the recipient's social- and labour market inclusion, with the aim of breaking the cycle of poverty.

The R.E.I. was implemented until 2019, when a new type of subsidy was introduced: the citizenship income and the citizenship pension.

The citizenship pension targets people aged 67+ (in Italy, as already mentioned, 67 years is the statutory age of retirement). It is a measure intended for families (not for single individuals) that find themselves in a situation of economic hardship. If the family unit consists of persons aged under 67 years, eligibility for the citizenship income arises.

The benefit is provided through an electronic payment card, the Citizenship Income (or Pension) Card, and is subject to participation in a social inclusion programme tailored to the characteristics of the beneficiary family unit. Recipients' total income is assessed (and includes real estate, bonds, etc.) to determine eligibility for the citizenship pension. The respective requirements must be met not only at the time of application, but as long as the benefit is paid. The financial benefit consists of a supplement to the family income and a possible contribution to rental fees or the family's mortgage payments.

The basic amount of this financial assistance is EUR 630 for a period of 12 months, i.e. a total of EUR 7,560 annually. This amount is increased depending on the number of family members. The second part (rent or mortgage payments) amounts to EUR 150 for 12 months, i.e. EUR 1,800 annually.

Those who apply for the citizenship pension must be Italian citizens or citizens of a European Union country; a family member of an Italian or European Union citizen who has the right of residence or the right of permanent residence; third-country nationals in possession of an EU residence permit for long-term residents or stateless persons in possession of a similar permit; and persons granted international protection status. In any case, beneficiaries must have been residents of Italy for a total of at least 10 years; the recipient's last 2 years of residence must have been continuous.

The Italian Budget Law for 2023 (Act of 29 December 2022, No. 197) completely repeals both the citizenship income and citizenship pension for 2024. For 2023, only the citizenship income has been amended, while the citizenship pension has remained unchanged.

Other welfare benefits may be provided by local governments (such as regions or municipalities). In such cases, residence in the municipality or region providing the benefit is a prerequisite, as is the fulfilment of certain income requirements.

## 6. Minimum income protection for the elderly and residence clauses in Italian legislation and jurisprudence

The payment of social assistance benefits to foreigners and their families is inextricably linked with the prohibition of discrimination<sup>15</sup>, but at the same time, the costs related to such benefits and how they impact public expenditure must be monitored.<sup>16</sup>

The Italian Constitutional Court<sup>17</sup> (Ruling No. 4/2013) stated as early as 2013: *"The legislator has authority to implement a differentiated approach for access to services that exceed the applicable thresholds to reconcile the maximum utility of the services' expected benefits with the limited available financial resources. The legitimacy of this approach does not, however, exclude that the respective regulations adopted must correspond to the principle of reasonableness ... It is possible to make the provision of certain social benefits not aimed at remedying a serious emergency situation subject to the demonstration by the foreigner of non-episodic and not short-term stays on Italian territory"*.

Another ruling (No. 197/2013) on the social allowance confirms the legitimacy of the residence requirement of at least 10 years in Italy for EU citizens as well: *"... the provision of continuous residence requirements (of ten years) on the national territory as a prerequisite for entitlement to the social allowance appears to have been adopted on the assumption of a more prolonged and continuous presence rather than on the basis of a merely "restrictive" choice and mere stays in the territory of the State"*. The same principle was subsequently reaffirmed by Constitutional Court Ruling No. 180/2016. Likewise, Constitutional Court Ruling No. 222/2013 affirmed: *"... in compliance with the fundamental rights of the individual guaranteed by the Constitution and international legislation, the legislator*

---

15. GARILLI A. (2020) Immigrati e discriminazioni nel settore della sicurezza sociale. Sulle provvidenze a sostegno di famiglia e genitorialità la Corte costituzionale sollecita il dialogo con la Corte di Giustizia. *Rivista Diritto della sicurezza sociale*, 3: 561-575; CHIAROMONTE W. GUARISIO A. (2019) Discriminazioni e welfare. In Barbera M. Guarisio A. (eds) *La tutela antidiscriminatoria. Fonti, strumenti, interpreti*: 329-408.

16. GABRIELE A. (2022) Le misure di sostegno alla genitorialità per i cittadini di paesi terzi: l'unità di intenti tra le politiche legislative e gli interventi della Corte costituzionale. *Lavoro Diritti Europa*. 2: 2-19.

17. All rulings of the Italian Constitutional Court can be accessed on the Constitutional Court's website: [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

*may reserve certain welfare services for citizens and persons similar to them, who reside in Italy”.*

According to Italian legislation, a foreigner is a “resident” of Italy if he/she is registered in the municipal register; EU citizens must request registration for stays that are longer than 3 months.

Since 2009, eligibility for social allowance requires 10 years of continuous residence in Italy. The Italian legislator has thereby limited the possibility of foreign nationals, especially third-country nationals over the age of 65 years, who (legally) moved to Italy to join their family, to immediately be eligible for the subsidy. Unlike regular residence, however, the additional requirement of 10 years of continuous residence in Italy is definitive. This requirement should therefore only be considered in applications for the allowance; when this consecutive 10-year period of residence took place is of no relevance. That is, even though entitlement to the social allowance is tied to the requirement of a minimum of 10 years of continuous residence in Italy, this stay could have taken place at any time of the beneficiary’s life and is not tied to proximity to the time of application for the social allowance.

On the other hand, however, the recipient must reside in Italy for as long as he/she receives the allowance. Entitlement to the social allowance is suspended if the recipient stays abroad for more than 29 days. After one year of suspension, the benefit ceases altogether.

Residence in Italy for at least 10 years is a prerequisite for entitlement to the citizenship pension, with the last 2 years of residence having been continuous. The criteria for entitlement to the two subsidies differ, but in both cases, the residence clause applies to Italian nationals as well, who will also lose entitlement to the allowances if they move abroad, because the social allowance, the minimum pension supplement and the citizenship pension are social assistance measures which are not exportable to other countries. Thereby, equal treatment between foreign and Italian workers for social security purposes is guaranteed.

On the other hand, the residence and stay limits that apply for entitlement to the social allowance and citizenship pension are not applicable to benefits considered ‘essential’, such as the disability allowance. This allowance is provided to all foreigners who legally reside in Italy, i.e. also third-country nationals, provided they have been in possession of a residence permit for at least 1 year. For EU citizens, it suffices to register in the municipal register.

According to Italian legislation, social assistance benefits are distinguished between 'essential' and 'non-essential' benefits. Only essential benefits are granted to foreigners as well without any residence requirement. In fact, some Constitutional Court rulings have declared certain regional or local regulations limiting eligibility to benefits for Italian nationals only as being unconstitutional, referring to the duty of social solidarity stipulated in Art. 2 of the Italian Constitution, regardless of nationality.<sup>18</sup> Thereby, according to the Court, the principle of universal solidarity can be achieved, aiming to expand guarantee.

On the other hand, limits to entitlement to benefits for the elderly are considered legitimate, i.e. if a pensioner moves to Italy from another country, he/she must possess the necessary means of subsistence. Only after prolonged residence in the country will he/she be entitled to a subsidy, as he/she only then establishes a closer connection with Italy.

Other Constitutional Court rulings, including very recent ones, involved third-country nationals requesting family or maternity benefits (Italian Constitutional Court 54/2022 and 67/2022) or citizenship income (Italian Constitutional Court 19/2022)<sup>19</sup>, while no dispute has involved EU citizens or elderly people moving within the territory of the EU. This can easily be explained by the fact that migration to Italy is largely characterised by the arrival of third-country nationals of working age. They are primarily young people, often with dependent children, who, in addition to seeking work, also request family benefits. There is no significant influx of elderly people from other European countries to Italy, especially not of elderly people without adequate means of subsistence and who would request national subsidies. The very low presence of elderly people from other EU Member States explains the absence of litigation and hence the lack of a specific doctrinal and jurisprudential debate on the matter.

---

18. FERRARO F CAPUANO V (2022) Bonus bebè e assegno di maternità: convergenza tra Corti e Carte in nome della solidarietà. *Lavoro diritti Europa*. 1: 20-21.

19. GIUBBONI S (2022) *Brevi note sulla recente giurisprudenza costituzionale in tema di accesso degli stranieri alla sicurezza sociale*. *Rivista di diritto della sicurezza sociale*. 2: 229-252; FONTANA G. (2022) *La Corte costituzionale tra supremazia e (apparente) subalternità. Quale futuro per i diritti sociali degli stranieri?* *Rivista di diritto della sicurezza sociale*. 2: 253-275; FERRARO F. CAPUANO V. (2022) *Bonus bebè e assegno di maternità: convergenza tra Corti e Carte in nome della solidarietà*. *Lavoro Diritti Europa*. 1: 2-23.



The recent decisions of the Constitutional Court address the issue of distinguishing between foreigners “however present in the territory of the State” and foreigners who are “legally resident in the territory of the State”, a distinction that we find in immigration legislation. Although everyone is entitled to fundamental rights in the name of the basic principle of solidarity<sup>20</sup>, equal treatment with the legal status of the citizen is only granted to those who “regularly” reside in the territory of the State. In the past, a distinction was also made between holders of residence permits and long-term residents with an indefinite permit.<sup>21</sup> In terms of provisions for the family, the Constitutional Court referred the matter to the CJEU to verify whether the benefits that were the subject of dispute fell within the scope of Art. 34 of the Charter of Fundamental Rights. The positive response of the CJEU<sup>22</sup>, which determined that the national legislation violated the principle of equal treatment both between third-country workers (in particular between holders of long-term residence permits and holders of ordinary permits) and between foreigners and citizens, made the content of the ruling of the Constitutional Court predictable, although of little practical impact because it referred to a law that was no longer being enforced. In fact, pending the proceedings, not only had the respective benefits been replaced by different provisions, the immigration law had been amended as well, equating the position of all foreigners in possession of a permit of more than 1 year.

As regards the social allowance specifically, however, the Constitutional Court (Ruling No. 50/ 2019) argued that *“the legislator may legitimately set down specific conditions for entitlement to benefits in excess of the individual’s basic needs, provided that such conditions are not manifestly unreasonable or inherently discriminatory. In this case, consideration of the social and legal integration of non-EU citizens in the national context, as certified by a long-term EU residence permit, to which the law achieves the recognition of a particular legal situation equating the non-EU citizen—for certain purposes— with Italian and Community citizens”*, arguing that the

---

20. RUGGERI V A (2019) *Cittadini, immigrati e migranti alla prova della solidarietà*. Diritto immigrazione e cittadinanza, 2.

21. FONTANA G (2022) *La Corte costituzionale fra supremazia e (apparente) subalternità. Quale futuro per i diritti sociali degli stranieri?*. Rivista del Diritto della Sicurezza Sociale. 2: 253-275.

22. CJUE, Case C-350/20, O.D. and others vs INPS, ECLI:EU:C:2021: 659.

social allowance could not be considered a benefit aimed at covering basic needs and the *"guarantee of the very survival of the person"*, such as the *"disability pension, the disability allowance, the allowance for the blind and deaf and the accompanying allowance"* (Rulings No. 230 e No. 22 of 2015, No. 40 of 2013, No. 329 of 2011, No. 187 of 2010, No. 11 of 2009 e No. 306 of 2008).

The Court's reasoning is surprising, however, in that the social allowance is not included among the welfare benefits and does not fall within the scope of the application of Regulation 883/2004. Since the target audience of the citizenship pension is similar to that of the social allowance, following the reasoning of the Court, it could also be considered extraneous to social security. This reasoning is not convincing, however. Judgment 19/2022 on citizenship income asserts that it falls within the scope of active policy, because *"it does not result in a welfare provision that aims at meeting a basic need of the individual, but pursues different and more specific objectives of active employment policy and social integration"*, while reaffirming, however, that it *"remains the duty of the Republic, in the implementation of the constitutional principles referred to in Articles 2, 3 and 38, first paragraph, of the Constitution, to guarantee, by taking the necessary measures, the right of every individual to a dignified life and to minimum subsistence"*. As neither the citizenship pension nor the social allowance can be considered 'active policies' due to the age factor, the reasoning of the Court could be reversed.

This issue is of little significance from a practical point of view following the amendment of the Immigration Act which equates holders of residence permits for over 1 year with Italian and Community citizens, though it could be important in a systematic way, since the benefits at issue are aimed at income support for elderly in need and thus meet basic subsistence needs as well as other benefits aimed at other categories of people, but without prejudice, however, to the legality of residence clauses that link the benefit's payment to the applicant's continuous residence in the territory of the State.

## Bibliography

- Ales E and Others (2021), *Diritto della sicurezza sociale*, Milano: Giuffrè.
- Ales E Canavesi G (Eds) (2019), *La vecchiaia nella tutela pensionistica*, Giappichelli, Torino.
- Bozzao P (2017) Anzianità e uscita dal lavoro: connessioni previdenziali, tra interferenze e resistenze del sistema multilivello. *Variazioni sui temi di diritto del lavoro*. 1: 73-112.
- Casillo R (2016) *La pensione di vecchiaia. Un diritto in trasformazione*. Napoli: ESI.
- Chiaromonte W and FERRARA M D, *Previdenza*. In Panzera C Rauti A Eds (2022) *Dizionario dei diritti degli stranieri*. Napoli: Editoriale Scientifica, pp. 521-541.
- Chiaromonte W and GUARISIO A (2019) *Discriminazioni e welfare*. In Barbera M. Guarisio A. (eds) *La tutela antidiscriminatoria. Fonti, strumenti, interpreti*: pp. 329-408.
- D'Onghia M (2019) Le prestazioni pensionistiche a tutela della vecchiaia nel prisma dei principi costituzionali tra vecchie questioni e nuovi bisogni. In: Canavesi G., Ales Edoardo (Eds.), *La vecchiaia nella tutela pensionistica*, Giappichelli, Torino: pp. 1- 13.
- Ferraro F and Capuano V (2022) Bonus bebè e assegno di maternità: convergenza tra Corti e Carte in nome della solidarietà. *Lavoro Diritti Europa*. 1: 20-21
- Fontana G (2022) La Corte costituzionale tra supremazia e (apparente) subalternità. Quale futuro per i diritti sociali degli stranieri? *Rivista di diritto della sicurezza sociale*. 2: 253-275.
- Gabriele A (2022) Le misure di sostegno alla genitorialità per i cittadini di paesi terzi: l'unità di intenti tra le politiche legislative e gli interventi della Corte costituzionale. *Lavoro Diritti Europa*. 2: 2-19
- Garilli A (2020) Immigrati e discriminazioni nel settore della sicurezza sociale. Sulle provvidenze a sostegno di famiglia e genitorialità la Corte costituzionale sollecita il dialogo con la Corte di Giustizia. *Rivista Diritto della sicurezza sociale*, 3: 561-575.
- Giubboni S (2012) *Diritti e solidarietà in Europa*, Bologna: Il Mulino.
- Giubboni S (2022) Brevi note sulla recente giurisprudenza costituzionale in tema di accesso degli stranieri alla sicurezza sociale. *Rivista di diritto della sicurezza sociale*. 2: 229-252;
- Persiani M (2012) *Diritto della previdenza sociale*. Padova: CEDAM.

- Pessi R (Ed.) (1995) *La riforma del sistema previdenziale*. Padova: CEDAM.
- Ruggeri V A (2019) Cittadini, immigrati e migranti alla prova della solidarietà. *Diritto immigrazione e cittadinanza*, 2.

# **Guaranteed minimum pensions under the Regulation of Coordination on social security systems: The case of Greece**

---

Anna TSETOURA

## **1. Introduction**

The types of benefits provided by public pension systems differ across countries. The public pension system in most countries is based on an earnings-related pension scheme and can either take the form of a common scheme for all employees or of several parallel schemes in different sectors or occupational groups.<sup>1</sup> In some Member States, notably in Denmark, the Netherlands and Ireland, the public pension system generally provides for a flat-rate pension, which can be supplemented by an earnings-related private occupational pension scheme.<sup>2</sup> In countries with flat-rate pensions, the pensionable earnings reference is irrelevant (namely in Denmark, the Netherlands, Ireland and the United Kingdom).<sup>3</sup> At the same time, public pension systems often also provide for a guaranteed minimum pension for those who do not qualify for the earnings-related pen-

- 
1. European Commission, Directorate-General for Economic and Financial Affairs, Pension schemes and Pension Projections in the EU-27 Member States 2008-2060 Volume I – Report, EUROPEAN ECONOMY Occasional Papers No. 56, October 2009, p. 30. European Commission Directorate-General for Economic and Financial Affairs, The 2015 Ageing Report Economic and budgetary projections for the 28 EU Member States (2013-2060) EUROPEAN ECONOMY 3|2015, Luxembourg: Publications Office of the European Union, 2015, p. 54 [http://ec.europa.eu/economy\\_finance/publications/european\\_economy/2015/pdf/ee3\\_en.pdf](http://ec.europa.eu/economy_finance/publications/european_economy/2015/pdf/ee3_en.pdf)
  2. European Commission, Directorate-General for Economic and Financial Affairs, Pension schemes and Pension Projections in the EU-27 Member States 2008-2060 Volume I – Report EUROPEAN ECONOMY Occasional Papers No. 56, October 2009, p. 30. [http://ec.europa.eu/economy\\_finance/publications/publication16034\\_en.pdf](http://ec.europa.eu/economy_finance/publications/publication16034_en.pdf)
  3. European Commission Directorate-General for Economic and Financial Affairs, The 2015 Ageing Report Economic and budgetary projections for the 28 EU Member States (2013-2060) EUROPEAN ECONOMY 3|2015, Luxembourg: Publications Office of the European Union, 2015, p. 56

sion scheme or who have only accrued a low earnings-related pension; a guaranteed minimum pension is usually means-tested and provided either through a specific minimum pension scheme or through a general social assistance scheme.<sup>4</sup>

For the purposes of the application of Regulation 883/04 on Coordination of Social Security Systems, determining whether a pension benefit is considered a social security benefit is crucial. This is also the case for (guaranteed) minimum pensions. We therefore examine the characteristics of social security benefits to be able to distinguish between social assistance and special non-contributory benefits. Guaranteed minimum pensions (basic/ national/ social pension) are frequently treated as a special non-contributory benefit in the context of the Coordination Regulation, even though the CJEU has, in several cases, considered these benefits to be social security benefits. Moreover, we should bear in mind that the CJEU has found that certain social security benefits indeed have some social assistance characteristics. After exploring the conceptual framework of pensions as social security benefits shaped by the judgments of the CJEU and some theoretical considerations, we examine the case of guaranteed minimum pensions in Greece.

## 2. Pension benefits in the Coordination Regulation

No specific definition of pensions is provided in the Coordination framework that can be connected to each of the social risks covered by the scope of Regulation 883/04, i.e. Article 3 of Regulation 883/04 in combination with Article 1 (l) of Regulation 883/04 on legislation. Moreover, no definitions of the other social risks listed in Article 3 of Regulation 883/04 are provided. A decisive criterion for the implementation of the Regulation is affiliation with a social security system, even against a single risk, and not the actual exercise of an activity; the duration of activity in

---

4. European Commission Directorate-General for Economic and Financial Affairs, The 2015 Ageing Report Economic and budgetary projections for the 28 EU Member States (2013-2060) EUROPEAN ECONOMY 3|2015, Luxembourg: Publications Office of the European Union, 2015, p. 54, European Commission, Directorate-General for Economic and Financial Affairs, Pension schemes and Pension Projections in the EU-27 Member States 2008-2060 Volume I – Report EUROPEAN ECONOMY Occasional Papers No. 56, October 2009, p. 30.

the labour market is equally irrelevant.<sup>5</sup> This implies that economically inactive persons may be entitled to a pension if national legislation provides for a retirement benefit for such persons, e.g. the Scandinavian system based on residence.<sup>6</sup>

As already mentioned, the Coordination Regulation does not define the nature of a social security benefit as such.<sup>7</sup> It is argued that such a definition would neither be possible nor useful<sup>8</sup>, considering the differences in national social security systems and benefits. For the purposes of the Coordination Regulation, a social security benefit, as established by case law, is a benefit that is granted a) without any individual and discretionary assessment of the recipient's personal needs on the basis of a legally defined position, and b) if it covers one of the risks expressly listed in the scope of the Regulation (exhaustive list).<sup>9</sup>

Regulation 883/04 provides a specific definition of "pension" for the purposes of its implementation. More specifically, under Article 1 (w) of Regulation 883/04, the term "pensions" refers not only to pensions per se but also to lump-sum benefits that can be substituted for a pension as well as payments in the form of reimbursement for contributions and, subject to the provisions of Title III, revaluation increases or supplementary allowances. The previous definition under Article 1 (t) of Regulation 1408/71

- 
5. Mavridis P., *The freedom of movement of persons, employees and services as a fundamental principle of European integration: Their employment and social security*, EDKA (Greek Social Security Law Review) 2004, p. 810.
  6. Mavridis P., as above, p. 295; M. Fuchs, Regulation No. (EC) No. 883/2004 – Article 3 in: M. Fuchs and R. Cornelissen (eds.), *EU Social Security Law – A Commentary in EU Regulations 883/2004 and 987/2009*, C.H. BECK- Hart- Nomos, Baden-Baden, 2015, p. 80.
  7. Mavridis P., as above; Fuchs M., Regulation No (EC) No. 883/2004 – Article 3 in: Fuchs M. and Cornelissen R. (eds.), *EU Social Security Law – A Commentary in EU Regulations 883/2004 and 987/2009*, C.H. BECK- Hart- Nomos, Baden-Baden, 2015, p. 80.
  8. Van Raepenbusch S., *Soziales Europa 1992*, leaflet 3, p. 18-30 in: Fuchs M., Regulation No. (EC) No. 883/2004 – Article 3 in: Fuchs M. and Cornelissen R. (eds.), *EU Social Security Law – A Commentary in EU Regulations 883/2004 and 987/2009*, C.H. BECK- Hart- Nomos, Baden-Baden, 2015, p. 80.
  9. Mavridis P., *The freedom of movement of persons, employees and services as a fundamental principle of European integration: Their employment and social security*, EDKA (Social Security Law Review) 2004, p. 811; Stergiou A., *Social Security Law*, Sakkoulas, Athens-Thessaloniki, 2014, p. 42., Katrougalos G., *The impact of Community law on social security law*, EDKA (Greek Social Security Law Review), 2006, p. 252.

was similar.<sup>10</sup> According to Article 1 of Regulation 1408/71, the Court noted that the term “benefits” was to be understood as meaning all pensions in the broadest sense, including increments, re-evaluation allowances or supplementary allowances.<sup>11</sup>

### ***2.1. Pension benefits as social security benefits***

The need for uniform implementation of European law calls for an identification of each benefit’s characteristics, in particular the objectives pursued and the conditions for granting the given benefit; what is of particular relevance is the application of the benefit and its purpose, defined in accordance with the conditions for granting and keeping it.<sup>12</sup> Thus, every time the Court reviews a given benefit, it examines whether its characteristics correspond to a benefit within the meaning of the Regulation, regardless of the classification assigned to it by national legislation.<sup>13</sup>

Hence, according to settled case law, a benefit is defined as a social security benefit insofar as it is granted to recipients without a prior individual and discretionary assessment of his/her personal needs in the given situation on the basis of a legally defined position, and covers one of the risks expressly listed in Article (3) (1) of Regulation 883/04.<sup>14</sup> Any case law references to “law” should be understood as references to “legislation” within the meaning of Article 1 (l) of Regulation 883/04. The list of risks contained in Article 3 (1) of Regulation 883/04 is exhaustive and consequently, any branch of social security not mentioned in the list is automatically excluded from that category, even if it confers a legally enforceable right on individuals entitling them to the respective benefit.<sup>15</sup> To be able to distinguish between different categories of social security benefits,

---

10. Case C-73/99 *Movrin* ECLI:EU:C:2000:369, para 34.

11. Case 1/72 *Frilli* ECLI:EU:C:1972:56, para 17.

12. Mavridis M., Freedom of movement of EU persons, workers and services -Social security, *EEEurL* (Hellenic Review of European Law) 2: 2005, p. 295.

13. Mavridis P., as above.

14. Case C-388/09 *Da Silva Martins* EE:C:2011:439, para 38; Case 249/83 *Hoeckx* ECLI:EU:C:1985:139, para 12-14 and on the other hand in Case 122/84 *Scrivner and Cole* ECLI:EU:C:1985, para 19-21 as well as Case C-356/89 *Newton* ECLI:EU:C:1991:265, p. I-3017 and Case C-78/91 *Hughes* ECLI:EU:C:1992:331, para 15.

15. Case 122/84 *Scrivner and Cole* ECLI:EU:C:198,5 para 19; Case C-25/95 *Otte* ECLI:EU:C:1996:295, para 22; Case 249/83 *Hoeckx* ECLI:EU:C:1985:139, para 12.



the risk each benefit alleviates must be considered as well.<sup>16</sup> When interpreting these criteria in view of a benefit, the conditions for granting the benefit undeniably confer a legally defined right on its recipients.<sup>17</sup>

Thus, according to the relevant interpretation of case law, one crucial element for categorising a benefit specifically as a social security benefit and as being affiliated with the Coordination Regulation, is its link with one of the traditional social risks set out in Article 3 (1) of Regulation 883/04. Case law has established certain characteristics that justify a benefit's classification as a social security benefit. More specifically, the CJEU has repeatedly held that the distinction between benefits excluded from the scope of Regulation 1408/71 and those that fall within its scope is essentially based on the **constituent elements of each particular benefit, in particular its purpose and the conditions that must be met for it to be granted to the recipient**, and not whether national legislation classifies it as a social security benefit.<sup>18</sup>

## *2.2. Case law's broad interpretation and benefits that guarantee a minimum income in old age: social security benefits with characteristics of social assistance*

When the Court classifies a benefit that is not based on paid contributions<sup>19</sup>, it points out that despite the need to make a distinction, it cannot rule out the possibility that a Member State's legislation on the respective benefit will include elements of both social security and assistance; that it specifies persons eligible to apply for it; its purpose and its mode of im-

---

16. Case C-406/04 *De Cuyper* ECLI:EU:C:2006:491, para 27.

17. Case C-78/91 *Hughes* ECLI:EU:C:1992:331, para 16; Case C-160/96 *Molenaar* ECLI:EU:C:1998:84, para 21.

18. Case C-78/91 *Hughes* ECLI:EU:C:1992:331, para 14; C-245/94 *Hoever and Zachow* ECLI:EU:C:1996:379, para 17; Case C-160/96 *Molenaar* ECLI:EU:C:1998:84, para 19; Case C-212/06 *Government of Communauté française and Gouvernement wallon* ECLI:EU:C:2008:178, para 16; Case C-111/91 *Commission of the European Communities* ECLI:EU:C:1993:92, para 28; of 18.01.2007, Case C-332/05 *Celozzi* ECLI:EU:C:2007:35, para 16; Case C-66/92 *Acciardi* ECLI:EU:C:1993:341, para 13; Case C-57/96 *Meints* ECLI:EU:C:1997:564, para 23; Case 122/84 *Scrivner and Cole* ECLI:EU:C:1985, para 18.

19. Case 1/72 *Frilli* ECLI:EU:C:1972:56, p. 00457; Case 187/73 *Callemeyn* ECLI:EU:C:1974:57, p. 00553; Case 39/74 *Costa, spouse Mazzier* ECLI:EU:C:1974:122, p. 01251; Case 139/82 *Piscitello* ECLI:EU:C:1983:126, p. 01427.

plementation.<sup>20</sup> Pursuant to the Regulation's material scope (Article 4 (2a) of Regulation 1408/71, currently Article 3 (2) of Regulation 883/04), an individual's contributions may not be used to make a fundamental distinction between social security and social assistance.<sup>21</sup> According to case law, social assistance benefits are granted at the Member State's discretion and/or guarantee a minimum income for individuals not covered by social security benefits established in the relevant Article of the Coordination Regulation (Regulation 1408/71, currently Regulation 883/04).<sup>22</sup>

The decisive criteria for the classification of a benefit as a social security or social assistance benefit which arise from case law are: (i) the benefit's main purpose, and (ii) how it is financed.<sup>23</sup> The Court has thus held that the German benefits dealt with in *Habelt et al.*<sup>24</sup> were old-age and survivors' benefits, as they were directly linked to social security contributions.<sup>25</sup> In view of the challenge of determining whether a benefit is based on contributions, taxes or a different form of payment, we can deduce that the decisive criterion for treating a benefit as a social security benefit is whether it is provided within the scope of a social security scheme and not whether it is received in return for previous payments.<sup>26</sup>

---

20. Tsantilas P., Issues in defining social security in European Community Law (the case-law of the Court of Justice of the European Communities), p. 35-36, in: Kremalis K. (scientific coordinator), Issues in defining the limits of private and social security, possibilities for private insurance complementing or partially substituting social security, Ant. N. Sakkoulas Publishing, Athens-Komotini, 1996.

21. Tsantilas P., as above, p. 36.

22. The Greek Ombudsman, "Report: residence clauses for granting social security benefits to European citizens. The right of permanent residence of European citizens (non-active persons)", EDKA (Social Security Law Review) LIV (2012), p. 844.

23. Paskalia V., Coordination of social security in the European Union: an overview of recent case law, *Common Market Law Review* 46, 2009, p. 1187-1188, with reference to cases C-406/04 De Cuyper, C-228/07 Petersen.

24. Case C-396/05 *Habelt* ECLI:EU:C:2007:810; Case C-419/05 *Moser* ECLI:EU:C:2006:75; Case C-450/05 *Wachter* ECLI:EU:C:2006:75.

25. Paskalia V., Coordination of social security in the European Union: an overview of recent case law, *Common Market Law Review* 46, 2009, p. 1188.

26. Paskalia V., Coordination of social security in the European Union: an overview of recent case law, *Common Market Law Review* 46, 2009, p. 1188, with reference to case C-249/04, Allard, para 16.

In *Hoeckx*<sup>27</sup>, the Court examined the characteristics of the benefit at issue by focussing on the element of need and the criterion of poverty, concluding that the Belgian minimum subsistence allowance is a social assistance benefit and as such, is excluded from the Regulation's scope. More specifically, the Court stated that, on the one hand, "minimex" confers a legally enforceable right on recipients, and on the other, is granted to anyone who does not have adequate means and is unable to "obtain them either by his own efforts or in any other way" (Article 1 (1) of the Law of August 1974); the Court thus adopted the criterion of 'need' as an essential criterion for eligibility to the benefit which does not require specific qualifying periods of employment, contributions or an affiliation with a particular social security body that covers the given risk (*Hoeckx*, para 13). An applicant must only demonstrate that "he is prepared to accept work", unless his/her health or any other compelling reason incapacitates him/her for work; furthermore, he/she is entitled to exercise his/her right to access social benefits and in fact any right associated with a subsistence allowance if substantiated by the public social welfare centre (Article 6, paras 1 and 3 of the 1974 Law cited above) (*Hoeckx*, para 13).

It follows that an allowance such as the one at issue, i.e. a general social benefit, cannot be classified under one of the branches of social security listed in Article 4 (1) of Regulation 1408/71 and is therefore not considered a social security benefit per se within the specific meaning of the Regulation (*Hoeckx*, para 14). That is, a social benefit that guarantees minimum subsistence for residents such as that provided by the Belgian Law of 7 August 1974 does not fall within the material scope of Regulation 1408/71 as defined in Article 4 (1) and (2) of Regulation 1408/71 (*Hoeckx*, para 15).

If a social assistance benefit can, however, be linked to one of the social risks listed in Article 3 (1) of Regulation 883/04, it could potentially fall within the Regulation's material scope, provided that certain additional criteria are met (case law extension of the material scope to social assistance *mutatis mutandis* with "traditional social security"). The Court has formulated these criteria, taking the imprecisely defined distinct limits between social security and social assistance benefits into consideration, given the mixed characteristics of many social security schemes.

---

27. Case 249/83 *Hoeckx* ECLI:EU:C:1985:139.

As clearly stated in *Newton*, although by virtue of certain characteristics of the legislation at issue, which has much in common with social assistance, particularly since entitlement to the respective benefit does not depend on qualifying periods of employment, insurance or other forms of contributions, it is, under certain circumstances, more similar to a social security benefit.<sup>28</sup> Thus, as the Court stated in *Frilli*, **by virtue of some of its features, the national legislation on guaranteed minimum income has certain similarities with social assistance** – in particular since it asserts that the claimant's need is an essential criterion for its application, but does not stipulate any other requirements for entitlement, such as qualifying periods of employment, membership or contributions. That is, the benefit approximates to social security because no review of each individual case is necessary, which is characteristic of social assistance, and because it **confers on recipients a legally enforceable right, entitling them to a benefit that is analogous to an old-age pension**.<sup>29</sup> Bearing in mind the broad range of recipients and how they are defined, such legislation actually fulfils a double function: on the one hand, it **guarantees a certain level of subsistence** to persons who fall wholly outside the social security system, and on the other, it provides an income supplement for those who receive social security benefits that are, however, inadequate to guarantee subsistence.<sup>30</sup>

Thus, **the legislative provisions that entitle elderly residents to a legally protected right to receive a guaranteed minimum pension** are targeted at wage earners or assimilated workers who meet the minimum qualifying periods of employment in a Member State, reside in that respective State and are entitled to a pension there; the benefit is **provided under the social security system** covered by Article 51 of the Treaty and under the regulations adopted to apply that Article, even where such legislation might fall outside this classification for other categories of recipients (*Frilli* para 18).

As a result, a benefit such as the **guaranteed minimum income** at issue in *Levatino*<sup>31</sup> must be considered an “old-age benefit” within the meaning of the Regulation (para 21). In that case, the beneficiary's rights

---

28. Case C-356/89 *Newton* ECLI:EU:C:1991:265, para 13.

29. Case 1/72 *Frilli* ECLI:EU:C:1972:56, para 14.

30. Case 1/72 *Frilli* ECLI:EU:C:1972:56, para 15.

31. Case C-65/92 *Levatino* ECLI:EU:C:1993:149.

were specified in accordance with the provisions of Chapter 3, Title III of the Regulation, i.e. in accordance with the provisions of Article 46 and 51 of Regulation 1408/71<sup>32</sup> (currently Articles 52-59 of Regulation 883/04).

From the above, we can conclude that a benefit that supplements a pension and covers one of the risks associated with old age, invalidity or death, even if it only guarantees a minimum income, can be defined as a social security benefit.<sup>33</sup> Moreover, in its definition of “pensions”, Regulation 883/04 refers to supplementary allowances that are understood as pensions, as defined in Regulation 408/71.

Accordingly, the Court held that insofar as a Member State’s legislation confers a right to a supplementary benefit designed to increase an individual’s pension and which is paid by way of social security without prior assessment of his/her needs or personal circumstances –which is characteristic of assistance– and is provided by the social security scheme within the meaning of Regulation 1408/71.<sup>34</sup> Consequently, Regulation 1408/71 does not exclude from its scope *ratione materiae* supplementary allowances paid by a national solidarity fund, such as the Fonds national de solidarité, granted to recipients of old-age, survivors’ or invalidity pensions with a view to ensuring minimum means of subsistence, provided they have a legally protected right to the respective allowance.<sup>35</sup>

In conclusion, the Court accepted early on that whilst it may seem desirable from the point of view of applying the Regulation to establish a clear distinction between legislative schemes that fall, respectively, under the classification of social security or assistance, the possibility cannot be excluded that by reason of the individuals it addresses, the legislative scheme’s objectives and method of application in fact cover both categories.<sup>36</sup> **Legislation such as the one at issue in the preliminary ruling in the joined Giletti cases, as well as in Newton, Frilli and Piscitello, thus fulfils**

---

32. Case C-65/92 *Levatino* ECLI:EU:C:1993:149, para 21.

33. Tsetoura A., *The European Pensioner*, Sakkoulas Publications, Athens-Thessaloniki, 2017, p. 122.

34. Cases 379, 380, 381/85 and 93/86 *Giletti* ECLI:EU:C:1987:98, para 11; Case 147/87 *Zaoui* ECLI:EU:C:1987:576, para 8.

35. Case 147/87 *Zaoui* ECLI:EU:C:1987:576, para 9.

36. Case 24/74 *Biason* ECLI:EU:C:1974:99, para 9; Cases 379, 380, 381/85 and 93/86 *Giletti* ECLI:EU:C:1987:9,8 para 9; Case C-356/89 *Newton* ECLI:EU:C:1991:265, para 12; Case 249/83 *Hoecx* ECLI:EU:C:1985:139, para 12.

**a dual function**, insofar as it firstly, **guarantees a minimum means of subsistence** for persons in need, and secondly, provides an additional income for recipients of social security benefits that are inadequate to ensure their subsistence, having regard to the broad definition of persons entitled to the benefit at issue.<sup>37</sup>

As highlighted in *Giletti*<sup>38</sup>, **legislation may also provide for benefits that can be classified as social assistance, which does not alter**, for the purposes of Community law, **the intrinsic social security character** of a benefit linked to an invalidity, old-age or survivor's pension and which is deemed an **automatic supplement** (*Giletti*, para 11). Legislation that does not require prior assessment of the individual's needs (means tested) – a characteristic feature of social assistance – and which confers a right to persons with a legally defined status, falls within the scope of social security within the meaning of the Regulation.<sup>39</sup>

In this regard, it is worth noting that in *Piscitello*, in which a social pension was reviewed, the Court held that a benefit such as **the social pension provided in Article 26 of Italian Law No. 153 of 30 April 1969**, which, firstly, confers on recipients a legally defined status that is not conditional on a discretionary individual assessment of their needs or personal circumstances, and, secondly, can be paid as an income supplement to recipients of social security benefits, in principle, falls within the scope of social security referred to in Article 51 of the EEC Treaty and is not excluded from the scope of Regulation 1408/71 in accordance with the provisions of Article 4(4) thereof.<sup>40</sup> This benefit, provided for in Article 26 of the abovementioned Italian law, is paid on the basis of the conditions and objective criteria laid down in that law **to elderly nationals, with the aim of providing them minimum means of subsistence. Such a pension must therefore be classified as an old-age benefit** within the meaning of Article 4(1) (c) of Regulation 1408/71.<sup>41</sup>

---

37. Cases 379, 380, 381/85 and 93/86 *Giletti* ECLI:EU:C:1987:98, para 10; Case C-356/89 *Newton* ECLI:EU:C:1991:265, para 14; Case 1/72 *Frilli* ECLI:EU:C:1972:56, para 15; as well as Case 187/73 *Callemeyn* ECLI:EU:C:1974:57, para 8; Case 139/82 *Piscitello* ECLI:EU:C:1983:126, para 12.

38. Cases 379, 380, 381/85 and 93/86 *Giletti* ECLI:EU:C:1987:98, para 11.

39. Case 24/74 *Biason* ECLI:EU:C:1974:99, para 10.

40. Case 139/82 *Piscitello* ECLI:EU:C:1983:126, p. 01427, *Operative part 1*.

41. Case 139/82 *Piscitello* ECLI:EU:C:1983:126, *Operative part 2*.

It could be argued that this interpretation gives social security a negatively defined function (ancillary) to broaden the concept of social security as used and regulated in the Regulation. This interpretation provides for a broad definition of the issues regulated in the Regulation, and at the same time, mitigates the damaging consequences identified in case law from excluding social assistance from its scope.

Hence, a social assistance benefit can only fall within the scope of the Regulation if it is guaranteed by law and only if it is granted without the requirement of an individual assessment, i.e. if the relevant national legislation recognises the existence of a legally enforceable subjective right to the respective benefit.<sup>42</sup> Accordingly, the Regulation does not apply to general social assistance benefits that are provided to those in need to ensure a decent guaranteed minimum income without being linked to a social risk listed as such (Article 3 (1) Regulation 883/04), but only to special categories of benefits, e.g. where legislation provides assistance benefits in case of unemployment or old age (pension assistance benefits) and at the same time, acknowledges a subjective right to the respective benefit.<sup>43</sup>

It follows, therefore, that **a benefit that exhibits social assistance characteristics may fall within the scope of the Regulation as a social security benefit** because it otherwise approximates to social security. Thereby, however, each individual case would need to be reviewed to determine whether the respective measure is a social security benefit with social assistance characteristics linked to one of the social risks that falls under the Regulation's material scope, in this case, old age. It is, by extension, extremely **difficult to distinguish benefits that are simultaneously associated with both social security and social assistance from special non-contributory cash benefits** which lie somewhere between social security and social assistance, but which are not treated as social security benefits for the purposes of the Regulation's application.

---

42. Schouckens P. and Monserrez L., Introduction to social security coordination in the EU, Reading Material, Master of European Social Security, 2011, p. 18.

43. Schouckens P. and Monserrez L., as above.

### 2.3. *Special non-contributory cash benefits*<sup>44</sup>: *the vagueness of case law*

Special non-contributory benefits are ‘mixed’ benefits. They are **partially connected to social security** in that they are reserved for individuals who meet the conditions for eligibility for given social security benefits, **and partially to social assistance**, in the sense that they do not depend on qualifying periods of employment or contributions, and that they intend to alleviate a clear need.<sup>45</sup>

In Regulation 1408/71, **the concept of “social security benefit”** within the meaning of Article 4(1) of Regulation 1408/71 (currently Article 3(1) of Regulation 883/04) **and the concept of “special non-contributory benefit”** within the meaning of Article 4 (2a) and (2b) of Regulation 1408/71 on special non-contributory benefits (replaced by Article 3 (3) of Regulation 883/04) **are mutually exclusive**.<sup>46</sup> A benefit that meets the conditions of a “social security benefit” within the meaning of Article 4 (1) of Regulation 1408/71, currently Article 3 (1) of Regulation 883/04, cannot, therefore, be considered a “special non-contributory benefit”.<sup>47</sup> It follows, by contrast, that if a benefit is considered a special non-contributory benefit, it does not qualify as a social security benefit.

According to the Court’s wording, a special benefit within the meaning of Article 4 (2a) of Regulation 1408/71 is defined by its purpose: it must either replace or supplement a social security benefit and by its nature be a social assistance benefit justified on economic and social grounds and is established in legislation that sets out objective criteria.<sup>48</sup> Hence, in *Skalka*, **the Austrian compensatory supplement that tops up retirement or invalidity pensions, was deemed by its nature to be a social assistance benefit, insofar as it intends to ensure minimum means of**

---

44. Article 3 (3) of Regulation No. 883/04 combined with Article 70 of Regulation No. 883/04 - Article 4 (2a) and (2b) of Regulation No. 1408/71 combined with Article 10a of Regulation No. 1408/71.

45. Paskalia V., *Coordination of social security in the European Union: an overview of recent case law*, *Common Market Law Review* 46, 2009, p. 1189, invoking judgment in Case C-160/02 *Skalka*, para 22.

46. Case C-286/03 *Hosse* ECLI:EU:C:2006:125, para 36.

47. Case C-286/03 *Hosse* ECLI:EU:C:2006:125, para 36.

48. Case C-20/96 *Snares* ECLI:EU:C:1997:518, para 33, 42 and 43; Case C-297/96 *Partridge* ECLI:EU:C:1998:280, para 34; Case C-43/99 *Leclère and Deaconescu* ECLI:EU:C:2001:303, para 32; Case C-160/02 *Skalka* ECLI:EU:C:2004:269, para 25.



**subsistence where the amount of the individual's pension is inadequate.** Entitlement to this benefit depends on objective criteria determined by law and, consequently, must be classified as a "special benefit" within the meaning of Regulation 1408/71.<sup>49</sup>

The determining criterion is how the benefit is financed.<sup>50</sup> The Court must consider whether the benefit is directly or indirectly drawn from social security contributions or from other public resources.<sup>51</sup> In the case of the Austrian compensatory supplement, the costs are borne by a social institution that is reimbursed in full from the relevant *Land*, which in turn receives the amount needed to finance this benefit from the Federal budget. The contributions of insured persons thus do not make up part of this financing mechanism. Consequently, the Austrian compensatory supplement must be considered a non-contributory measure within the meaning of Article 4(2a) of Regulation 1408/71<sup>52</sup>, i.e. it is a **special non-contributory benefit** (Skalka, para 31). As follows from this case law, supplementary benefits provided to pensioners whose income falls below a certain threshold are generally considered special non-contributory benefits.<sup>53</sup>

National legislation that puts nationals at a disadvantage simply because they have exercised their freedom to move to another Member State clearly represents a restriction to the freedoms conferred on every EU citizen by Article 21 (1) TFEU.<sup>54</sup> Such a restriction may, with regard to Community law, only be justified if it is based on objective public interest considerations, independent of the person's nationality and proportionate to the legitimate objective of national provisions.<sup>55</sup>

---

49. Case C-160/02 *Skalka* ECLI:EU:C:2004:269, paras 26-27.

50. Case C-215/99 *Jauch* ECLI:EU:C:2001:139, para 32 and 33; Case C-160/02 *Skalka* ECLI:EU:C:2004:269, para 28.

51. Case C-160/02 *Skalka* ECLI:EU:C:2004:269, para 28.

52. Case C-160/02 *Skalka* ECLI:EU:C:2004:269, para 29-30.

53. Paskalia V., Coordination of social security in the European Union: an overview of recent case law, *Common Market Law Review* 46, 2009, p. 1195.

54. Case C-224/98 *D'Hoop* ECLI:EU:C:2002:432, para 35; Case C-224/02 *Pusa* ECLI:EU:C:2004:273, para 20; Case C-406/04 *De Cuyper* ECLI:EU:C:2006:491, para 39; Case C-544/07 *Rüffler* ECLI:EU:C:2009:258, para 73.

55. Case C-406/04 *De Cuyper* ECLI:EU:C:2006:491, para 40; Case C-192/05 *K. Tas-Hagen and Tas* ECLI:EU:C:2006:676, para 33; Case C-221/07 *Zablocka-Weyhermüller* ECLI:EU:

Moreover, the residence criterion was considered in the EU legislative process as creating a genuine link or genuine connection between the applicant and the host Member State for the establishment of entitlement to the special non-contributory benefits in the relevant Annex of the Regulation.<sup>56</sup> Indeed, the Court has held that it is legitimate for national legislation to want to ensure the existence of a real link between the applicant for a specific allowance and the relevant State<sup>57</sup>, and to ensure financial balance of the social security system.<sup>58</sup> Therefore, under circumstances in which the acquisition of entitlement to a non-contributory benefit is not subject to criteria such as previous contributions, it is legitimate for a Member State to only award such benefits after establishing that a genuine link exists between the claimant and the competent State.<sup>59</sup> The existence of such a link can effectively be established by determining that the person in question has in fact resided in that Member State for a reasonable period.<sup>60</sup>

The question that arises is whether the legal status of special non-contributory benefits is precisely defined, taking the Court's judgments and reasoning in *Hosse*<sup>61</sup> and *Jauch*<sup>62</sup> into consideration. More specifically,

---

C:2008:681, para 37; Case C-544/07 *Rüffler* ECLI:EU:C:2009:258, para 74; Case C-499/06 *Nerkowska* ECLI:EU:C:2008:300, para 34.

56. van Overmeiren F. (ed.) Eichenhofer E. and Verschueren H., trESS Analytical Study 2011, Social security coverage of non-active persons moving to another Member State, p. 15.

57. Case C-224/98 *D'Hoop* ECLI:EU:C:2002:432, para 38; Case C-138/02 *Collins* ECLI:EU:C:2004:172, para 67.

58. Case C-158/96 *Kohll* ECLI:EU:C:1998:171, para 41; Case C-228/07 *Petersen* ECLI:EU:C:2008:494, para 57.

59. Case C-503/09 *Lucy Stewart* ECLI:EU:C:2011:500, para 92.

60. Case C-503/09 *Lucy Stewart* ECLI:EU:C:2011:500, para 93.

61. Case C-286/03 *Hosse* ECLI:EU:C:2006:125, para 36. According to para 36 of the *Hosse* judgment: "The scheme of Regulation No. 1408/71 shows that the concept of 'social security benefit' within the meaning of Article 4(1) and the concept of 'special non-contributory benefit' within the meaning of Article 4(2a) and (2b) of the regulation are mutually exclusive. A benefit which satisfies the conditions of a 'social security benefit' within the meaning of Article 4(1) of Regulation No. 1408/71 therefore cannot be analysed as a 'special non-contributory benefit'".

62. Case C-215/99 *Jauch* ECLI:EU:C:2001:139, para 18. According to para 18 of the *Jauch* judgment: "Article 4(2a) of Regulation No. 1408/71 concerns 'special non-contributory benefits' which are provided under legislation other than that relating to the traditional

the Court seems to have excluded the possibility of establishing a connection in some instances between special non-contributory benefits and the concept of social security benefits within the meaning of Article 4 (1) of Regulation 1408/71, currently Article 3 (1) of Regulation 883/04 (Hosse, para 36); in other instances, the Court, treating said benefits as social assistance benefits, has left the door open for such benefits to be indirectly associated with the field of social security to which the Regulation applies, given that they are intended to provide supplementary, substitute or ancillary support against the risks covered by the branches of social security referred to in the Regulation's material scope (Jauch, para 18). The extension of the latter's scope was guaranteed due to its link with traditional social security, keeping in mind the criteria examined above.

**Case law does not clearly define when a benefit shall be considered as relating to both social security and social assistance and therefore, when it is to be considered a social security benefit and when it is to be considered a special non-contributory benefit (although a connection may exist to both social security and social assistance); therefore, it is not considered to be a social security benefit.**

In any event, in the context of special non-contributory benefits, the Court has repeatedly emphasised that the principle of exportability of social security benefits applies unless Community legislature has adopted provisions that derogate from that principle.<sup>63</sup> The Court has held that the special non-contributory benefits covered in Annex IIa to Regulation 1408/71, Community legislature can adopt provisions that derogate from the principle of exportability of social security benefits when implementing Article 51 of the Treaty; this implies that **the condition of residence in the State of the competent institution may legitimately be required for enti-**

---

branches of social security listed in Article 4(1) of that regulation, or even come under social and medical assistance expressly excluded from the scope of Regulation No. 1408/71 by Article 4(4), but which may nevertheless be brought within the field of social security to which that regulation applies if they are intended to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 4(1) of the regulation".

63. Among others, Case 87/76 *Bozzone* ECLI:EU:C:1977:60, p. 191; Case 139/82 *Piscitello* ECLI:EU:C:1983:126, para 16; Cases 379, 380, 381/85 and 93/86 *Giletti* ECLI:EU:C:1987:98, para 16; and Case C-236/88 *Commission* ECLI:EU:C:1990:303, para 16.

tlement to benefits closely linked with the field of social security.<sup>64</sup> The justification for limiting the export of such benefits is usually that they are not based on the payment of contributions by the beneficiary and that they are intended to guarantee a minimum level of subsistence, taking the cost of living and integration in the respective Member State into consideration.<sup>65</sup>

#### *2.4. A pension as a social security benefit<sup>66</sup> or as a special non-contributory benefit*

A pension by virtue of national legislation should be a social security benefit pursuant to the Regulation, i.e. the pension rules thereof apply. Pensions associated with insurance periods (contributions on income), with periods of residence (usually relating to income tax with the purpose of financing the social security system), or with participation in the financing of a specific social security scheme, are subject to pension regulations. Problems mostly arise with regard to pensions that have “assistance characteristics”, in particular given the broad definition of pensions in Article 1 of Regulation 883/04.

The special rules for calculating old-age pensions covered in Title III of the Regulation do not apply to special non-contributory old-age pensions.<sup>67</sup> Old-age, invalidity and survivors’ pensions provided for in national law and which possess the characteristics of a special non-contributory cash benefit, and have for this reason been included in Annex XI of Regulation 883/04, are treated by the Regulation as special non-contributory, non-exportable cash benefits and not as a pension for the purposes of applying Articles 50–60 and 40–49 of Regulation 883/04. This is also set out in Regulation 883/04 itself, in particular in Article 70 (3) of Regulation

---

64. Case C-43/99 *Leclère and Deaconescu* ECLI:EU:C:2001:303, para 32; Case 313/86 *Lenoir* ECLI:EU:C:1988:452, para 16; and Case C-20/96 *Snares* ECLI:EU:C:1997:518, para 42.

65. Coucheir M. (ed.), Sakslin M. (ed.), Giubboni S., Martinsen D. and Verschueren H., trESS Think Tank Report 2008, The relationship and interaction between the coordination Regulations and Directive 2004/38/EC, p. 11.

66. In itself or as relating to social security and social assistance.

67. Verschueren H., Special non-contributory benefits in Regulation 1408/71, Regulation 883/2004 and the case law of the ECJ, *European Journal of Social Security*, Vol. 11(1-2) 2009, p. 225-226.

883/04, according to which Article 7 and the other chapters of Title VII do not apply to special non-contributory cash benefits.

In addition, pensions that fall under the classification of social assistance and are provided for in the relevant national legislation as assistance benefits are excluded from the Regulation's scope.

The focus is therefore on pension benefits associated with both categories, social security and social assistance. These benefits, insofar as they relate to one of the social risks of old age, invalidity or death, fall within the scope of the Regulation, in particular the rules of Articles 50-60 and 40-49 of Regulation 883/04. The complexity of this issue, which has likely been exacerbated by existing case law, is apparent in the declarations in Annexes X and XI of Regulation 883/04.

On the one hand, **Annex X of Regulation 883/04 on special non-contributory cash benefits** includes many States that have listed **social pensions of a non-contributory nature** as special non-contributory benefits (Ireland, Spain, Cyprus, Poland, Portugal, Slovenia, Slovakia). On the other hand, **a national pension** (which is not classified as contributory or non-contributory)<sup>68</sup> is listed in **Annex XI on special provisions for the application of Member States' legislation** (Finland). As is well known, Member States have competence to configure their own social security schemes. It is thus possible for non-contributory pensions to be either included or excluded from the Regulation's rules on pension benefits, de-

---

68. National pensions and guarantee pensions are financed by the State, as set out in: European Commission, Your social security rights in Finland, July 2012, p.5. [https://ec.europa.eu/employment\\_social/empl\\_portal/SSRinEU](https://ec.europa.eu/employment_social/empl_portal/SSRinEU)

National pensions and guaranteed pensions are financed by the State - European Commission, Your social security rights in Finland, July 2012, p. 6 and European Commission, Your social security rights in Finland, July 2013, p. 6.

[http://ec.europa.eu/employment\\_social/empl\\_portal/SSRinEU](http://ec.europa.eu/employment_social/empl_portal/SSRinEU)

In the 2014 update (Your right country by country-Finland-Old-age pension-national pension) it is stated that the national Finnish pension is paid by Kela without indicating its financing method <http://ec.europa.eu/social/main.jsp?catId=1109&langId=en&intPageId=2936>

For national pensions: Social Insurance Institution (Kela) (Kansaneläkelaitos)- An independent body under the Parliament responsible for the basic benefits, MISSOC – [www.missoc.org](http://www.missoc.org), Organisation of social protection-Finland 1/1/2015 <http://www.missoc.org/MISSOC//INFORMATIONBASE/COUNTRYSPECIFICDESCS/ORGANISATION>

In the 2021 update, European Commission, Your social security rights in Finland, there is no reference to the financing method.

pending on their national characteristics. The question, of course, is whether, for example, the social non-contributory pensions of the States listed in Annex X share characteristics with the Finnish national pension (listed in Annex XI). The national pension provided by Finland's social security system includes a residence requirement, i.e. recipients must have resided in the territory of Finland for a specific amount of time to be entitled to said benefit;<sup>69</sup> such a requirement is usually associated with a special non-contributory benefit. Moreover, in accordance with Article 70 (3) of Regulation 883/04, the provisions on waiving residence requirements (principle of exportability) of Article 7 of Regulation 883/04 (former Article 10 of Regulation 1408/71) do not apply to said benefits, nor do the provisions of the other chapters in Title III.

In view of this generalised distinction of the categories according to which the benefits in question can be classified, our objective is to identify a tangible and clear criterion to facilitate European coordination of social security law and to treat similar benefits in a uniform manner. Besides, the Regulation does not establish a general criterion for a precise distinction between social security and social assistance, considering the fact that the previous conceptual categories have lost some of their clarity.<sup>70</sup> Indeed, the boundaries between social security and social assistance are not straightforward in many EU countries.<sup>71</sup>

It is worth noting that the **Italian social pension (supplementary allowance)** established in Italian Law No. 153 of 30 April 1969, which was the subject of CJEU case *Piscitello*<sup>72</sup>, is deemed a social security benefit that is associated with both categories, namely social security and social

---

69. <http://ec.europa.eu/social/main.jsp?catId=1109&langId=en&intPageId=2936>

70. TSANTILAS P., Issues in defining social security in European Community Law (the case-law of the Court of Justice of the European Communities), p. 35, in: KREMALIS K. (scientific coordinator), Issues in defining the limits of private and social security, possibilities for private insurance complementing or partially substituting social security, Ant. N. Sakkoulas Publishing, Athens-Komotini, 1996. See also Martinsen D., The Social Policy Clash: EU Cross-Border Welfare, Union Citizenship and National Residence Clauses, presented at the European Union Studies Association (EUSA) Biennial Conference 2007, (10<sup>th</sup>), 17-19 May 2007, Montreal.

71. JORENS Y. and LHERHOUD J-PH., trESS European Report 2011, Organisation and coordination of a network on the co-ordination of social security schemes within the European Union, Lot 1: Expertise in social security coordination, p. 13

72. Case 139/82 *Piscitello* ECLI:EU:C:1983:126, p. 01427.

assistance, and is treated as an old-age pension under Regulation 883/04 in Annex X on special non-contributory benefits. More specifically, Italy lists this benefit under point a), Annex X, Regulation 883/04 to specifically be considered a special non-contributory benefit.

Thereby, said benefit is classified as a special non-contributory benefit and is therefore not exportable and not subject to the provisions of the other chapters of Title III of the Regulation, i.e. to the regulations on pensions. This is the case despite the Court's contrary ruling in the relevant case, in which it held that, provided that Regulation 1408/71 does not contain special provisions on these allowances, it must be accepted that the waiving of residence rules provided for in Article 10 (1) of Regulation 1408/71 also applies to these benefits.<sup>73,74</sup>

Accordingly, **France's supplementary allowances**, which in the *Giletti and Zaoui* cases were deemed to be social security benefits, are listed as special non-contributory benefits in Annex X of Regulation 883/04.

However, it is not impossible for a benefit listed as a special non-contributory benefit under Regulation 883/04 to be included in the context of a national social assistance scheme that falls outside the scope of the Regulation, such as, for example, the social pension of Cyprus.<sup>75</sup>

Clearly, at this stage, the application of the provisions on pensions depends, among others, on how each national pension benefit is defined by the relevant State in the context of the European coordination system. Of course, added confusion is caused by the fact that in the case of pension benefits that are considered to be social security benefits based on their association with both social security and social assistance, as well as

---

73. Case 139/82 *Piscitello* ECLI:EU:C:1983:126, *Operative part 2*.

74. Of course, the *Piscitello* case was dealt with prior to the adoption of Regulation 1247/92, which sought to exclude so-called special non-contributory benefits from the principle of exportability or, otherwise said, it sought to create a different coordination system that would differ with regard to these benefits (Explanatory Memorandum of Regulation 1247/92, para 6). The benefits considered to be special non-contributory following agreements between the legislative body and Member States were registered in Annex IIa, which was integrated in Regulation No. 1408/71 (currently Annex X of Regulation 883/04).

75. ANNEX X, Regulation No. 883/2004, CYPRUS, point a) social pension, in comparison with: Your rights country by country, (*updated in 2019*) Cyprus - Social assistance - Social pension <https://ec.europa.eu/social/main.jsp?catId=1105&langId=en>. See the update of 2021 as well <https://ec.europa.eu/social/main.jsp?catId=1105&langId=en>

in the case of special non-contributory retirement benefits, it is possible to link them to non-contributory benefits intended to provide ancillary coverage and to ensure a guaranteed minimum income. The only element that arises from case law and that could act as a dividing line is the dual function of the former as recognised by the Court. Besides, the question arises whether such a classification can be presumed solely on the basis of listing the benefit under the relevant Annex. The Court initially followed this rationale for special non-contributory benefits, treating registrations of benefits by Member States as the decisive criterion; later, however, the Court started examining in detail the characteristics of each benefit from scratch.

### 3. Granting a supplement and the guaranteed minimum pension

The application of **Article 58 of Regulation 883/04** (Article 50 of Regulation 1408/1971) requires the legislation on retirement in the State of residence to provide for a guaranteed **minimum pension**.<sup>76</sup> Thus, in *Torri*<sup>77</sup>, the Court held that Article 50 of Regulation 1408/71 is applicable only in cases where provision is made in the legislation of the Member State in whose territory the worker resides and in which he/she is entitled to a guaranteed minimum pension.<sup>78</sup> Accordingly, in *Browning*<sup>79</sup>, the Court held that Article 50 of Regulation 1408/71 is to be interpreted as meaning that a “minimum benefit” exists only where the legislation of the State of residence includes a specific guarantee, the object of which is to ensure for recipients of social security benefits a minimum income that is in excess of the amount of benefit they may claim solely on the basis of their qualifying insurance periods and contributions (para 15). This reflects the opinion of the Advocate General as well.<sup>80</sup>

---

76. Schuler R., Regulation (EC) No. 883/2004 – Article 58 in: Fuchs M. and Cornelissen R. (eds.), *EU Social Security Law – A Commentary on EU Regulations 883/2004 and 987/2009*, C.H. BECK – Hart- Nomos, Baden- Baden, 2015, p. 367 invoking case C-64-77 *Torri*, EU: C: 1977:197.

77. Case 64/77 *Torri* ECLI:EU:C:1977:197.

78. Case 64/77 *Torri* ECLI:EU:C:1977:197, para 13.

79. Case 22/81 *Regina ex parte Norman Ivor Browning* ECLI:EU:C:1981:316.

80. Case C-143/97 *Conti* ECLI:EU:C:1998:59, para 47.



By contrast, the Belgian supplement to a miner's pension at issue in *Conti*<sup>81</sup>, which was provided in accordance with strictly defined conditions and by raising the pension to the level of a full benefit, ultimately improved the situation of a particular category of persons; precisely this benefit, however, is not related to qualifying insurance periods. Consequently, the Belgian legislation on miners' pensions cannot be regarded as granting a guaranteed minimum income to miners, while Article 50 of the Regulation does not apply for yet another reason: it necessarily presupposes that benefits are calculated in accordance with Community regulations on retirement benefits within the meaning of Article 46 (2) of the Regulation; according to the wording of Article 50 of Regulation 1408/71: "...a minimum benefit fixed by that legislation for an insurance period equal to all the insurance periods taken into account for the payment"<sup>82</sup>. Article 58 of Regulation 883/04 contains the exact same wording. However, the calculation in the *Conti* case did not relate to an independent benefit solely on the basis of qualifying periods of employment accrued under the Belgian system.<sup>83</sup>

Three cases on supplements that were presented before the Court are examined below in chronological order; in these cases, the Court examined the legal form of the supplements at issue in detail. In the first case (*Levatino*) and following the *Frilli*<sup>84</sup> judgment, the Court classified the minimum income supplement, i.e. the Belgian guaranteed minimum income, as an old-age pension, taking into account that the Regulation also includes non-contributory schemes and thus linked it to the rules on pensions. In the second case (*Stinco and Panfilo*), the Court classified the Italian minimum income supplement as a non-contributory pension benefit affiliated with the special rules on pensions. In the third case (*Koschitzki*), which dealt with the same Italian minimum pension income, the Court avoided classification of the benefit. The Court noted that the competent institution is not required to take a supplement intended to raise pensions to the minimum subsistence level in accordance with national legislation into consideration where, on account of the fact that the income threshold established by national legislation for that supplement is exceeded, an in-

---

81. Case C-143/97 *Conti* ECLI:EU:C:1998:501.

82. Case C-143/97 *Conti* ECLI:EU:C:1998:59, paras 49-50.

83. Case C-143/97 *Conti* ECLI:EU:C:1998:59, para 50.

84. Case 1/72 *Frilli* ECLI:EU:C:1972:56, para 18.

sured person who has worked exclusively in the respective Member State cannot claim that supplement.

More specifically, in *Levatino*<sup>85</sup>, the issue addressed in the proceedings between the Office National des Pensions (hereinafter “the ONP”) –the competent Belgian authority for the payment of old-age benefits– and Mr Levatino, were the rights of his mother, Mrs Milazzo, which he had succeeded. The Court reviewed both the provision on awarding supplements, namely Article 50 of Regulation 1408/71 (currently Article 58 of Regulation 883/04), and the provision on revalorisation of benefits, Article 51 of Regulation 1408/71 (currently Article 59 of Regulation 883/04).

Mrs Milazzo, an Italian national, was a resident of Belgium. She had been receiving a retirement pension based on qualifying periods of employment in Belgium since 1 October 1967 and a retirement pension from Italy since 1 November 1967. In addition, she had been receiving the guaranteed minimum income allowance for elderly persons provided for in Belgian law since 1 January 1973.

In the question referred to the Court for a preliminary ruling, the national court asked whether Articles 46 and 51 of the Regulation were applicable to determine and adjust the amount of a benefit such as the guaranteed minimum income allowance, which is paid to a worker who has been employed in a Member State, resides in that State and receives a retirement pension from both his/her State of residence and from another Member State, even where the application of those provisions may confer an advantage for a migrant worker over a non-migrant worker (*Levatino*, para 17). The provisions of Article 46 of Regulation 1408/71 (currently Article 52 of Regulation 883/04) relate to the awarding of old-age benefits; the provisions of Article 51 of Regulation 1408/71 cover the revalorisation of benefits<sup>86</sup> (currently Article 59 of Regulation 883/04), which stipulate

---

85. Case C-65/92 *Levatino* ECLI:EU:C:1993:149.

86. Paragraph 19: Article 51 consists of two paragraphs. Article 51 (1) provides that if the benefits of the States concerned are altered by a fixed percentage or amount to take account of an increase in the cost of living or changes in the level of wages or salaries or other reasons for adjustment, such percentage or amount must be applied directly to the amount of the benefits without a need for recalculation in accordance with the provisions of Article 46. However, Article 51 (2) provides that a recalculation shall be carried out in accordance with Article 46, if the method of determining or the rules for calculating the benefits should be altered.

the circumstances under which benefits “determined under the provisions of Article 46” must be increased or recalculated (Levatino, para 18).

Invoking its judgment in *Frilli*<sup>87</sup>, the Court noted that a benefit such as the one at issue in the main proceedings must be considered an “old-age benefit” within the meaning of the Regulation. In this case, the beneficiary’s rights must, according to Article 44 of the Regulation, be determined in accordance with the provisions of Chapter 3 of Title III of the Regulation, that is to say, in particular in accordance with the provisions of Articles 46 and 51 (Levatino, para 21). According to the Court (Levatino, para 34), the purpose of a benefit such as the guaranteed minimum income for elderly persons is to offset the inadequacy of their available resources and to ensure that they receive the minimum income guaranteed by law, at least where the individual resides in the territory of the State providing the respective benefit. Entitlement to the benefit is not conditional on the person’s insurance status or, in the case of certain beneficiaries, on their duration of residence. The amount of the benefit, which is independent of the recipient’s insurance status or the duration of his/her residence in the Member State, is equal to the difference between the guaranteed minimum income established in national legislation, on the one hand, and part of the beneficiary’s resources, including the national and foreign pensions he/she receives, on the other. In view of its differential nature, the amount of this benefit varies in accordance with the evolution of the amount of guaranteed minimum income, which is regularly re-assessed, and the resources of the person concerned.

Furthermore, a benefit such as the guaranteed minimum income differs from an old-age pension, as the nature and the manner of determination of old-age pensions are –unlike the guaranteed minimum income benefit– not affected by the provisions of Article 51 (1), even if this could put the migrant worker at an advantage (Levatino, para 38).

Although it is true that the application of the provisions of Article 51 (1) may –regard being taken to their purpose mean that a migrant worker is granted a benefit amount that is greater than that to which the worker is entitled under Article 46 of the Regulation, it may not have the effect of jeopardising the benefit’s actual purpose (Levatino, para 39). The Court concluded that the provisions of Articles 46 and 51 (2) of the Regulation are applicable for determining and adjusting the amount of the benefit,

---

87. Case 1/72 *Frilli* ECLI:EU:C:1972:56, para 18.

such as the guaranteed minimum income paid to a worker who has been employed in a Member State, resides in that State and receives a retirement pension from that State in addition to a retirement pension from another Member State. Article 51 (1) is not, however, applicable to the adjustment of such a benefit (Levatino, para 51). It is worth noting that Article 51 (1) of Regulation 1408/71 corresponds to Article 59 (2) of Regulation 883/04 and Article 51 (2) of Regulation 1408/71 to Article 59 (1) of Regulation 883/04.

Furthermore, in *Stinco and Panfilo*<sup>88</sup>, the dispute in the proceedings between Stinco and Panfilo, both Italian nationals, and the Istituto nazionale della previdenzasociale (INPS), surrounded the INPS's refusal to take the amount necessary for reaching the guaranteed minimum pension as set out by the INPS, into account for calculating the old-age pension under Italian law. Stinco and Panfilo applied to the INPS for an old-age pension and were each, from that date onwards, also entitled to an old-age pension from other Member States, namely France and the United Kingdom.<sup>89</sup> The INPS awarded Stinco and Panfilo pro rata pensions in accordance with Article 46 (2) of Regulation 1408/71, calculated by reference to the notional pensions they would have received had they worked in Italy only throughout their active lives. The amount of the notional pensions was such that had they in fact been entitled to the national pension amount, they would have been awarded the statutory Italian pension supplement to reach the guaranteed minimum pension. The national court stated that the pension they actually received was not, however, supplemented to reach the statutory minimum pension, because the total pension they received after including the pensions paid by France and the United Kingdom exceeded the threshold for entitlement to payment of the supplement under Italian law.

By submitting its question to the CJEU for a preliminary ruling, the national court essentially asked whether Article 46 (2) (a) of Regulation 1408/71 must be interpreted as requiring the competent institution, when determining a pension's theoretical amount on the basis of which the pro

---

88. Case C-132/96 *Stinco and Panfilo* ECLI:EU:C:1998:427.

89. Para 7: Under Article 6 of Decree-Law No. 463 of 12 September 1983, which became Law No. 638 of 11 November 1983, entitlement to the supplement is subject to the recipient's income which shall not exceed twice the annual amount of the minimum pension.

rata pension is calculated, to include a supplement intended to raise the pension to the statutory minimum income (Stinco and Panfilo, para 12).

The Court initially referred to the *Levatino* case<sup>90</sup>, holding that the provisions of Article 46 of Regulation 1408/71 apply to non-contributory old-age benefits such as the income guaranteed to the elderly under Belgian law (Stinco and Panfilo, para 13). In that case, however, the INPS and the Austrian government argued that since the supplement provided for under Italian law amounts to a special non-contributory benefit in accordance with Article 4 (2a) of Regulation 1408/71 as amended by Regulation 1247/92, it cannot, under Article 10a, be included in the calculation of the theoretical amount of an individual's pension under Article 46 (2) (a). In this respect, it should be noted that according to Article 10a of Regulation 1408/71, as amended by Regulation 1247/92, the special non-contributory cash benefits set out in Annex IIa of Regulation 1408/71 are not transferable to Member States other than the Member State in which the worker resides. The possibility of exporting a benefit such as the supplement provided for under Italian law is not in any way connected with the question of determining the theoretical amount of a pension (para 17). It follows that a benefit such as that at issue in the main proceedings cannot be considered as being excluded from the scope of Article 46 of Regulation 1408/71 by reason of the adoption of Article 10a of the same Regulation (Stinco and Panfilo, para 18).

The Court invoked its judgment in *Browning*<sup>91</sup>, where it had pointed out that the method of calculation referred to in Article 46 (2) (a) of Regulation 1408/71, which relates to the determination of the theoretical amount of a pension, is distinct from the situation referred to in Article 50, which relates to the awarding of a supplementary payment in excess of the minimum payable in application of the normal rules under a particular national legal system (para 20). The Court held that it follows that a statutory minimum benefit established by a Member State must be included in the calculation of the theoretical amount referred to in Article 46 (2) (a) of Regulation 1408/71 (Stinco and Panfilo, para 21).

Accordingly, the answer to the question referred by the national Italian court is that Article 46 (2) (a) of Regulation 1408/71 must be interpreted as requiring the competent institution –in determining the theo-

---

90. Case C-65/92 *Levatino* ECLI:EU:C:1993:149, para 24.

91. Case 22/81 *Browning* ECLI:EU:C:1981:316, paras 13 and 14.

retical amount of the pension on which the calculation of the pro rata pension is based— to include a supplement intended to raise the pension to the statutory minimum income (Stinco and Panfilo, para 22).

The Court assumed a different position in the Koschitzki judgment, however.<sup>92</sup> Ms U. Koschitzki had been the recipient of an old-age pension in Italy since October 1996. She had accrued 262 weeks of contributions in Italy and 533 weeks in Germany, i.e. a total of 795 weeks of contributions. In October 1996, Ms U. Koschitzki's household income exceeded the limit provided for in Article 4 of Legislative Decree 503/92. Ms U. Koschitzki and the INPS disagreed as to whether the supplement that raised her pension to Italy's guaranteed minimum pension must be included to determine the theoretical amount of her pension on which the calculation of the pro rata pension is based. Relying on the judgment in case C-132/96 Stinco and Panfilo of 24 September 1998 (European Court Reports 1998, p. I-5225), Ms U. Koschitzki claimed that the answer to that question should be affirmative.

The national court essentially asked whether a supplement that raises pensions to the guaranteed minimum pension in accordance with national legislation must be included to determine a pension's theoretical amount on which the calculation of the pro rata pension is based pursuant to Article 46 (2) (a) of Regulation 1408/71, where the income limits provided for by the national law relating to the supplement are exceeded (Koschitzki, para 22).

The Court referred to the Stinco and Panfilo case, emphasising that in this case, on account of the fact that the income limits set by the national legislation on the supplement intended to raise pensions to reach the guaranteed minimum pension are exceeded, an insured person in the position of Ms U. Koschitzki, who had worked exclusively in the Member State concerned, could not claim that supplement (para 25). According to the Court, if the law of the respective Member State provides that the right to the supplement is subject to the general condition that the recipient does not earn an income greater than a specified threshold or an income combined with that of his/her cohabiting spouse which exceeds a higher threshold, that provision must also be considered in the calculation of the pension's theoretical amount referred to in Article 46(2) (a) of Regulation 1408/71 (Koschitzki, para 29).

---

92. Case C-30/04 *Koschitzki* ECLI:EU:C:2005:492.

Thus, the answer to the question referred by the national court was that Article 46 (2) (a) of Regulation 1408/71 must be interpreted as meaning that in order to determine the theoretical amount of the pension on which the calculation of the pro rata pension is based, the competent institution is not required to take a supplement intended to raise the pension to the guaranteed minimum pension in accordance with national legislation where, on account of the fact that the income limits set by the national legislation on that supplement are exceeded, an insured person who has worked exclusively in the respective Member State cannot claim such a supplement (Koschitzki, para 38).

It is worth noting that the Belgian guaranteed minimum income (Levatino) and the Italian basic pension supplement (Stinco and Panfilo, Koschitzki) are included in Annex X to Regulation 883/04 on special non-contributory benefits. It can thus be observed that Member States have gradually started expressing reservations about non-contributory benefits, which the Court could potentially classify as social security benefits that are simultaneously related to both social security and social assistance, listing any non-contributory benefits as 'special non-contributory benefits'. As previously discussed, even the Court itself has not been able to provide a clear picture as to when a benefit should be regarded as being associated with both social security and social assistance and thus to be considered a social security benefit, while a benefit that is considered a special non-contributory benefit (although it is also connected to both social security and social assistance) is not considered a social security benefit. We can conclude that benefits that are more contributory in nature are classified as social security benefits and are therefore subject to the regulations on pensions.

#### **4. The case of Greece**

In the past, the Greek State provided for pension thresholds to ensure minimum subsistence, especially for pensioners; however, these thresholds have been abolished in the meantime. Greece has thus abandoned measures of a specific nature targeted exclusively at the group of pensioners and instead has adopted a universal measure that targets the entire population. The social assistance allowance at issue is of a general nature and is not linked to one of the social risks covered by the social security system. However, the national courts have dealt with pension thresholds, the pension supplement and the previous benefits entitled

“minimum pension” provided under the former national legal framework in line with EU social security law. Below, we analyse the special benefits for the elderly listed in Annex X of Regulation 883/04 as a special non-contributory benefit, the pension supplement of Article 58 of Regulation 883/04, and guaranteed minimum pensions prior to the merging of social security institutions under the reform of Greek Law 4387/2016, as illustrated by national case law, as well as recent developments in guaranteed minimum pensions for the purposes of the Coordination Regulation within the context of Greek social security law.

#### ***4.1. Special benefits for the elderly listed in Annex X of Regulation 883/04 as special non-contributory benefits***

The special non-contributory benefit listed in Annex X of Regulation 883/04 by Greece cover special benefits for the elderly established in Law 1296/82. Law 1296/82 focusses on OGA (Agricultural Insurance Organisation) and OPEKA (Organisation of Assistance Allowances and Social Solidarity). More specifically, OGA, according to Law 4387/2016 (Article 51, para 1), joined the Unified Social Security Institution on 1 January 2017, which was established by the same article EFKA (already e – EFKA<sup>93</sup>). OGA is a social security institution in accordance with the provisions of Article 53 of the same Law, while it maintains an independent legal personality in terms of exercising non-insurance-related responsibilities. Furthermore, Article 1 of Law 4520/2018 states the following: “1. The Agricultural Insurance Organisation (OGA), from the entry into force hereof, is renamed into the Organisation of Assistance Allowances and Social Solidarity (OPEKA) and is a single body implementing policies developed in the context of the National System of Social Solidarity of Law 4387/2016”.

According to Greek case law, the social solidarity allowance provided to uninsured elderly persons constitutes a social assistance benefit.<sup>94</sup> It is granted without an individual assessment of the person’s needs provided

---

93. Article 51 A of Law 4387/2016, added by Article 1 of Law 4670/2020 (Government Gazette A’ 43 / 28.2.2020, entry into force from 1.3.2020, according to Article 108 of this law)], under para 1 of Article 51 of Law 4387/2016 (Government Gazette AD 85).

94. Stergiou A., *Social Security Law*, 4<sup>th</sup> edition, Sakkoulas publications, 2022, p. 257 with reference to the Judgments of the Council of the State 1515/2021, 719/2018.



that his/her income does not exceed a certain limit that is adjusted by legislation over time, is subject to judicial control<sup>95</sup> and is means-tested.

According to Law 4387/2016 (Article 93), which replaced Law 1296/82, 1, the Social Solidarity Allowance for Uninsured Elderly is paid by OGA to both uninsured elderly persons and to those who do not meet the retirement requirements, if the following conditions apply:

a. They have reached the age of 67 years;

b. They do not receive or are not entitled to a pension from abroad or to any other social security or social assistance benefit from Greece that exceeds the full amount of allowance established in para 3.

In the event that the public pension or benefit is lower than the allowance amount established in para 3, pensioners are entitled to the difference between their pension or other benefit and the maximum amount of the allowance. If the resulting amount is less than EUR 20, the allowance will not be paid. In case of any changes in the amount of the beneficiary's pension or benefit he/she receives from abroad or from the Greek State, the recipient must report this change immediately so that the allowance's amount can be adjusted accordingly. For those who receive a pension or other benefit from a foreign institution, the monetary exchange rate on the 1st business day of the year is used to grant, re-grant or adjust the amount of allowance they receive by the body responsible for its payment; this also applies to the pension they receive from a foreign institution.

c. They have permanently and legally resided in Greece for 15 consecutive years immediately prior to submitting their application for the allowance, or for at least 15 years between the ages of 17 and 67 years, out of which the applicant must have resided in Greece for ten consecutive years at the time of submitting his/her application. The applicant must continue to reside in Greece after the benefit has been granted.

d. The amount of allowance is paid in full or, in accordance with the provisions of indent b, para 1, to those who meet the above criteria cumulatively and have resided in Greece for at least 35 full years, while it is reduced by 1/35 for each one (1) year remaining to reach 35 years of residence in the country.

e. The total annual individual taxable income as well as its exemption or the applicability of a special income tax does not exceed the amount of EUR 4 320 or, in the case of a married couple, the total annual household

---

95. Stergiou A., Social Security Law, 4<sup>th</sup> edition, Sakkoulas publications, 2022, p. 257.

taxable income, as well as the exemption or applicability of a special income tax does not exceed the amount of EUR 8 640.

2. Income excludes: a. financial assistance granted to individuals with disabilities; b. food allowance granted to children due to a chronic end-stage renal disease and transplant recipients; c. unemployment benefits; d. alimony paid for a minor child based on a court decision or notarial deed or private document.

#### ***4.2. Pension supplement under Article 58 of Regulation 883/04 and the guaranteed minimum pension prior to the merging of social security institutions under the reform of Greek Law 4387/2016***

In Greece, the pension supplement (Article 58 of Regulation 883/04) was awarded as a benefit to Greek residents who were insured, taking the individual's (Greek) pension amount into account. More specifically, IKA (Idryma Koinonikon Asfaliseon/ Social Security Fund) granted pensioners with qualifying periods of insurance in Greece or in other Member States a supplement up to the guaranteed minimum income/ guaranteed minimum pension threshold, increased in accordance with Greek contribution periods; i.e. the insured person was entitled to the supplement until he/she reached the retirement age established in the law of the other State in which he/she had accrued periods of insurance.<sup>96</sup>

Despite receiving a pension from a foreign institution, entitlement to the supplementary benefit was based on the sum of the applicant's partial pension(s). Thus, in the decision of the Administrative Court of Appeal of Athens 1996/2010 (576367) (legal database NOMOS), the Court held that IKA should review the claimant's right to continue receiving the supplementary benefit once the German institution began paying the claimant the old-age pension he was entitled to. If the total amount of the two separate parts of the pensioner's monthly old-age pension exceeded the pension threshold (guaranteed minimum pension), continued payment of the supplement would cease legally. However, in addition to continued payment of the supplement, retroactive retrieval is also possible in case a foreign partial pension, the sum of which increased in excess of the mini-

---

96. IKA Directorate of International Insurance Relations, Circular No. 41/2011, No. Prot. Σ07 / GEN / 9, Athens, 21-6-2011, subject: "New instructions regarding the application of Art. 51 para 4 Law 2084/92 in combination with the provisions of the Community Regulations".

imum benefit, was due retroactively (a circumstance that could imply a breach of the principle of free movement in combination with the principle of equal treatment, if we consider that the individual would not have been impacted by such a provision had he/she not moved).

The aforementioned approach can be compared with Belgium's. In this regard, the *Lustig*<sup>97</sup> case is interesting in that the Court held that Article 50 of Regulation 1408/71 on the respective supplement was not applicable; the Advocate General's opinion in the same case is interesting as well.<sup>98</sup>

Greece's application of increments is also worth mentioning. According to the interpretation of increments based on total days in combination with the application of Article 50 of Regulation 1408/71 or Article 58 of Regulation 883/04, IKA must pay additional amounts (increments) for insurance periods accrued outside of Greece. The administration proposed a review of the interpretation of the relevant provisions to the General Secretariat of Social Security (GGKA), taking the purpose of the increase of the threshold in the Greek insurance system into consideration (creation of incentives to remain active in the labour market and continued membership in insurance, prevention of early retirement and preventing eva-

---

97. Case C-244/97 *Rijksdienst voor Pensioenen* ECLI:EU:C:1998:619.

98. The question was raised in proceedings between Mrs Lustig, a Belgian national, and the Rijksdienst voor Pensioenen (National Pensions Office), concerning the latter's refusal to take account, for the purposes of applying the legislation concerning the guaranteed minimum retirement pension granted under Belgian legislation, of periods of insurance completed by Mrs Lustig in the Netherlands for as long as she was not yet entitled to a retirement pension under Netherlands' legislation. The Advocate General Nial Fennelly agreed with the parties which submitted observations that the graduated minimum pension rate does not constitute a distinct benefit, the grant of which would be subject to Article 45 and the amount of which would, in the present case, be determined in accordance with Article 46(2) of Regulation 1408/71. In his opinion, it is worth bearing in mind when determining whether the principle of aggregation should be applied to the calculation of the amount of benefit payable to the applicant, that the present case concerned a rule regarding admission to a distinct class of pension recipients, who benefit from the application of a graduated minimum scale. The applicant's situation therefore had certain aspects in common with that of a person who would be excluded from the outset from the class of recipients of old-age benefits if his/her periods of insurance or residence in other Member States were not taken into account (thought 13).

sion of contribution payments).<sup>99</sup> In its report, GGKA pointed out<sup>100</sup> that "... the increases in the amount of the pension threshold provided by domestic legislation will be calculated only on the basis of insurance days accrued in accordance with the national legislation both for the calculation of the theoretical amount and of the proportionate amount". In addition, GGKA asserted that in cases in which an obligation arises to pay out a supplementary benefit pursuant to Article 58 of Regulation 883/04 (or Article 50 of Regulation 1408/71), it will be granted up to the basic threshold (full or reduced), with a possible increase for 4 500+ insurance days accrued in the national system.<sup>101</sup>

The "minimum benefit" referred to in Article 58 of Regulation 883/04 was disconnected from the case-by-case pension thresholds for pensioners entitled to a pension and who have accrued insurance periods in another Member State, but who permanently reside in Greece in accordance with the provision of Article 34, para 1, para 11 of Law 3996/2011.<sup>102</sup>

#### *4.2.1. Greek case law on guaranteed minimum pensions under the Coordination Regulation*

The case law presented below discusses the legislative developments on guaranteed minimum pensions. Under the previous social security law, "minimum thresholds" applied to pensions to ensure minimum subsis-

---

99. IKA – Directorate of International Insurance Relations, Circular No. 41/2011, No. Prot. Σ07 / ΓΕΝ / 9, Athens, 21-6-2011, subject: "New instructions regarding the application of Art. 51 para 4 Law 2084/92 in combination with the provisions of the Community Regulations". See also IKA - Directorate of International Insurance Relations, Circular No. 41/98, No. Prot. Σ07 / ΓΕΝ, Athens, 10-3-1998, subject "Reform and supplementation of the codified instructions for the application of the Regulations EEC 1408/7 & 574/72", p. 51 b, 'combined with 'General provisions'.

100. Document No. Φ.60000/28007/181/19-0411.

101. IKA - Directorate of International Insurance Relations, Circular no. 41/2011, No. Prot. Σ07 / ΓΕΝ / 9, Athens, 21-6-2011, subject: "New instructions regarding the application of Art. 51 para 4 Law 2084/92 in combination with the provisions of the Community Regulations".

102. See, in particular, IKA, Directorate of International Insurance Relations, Circular No. 93/2011, posted on the internet ΑΔΑ: 45ΨΠ4691ΩΓ-PBA, Athens, 13-12-2011, subject: Determination of the amount of the minimum benefit for the application of Article 50 of Regulation 1408/71 and Article 58 of Regulation 883/04.

tence, but these have since been abolished. Law 3863/2010 introduced the basic/ national pension which is treated in Greek law as the guaranteed minimum pension as stipulated in Article 58 of Regulation 883/04 in application of Law 3996/2011, which includes the relevant provision. Currently, Law 4386/2016 does not contain a distinct provision on a subsistence threshold for pensioners, except in certain cases (Stergiou, 2022; 1012). We will analyse these aspects in the next section.

We first review Judgment No. 5106/2019 of the Administrative Court of First Instance of Thessaloniki<sup>103</sup>; the Coordination Regulation applied because the 'claimant had moved within the EU, accruing insurance periods in both Greece and Germany. The Court, on the one hand, dealt with the (Community) concept of guaranteed minimum income and, on the other, with the national concept of income thresholds for pensioners. The fundamental principle that runs through the rationale of the decision is the principle of equal treatment.

It should be noted that in view of Article 50 of Regulation 1408/71 (now Article 58 of Regulation 883/04), entitlement to a supplementary benefit or to a supplement provided by the pensioner's State of habitual residence when the amount of his/her pension is lower than the guaranteed minimum income as defined in the applicable legislation, the guaranteed minimum income under Greek law is the current "thresholds of pensions" ("minimum limits").<sup>104</sup> The direction given by the social security institution IKA was also highlighted in the Court's judgment.

In this case, the national court held that the decoupling of the concept of minimum benefit from pension thresholds, which is the intention of Ar-

---

103. Published in Social Security Law (Greek review), p. 775.

104. IKA - Directorate of International Insurance Relations - EEC Pensions Department, Circular No. 16/96, Prot. No. Σ07 / ΓΕΝ, Athens, 8-2-1996, subject: Reform and supplementation of the instructions for the application of the Regulations EEC 1408/71 and 574/72, p. 70. However, the provision of Article 34, para 1, para 11 of Law 3996/2011 determined the amount of "minimum benefit" and disconnected its meaning from the case-by-case pension thresholds for pensioners who have established a right to a pension with the inclusion of Community insurance periods accrued and who permanently reside in Greece. IKA, Directorate of International Insurance Relations, Circular No. 93/2011, posted on the internet ΑΔΑ: 45ΨΠ4691ΩΓ-ΡΒΛ, Athens, 13-12-2011, subject: Determination of the amount of the minimum benefit for the application of Article 50 of the Civil Code. 1408/71 and Article 58 of Regulation (EC) 883/04.

ticle 34 of Law 3996/2011<sup>105</sup>, puts migrant workers at a disadvantage relative to those who have accrued all of their insurance periods in Greece, and thus entails unequal treatment. This is because, on the one hand, Article 58 of Regulation 883/04 only applies to workers, i.e. insured persons who have moved within the Union, and on the other hand, the amount of the minimum benefit is less than the amount of the pension thresholds – which are still in force– and which is to be granted, at least at the time of the present case, to pensioners who have never moved within the Union. This has already been pointed out in doctrinal research.

Specifically, it has been argued that decoupling the minimum benefit from the pension thresholds could be seen as an indirect discrimination against migrant workers relative to persons who have accrued all of their insurance periods in Greece.<sup>106</sup> This is because migrants are less likely to establish an independent right (the right to retire based exclusively on Greek insurance periods), a right that would provide them with the ability to compare the independent real amount of their pension, in full or reduced, with the corresponding full or reduced amount of the pension threshold relative to employees who have not exercised their right of movement.<sup>107</sup>

According to the Administrative Court of First Instance, the minimum benefit provided for in Article 58 of Regulation 883/04 was to be determined for the applicant, who was a double pensioner, receiving a widow's pension from the German insurance institution, at the level of the old-age pension threshold established by IKA, increased by 25 per cent due to her previous status, to adjust the amount of the supplementary benefit accordingly, which must be granted for the period of time, and based on Decision No. 6104/3.4.2012, the holiday and leave allowance must also be adjusted. Consequently, the claim was upheld and the contested decision of IKA's Local Administrative Committee was partially annulled.

---

105. IKA, Directorate of International Insurance Relations, Circular No. 93/2011, posted on the internet ΑΔΑ: 45ΨΠ4691ΩΓ-ΡΒΛ, Athens, 13.12.2011, subject: Determination of the amount of the minimum benefit for the application of Article 50 of Regulation 1408/71 and Article 58 of Regulation 883/04.

106. Zacharis Y., Minimum social security benefits and coordination: challenges and problems, *EDKA (Greek Social Security Law Review)* 2014, p. 87.

107. *Ibid.*

Judgment No. 2395/2020 of Administrative Court of First Instance of Athens<sup>108</sup>, concerned an insured citizen of another EU Member State, who had accrued insurance periods in several Member States without qualifying for a full pension in any of them.

The Court stated that the claimant's pension could not be lower than the minimum benefit, which is individually determined by the national legislation of the competent institution and referred to in Article 34 para 1 of Law 3996/2011, containing a provision that explicitly refers to the minimum benefit established in Article 58 of Regulation 883/04. According to the latter, the minimum benefit in the sense of Article 58 of Regulation 883/04 is the basic pension established in Article 2 of Law 3863/2010, i.e. EUR 360, which is adjusted on a case-by-case basis.

The Greek Court, invoking amongst others *Stinco* and *Panfilo*, pointed out that the relevant provisions of Member States that provide for minimum benefits, are intended, in various forms, to provide pensioners with a minimum income in excess of the amount to which they would normally be entitled based on their accrued insurance periods and contributions. It is therefore concluded that the minimum benefits referred to in Article 50 of Regulation 1408/1971 (and Article 58 of Regulation 883/04) are distinct from the "theoretical amount" referred to in Article 46 (2a) (and 52 para 1bi), which does not represent the benefit's real amount, but is the basis for the calculation in application of the rules on accountability and apportionment.

The Court also noted that the provision of this minimum benefit does not breach the principle of equal treatment between migrant and non-migrant workers. More specifically, according to the Court, the provisions of Articles 46 and 50 of Regulation 1408/1971 [Articles 52 and 58 of Regulation 883/04] do not guarantee the right for recipients of social security benefits to receive the theoretical amount of their pension, which merely represents the basis for calculating the amount of the supplementary benefit, but guarantee a minimum income, which exceeds the amount to which they would normally be entitled based on their accrued insurance periods and contributions. This minimum income has been the common denominator for the amount of the basic pension (EUR 360), according to Article 20, parA 11 of Law 2434/1996, which was replaced by Article 34, parA 1 of Law 3996/2011 and Article 2, parA 1 of Law 3863/2010 and,

---

108. Published in the legal database NOMOS (798118).

based on the explanatory notes of these laws, has a welfare characteristic, is financed from the State budget and is set at an amount to prevent any adverse financial effects on the country's social insurance system. The Court concluded that the provision of this minimum benefit does not breach the principle of equal treatment of migrant and non-migrant workers, whose circumstances differ and who represent disparate categories of insured persons.

Law 3996/2011 was published on 5 August 2011, with Article 34, para A 1 introducing a general provision. The minimum benefit established in Article 50 of Regulation 883/04 was specified for the first time (including pending applications) for reasons of public interest (harmonisation with Community legislation, addressing the issue of non-legislative determination of the minimum benefit, cessation of the Administration's practice of determining the amount of minimum benefit on the basis of the pension paid by each insurance organisation, and social security).

Additionally, the Court stated that the 1 per cent increase provided for in Article 51, para 4 of Law 2084/1992 for every 300 days of insurance in excess of the base amount of 4 500 days supplements the amount of old-age pension, which is granted by IKA and calculated on the basis of total insurance days accrued by the beneficiary in Greece and abroad. The 41/2011 circular of IKA, which stipulates the opposite, is only a pseudo-interpretation, and assumes the role of an executor of an administrative act with regulatory content, but is not applicable as it has not been officially published. The Court partly accepted the appeal.

#### ***4.3. Income security of the elderly and European solidarity: what about a guaranteed minimum pension in the context of Greek social security law?***

Scholars have already questioned whether the expectations of the CJEU's case law of European citizenship are too high or even whether it runs counter to the very logic of social solidarity.<sup>109</sup> The criticism is based on the view that jurisprudence undermines the 'psychological glue' that holds national welfare systems together and ensures the maintenance of their norms and legitimacy, which continues to be determined by a sense

---

109. Verschueren H., European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems, *Europea Journal of Migration and Law* 9, 2007, p. 337.



of social solidarity based on a common identity and a common interest in participating in a national community.<sup>110</sup>

This, of course, calls for a look at how social solidarity is perceived. It is argued, for example, that those who claim measures of solidarity from a particular Member State must in one way or other have contributed to its financing.<sup>111</sup> Others claim that the "CJEU's case law on 'judicial activism' contravenes the will of the Member States' legislature."<sup>112</sup> However, as noted, case law on citizenship and political agreement on the provisions of Regulation 1408/71 and Regulation 883/04 on subsistence benefits could strengthen the EU's legitimacy.<sup>113</sup> Indeed, European citizenship calls for a social face to complement the economic one.<sup>114</sup> Besides, at the political level, it has long been clear that as long as the Union remains a major player in economic cooperation, it is unable to garner the support of the European people.<sup>115</sup> Moreover,

- 
110. DOUGAN M., The constitutional dimension to the case law on Union citizenship, *European Law Review* 31, 2006, p. 623.
  111. ARNULL A., *The European Union and its Court of Justice*, Oxford University Press, 2006, p. 530, DOUGAN M., Fees, Grants, Loans and Dole Cheques; Who covers the Costs of Migrant Education within the EU?, *Common Market Law Review* 42, 2005, p. 943, HAILBRONNER K., Union citizenship and access to social benefits, *Common Market Law Review* 42, 2005, p. 1264-1266.
  112. HAILBRONNER K., Union citizenship and access to social benefits, *Common Market Law Review* 42, 2005, p. 1251.
  113. VERSCHUEREN H., European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems, *Europea Journal of Migration and Law* 9, 2007, p. 337.
  114. HATZOPOULOS V., The Emerging Social Face of the EU Internal Market: Inspired Political Choice or Legislation? *Greek Review of European Law* 3:2005, p. 532, JEPSSEN M. and SERRANO PASCUAL A., The European Social Model: an exercise in deconstruction, p. 6. [http://www.seeurope-network.org/homepages/seeurope/file\\_uploads/jep\\_serr\\_1003.pdf](http://www.seeurope-network.org/homepages/seeurope/file_uploads/jep_serr_1003.pdf), CREMONA M., EU enlargement: solidarity and conditionality, *European Law Review* 30, 2005, p. 4., SCHMITT M., La dimension sociale du traite de Lisbonne, *Droit social* no 6, juin 2010, p. 682, STERGIU A., The Social Europe in Lisbon Treaty, *Greek Review of Labour Law* 70, 2011, p. 13. O'NEILL A., *Social Rights in the Charter: Employment and social security*, Matrix Chamber, London, p. 13, TSETOURA A., The role of fundamental social rights over economic policies in the European edifice: resonating with national events, *EDKA (Greek Social Security Law Review)* 2015, p. 283 sub.
  115. HATZOPOULOS V., The Emerging Social Face of the EU Internal Market: Inspired Political Choice or Legislation? *Greek Review of European Law* 3:2005, p. 532.

the fight against poverty and social exclusion is one of the key commitments of the EU and its Member States.<sup>116</sup>

Furthermore, reference to economic solidarity (case *Grzelczyk*)<sup>117</sup> between nationals of the host Member State and those of other Member States reflects a conviction in Union citizenship within the wider community of the Union and beyond the community of their own nationality, as part of the European citizen's social contract with the Union; in an integrated Union, social solidarity is not limited to national solidarity.<sup>118</sup> Therefore, a full application of the principle of equality of residence on the basis of minimum social benefits seems to be the most suitable and effective answer to the question of how to promote solidarity and mutual responsibility between Member States and their citizens.<sup>119</sup> We have touched on this above in relation to special non-contributory benefits.

Yet the distinction between contributory social insurance and other types of benefits is proving to be far more persistent than would have been expected on the basis of such trends and lines of reasoning.<sup>120</sup> Social insurance continues to be a separate category in the legislation of all EU Member States, with its own legal principles of membership, obligations and personal rights and separate institutions responsible for its administration.<sup>121</sup> While a considerable body of non-contributory benefits has been introduced to address the shortcomings of social insurance systems, it does not seem to have affected the continuation or legitimacy of social insurance itself.<sup>122</sup>

---

116. Decision 1098/2008 / EC of the European Parliament and of the Council of 22 October 2008 on the European Year for Combating Poverty and Social Exclusion (2010), EE L 298, 7.11.2008, p. 20, point 1. <http://eur-lex.europa.eu/legal-content/EL/TXT/PDF/?uri=CELEX:32008D1098&from=GA>

117. Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458

118. VERSCHUEREN H., European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems, *Europea Journal of Migration and Law* 9, 2007, p. 339.

119. van der MEI A.P., *Free Movement of Pensioners within the European Community, Cross border Access to Public Benefits*, Hart Publishing, Oxford, 2003, p. 468.

120. VONK G., The EU (non) co-ordination of minimum subsistence benefits: What went wrong and what ways forward? *EJSS* 2020, p. 4.

121. VONK G., as above.

122. VONK G., as above.

**The question is whether the guaranteed minimum benefit is a social security benefit that falls under the regulations on pensions and is therefore** considered a supplement within the meaning of Article 58 of Regulation 883/04 (Article 50 of Regulation 1408/71), and which may be taken into consideration when determining the amount of the recipient's pension based on Article 52 of Regulation 883/04 (Article 46 of Regulation 1408/71). If a minimum benefit is regarded as a special non-contributory benefit and not as a social security benefit, it does not fall under the above provisions. Such a benefit only exists if the legislation on pensions in the country of residence contains a specific guarantee to ensure that the beneficiaries of social security pensions receive a minimum income (in the form of supplements), which may be higher than the amount of pension they can claim solely on the basis of their qualifying periods of insurance and contributions.<sup>123</sup> Moreover, from the conclusions of Advocate General Siegbert Alber in *Conti* cited above<sup>124</sup>, what seems to be a decisive factor is whether the individual would be entitled to the given benefit on the basis of the national legislation of the State in which he or she has worked throughout his or her career.

This can be linked with the legislative developments in Member States. As already mentioned, the CJEU does not consider a guaranteed minimum income for the elderly as a form of social assistance because it provides recipients with clearly defined subjective rights, analogous to those covered by social security. According to the Court, for benefits to be classified as social security benefits, they must be linked to one of the risks included in Art. 3 Regulation 883/2004. As noted, this approach seemed reasonable because in the past, schemes classified as social assistance at the national level were indeed of a general nature: Sozialhilfe in Germany, Revenu minimum d'insertion in France, Supplementary Benefits in the UK, Sociale Bijstand in the Netherlands, the Bestaansminimum in Belgium, etc.<sup>125</sup>

---

123. Schuler R., Regulation (EC) No. 883/2004 – Article 58 in: Fuchs M. and Cornelissen R. (eds.), *EU Social Security Law – A Commentary on EU Regulations 883/2004 and 987/2009*, C.H. BECK – Hart- Nomos, Baden-Baden, 2015, p. 367 invoking case C-22-81 *Browning*, EU: C: 1981:316.

124. Case C-143/97 *Conti* ECLI:EU:C:1998:59, para 47; Case C-143/97 *Conti* ECLI:EU:C:1998:501.

125. Vonk G., as above, p. 5.

Nevertheless, since then, the former general social assistance schemes have become more categorical in many States: in Germany, *Arbeitslosengeld II* is now a separate scheme alongside the residual *Sozialhilfe* safety net for the elderly and for those who in capable of earning a minimum income through work, while in the Netherlands, with the introduction of the *Participatiewet* in 2015, disabled and elderly beneficiaries enjoy a distinct legal position compared to other social assistance recipients.<sup>126</sup>

In contrast to this approach taken by the Member States mentioned above, Greece's path has differed. While in the past, the State provided for pension thresholds taking minimum subsistence, especially for pensioners, into account, these pension thresholds have been abolished and the Law 4387/2016 does not provide for an autonomous concept of guaranteed minimum pension (contrary to the previous Laws 3863/2010, 3996/2011), though it may apply in some exceptional cases.<sup>127</sup> In addition, the Allowance of Social Solidarity for Pensioners (EKAS), established by Law 2434/1996 (Article 20), which could have been treated as a pension threshold, was gradually retracted until 31 December 2019.<sup>128</sup> In place of the latter, the legislator introduced compensatory social assistance measures (Law 4411/2016), as well as a guaranteed minimum income.<sup>129</sup>

Specifically, Article 235 Law 4389/2016 2016 (as amended by Article 29 of Law 4659/2020), states that the guaranteed minimum income is intrinsically a welfare measure, targeted at households facing extreme poverty and complements other public policies aimed at fighting poverty and social exclusion.

The programme consists of three pillars: (i) income support, (ii) access and links with complementary social benefits and services, as the case may be and according to the beneficiary's needs, and (iii) activation and promotion services for beneficiaries such as assisting them in finding a job, enabling participation in vocational training and placement programmes and a return to the education system.

---

126. Vonk G., *The EU (non) co-ordination of minimum subsistence benefits: What went wrong and what ways forward?* EJSS 2020, p. 5.

127. Stergiou A., *Social Security Law*, 4<sup>th</sup> edition, Sakkoulas publications, Athens-Thessaloniki, 2022, p. 1012.

128. Stergiou A., as above.

129. Stergiou A., as above, p. 1013.

2. The following categories are defined as 'beneficiary units':

a. Single-person households: any adult who lives alone and does not fall into the category of an adult up to the age of 25 years, who attends a university or school or is enrolled in vocational training or in a training institute in Greece or abroad.

b. Multi-person households: all persons who live under the same roof. This may also include individuals or families being hosted, provided that their hosting was declared in the latest tax return. Adult children up to the age of 25 years who are attending a university or school or are participating in vocational training or are enrolled in training institutes are also included in multi-person households, regardless of their place of residence.

c. Homeless persons: persons who live on the street or in an unsuitable accommodation, provided they have been registered by the social services of the municipalities or community centre or live in dormitories, transitional accommodation hostels and hostels for women victims of violence that are operated by the municipalities.

Minors are defined as members of the beneficiary unit up to the age of 18 years.

Income support is defined as the difference between the guaranteed minimum income and the person's real income, as calculated within the framework of the Social Solidarity Income Programme for the purposes of eligibility, divided by the number of months it concerns, i.e. by six.

The guaranteed minimum amount is defined as the amount guaranteed by the programme for each household, depending on the number and age of its members, after the payment of income support (guaranteed minimum income).

The income threshold is defined as the income criterion for inclusion in the programme and is equal to the guaranteed minimum amount.

The declared income is defined as the total income declared by the applicants, derived from every source of domestic and foreign origin – before taxes, after deduction of social security contributions– by all members of the beneficiary unit in the last six months before the date of submission of the application for inclusion in the Social Solidarity Income Programme. The total declared income includes all allowances and other benefits, as well as exempt income or income subject to special taxation, with exceptions, discussed below.

The declared income does not include the underwriting allowance established in Article 9 of Law 2082/1992 (A' 158), non-remunerative disabil-

ity allowances granted by the State, financial support granted under point c of para 1 of Article 1 of n.d. 57/1973 (A' 149) to those in a state of emergency as a result of a natural disaster, as well as unemployment allowance pursuant to para 5 of Article 30 of Law 4144/2013 (A' 88). Also, in case of self-employed persons who reside in transitional accommodation hostels, hostels for women victims of violence and in dormitories and participate in a labour market integration programme, their total declared income excludes the total net income from hired services, community service programmes or from any other work programme for two assistance periods.

Beneficiaries of guaranteed minimum income, who fall into the following categories, are considered incapacitated for work:

a. Persons with disabilities (PWDs) who, according to the opinion of the Disability Certification Committee, have been deemed "unfit for work". In the event that a person with a disability does not possess such a certification, but claims that he/she is unfit for work, he/she must provide an official statement and certificate of the degree of his/her disability from the Disability Certification Committee.

b. Full-time students, vocational school apprentices or those participating in a vocational training programme without having concluded an employment relationship.

Those fit for work who are beneficiaries of the Social Solidarity Income between the ages of 18 and 65 years, do not fall under the above categories.

Greece abandoned its very generous benefits that targeted pensioners and has instead adopted a universal measure targeting the entire population. The allowance at issue is of a general social assistance nature without a link to one of the social risks covered by a social security system. However, as discussed above, the CJEU requires an allowance to be linked to a specific social risk in order to consider a benefit exhibiting characteristics of social assistance as a social security benefit. It remains to be seen how the future legislative developments in the field of Greek social security law play out.

Ultimately, Vonk argues that the Coordination Regulation should abandon the concept of special non-contributory benefits and introduce a new category of minimum subsistence benefits, which would include social assistance schemes as well.<sup>130</sup> Such a change could be accompanied

---

130. Vonk G., *The EU (non) co-ordination of minimum subsistence benefits: What went wrong and what ways forward?* EJSS 2020, p. 1.

by a single, coherent principle to govern the relationship between entitlement to benefits (Regulation 883/2004) and residence rights (Directive 2004/38), if necessary, supported by a cost-sharing mechanism for minimum subsistence benefits under Regulation 883/2004 and, preferably, by a recognition of minimum protection standards for economically inactive EU citizens without a legal right of residence.<sup>131</sup>

## 5. Conclusion

The characteristics of a social security benefit depend on the rulings of the CJEU and at the same time, on the willingness of Member States to support extensive protection in the context of Coordination Regulation. Several provisions across European countries on guaranteed minimum income in old age exist, but the question remains what types of benefits these are and how they are to be coordinated. For the time being, Greece no longer provides for a benefit with the exclusive purpose of guaranteeing a minimum income for the elderly, but only provides for a benefit of a general nature. In any case, the CJEU provides for sufficient protection of the elderly subsuming assistance allowances that guarantee a minimum income in old age under the social security benefits covered by the Coordination Regulation. Gradually, Member States may come to realise that there is an actual need for social security benefits that guarantee minimum subsistence for the elderly taking the ageing indicators in Europe (European Commission, 2019) into consideration and thus for the provision of such benefits and their coherent coordination.

## Bibliography

- Arnall A (2006) *The European Union and its Court of Justice*, Oxford University Press
- Coucheir M (ed.), Sakslin M (ed.), Giubboni S, Martinsen D and Verschueren H (2008) *The relationship and interaction between the coordination Regulations and Directive 2004/38/EC*, trESS Think Tank Report
- Dougan M (2005) Fees, Grants, Loans and Dole Cheques; Who covers the Costs of Migrant Education within the EU?, *Common Market Law Review*, 42, p. 943.

---

131. Vonk G., as above.

- Dougan M (2006) The constitutional dimension to the case law on Union citizenship, *European Law Review*, 31, p. 623
- European Commission (2009) Directorate-General for Economic and Financial Affairs, Pension schemes and Pension Projections in the EU-27 Member States 2008-2060 Volume I – Report, EUROPEAN ECONOMY Occasional Papers No. 56
- European Commission (2019) Ageing report 2018 and OECD- European Observatory on Health Systems and Policies
- European Commission (2019) Your rights country by country, (updated on 2019), Finland-Old-age pension – national pension
- European Commission (2021), Your social security rights in Finland, (updated on 2021), *missoc-ssg-FI-2021-en.pdf*
- Fuchs M (2015) Regulation No (EC) No. 883/2004 – Article 3 in: Fuchs M and Cornelissen R (eds.), *EU Social Security Law – A Commentary in EU Regulations 883/2004 and 987/2009*. Baden Baden: C.H. BECK-Hart- Nomos, p. 80.
- Hailbronner K (2005) Union citizenship and access to social benefits, *Common Market Law Review*, 42, p. 1251
- Hatzopoulos V (2005) The Emerging Social Face of the EU Internal Market: Inspired Political Choice or Legislation?, *Greek Review of European Law*, 3, p. 532
- Jepsen M and Serrano Pascual A (2005) The European Social Model: an exercise in deconstruction, *Journal of European Social Policy*, 15(3), p.6.
- Jorens Y (ed.), Lhernould JP (ed.), Fillon JC, Roberts S and Spiegel B (2007) *Towards a new framework of applicable legislation – New forms of mobility, coordination principles and rules of conflict*, trESS Think Tank Report
- Katrougalos G (2006) The impact of Community law on social security law, *EDKA (Social Security Law Review)*, p. 252.
- Martinsen D (2007) *The Social Policy Clash: EU Cross-Border Welfare, Union Citizenship and National Residence Clauses*, presented at the European Union Studies Association (EUSA) Biennial Conference 2007, (10<sup>th</sup>), May 17-19 2007, Montreal.
- Mavridis P (2004) The freedom of movement of persons, employees and services as a fundamental principle of European integration: Their employment and social security, *EDKA (Greek Social Security Law Review)*, p. 810.



- O'Neill A (2011) *Social Rights in the Charter: Employment and social security* London: Matrix Chamber
- O' Neill R (2011) Residence as a condition for social security in the United Kingdom; a critique of the UK right to reside test for accessing benefits and how it is applied in the courts, *European Journal of Social Security*, (2), p. 3.
- Paskalia V (2009) Coordination of social security in the European Union: an overview of recent case law, *Common Market Law Review*, 46, p. 1185
- Schouckens P and Monserez L (2011) Introduction to social security coordination in the EU, 2011 in: Schouckens P, *EU social security coordination law*, Leuven: KU Leuven, p. 20
- Schuler R (2015) Regulation (EC) No. 883/2004 – Article 58 in: Fuchs M and Cornelissen R (eds.), *EU Social Security Law – A Commentary on EU Regulations 883/2004 and 987/2009*. Baden Baden: C.H. BECK – Hart-Nomos, p. 367.
- Schmitt M (2010) La dimension sociale du traite de Lisbonne, *Droit social*, no 6, p. 682
- Stergiou A (2011) The Social Europe in Lisbon Treaty, *Greek Review of Labour Law*, 70, p. 13
- Stergiou A (2014) *Social Security Law*, 2nd edition, Athens - Thessaloniki: Sakkoulas Publications
- Stergiou A (2014) European social citizenship: Lost in financially painless compromises, *EDKA (Greek social security review)*, p. 17
- Stergiou A (2020) Minimum guaranteed income, *Social Security Law (Greek review)*, 2/2020, p. 206
- Stergiou A (2022) *Social Security Law*, 4<sup>th</sup> ed., Athens – Thessaloniki: Sakkoulas Publications
- Tsantilas P (1996) Issues in defining social security in European Community Law (the case-law of the Court of Justice of the European Communities in: Kremalis K (scientific coordinator), *Issues in defining the limits of private and social security, possibilities for private insurance complementing or partially substituting social security*. Athens – Komotini: Sakkoulas Publishing, p.35-36
- The Greek Ombudsman (2012) "Report: residence clauses for granting social security benefits to European citizens. The right of permanent residence of European citizens (non-active persons)", *EDKA (Social Security Law Review)*, p. 844.

- Tsetoura A (2015) The role of fundamental social rights over economic policies in the European edifice: resonating with national events, *EDKA (Greek Social Security Law Review)*, p. 283
- Tsetoura A (2017) *The European Pensioner*. Athens – Thessaloniki: Sakkoulas Publications
- Van der Mei AP (2003) *Free Movement of Pensioners within the European Community, Cross border Access to Public Benefits*. Oxford: Hart Publishing, Oxford
- Van Overmeiren F(ed.), Eichenhofer E and Verschueren H (2011), *Social security coverage of non-active persons moving to another Member State*, trESS Analytical Study
- Verschueren H (2007) European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems, *European Journal of Migration and Law*, 9, p. 315
- Verschueren H (2009) 'Special non-contributory benefits in Regulation 1408/71, Regulation 883/04 and the case law of the ECJ', *EJSS*, 11 Nos. 1-2, p. 224
- Vonk G (2020) The EU (non) co-ordination of minimum subsistence benefits: What went wrong and what ways forward? *EJSS*, p. 4.
- Zacharis Y (2014) Minimum social security benefits and coordination: challenges and problems, *EDKA (Greek Social Security Law Review)*, p. 87.

# Ongoing crises and limits to the reductions of social security rights: the case of Greece

---

Olga ANGELOPOULOU

## 1. Introduction

Greece's debt crisis began 12 years ago, in 2010. The Greek State concluded three Loan Facility Agreements with European countries, accompanied by so-called "Memoranda of Understanding", namely agreements between Greece and the other Member States as well as with the European Central Bank and the International Monetary Fund (IMF) on measures the country had to take as a prerequisite for the disbursement of each loan tranche. The economic adjustment programmes related to the Memoranda ended on 21 August 2018. Since then and until 20 August 2022, the status of "enhanced surveillance" applied to Greece, with the European institutions continuing to monitor the enforcement of the agreed economic reforms. This status ended in 2022 after Greece completed early repayment of loans to the IMF.

Harsh measures have been introduced in many fields over the last 12 years: tax increases, cancellation of collective agreements, dismissal of civil servants and private sector employees, decreases in the minimum wage, reductions and abolition of social security benefits, increases in the statutory retirement age and massive pension cuts. From the very beginning of this period of austerity, intense discussions at the political as well as at the academic and judicial level on defining limitations to the deterioration of social security took place. The traditional debate on the binding nature of constitutional social security rights<sup>1</sup>, as well as on the

- 
1. For a general overview of this debate, see Kontiadis X. (2004), *Constitutional Guaranties and Institutional Organisation of the Social Security System*, Athens: Ant. N. Sakkoulas, pp. 113 ff. (in Greek). For a more detailed presentation of Greek theory and jurisprudence on this issue in English, see Angelopoulou O (2010) *Country Report on Greece*. In: Becker U, Pieters D, Ross F and Schoukens P (eds.) *Security: A*

constitutional consolidation of the welfare state principle<sup>2</sup> has been transformed into a battle of arguments in the judicial field: can the law, whether at the constitutional or international human rights treaty level set limitations to social security? What kind of limitations can courts set and furthermore, how can the judiciary denounce restrictive legislative measures as being contrary to the Constitution or to international law without interfering with the crucial political decisions underlying these restrictions, i.e. without infringing on the basic principle of the separation of powers?

## 2. The outcome: *nearly* all cuts are legitimate

Greek jurisprudence addressed the questions raised above, as a large number of claims were brought before the courts by citizens, employees, civil servants, freelancers and pensioners protesting their loss of rights and calling attention to their new burdens. This chapter focuses primarily on limitations imposed on pensions, which constitute basic income in old age, and briefly touches on the reductions and limitations to salaries as well. Before delving into crucial judicial decisions and their underlying reasoning, it is important to mention the nature of pension reductions (or “cuts”, as they are frequently referred to) that were introduced during the crisis. In a first phase (2010–2015), the said cuts entailed percentual reductions (3 per cent for pensions between EUR 1,400 and EUR 1,700, 6 per cent for pensions between EUR 1,700 and EUR 2,000, 7 per cent for pensions between EUR 2,000 and EUR 2,300, etc.<sup>3</sup>). These reductions were in some cases related to the pensioner’s age (e.g. 40 per cent on any pension amount exceeding EUR 1,000 among pensioners younger than 55 years of age and 20 per cent on any pension amount exceeding EUR 1,200 among all other pensioners<sup>4</sup>). Pensions below EUR 1,000 were excluded from reductions until

---

General Principle of Social Security Law in Europe, Munich, Leuven and Erfurt: Europa Law Publishing, 147-225.

2. See Fn. 9 and X. *Kontiadis*, The social state principle in the new Constitution, The dilemmas of the revising legislator, EDKA 2001: 1-23.
3. Art. 38 of Law No. 3863/2010 as amended by Art. 44 para. 11 of Law No. 3986/2011, which increased the percentages of the reductions. All pension amounts are gross amounts.
4. Art. 2 paras. 1 and 2 of Law No. 4024/2011.

2016, but holiday allowances (for Easter, summer and Christmas) were initially reduced to fixed amounts for all pensioners<sup>5</sup>, namely EUR 400 for Christmas, EUR 200 for Easter and EUR 200 for summer, and subsequently, as of 1 January 2013, these fixed amounts were abolished altogether.<sup>6</sup> The said cuts were introduced successively and implemented through a number of pieces of legislation.

The configuration of the reductions changed in 2016, by means of Law No. 4387/2016,: instead of percentual reductions, all pensions, irrespective of their duration up to that point and their total amount, were "re-calculated", resulting in substantially lower gross pension amounts.<sup>7</sup> The new pensions consist of two parts: the so-called "national" pension (EUR 413,70 for those who have legally and permanently resided in Greece for 40 years) and the so-called "contributory" pension, which depends on the amount of salary earned from 2002 onwards as well as on the worker's years of contributions. The contributory pension is quite low: the pension of a worker with 44 years of contributions amounts to 50 per cent of his/her salary, while the pension of a worker with 30 years of contributions amounts to 26.37 per cent of his/her salary and to 33.81 per cent for 35 years of contributions, which are relatively long careers,

---

5. With the exception of pensioners below the age of 60 years and pensioners who receive a pension that is equal or higher than EUR 2,500 per month (Art. 3 of Law No. 3847/2010). Until these reductions were introduced, holiday allowances were based on the amount of the individual's monthly pension, i.e. his/her Christmas allowance was equal to one monthly pension and his/her Easter and summer allowances were each equal to half of the pensioner's monthly pension.

6. Art. 1, para. IA. 6 of Law No. 4093/12.

7. The same law introduced two structural changes as well: all social insurance institutions for primary pensions were merged into one social security institution (EFKA, Eniaios Foreas Koinokinis Asfalis) while all social insurance institutions for auxiliary pensions were also merged into one institution as well (ETEAEF, Eniaios Foreas Epikourikis Asfalis kai Efax Parohon). Greek compulsory pension insurance schemes are divided into two categories: the "primary" pension schemes and the "auxiliary" pension schemes. The auxiliary pension scheme supplements the primary one. By means of Law No. 4670/2022, institutions granting auxiliary pensions as well as lump-sum benefits (mostly for civil servants and specific categories of insured persons) were merged under EFKA, also renamed "National Electronic Institution of Social Security" (eEFKA).

especially in times of high unemployment. This method of calculation applies to all insured persons, including civil servants.<sup>8</sup>

Turning now to the jurisprudence in question, the outcome of a long series of judicial decisions is that only very few restrictive measures were considered to be contrary to the Constitution: in terms of salaries and collective agreements, nearly all cuts were deemed legitimate; only the abolition of the right of unions to recourse to unilateral arbitration was held to be a breach of the Constitution.<sup>9</sup> Furthermore specific salary cuts were found to be unconstitutional, specifically as being contrary to the principle of proportionality; the cuts introduced in 2012 for the so-called “special salaries” of specific categories of persons employed in the public sector, in particular, judges<sup>10</sup>, university professors<sup>11</sup> and for

- 
8. The Higher Administrative Court (State Council) found this method of calculation to be contrary to the principle of equal treatment in social security, because it results in a lower pension for those with longer contribution periods (State Council, Plenary Session, 1891/2019). The Court annulled the respective ministerial decision stipulating the application of said “recalculation” method from the date of the Court’s decision (4 October 2019). In 2020, a new law (No. 4670/2020) entered into force to “comply” with the Court’s decision, as stated in the Statement of Reasons accompanying the respective bill, which maintained the same rate of return on contribution periods of up to 30 years and slightly increased the rate of return for contribution periods between 31 and 44 years, hence a rate of return of 50% applies to 40+ years of contributions. The rate of return was reduced for contribution periods of 45+ years. The respective provisions of Law No. 4670/2022 entered into force on 4 October 2019.
  9. State Council (Plenary Session) 2307/2014. According to Art. 22, para. 2 of the Greek Constitution, *“General working conditions shall be determined by law, supplemented by collective labour agreements concluded through free negotiations and, in case of the failure of such, by rules determined by arbitration.”* This decision was commented on by several authors (in Greek) in articles issued by the Labour Law Review 2015 Volume No. 1. On the interventions of the Memoranda in the Greek labour market and their implications, see Yannakourou S/ Tsimboukis C, (2014), Flexibility without security and deconstruction of collective bargaining: the new paradigm of labor law in Greece, Comparative Labor Law and Policy Journal 35(3), 331-370.
  10. Special Court of Art. 88, para. 2 Greek Constitutional Court decisions nos. 88/2013, 1/2018, 255/2021. Also, pension cuts related to the same reductions of salaries, Council of Audit (Plenary Session) 4327/2014. Art. 88, para. 2 Greek Constitution, which stipulates equating the salaries of judges with their mission and function, is the basis for the principle of analogy between the salaries and pensions of judges, and therefore, their pension could not be reduced in such a way as to lose their analogy with the judges’ salaries. The Court stated that the pension of judges could not be reduced to a level

security force personnel (Army and Police)<sup>12</sup>, were found to be “insufficiently justified” by the legislator who failed to assess the equivalence of the remaining salary of these groups of employees with their role and mission and the accumulative impact of these cuts on their level of subsistence. The “mere mathematical criterion” of the amount of cost relief attained by the State through such measures was found to be suitable for applying the principle of proportionality, as the legislator should have taken the significance of the services being provided by each group into consideration and should have assessed whether their remaining income was equivalent to their mission.

The year 2012 was crucial for pensions as well, since the State Council in its key Decision 2287-2290/2015 determined –as is elaborated later on– that the cuts enforced in 2012 breached the principle of proportionality.

### 3. Development of the key arguments

Over the last 10 years, arguments against and in support of the constitutionality of pension cuts have followed a dynamic course and have changed drastically compared to before the crisis. New positions and new views have evolved as well. Specifically, while courts accepted that provisions restricting individuals’ rights, such as short periods of prescription of claim against the State<sup>13</sup> or low default interests for such claims<sup>14</sup>, were considered to be contrary to the Constitution in the past because “they could be justified on the grounds of the “mere monetary” interest of the State”, the country’s economic situation was the reason for approaching all restrictive measures as “part of a general structural plan” to achieve “financial” i.e. “fiscal consolidation” and the reductions by the legislator were

---

equal to a reduction of 40% of their salary. For this comparison, the Court stated that the pensions’ net amount had to be taken into account. It should be noted that previous decisions of the Special Court on Art. 88, para 2 of the Greek Constitution (35/2014, 164/2015) determined that the cuts of judges’ pensions introduced in 2010 and 2011 were constitutional.

11. State Council (Plenary Session) 4741/2014.

12. State Council (Plenary Session) 2192/2014.

13. AED 1/2012 (Anotato Eidiko Dikastirio - Supreme Special Court, which has competence in questions of conformity of legal provisions with the Constitution in case of contradictory decisions by the supreme courts on this matter).

14. AED 25/2012.

therefore justified or, in other words, it was far more difficult for the courts to question the legality of the reductions: *what used to be a single limitation to an individual's rights in the past was now seen as an essential component in the overall plan and an important cause for the State.*<sup>15</sup>

Another argument of claimants before the courts was that the measures introduced were not proportionate because they were not of a temporary nature. The courts decided that *a restriction or cut does not have to be temporary to be legitimate on the basis of the principle of proportionality.* According to the Greek courts, all legislative measures were introduced not only to address the urgent fiscal crisis but also to achieve long-term consolidation of public financing.<sup>16</sup>

The principle that was most intense elaboration by the jurisprudence was that of proportionality, i.e. not only in terms of judicial restraint and strict control of its application, but also in the manner in which the courts did (or sometimes did not) review the impact of the alleged restriction. According to the State Council in its decision on the "first Memorandum"<sup>17</sup> and the subsequent laws enforced to achieve its full implementation<sup>18</sup>, under the circumstances which had led to its adoption, *"the legislator's*

---

15. This approach was heavily criticised by academia on account of the drastic change in the jurisprudence, not only compared to specific restrictions before the crisis and restrictions explicitly imposed by the Memoranda, but also on the exact same issue, such as the change in the ECHR's jurisprudence on the low default interest (6%) for claims against the State. Whereas the Court in its decision *Meidanis vs Greece* (Application No. 3397706, Judgment of 22 May 2008) found this regulation to be contrary to Art. 6 ECHR in its later decision *Viaropoulou and Others v. Greece* (nos. 570/11 and 737/11, Judgment of 25 September 2014), *Drosos Y* (2015), *The crisis of the economy and the judgement of the judiciary*, *Administrative Law Journal* 2015(1): 15-25.

16. State Council (Plenary Session) 668/2012 (No. 25), ECHR in its judgment of 7 May 2013, *Ioanna Koufaki and ADEDY vs. Greece*, Applications nos. 57665/12 and 57657/12 (No. 12). If, however, the cut or restriction is of a temporary nature, its consequences will be limited, which is an indication in favour of its constitutionality, ECHR decision of 8 October 2013, *Mateus and Januario vs. Portugal*, 62253/12 and 57725/12 (No. 28), *Tsetoura A*, *The protection of the insured from the retrospective and unfavorable change of their social security status. Comparative presentation of the jurisprudence of the ECHR, Greek and foreign Courts*, *Social Insurance Law Review* 46(4), 737-894.

17. State Council (Plenary Session) 668/2012.

18. And for the country to comply with all obligations stipulated in the Memorandum, State Council 1285-1290/2012.



*evaluation of the total fiscal impact of the crucial measures lies beyond judicial control*". The claimants' allegation that the principle of proportionality had been breached because the legislator had not reviewed whether other less restrictive measures would have sufficed to achieve the same public interest outcomes<sup>19</sup> was rejected since, according to the courts, judicial control in this regard was "marginal".

When examining the application of the principle of proportionality, one very important question arises about the "procedure" the State must follow to adopt severely restrictive measures: *should the legislator review the impact of the measures on citizens' standard of living? Or are severely restrictive measures always legal because they will always contribute to the State's fiscal consolidation?* The Greek courts declared that the Greek Constitution can indeed set limits to the legislator's freedom to apply a restrictive fiscal policy, but in most cases, rejected the argument that the State should examine less restrictive measures before choosing each restriction/cut<sup>20</sup>. Additionally, if one accepts that the legislator has an obligation to assess the impact of specific restrictive measures on standard of living of the individuals, one has to determine the party who bears the burden of proof of the measures' necessity? When bringing a claim before the court, is it the individual who must demonstrate the measures' impact on his/her standard of living or does the government have to prove that it has assessed the impact of its measures on citizens' standard of living?

This "procedural" question has proved crucial in times of severe and, above all, continuous crisis for two basic reasons: first, despite the severity of the crisis, some form of judicial control must be safeguarded. The judiciary as one of the three essential pillars of democracy has the obligation to develop reasoned and justified judgments and to function fully as part of each country's democracy.<sup>21</sup> In times of crisis, the judiciary is confronted with the government's argument that the measure under review serves an

---

19. Such a review is not evident from all of the documents attached or accompanying the legislator's interventions and is therefore missing, according to the claimants.

20. State Council (Plenary Session) 668/2012. The same approach was taken by the ECHR in its judgment of 7 May 2013, Ioanna Koufaki and ADEDY vs. Greece, Application nos. 57665/12 and 57657/12.

21. Rizos S. (2015), The State Council between the Constitutional Social State Principle and the political objection "you cannot take anything from someone who has nothing" (Objection of Menippos), Theory and Practice of Administrative Law 2015(3)Q 289-293.

imperative public interest and is necessary for achieving the latter, an argument that is quite difficult, if not impossible, to put under scrutiny. The second reason is the challenge the judiciary faces in defining a guaranteed minimum pension, i.e. a limit of deterioration of the pension amount that the legislator cannot impinge on. Questions arose such as: can a pension be cut by 50 per cent or more? Where does one set the limit? Is such a limit the same for every individual or does the amount of pension a person received before the crisis play a role?

The State Council issued the milestone Decisions nos. 2287-2290/2015 (Plenary Session) in 2015, which dealt with the above-mentioned questions. Since the restrictions introduced by the government reduced people's pensions, the Court reminded that the social security institution, which is protected by the Greek Constitution, builds on the notions of contributions and social risk. When an insured person ceases to pay contributions and faces a social risk, he/she becomes entitled to an equivalent benefit. In times of extremely unfavourable fiscal circumstances, when the State is not able to provide sufficient financing to social insurance institutions and when other means to ensure its sustainability do not exist, the Constitution does not prohibit the legislator to intervene (i.e. cut) existing pension payments. The Court has declared that *the possibility of the legislator to cut pensions is not unlimited*, even in emergency situations, but is limited by the principles of proportionality<sup>22</sup>, social solidarity<sup>23</sup> and equality of citizens in view of public charges<sup>24</sup>, as well as the protection of property under the meaning of Art. 1 of Protocol No. 1 ECHR. This, according to the Court, means that the reduction of pension amounts *should not infringe on the "essence" of the right to*

---

22. According to Art. 25, para. 1 of the Greek Constitution, *"The rights of the human being as an individual and as a member of the society and the principle of the welfare state rule of law are guaranteed by the State. All agents of the State shall be obliged to ensure the unhindered and effective exercise thereof. These rights also apply to the relations between individuals to which they are appropriate. Restrictions of any kind which, according to the Constitution, may be imposed upon these rights, should be provided either directly by the Constitution or by statute, should a reservation exist in the latter's favour, and should respect the principle of proportionality."*

23. According to Art. 25, para. 4 of the Greek Constitution, *"The State has the right to claim of all citizens to fulfil the duty of social and national solidarity"*.

24. According to Art. 4, para. 5 of the Greek Constitution, *"Greek citizens contribute without distinction to public charges in proportion to their means"*.

*social insurance right*, i.e. an individual's pension should ensure a decent standard of living and safeguard not only the pensioner's access to basic necessities (food, clothing, housing, basic household goods, heating and medical treatment), but also his/her participation in social life in a way that does not substantially differ from the life he/she enjoyed during his/her period of gainful activity.<sup>25</sup> For the legislator to comply with its constitutional obligation, the Court ruled that it is necessary for the government to conduct *a special, justified and scientifically based study* substantiating that the measures are suitable for solving the sustainability problem of social insurance institutions –also in view of the causes of said problem– and that the measures in question taken together with other burdens imposed on citizens (e.g. higher taxes) do not infringe on the “essence” of insured's right to social insurance right. The Court asserted that given the complexity and technical nature of the evolving issues, judicial control would not be possible if such a study does not exist. As regards the pension cuts introduced between the years 2010 and 2012, the State Council ruled that at the initial phase of the crisis and in order for the legislator to act promptly in order to avoid acute damage, the absence of the said study did not render the cuts of the years 2010 and 2011 unconstitutional, as they had been introduced during the initial phase of the crisis when the legislator had to act promptly to prevent acute damage. Yet after the first two years of the crisis and following the numerous cuts that had already been implemented in addition to other burdens for pensioners (such as higher taxation), before cutting pensions again the legislator was called on to scientifically and judicially review the implications of any further planned cuts on pensioners' standard of living and to assess whether any new reductions, taken cumulatively with previous cuts and fiscal burdens, violate the “essence” of the social insurance right or .

A novelty introduced into Greek jurisprudence by the State Council's Decisions 2287-2288/2015 was to consider the pension cuts “unconstitutional” from the date of publication of its decisions (10 June 2015) [hereinafter: “future effect” of the Court's decisions] in order to minimise the

---

25. In its decisions, the State Council referred to the decision of the German Federal Constitutional Court of 9 February 2010, 1BvL 1/09, 1 BvL 3/09, 1 BvL 4/09 Rn. 135. In a different approach, the dissenting opinion to those decisions supported the view that a pension should not be reduced by more than 50%.

decisions' effects on public financing. The unconstitutionality would only refer to previous periods only for those who had submitted claims before the courts prior to the date of publication of the decisions. Other persons could only claim the unconstitutionality of their pension cuts declared by decisions 2287-2288/2015 only for the period from 10 June 2015 onwards.

The legislator's obligation to assess the impact of pension cuts on pensioners' standard of living and to prove that such a review had indeed taken place was also recognised by the European Committee of Social Rights of the Council of Europe in case No. 76/2012, Federation of Employed Pensioners of Greece (IKA –ETAM) vs. Greece. The Committee concluded that Article 12, para 3 of the 1961 Social Charter had been violated due to the cumulative effects of the cuts that had been introduced between the years 2010 to 2012<sup>26</sup>, as asserted in the statement of the claimant (trade union) and which were bound to significantly deteriorate the standard of living and living conditions of many pensioners. The Committee accepted that despite Greece's unique situation created by the economic crisis and the fact that the government had been required to take urgent action, it had not examined and evaluated the effects of such far-reaching measures. Such an assessment is necessary to determine in a meaningful way, the full impact of interventions on vulnerable groups in society. The government also did not review studies published by the organisations concerned, despite the fact that these organisations represent the interests of many of the groups most severely affected by the respective measures.<sup>27</sup>

Despite the "future effect" of the State Council's decision of 2015, the third Memorandum required the "alleviation" of this legislation's

---

26. Contrary to dealing with each restriction separately. According to the Committee, some of the restrictions introduced by the government and criticised by the trade union (claimant) did not in themselves amount to a violation of the Charter of 1961. This is particularly the case in relation to the cuts introduced in respect of the holiday bonuses, the reductions in pension rights in cases in which the pensioner's level of pension benefits was considered sufficiently high and in cases in which the pensioner was still quite young, in which case it was legitimate for the State to conclude that it is in the public interest for such persons to be encouraged to remain active in the workforce.

27. Kakara P (2014), Greece and the right to social security in the framework of the European Social Charter. The decisions of the European Committee of Social Rights on the collective complaints 76- 80/2012 against Greece, *Labour Law Review* 73(13): 849-871.

consequences. To comply with this requirement, the government introduced a new law which, as already mentioned, introduced a new calculation method for all pensions (Law No. 4387/2016, which entered into force on 12 May 2016).

To make a long storyshort, the State Council dealt with the constitutionality of the legislator's provisions on the recalculation of pensions. By Decisions 1891/2019 and 1890/2019 (Plenary Session), the Court reiterated its prior line of reasoning from the year 2015, but made some significant changes. It repeated its jurisprudence on the "essence" of the right to social security, but also added the analogy of paid contributions and all the completed insurance periods to the pension amount (contributory nature of pensions) to the meaning of said "essence". The Court did not demand for a "special, justified and scientifically based study" to assess the sustainability and protection of the "essence" of the right to social insurance right. In fact, the Court ruled that the continued sustainability and adequacy of pensions must be "justified" by the legislator, by means of prior actuarial studies which should be conducted by a competent authority to "confirm sustainability".<sup>28</sup> In other words, the "special, justified and scientifically based study" that substantiates both the sustainability and protection of the "essence" of the right to social insurance right was replaced by actuarial studies that only refer to sustainability, while the concrete method for justifying the adequacy of pensions was not mentioned by the Court. The Court decided as follows: **(a)** the legislator was not bound by the Court's prior Decisions 2287-2290/15 and could introduce the same cuts again (i.e. the same amount) if the measures were adequately justified; **(b)** the same cuts entered into force when Law No. 4387/16 was issued (12 May 2016) and were substantiated due to the requirements of the Third Memorandum; **(c)** an actuarial study was carried out for EFKA but not for ETEAEP<sup>29</sup> which concluded that the recalculation of pensions (applied from 1 January 2019 onward) could not be justified, and **(d)** the new pension consisting of two parts, namely the "national" and the "contributory" pension, was found to constitute a breach of the "contributory character" of old-age pension, since a pension consisting of 50 per cent of the person's insured salary could only be achieved after 44

---

28. Until these decisions were issued in 2019, the State Council rejected the claimants' allegations that the lack of actuarial studies meant that the measure reviewed was unconstitutional or contrary to Art. 22, para. 5 of the Greek Constitution.

29. See Footnote 7.

years of contributions. The Court annulled the ministerial decisions on the recalculation of primary and auxiliary pensions for the future, i.e. from 4 October 2019 [“future effect” of the annulment of the ministerial decisions]. The legislator responded by introducing Law No. 4670/2020 which (slightly) changed the method of pension (re)calculation retrospectively, namely from 4 October 2019 onwards. To date, there is no jurisprudence on the constitutionality of Law No. 4670/2020.

The fact that the Court’s decisions on legislation have a “future effect” paints a complicated picture. Several months later, the State Council’s Decision 1439/2020 (Plenary Session) clarified that pensioners could only make claims before the courts for pension cuts of the year 2012, which were found to be unconstitutional by Decisions nos. 2287-2290/2015, but only from 10 June 2015 onwards (date of issuance of the Decisions) until 12 May 2016 (date of entry into force of Law No. 4387/16).

By means of Law No. 4714/2020, which came into force on 31 July 2020, the pension cut introduced for primary pensions in 2012 (specifically, the amounts deducted between 10 June 2015 and 12 May 2016) were returned to all pensioners. The Easter, Christmas and summer allowances (EUR 800 annually) for primary pensions and the reductions of auxiliary pensions were not retroactively granted, although Decisions 2287-2288/15 and 1439/2020 found their discontinuation to be unconstitutional as well. Law No. 4714/2020 stipulated that these payments would extinguish any of the pensioners’ remaining claims, unless the pensioner had already brought a claim before the court. By its Decisions 1403-1407/2022 (Plenary Session), the State Council ruled that the “extinction” of claims (previously held to refer to unconstitutional pension cuts) was constitutional due to the “serious reasons of public interest related to the fiscal situation of the country”.

The constitutionality of the method of assessment of the notion “decent standard of living” or, as the State Council refers to it, the “adequacy” of pensions is also worth mentioning. The Greek experience clearly demonstrates that in times of crisis, the approach taken is not a subjective, but an objective one, meaning that in order to judge *on the constitutionality of the respective measures, the general situation of pensioners’ standard of living in the country as a whole needs to be considered, not the claimant’s personal situation.*<sup>30</sup>

---

30. Kontogeorgopoulou P (2019), Thoughts on the sufficiency of pensions, Social Security Law 2019(4), 750-762.

According to the State Council's decision on the first Memorandum<sup>31</sup>, the introduction of cuts to the holiday bonuses for all pensioners by the legislator, i.e. without any exemptions for pensioners who receive a low pension, did not infringe on individuals' right to a fair trial as enshrined in Art. 20, para. 1 of the Greek Constitution and Art. 6, para. 1 of the ECHR. In fact, no reduction in pensions was found to be unconstitutional on the basis of pensioners' personal situation. An interesting ruling was handed down in this respect in the field of social assistance. According to the Greek legislation applicable before the crisis, social assistance or, more precisely, social compensation benefits, were granted to families with 3+ children. One of these benefits was the so-called "life-long pension for mothers with many (4+) children", which amounted to a monthly supplement of around EUR 107 in 2012. In 2012, the 2<sup>nd</sup> Memorandum abolished all of the above-mentioned benefits and introduced new ones, the amount of each depending on household income and only granted for children under the age of 18 years or under the age of 24 years, if studying. One mother whose lifelong benefit was revoked brought a claim before the court, which was rejected by State Council Decision No. 719/2018. According to the Court, the legislator is not bound by the Constitution to maintain a specific system of family benefits; on the contrary, the introduction of new measures to protect families and children lies within the legislator's discretion. What is noteworthy is the fact that the claimant in this specific case lost a lifelong benefit, but this utter deprivation was not found to be contrary to Art. 1 of Protocol No. 1 to the ECHR<sup>32</sup>, although from what can be deduced from the Court's decision, she was not entitled to a new family benefit. The State Council ruled that mothers who do not receive an old-age pension and are not engaged in any gainful activity and therefore do not enjoy a decent standard of living, can apply for other general social assistance benefits, either the so-called "guaranteed minimum income" (EUR 200 monthly) or the so-called "social assistance bene-

---

31. (Plenary Session) 668/2012.

32. If an interference with the right to property, including claims to social benefits, is lawful and a public interest exists, the ECHR reviews whether a fair balance exists between the public interest and the applicant's individual right. Pension reductions are very likely to be found to be legitimate, as claimants are not entitled to a specific pension amount. On the other hand, the Court has held that a complete interruption or cessation of pensions amounts to a violation of Art. 1 of Protocol No. 1 to the ECHR (*Apostolakis v Greece*, decision of 22 October 2009, 39574/07).

fit for the elderly" (EUR 360 monthly). The Court did not review whether the claimant was entitled to the new benefit(s) (or to benefits related to general social assistance), nor did it examine the consequences of the revocation of her lifelong benefit to her overall economic situation; it only focussed on the "abstract" constitutionality of the end of the respective benefit.<sup>33</sup> Moreover, the State Council concluded in a recent decision that the amount of guaranteed minimum income provided as a social assistance benefit lies within the legislator's discretion.<sup>34</sup>

In cases relating to salary reductions and, in particular, to cuts of the holiday bonuses amounting to EUR 800 annually (EUR 400 for Christmas, EUR 200 for Easter and EUR 200 for summer), both the State Council (1310/2019, Plenary Session) and the Aeropag (77/2022, Plenary Session) ruled that the cut of those benefits was constitutional on the basis, among others, of the relationship between the nominal salaries of civil servants and public sector employees with the poverty threshold determined by the Hellenic Statistical Authority and Eurostat (EU-SILC). The poverty threshold for the year 2011 (one year before the said allowances were abolished) amounted to EUR 6,591 per person annually, while the median equivalised disposable income amounted to EUR 12,637.08 per person annually. The salaries of civil servants and public sector employees were higher than the poverty threshold and, therefore, both Courts rejected the claimants' allegations that the said cut infringed on their right to human dignity and to a decent standard of living. This approach was not without criticism because it relates the poverty threshold with the salaries of employees in times of crisis, with taxation increasing and salaries continually falling. This criticism was already expressed by the ILO's Committee of Experts on the Application of Conventions and Recommendations in its report on Greece in 2012, which underscored the fact that the existing poverty indicators linked to the median income no longer reflected the real state of the population's deprivation. In fact, in economies where wages are in freefall, the median income is impacted as well; the related poverty threshold may then drop below the level of subsistence. Where benefits are calculated as a percentage of sub-

---

33. Boukouvala V (2017), The legal consequences of judgments on the constitutionality of the law in the concentrated system of constitutionality control and the issue of postponing the time when the status of non-constitutionality begins, <http://www.ddikastes.gr>

34. 1515/2021. The amount of the social benefit for poor elderly persons is set at EUR 360 per month.



standard wages, the social security system resembles an iceberg where only a small share of benefits is paid above the subsistence level, while the bulk of the system operates below this level at which the application of most provisions of the Convention becomes meaningless.

## Bibliography

- Angelopoulou O (2010) Country Report on Greece. In: Becker U, Pieters D, Ross F and Schoukens P (eds) *Security: A General Principle of Social Security Law in Europe*, Munich, Leuven and Erfurt: Europa Law Publishing, pp. 147-225.
- Boukouvala V (2017) The legal consequences of judgements on the constitutionality of law in the concentrated system of constitutionality control and the topic of postponing the time when unconstitutionality begins, <http://www.ddikastes.gr>.
- Drosos Y (2015) The crisis of the economy and the judgement of the judiciary, *Administrative Law Journal* 2015(1): 15-25.
- Kakara P (2014) Greece and the right to social security in the framework of the European Social Charter. The decisions of the European Committee of Social Rights on the collective complaints 76- 80/2012 against Greece, *Labour Law Review* 73(13): 849-871.
- Kontogeorgopoulou P (2019) Thoughts on the sufficiency of pensions, *Social Security Law* 2019(4): 750-762.
- Kontiadis X (2004) *Constitutional Guaranties and Institutional Organisation of the Social Security System*, Athens: Ant. N. Sakkoulas.
- Kontiadis X, (2001) The social state principle in the new Constitution, The dilemmas of the revising legislator, *EDKA* 2001: 1 23.
- Yannakourou S/ Tsimboukis C (2014) Flexibility without security and deconstruction of collective bargaining: the new paradigm of labor law in Greece, *Comparative Labor Law and Policy Journal* 35(3): 331-370.
- Tsetoura A (2014) The protection of the insured from the retrospective and unfavorable change of their social insurance status. Comparative presentation of the jurisprudence of the ECHR, Greek and foreign Courts, *Social Insurance Law Review* 46(4): 737-894.
- Rizos S (2015) The State Council between the Constitutional Social State Principle and the political objection «you cannot take anything from someone who has nothing” (Objection of Menippos), *Theory and Practice of Administrative Law* 2015(3): 289-293.



# Guaranteeing a minimum income in old age - the case of Sweden

---

Thomas ERHAG

## 1. Introduction

This chapter analyses recent legal changes to benefits in the Swedish pension system that guarantee a minimum income in old age. The first part of the chapter addresses the purpose and implications of different residence-based pension benefits and describes how changes related to these benefits have challenged the pension system's overarching principles.<sup>1</sup> The second part analyses the interpretation and impact of European Union (EU) Regulation 883/04 on residence-based pension benefits with a special focus on the judgment in case C-189/16.<sup>2</sup> The Swedish interpretation of this judgment resulted in the cessation of export of all residence-based pension benefits in cash to pensioners residing in other EU/European Economic Area (EEA) States as of 1 January 2023.

## 2. Policies addressing poverty in old age

The European Pillar of Social Rights, Principle 15, highlights the right of workers and self-employed persons to a pension "commensurate to their contributions and ensuring an adequate income." This principle asserts that "Everyone in old age has the right to resources that ensure living in dignity." In other words, the EU recommendation states that Member State's social security legislation aimed at protecting citizens against poverty in old age should be a combination of two elements: (i) the insurance principle safeguarding pensions at an adequate level that corresponds to the level of their contributions, and (ii) guarantee of a sufficient standard

- 
1. For a further description of the principles of the Swedish pension system and recent reforms see Erhag T (2020/2).
  2. Case C-189/16 *Zaniewicz-Dybeck*. For an earlier analysis of this case in Swedish see Erhag T (2020/1)

of living for persons who were not economically active and thus did not have the possibility to contribute to their pension.<sup>3</sup>

The challenge lies in the fact that the adequacy of old-age pensions has both a collective and an individual dimension. At the individual level, pension adequacy depends on the replacement rate at retirement; over time, the value of his/her pension hinges on the chosen indexation. Another dimension of individual pension adequacy is a guaranteed minimum income, i.e. a basic level of subsistence during retirement. At the collective level, pension adequacy is associated with maintaining the pension system's sustainability to deliver adequate benefits over time. The concept of adequacy needs to be assessed today as well as in the future, as most pension reforms have long transitional periods and often do not impact current pensioners or persons who will soon retire.<sup>4</sup>

Another aim of the pension system is to secure elderly person's dignity in the wording of the recommendation, and it should be redistributive and based on solidarity within the national community. This 'solidaristic' community is framed by the nation state, and the criterion for entitlement to a pension is usually legal residence in that State's territory. Typical examples of pensions are tax-financed basic pensions or guaranteed minimum income support as well as means-tested income supplements, all of which are examples of *solidarity benefits*.<sup>5</sup>

In its latest analysis of EU pensions, the European Commission reviews how effective current and future pensions are to prevent poverty in old age and whether they have succeeded in maintaining an adequate income replacement ratio for EU citizens. The analysis of the living standards of elderly Europeans uses Principle 15 of the Social Pillar as the starting point and reviews the performance of pension systems both in relation to adequacy of intergenerational solidarity and to the different components of the pension system that provide for a guaranteed minimum income for elderly persons with insufficient resources.<sup>6</sup> Notably, the Commission calls for an increased focus on reforms to improve the protection of low-

---

3. For an elaboration of the definition of adequacy in this context, see European Commission (2012), p. 27 f.

4. Ibid.

5. In the EU pension adequacy report, these benefits are reported under "solidarity mechanisms", European Commission (2021:2).

6. European Commission (2021:1), p. 18 ff.

income pensioners by improving minimum guarantees, sometimes in combination with stricter eligibility criteria for residence-based pension benefits.<sup>7</sup>

### 3. Pension benefits aimed at guaranteeing minimum income protection in old age

#### 3.1 *The Swedish pension system in a nutshell*

Sweden introduced a universal invalidity and old age pension in 1913. This initial system, later reformed in 1935, was a combination of a contribution-based pension and a universal supplement in the form of a nominal basic pension. In the 1950s and 1960s, the debate on public (State) responsibility for ensuring an adequate pension laid the groundwork for new reforms. The reformed public system combined a flat-rate universal benefit (*folkpension*) with an earnings-related Defined Benefit Supplement (*ATP*). In the 1990s, concerns about the pension system's financial sustainability resulted in major reforms, and a new system was gradually rolled out from 2001 onwards. The current public old-age pension system is a contribution-defined system. The calculation of income-related old-age pension is based on the so-called life income principle. Pensions are largely drawn from a distribution system and to a lesser extent from a premium pension system. In the premium pension system, contributions are paid, and the balance on individual premium pension accounts must be reported. The individual chooses a trustee that will manage his/her funds. In addition to the universal old-age pension scheme, a 'standard' level of protection is ensured through supplementary benefits drawn from mandatory insurance in occupational pension schemes based on a collective agreement.

Belonging to the *statutory old-age pension scheme (allmän pension)* means being covered by Swedish social insurance. The individual is insured either by working or residing in Sweden. Individuals in gainful employment in Sweden acquire pension entitlements for two types of income-related pensions (*inkomstrelaterad pension*): *income pension (inkomstpension)* and *premium pension (premiepension)*. *Income pension* is a pay-as-you-go (PAYG) scheme and is based on pension benefits earned from contributions paid (notional contribution-defined). This component

---

7. Ibid p. 63.

of the public pension scheme lies outside the State budget. The contributions made to the *premium pension* scheme are deposited in individual pension accounts and invested in private funds selected by the insured person; a passive fund solution is also provided. Pension rights are acquired for each year of work and the contributions paid. These rights are based on the individual's specific pensionable income; 16 per cent of this income is allocated to his/her *income pension* scheme and 2.5 per cent to his/her *premium pension* scheme. Retirement age is flexible and starts from the age of 62 years, but pension rights increase if the person remains in employment. A tax-financed *guarantee pension (garantipension)* based on residence criteria is provided for those aged 65+ years who have an insufficient income-related pension.

The *guarantee pension* is a tax-financed pension, intended to secure a minimum pension for persons aged 65+ who have no or an inadequate *income and premium pension*. It is a pension income-tested and inflation-indexed supplement or top up to total benefits provided by the income-related public pension scheme. Beneficiaries must have resided in Sweden for a minimum of three years to be eligible; 40 years of residence are required for eligibility to a full *guarantee pension*. Pension income is reduced proportionately for those with shorter periods of residence. Consequently, persons who have lived in other countries for several years and do not have any other income might not be able to support themselves. Under normal circumstances, they would need to apply for municipal social assistance to receive minimum subsistence. To reduce the pressure on municipalities, two State-financed support measures target low-income pensioners: the *housing supplement (bostadstillägg)* and the *maintenance support for the elderly (äldreförsörjningsstöd)*. The means-tested *housing supplement* is also a component of the public pension system. Together with the residence-based and pension income-tested *guarantee pension*, it aims to provide pensioners sufficient means to reach the minimum subsistence level established in social assistance legislation. The income-tested *maintenance support for the elderly*, which is a component of the social security and pension scheme, guarantees a decent standard of living for persons with a very low or no pension and no other means of income. All other benefits he/she may be entitled to must be claimed before he/she can qualify for maintenance support; such benefits include *income pension, premium pension and guarantee pension*, as well as the *housing supplement for pensioners*.

### *3.2 Basic principles and recent reforms*

The main principle of the Swedish pension reform of 1999 was to establish a mandatory State-run pension scheme that provides an adequate earnings-related retirement benefit with universal coverage for all persons engaged in gainful activity, backed by a safety net that guarantees an adequate standard of living for the elderly. This continued objective was the cornerstone of the pension system of the 1950s and corresponds to the goals pursued by the European Commission today.<sup>8</sup> The challenge, of course, is to ensure that pensions are sustainable over time and it became clear during the pension reform that the first crucial step was to replace the old benefit-defined pension scheme with a notional contribution-defined pension scheme. Another goal of the pension reform was to set up a financial account component and create a system that includes privately managed individual financial accounts.

The ongoing reforms of the Swedish pension system highlight a series of issues related to key elements of the pension reform. Swedish pensions are characterised by a high degree of 'stateness', a "public, universal and compulsory pension system is the cornerstone for the individual's pension protection"<sup>9</sup> and provide for a high-degree of income replacement, but also for a solidarity benefit for those who do not have an income, with the aim of securing basic subsistence. There is therefore reason to assume that citizens expect the mandatory pension system to deliver, firstly, an adequate income replacement ratio and, secondly, adequate basic protection for those without a pension or with only an insufficient income-based pension.<sup>10</sup>

The parliamentary pension group agreed in 2017 to further reform the system. The idea behind this reform was twofold, namely to introduce new measures to improve pension and benefit adequacy for the most economically vulnerable groups of society, but also to reform the premium pension, raising the statutory retirement age given increased life expect-

---

8. European Commission, COM/2012/055 final. The European Commission Pension Adequacy Report 2018 considers three aspects of adequacy: poverty protection, income maintenance and pension duration, p. 22 f.

9. DS 2009:53, p. 7.

10. This is also the essence of the overarching principles of the "promises" made by Swedish pension system. DS 2009:53, p. 7 f.

tancy and to reduce the income gap between men and women.<sup>11</sup> Consequently, two government bills were presented and adopted by Parliament in 2019. One bill focussed on establishing entitlement to minimum subsistence based on residence while the other sought to raise retirement age to close the gap between de facto retirement and higher life expectancy.<sup>12</sup>

The main principle of the general pension scheme is that pensions are based on the income the pensioner earned throughout his/her life, i.e. the life income principle. Basic protection is a departure from this principle but is indispensable to ensure that elderly persons, who were not able to acquire an adequate pension, have access to minimum subsistence. To encourage people to remain in the labour market and to further endorse the scheme's legitimacy, work must always pay off, and the pension income of those who have consistently worked throughout their lives is higher than the level of basic subsistence (respectful distance – *respektavstånd*). The design of the minimum income scheme thus aims to strike a balance between the objective of providing solid and adequate protection against financial vulnerability and safeguarding the pension scheme's life income principle. In the recent pension reform, this meant that an improvement in the economic situation of pensioners facing severe economic hardship had to be accompanied by changes in the pension income scheme to ensure that the respectful distance was maintained. This has proven challenging.

The income-/balance indexes in income-related pensions have been effective, with the value of pension rights, i.e. the amount of pension income, decreasing in a number of annual revisions between 2010 and 2020, thereby affecting the income replacement ratio. Over this same period, the consumer price-indexed guarantee pension has lost in value compared to the income-related pension, as wages (income) have risen more than consumer prices. As a result, any initiative to strengthen minimum income, i.e. the guarantee pension, by nominally raising that benefit will diminish the "respectful distance". The political response was to introduce a new benefit, namely an additional payment to the income-related benefit targeted at pensioners who earned low wages during their working lives<sup>13</sup> (*inkomstpensionstillägg*). The proposal meant a move away from two of the

---

11. Socialdepartementet/Ministry of Social Affairs, 2017-12-14.

12. Prop. 2018/19:133. Prop. 2018/19:134.

13. DS 2020:7. Prop. 2020/21:1. Introduced in the Social Insurance Code Ch. 74 a.



principles Sweden's pension system is based on. Firstly, it meant that factors other than (working) life income would define the right to a pension, and secondly, that income-related pensions would be financed from sources other than contributions. The aim was thus to strengthen the redistributive effects, i.e. the solidarity aspects of a component of the pension system that was supposed to function according to the insurance principle. One of the legislator's overarching principles was to safeguard the different aspects of adequacy, even if this requires a move away from the prevailing normative principles.

### ***3.3 Solidarity benefits aimed at basic protection***

The guarantee pension is the pension benefit that is perhaps the clearest expression of minimum subsistence in the Swedish pension system, and becomes available for individuals aged 65+.<sup>14</sup> The guarantee pension is an inflation-indexed supplement, a top-up with a specified maximum<sup>15</sup> to the total benefit provided by the two earnings-related schemes.<sup>16</sup> The condition for eligibility to this minimum subsistence is residence, whereby each year of residence between the ages of 25-64 years counts as a qualifying year.<sup>17</sup> This requirement for acquiring insurance periods was introduced shortly before Sweden joined the EU (Prop. 1992/93:7); today, 40 years of residence are required for eligibility to a full pension, with the pension proportionately reduced for any missing years.

The means-tested "housing supplement"<sup>18</sup> is an additional benefit provided for elderly with a low income, e.g. for pensioners whose income relies exclusively on the guarantee pension. The residence-based guarantee pension is a tax-financed pension and, along with the means-tested hous-

---

14. Introduced by Prop., 1997/98:15. In force from 1 January 2001. Socialförsäkringsbalken/Social Insurance Code (SFB), Ch. 67.

15. In 2022, the maximum gross amount is SEK 8,779 (single household) or SEK 7,853 (married).

16. A single person with a gross income-related statutory pension of SEK 12,794 (or 11,389) will not receive a guarantee pension.

17. Residence years between the ages of 16-24 years will also be included if there is an income conferring entitlement to the income pension.

18. SFB, Ch. 100-103. The supplement is provided irrespective of whether the pensioner owns or rents his/her home, the amount is related to personal housing costs, income and assets.

*ing supplement*, aims to provide beneficiaries with at least minimum subsistence, as expressed in social assistance legislation (Social Services Act (2001:453)).

Since the guarantee pension is pro-rated based on years of residence, migrants who continue working later in life, including Swedes who return from living abroad, may be eligible to minimum subsistence but may also require social assistance which is provided by local authorities. This put pressure on local means-tested benefits as a source for support.<sup>19</sup> To offset this development, a targeted social security benefit was introduced in 2003 (Prop. 2000/01:136). The *maintenance support for the elderly* benefit ensures that persons over the age of 65 years do not have to apply for social assistance.<sup>20</sup> It guarantees a decent standard of living for those who only have a small or no pension and no other means of income. In other words, the maintenance support for the elderly benefit is provided when all other retirement benefits prove insufficient. Any other benefits the pensioner is entitled to must be claimed before he/she can apply for the maintenance support benefit. Such benefits include the old-age and the guarantee pension, as well as the housing supplement for pensioners.

In monetary terms, a full guarantee pension in 2022 amounts to SEK 8,779<sup>21</sup> (taxable) per month, and added to the maximum housing supplement of SEK 6,990, the total monthly pension amount is around SEK 14,500.<sup>22</sup> The guarantee minimum income is indexed to the cost of living, meaning that the relative value in relation to wages has eroded over time.

Initiatives were taken in 2019 to raise the living standards of those facing severe economic hardship to ensure access to an adequate minimum

---

19. Erhag T (2013).

20. SFB, Ch. 74.

21. As indicated above, the guarantee pension for a married pensioner is lower, namely SEK 7,853 monthly for 2022. The reason behind this is an underlying assumption that the expenses of a married couple are shared and that the need for the tax-financed guarantee pension is lower when married. Guarantee pensions are subject to income tax, while the supplements for housing or maintenance support are not. The basic tax allowance for 2022 is SEK 20,200 (income tax is paid on any income above this amount), while it is substantially higher for pensioners, namely SEK 53,600 for 2022. The result is, of course, that pensioners with a low income (i.e. income from the guarantee pension only) will be compensated through the tax system.

22. According to Statistics Sweden, the average monthly income in Sweden for 2022 is SEK 37,100.

income. This change meant an increase in the basic level of the guarantee pension by SEK 200 per month, raising the ceiling for housing costs in the calculation of the housing supplement as well. In addition, recipients of the maintenance support benefit are allowed to earn an income from gainful activity of up to SEK 24,000 annually without any deduction to the benefit in an effort to provide incentives for pensioners to continue working. Consequently, the new benefit "income pension supplement" was introduced to raise the pension incomes (pro rata) of persons with an inadequate pension.

In August 2022, the level of the guarantee pension and housing supplement were raised by SEK 1,000 each. The original proposal was to introduce a new tax-free benefit, the guaranteed supplement (*garantitillägg*), with the intention of boosting the minimum subsistence provided by the guarantee pension. However, Parliament instead agreed to raise the level of minimum income benefits.

The patchwork changes in recent years have been criticised for being incoherent and non-transparent. Introducing new benefits is costly for the Administration, and reducing the gaps of income-related (i.e. work-related) pensions and of residence-based minimum income benefits are said to negatively affect the incentive to work. The Pension Authority has found, however, that persons who work later in life actually lose money compared to retiring. The Director-General of the Pension Authority has stated that the currently six different minimum income benefits, together with residence rules and taxes, create a situation that is impossible to decipher.<sup>23</sup>

#### 4. Crucial components of the guarantee pension

It goes beyond the scope of this chapter to elaborate how the amount of guarantee pension is calculated, but some aspects deserve to be highlighted. Unlike the previous national pension (*folkpension*), a guarantee pension is not paid in full to all persons who reside in Sweden. The right to a guarantee pension is contingent on periods of residence, referred to as insurance periods; the right to a guarantee pension is contingent on a minimum insurance period of three years (SFB Chapter 67, Section 2). A 40-year insurance period entitles the pensioner to a full guarantee pension (SFB

---

23. The Pensions Agency published a critical report on the matter, Swedish Pension Agency (2022).

Chapter 67, Section 25); for those who did not accumulate the full insurance period, pension income is reduced proportionately to the corresponding rate between the insurance period and the number 40. The basic level for the annual full guarantee pension amounts to a 2.13 price base amount for single persons, is not paid in full and must be further reduced if the insured person receives an income-based pension from Sweden or from another country. The guarantee pension is therefore difficult to characterise, because it is communicated as being a guaranteed minimum income benefit, but is only paid as a supplement to pensioners whose income is below a certain minimum level defined in SFB 67 Ch. 21-24.<sup>24</sup>

The possibility of exporting the guarantee pension when moving to another EU State did not initially follow from SFB but was a right that derived from Article 7 of Regulation 883/04. The main rule and exception in such situations is difficult to determine but suffice to say that Swedish law contains a residence requirement for an individual to be entitled to a guarantee pension. EU law and more specifically Article 7 of Regulation 883/04 removes this residence requirement when a recipient moves to another EU/EEA country. According to the Swedish Pension Agency, in December 2017, 42,689 recipients of a guarantee pension were residents in other EU/EEA States.

#### ***4.1 Coordination of benefits for 'free movers'***

EU membership has posed certain challenges for the guarantee pension, or the previous *folkpension*.<sup>25</sup> First, Article 7 of Regulation 883/04 removes the residence requirement established in Swedish law.<sup>26,27</sup> Secondly, Regulation 883/04 also contains rules to ensure that insurance periods (linked to residence) acquired in other countries are included in the calculation of the guarantee pension. The rules for this calculation are set out in

---

24. See Prop. 1997/98:152, p. 41-42. These characteristics are important for coordinating social security in accordance with EU Regulation 883/04.

25. See Prop. 1997/98:152. Se även Erhag T (2013), pp. 237-252.

26. Compare Prop. 1997/98:152, p. 95-97.

27. Pennings F (2015) emphasises, in particular, the problem of residence conditions in national law, as such national conditions would undermine the Regulation's practical effect. Residence requirements may therefore, as a general rule, be considered as giving way to the extent that applicable legislation has been established for a person., p. 114, 117 f.

Articles 50 to 60, and in particular in Article 52 of Regulation 883/04. Accordingly, Member States must take insurance periods acquired in other States into consideration when calculating the pension amount, but payment of the benefit is contingent on the insurance periods the pensioner acquired in each State (pro rata). To prevent the export of an unabridged guarantee pension for an individual who has resided in Sweden for a short time only, it was therefore deemed acceptable to introduce a requirement to "earn" pension rights based on insurance periods for guarantee pensions as well. Based on the Regulation's rules on old-age and survivors' pensions in Chapter 5, Sweden has developed a method for calculating the level of guarantee pension for individuals who have acquired insurance periods (residence) in several States, in case the person actually receives an old-age pension from another country or countries. Including this foreign old-age pension in the calculation to determine the amount of the Swedish pension prevents an overlap of benefits.

The supplementary pension components, the housing benefit and maintenance support have always been classified as special non-contributory benefits under Article 70 of the Regulation, and are not exportable in line with the residence requirement in the Social Insurance Code.

#### ***4.2 Re-thinking the classification of the guarantee pension, case C-189/16***

Case C-189/16<sup>28</sup> concerned a woman (BZD) born in 1940, who had moved from Poland to Sweden in 1980. She had lived and worked in both countries. When she reached statutory retirement age in 2005, the Swedish Social Insurance Agency granted her an income-related pension in the form of income pension (and an additional supplementary pension). However, she was not granted a guarantee pension. When calculating the right to the guarantee pension, the Swedish Social Insurance Agency had included her insurance periods (residence) in both Sweden and Poland. Together, her insurance period exceeded 40 years, which is why there was no reason to make any reductions in accordance with SFB, Chapter 67, Section 25 in relation to gaps in insurance periods. On the other hand, the Swedish Social Insurance Agency, based on Articles 46-47 of Regulation 1408/71, applied a pro-rata method according to which the pension is first

---

28. Case C-189/16 Zaniewicz-Dybeck.

calculated in accordance with Swedish law as though the person's entire career and residence had taken place in Sweden (theoretical amount).<sup>29</sup>

When calculating the theoretical amount, the insurance period in Poland was assigned a pension value that corresponds to the average value of the Swedish insurance period.<sup>30</sup> The calculation of the theoretical amount was made on the basis of SFB, Chapter 67, Section 25, which is now Article 56 (1) (c) of Regulation 883/04. BZD believed, however, that a different calculation should be used, the outcome of which would be more favourable in that she would receive a guarantee pension. The question in the case thus concerned how an old-age pension from another EU country affects the calculation of the Swedish guarantee pension.

The Supreme Administrative Court asked for a preliminary ruling. The questions submitted to the CJEU focussed on the calculation methods used and which ones can be used by national authorities to include the pension income an insured person draws from another EU State when calculating the right to a guarantee pension, without contravening Regulation 883/04.<sup>31</sup>

#### *4.2.1 The preliminary ruling*

The CJEU's judgment was relatively surprising as the Swedish guarantee pension had to be reclassified. The first answer clarified that Sweden, in calculating BZD's guarantee pension, should not apply the calculation rules established in Articles 46-47 of Regulation 1408/71 (now Articles 52 and 56 of Regulation 883/04), but should instead use the calculation specified in Article 50 (now Article 58 of Regulation 883/04). The reason is the configuration of the guarantee pension, especially the fact that a low-income pension results in the guarantee pension "filling" the gap up to the guaranteed minimum income (para 45), i.e. the guarantee pension is to be classified as a "minimum benefit" in accordance with the Regulation.

---

29. The method of calculation and dispute focussed primarily on Article 47 (1) (d) of Regulation 1408/71, which is now Article 56 (1) (c) of Regulation 883/04.

30. The method of calculation was expressed in a legal statement from the Swedish Social Insurance Agency, 2007:2.

31. HFD 2018 ref. 38.

The definition of minimum benefits was established in case 22/81 *Browning*<sup>32</sup> and are described as “where the legislation of the State of residence includes a specific guarantee the object of which is to ensure for recipients of social security benefits a minimum income which is in excess to the amount of benefit which may claim solely on the basis of periods of insurance and their contributions.” Minimum benefits shall be based on a distinct calculation method and are regulated in Article 58 of Regulation 883/2004.<sup>33</sup>

The second question focussed on whether Sweden can include the pension income from another country when calculating the guarantee pension, without contravening EU law. This question was answered in the affirmative, with reference to the fact that Article 58 provides that a Member State shall, in applying this Article, include all pension income in the calculation of pensions.

#### 4.2.2 *Interpreting the judgment*

Some of the passages in the judgment are difficult to interpret. They are based on the interpretation of secondary law, which is also not entirely clear in its wording. The number of cases involving Article 58 are relatively few.<sup>34</sup> In addition, to my knowledge, Article 58 has not been thoroughly dealt with in the legal doctrine, and comments on the article and its application are often very brief only.<sup>35</sup> It is extremely difficult to gain a tangible understanding of what constitutes a benefit in accordance with Article 58 and what the consequences of the CJEU’s reclassification are. This chapter explores the latter issue and discusses the consequences for a benefit that falls under Article 58 of Regulation 883/04. The challenge and ‘dramatic’

---

32. Case 22/81 *Browning*.

33. Another example of a type of benefit that is specifically regulated are special non-contributory benefits under Article 70 of Regulation 883/04. These are perceived as hybrids between social security and social assistance. Maintenance support for the elderly and the housing supplement for pensioners are two Swedish examples of such benefits; these benefits are also residence-based according to Chapter 5 SFB and cannot be exported according to either national legislation or the EU Regulation. Case law on this issue is reviewed by J. Paju, (2019).

34. Case 64/77 *Torri*, Case 22/81 *Browning*, case C -65/92 *Levatino*, case C-132/96, case C-30/04 *Koschitzki*

35. Se t.ex. Pennings F (2015), Fuchs & Cornelissen (2015), Westerhäll (1995).

consequences of the judgment are not so much connected to the facts of the case's legal dispute as they are to understanding or interpreting the consequences for the guarantee pension which, according to the judgment, falls under Article 58 of Regulation 883/04.

### *Article 58*

#### **Award of a supplement**

1. A recipient of benefits to whom this chapter applies may not, in the Member State of residence and under whose legislation a benefit is payable to him/her, be provided with a benefit which is less than the minimum benefit fixed by that legislation for a period of insurance or residence equal to all the periods taken into account for the payment in accordance with this chapter.

2. The competent institution of that Member State shall pay him/her throughout the period of his/her residence in its territory a supplement equal to the difference between the total of the benefits due under this chapter and the amount of the minimum benefit.

This classification has consequences for the calculation of the scope or amount of the guarantee pension. Periods of residence in other countries must be included when calculating an insured person's insurance period<sup>36</sup>; in addition, the person's foreign old-age pension can be included in the calculation which reduces the amount of the guarantee pension.

Without going into more detail about the consequences for the calculation of the guarantee pension, the CJEU's judgment implies that the provision in SFB Chapter 67 § 16 (unlike prior to the judgment) can be applied in accordance with its wording, i.e. the foreign old-age pension shall be included in the calculation and could reduce the amount of the beneficiary's guarantee pension.<sup>37</sup> The purpose of calculating minimum benefits according to Article 58 is, ultimately, to ensure that a beneficiary receives a

---

36. What is surprising is that the issue of Article 58 has not yet been raised in relation to the guarantee pension.

37. It should be mentioned here that the pension authority faces a Herculean task in recalculating pensions and the delivery of decisions based on new calculations. If the calculation results in entitlement to the individual benefit, it can be reconsidered *ex officio* with the support of SFB Ch. 113, 29 § and 31 §. See PRS 2018:6. Such recalculations often resulted in reductions in pensions, see the judgment of the Swedish Supreme Administrative Court, HFD 2022 ref 9.



benefit amount no lower than the guarantee pension.<sup>38</sup> The guarantee pension according to the Swedish calculation is thus the minimum pension amount. Para 2 of Article 58 further states that the minimum benefit amount, i.e. the guarantee pension, must only be provided for as long as the person resides in Sweden. In this regard, the judgment is not entirely clear in my opinion, and leaves room for two interpretations, both of which can, however, be considered reasonable based on the Regulation and the CJEU's judgment.

The Swedish interpretation and understanding of Article 58 following the CJEU's ruling is that there is no longer any legal grounds for exporting the guarantee pension because according to Article 58, the benefit only needs to be paid to eligible pensioners residing in Sweden. This situation is not at all part of the judgment in BZD, but a consequence thereof insofar as Article 58 is to be understood as a special rule in relation to Article 7 on exportable benefits. In SFB Chapter 5, especially § 9 and § 14, it also appears that it is not possible, as a general rule, to export benefits under Swedish law. Earlier, SFB Chapter 2 § 5 supported the precedence of the Regulation's export rule in Article 7 over Swedish law. If Article 58 is a special rule, the legal basis (Article 7) for exporting a benefit –in this case the guarantee pension– is excluded. The consequence of this interpretation is far-reaching, as slightly over 42,000 people who reside in another EU State will lose their right to a guarantee pension.<sup>39</sup> The passage in the judgment on which this interpretation is based is para 52:

"Regulation No.1408/71 is to be interpreted as meaning that, when the competent institution of a Member State calculates a minimum benefit, such as the guaranteed pension at issue in the main proceedings, it is

---

38. Another problem related to the interpretation of Article 58.1 is that the term "minimum benefit" is translated into "minimibelopp" in the Swedish version. This Swedish term would normally be translated into *minimum amount* in English. However, this is probably a mistranslation because other language versions use the term "minimum benefit" or similar. Likewise, the Swedish term "försäkringsperioder" in Art 58.1 only refers to "periods" (as opposed to insurance periods) in other language versions. Article 58.1 ends in Swedish with the term "minimibeloppet", but in English, the expression "the amount of the minimum benefit" is used, which should properly be translated as "minimiförmånsbeloppet" which in this case would correspond to the guarantee pension paid in full. Of course, the linguistic differences mentioned here do not make it any easier to fully understand the judgment.

39. The number comes from Prop. 2017/18:275, p. 10.

inappropriate to apply Article 46(2) or Article 47(1)(d) of the regulation. Such a benefit must be calculated in accordance with Article 50 of the regulation, in conjunction with the provisions of national law, without, however, applying national provisions, such as those in the main proceedings, providing for a pro rata calculation.”

It is undeniable that a literal interpretation of the judgment leads to the conclusion that when calculating a minimum benefit, the application of the Regulation’s (general) calculation rules are excluded.

A second possible interpretation is based on the same para 52, but considers that Article 58 depends on context and that the CJEU in the quotation above only ruled on the *calculation* in a situation “such as those in the main proceedings”. Article 58 in a case such as BZD would thus imply that the previous Swedish calculation based on Articles 46 and 47 (now Articles 52 and 56) shall no longer be used. Note here that in the BZD case, the question of exportability did not arise at all and that the CJEU therefore did not rule on the question whether Article 58 is a special rule of Article 7 in all different types of situations.

The significance of the judgment would then only be that Article 58 represents a special rule for as long as the beneficiary resides in Sweden and is dependent on the minimum benefit (guarantee pension) as a supplement up to a certain pension amount. Such an interpretation of Article 58 and the CJEU’s judgment imply that Sweden has the obligation of paying an amount that corresponds to the difference between the individual’s total pension income from different States (including Sweden) and the “minimum benefit amount”, i.e. the full guarantee pension. If the pensioner moves to another Member State, the guarantee pension is paid out, but based on the normal calculation rules, i.e. in accordance with Articles 52 and 56. The minimum benefit based on Article 58 would then no longer be paid by the former State of residence (in this case Sweden), but the pro rata calculated guarantee pension would be exported.

The purpose of Article 58 of Regulation 883/04 is to ensure that pensioners have access to at least a minimum pension in their country of residence if they meet the applicable conditions. If the total sum of a pensioner’s pro rata pensions does not amount to the level of minimum pension in his/her State of residence, the State of residence shall pay a supplement up to that minimum level. The supplement is only paid for the period during which the pensioner resides in the country providing the minimum

pension income.<sup>40</sup> One condition for the minimum pension according to Article 58 is that the country of residence actually provides for one.<sup>41</sup>

### ***4.3 Dilemma and legislator's response***

It is no exaggeration to say that the Swedish government, Parliament and pension authority were surprised by the ruling and in particular by the fact that the guarantee pension was considered a benefit that falls under Article 58. On the same day as the Swedish Supreme Administrative Court delivered its judgment based on the preliminary ruling, the government presented a bill to Parliament with legislative changes allowing for continued payment of the guarantee pension when the insured person moves to another State within the EU/EEA.<sup>42</sup> A government committee was appointed to review the impact of the CJEU's judgment.<sup>43</sup>

The bill contained a proposal for changes to the SFB to ensure continued export of the residence-based guarantee pension. SFB Chapter 5, Section 14 only postulates that a guarantee pension, being a residence-based benefit, will continue to be provided for stays outside Sweden for a period of maximum one year. In cases in which the Swedish residence requirements are "eliminated" in accordance with SFB Chapter 5, Sections 2-8 and SFB Chapter 5, Section 9 by a move within the EU/EEA, the direct effects of Article 7 of Regulation 883/04 will apply. In other words, the legislator never had to actually introduce a special export rule in SFB Chapter 5 because it was unnecessary. As an integral part of national law, the provision of the EU Regulation took precedence over the residence requirement in the SFB.

In interpreting the CJEU's judgment, the government concluded that the consequence of a classification of the guarantee pension under Article 58, as *lex specialis* in relation to Article 7, was that a legal basis for continuing to grant and pay the guarantee pension to residents residing in another Member State no longer existed. This is based on an *interpretation* of the judgment and the Regulation, since the question of export was not at issue in the CJEU's judgment.

---

40. Fuchs/Cornelissen, (2015), p. 367.

41. Case 64/77 Torri.

42. HFD 2018 ref. 38. Prop. 2017/18:275.

43. Dir. 2018:106.

While waiting for the committee to deliver its report, an urgent “temporary” legislation was introduced. The intention was to ensure that the application of law does not change in comparison to before, i.e. to before the CJEU’s judgment, and that the calculation of guarantee pension shall be based entirely on national legislation.<sup>44</sup> Thus, the legislator had to introduce an explicit legal basis for the export of the guarantee pension, meaning that the benefit could be provided to an EU/EEA resident if the other conditions in SFB 67 and 81 continued to apply (SFB Chapter 5, Section 17a).

The temporary law entered into force on 1 January 2019. During a period of (political) waiting, the temporary exception in place stipulated continued payment of the guarantee pension to residents in other EU/EEA countries. Yet pension benefits are long-term benefits, and to solidify the “status quo”, transitional provisions were introduced to the temporary legislation as well, giving the temporary legislation retroactive effect. According to the transitional provisions, the exceptional wording of SFB was therefore applied as early as 1 January 2011, i.e. when the SFB entered into force.

The legislation adopted in connection with the CJEU’s judgment in the BZD case was very clear to the extent that it safeguards the insured person’s previously established preferential position. The method used by the legislator was swiftly introduced as an exceptional legislation with far-reaching retroactive effects. Pensioners entitled to the guarantee pension who had left Sweden to reside in another EU country could thus count on continued payment of the benefit. This is commendable in several ways, but was this method chosen self-evidently and what was the legal framework for providing such protection based on an established preferential position? The situation turned in October 2022, however, when the temporary legislation was lifted and 43,000 pensioners residing in other EU/EEA States lost their right to the benefit. The following section presents some brief reflections on the potential dilemmas the Swedish legislator faced.

#### *4.3.1 The guarantee pension was never intended for export outside Sweden*

The exceptional and temporary legislation implemented with retroactive effect was not grounded in legal necessity. There is clearly no prohibi-

---

44. Prop. 2017/18:275, p. 10.

tion in the Constitution against introducing retroactive legislation.<sup>45</sup> Moreover, this particular retroactive legislation was created to deal with the very far-reaching and retroactive effects of (the interpretation of) the CJEU's judgment. Without exceptional legislation, insured persons residing in other EU/EEA States would have lost their guarantee pension just like insured persons with a guarantee pension lose entitlement when they move to a third country outside the EU/EEA. In that case, retroactive legislation becomes a means to address the unforeseen effects of a given judgment. Without retroactive legislation, insured persons would have lost their right to a guarantee pension when moving within the EU/EEA, the same way persons moving to third countries do, an appropriate and natural consequence given the regulation of residence-based benefits in SFB Chapter 5.<sup>46</sup>

Laws usually apply from their entry into force with limitations to criminal and tax law as far back in time as the legislator chooses. For legal rules that have been elaborated or created through case law, the situation is not entirely clear, but sudden and sharp reversals of practice can be problematic, the same way legislation that abruptly changes the legal situation usually is. The CJEU itself has limited the legal effect of judgments when this has been called for.<sup>47</sup>

The question was not so straightforward for the legislator, however. The main reason for introducing retroactive legislation is to ensure compliance with the principle that the legal consequences of one's actions must be assessable in advance. The object of protection in our case is the insured person whose legal position has changed in line with the interpretation of a CJEU ruling. The legislator subsequently introduced retroactive legislation to counteract the retroactive and negative effects of the judgment's interpretation. This is fully in line with the 'good' intended to be protected by a ban on retroactive legislation, namely predictability.<sup>48</sup>

---

45. Erhag T and Lind A-S (2013).

46. In Prop. 2017/18:275, it seems that all parties in the pension group, i.e. those behind the pension agreement, supported the proposal for exemptions, p. 7.

47. On the other hand, the CJEU was likely not aware that its ruling would result in 43,000 people losing their right to a guarantee pension. When the CJEU has ruled on matters of major significance, it has sometimes limited the retroactive effects of its judgments, see, e.g. case 43/75 *Defrenne*.

48. Prop. 2017/18:275, p. 13.

The question ultimately is what the injustice in this case consists of and whether the predictability is worthy of protection. The guarantee pension was never intended for export outside Sweden's borders. In the event of a move to a country outside the EU (or EEA or Switzerland), the guarantee pension could not be paid according to the main rule in the SFB, as the guarantee pension is residence-based benefit according to Chapter 5 SFB. In relation to the EU, this rule has been repealed by means of Article 7 of Regulation 883/04. EU law has created an exception to the Swedish main rule in place. Now that the CJEU has reclassified the guarantee pension, the legislator perceives the legal situation as meaning that the guarantee pension need no longer be exported and shall ensure that the exemption is maintained by means of temporary and exceptional legislation. However, after 1 January 2023, the payment of the guarantee pension ends because the exception no longer applies. But we still have no clarity whether this is the result of a correct understanding and interpretation of Regulation 883/04.

The current situation makes it difficult, in my opinion, to keep track of concepts such as justice, equal treatment and predictability. It is not difficult, however, to find good arguments to safeguard the situation in the short term for the nearly 43,000 pensioners at *risk* of losing their guarantee pension; but in the long term, it will become more difficult to understand *why* in legal terms they should continue receiving it. In other words, why is an EU pensioner's position more worthy of protection than that of a pensioner who moves to a third country when EU law does not even seem to protect the EU pensioner?

The fact that 43,000 people will now lose their right to a guarantee pension could, of course, undermine confidence in the pension system, which justifies the legislator's temporary initiative. But in the longer term, the interpretation (of the interpretation) may also undermine the principle of free movement. It remains to be seen how the CJEU would deal with the question on whether it really intended to end the export of cash benefits such as the guarantee pension. It is highly likely that a Swedish court will ask for a preliminary ruling on this matter sometime in 2023.

#### *4.3.2 The CJEU did not consider the right to export the guarantee pension*

Has the legislator interpreted the judgment correctly? This question cannot, in fact, be answered, but the legislator has intervened in a situation in which the imagined consequences of a judgment seem unreason-

able. The exemption legislation in Prop. 2017/18: 275 is based on an interpretation of the CJEU ruling and an assessment of its consequences. The interpretation appears, in my opinion, perhaps the most reasonable outcome. The measure of retroactive exceptional legislation while awaiting the conclusion of the government report on a long-term solution as well as "freezing" the legal situation was a way of taking urgent political responsibility for a legal situation that is undesirable or, as the legislator puts it, "unreasonable".<sup>49</sup> This is not to say, however, that there are no other reasonable interpretations of the judgment or of the pension rules in Regulation 883/04.

Another scenario, viewed in retrospect, would have been to start applying the second interpretation of Article 58, which I have referred to above. In a case such as BZD, the guarantee pension is calculated in accordance with Article 58 and always amounts to at least the guaranteed minimum amount stipulated in the SFB, but includes the individual's foreign pensions when calculating the supplement amount from the guarantee pension. If this individual moves to another EU/EEA State, the supplement to the guarantee pension up to the guaranteed minimum amount is *not* exported, a practice that is also in line with Article 58. The component of the guarantee pension that can be exported is only that which is derived from Swedish residence, i.e. the pro-rata calculated pension. This reasoning is grounded on the fact that Article 7 is used as the legal basis for exporting the pro-rata calculated part of the guarantee pension and that Article 58 as a special rule is only applied when the guarantee pension serves as a supplement. It is unclear whether this scenario is in line with EU law. The question of conformity can only be answered by the CJEU.

---

49 .Prop. 2017/18:275, p. 13 "Att individer som har planerat inför pensionen utifrån hittillsvarande tillämpning, och att personer som redan har garantipension, ska hamna i en situation där de ekonomiska förutsättningarna ändras utan någon möjlighet till framförhållning bedöms som orimligt". ("That individuals who have planned their pension on the basis of a previous application, and that persons who already have a guarantee pension should end up in a situation in which the financial conditions change without any possibility of foresight is considered unreasonable") The next sentence states that a non-change will result in an increased administrative burden for the pension authority. Predictability connected to the principle of legal certainty does not usually intend to protect the state administration.

### 4.3.3 *The government report*

The government report proposing a long-term solution was presented in December 2019 and has not yet resulted in any (major) legislative changes.<sup>50</sup> The main solution proposes replacing the guarantee pension with a new “grundpension” (basic pension). Pension rights would be acquired through years of residence or work, with pension rights registered in Sweden. The emphasis on periods of residence or work makes this pension an alternative way of acquiring pension rights alongside the income-related pension. The amount of the basic pension will then be offset against the income-related pension based on a new calculation of the aggregated pension.

The calculation basis will consist of the income-based old-age pension which the insured person is entitled to during that same year. In this calculation basis, the income-based old-age pension refers to both the pension under the Social Insurance Code, which is calculated using its own specific method, and the general compulsory old-age pension under foreign law which is not to be equated with a basic pension. When calculating the basic pension, the insurance period will affect the amount of the insured pension’s basic pension (basic amount) and the amount above which the calculation basis decreases the basic pension amount at a slower rate (phasing level). The minimum or guaranteed amount will be the same as for the guarantee pension. An obvious intention of the proposal was to create a technical solution that prevents the basic pension from being classified under Article 58 in Regulation 883/04. This would reset the legal situation to the one applied before the CJEU’s judgment in BZD.

## **5. Reforming minimum income protection in old age with an eye on coordinating social security - some concluding remarks**

The CJEU’s judgment in the BZD case (C-189/16) showed that certain regulatory and technical aspects of the guarantee pension had to be adjusted and could be described as having a real jack-in-the-box effect. Just like other parts of the pension system are under review, the legislator has had reason to review and, as shown, reinforce the basic protection of the Swedish pension system. The international aspects of the guarantee pension are an important part of these efforts.<sup>51</sup>

---

50. SOU 2019:53.

51. Ds 2018:8.



Without having implemented the proposed changes of the guarantee pension, the legislator has not hesitated to present further initiatives to secure minimum income in old age by introducing new benefits and raising the amount of the benefit. These new initiatives have been criticised for disrupting the balance in the overall pension system and at the same time, the system is not yet "EU-proof".<sup>52</sup>

One of the leading questions of this chapter concerned the export of guarantee pensions; the export of Swedish residence-based tax-financed benefits has evidently been controversial to the extent that export was in no way envisioned when Sweden joined the EU in 1995.<sup>53</sup> This has presented a dilemma. With the CJEU's judgment (C-189/16), Sweden was surprisingly offered an opportunity to end exporting the guarantee pension to residents in other EU/EEA States.

This issue has now been resolved from the Swedish perspective. The guarantee pension will no longer be exported to pensioners who reside in another Member State giving full effect to (an interpretation of) the CJEU ruling. This may be the result of a reasonable interpretation of the judgment, but is unfortunate in the face of legitimate expectations of pensioners who have or intended to make use of their right to free movement.

## Bibliography

### *Books, book chapters and journal articles*

- Erhag T (2013) Changing normative patterns in statutory old-age pensions: reflections on developments due to pension reform and EU Citizenship. In: Numhauser-Henning and Rönmar (eds). Normative Patterns and legal developments in the social dimension of the EU. Hart publishing, pp. 237-252.
- Erhag T and Lind A-S (2013) Retroaktivitet i social trygghetsreglering. In: Velferd och Rettferd, festskrift till Asbjörn Kjönstad. Gyldendal, pp. 139-154.
- Erhag T (2020/1) Lagstiftarens dilemma vid tolkning av ett rättsfall – retroaktiv undantagslagstiftning med anledning av en dom om garantipension. In: Eklund/Lerwall/Lind (eds.). Vänbok till Sverker Scheutz. Iustus förlag, pp. 173-190.

---

52. Socialdepartementet, S2019/00462/SF, p. 11.

53. Compare the discussion on the "risk of export", *ibid* p. 41.

- Erhag T (2020/2) Renovating the reformed Swedish old-age pension, *JSSL* 27(3) 159-176.
- Fuchs M & Cornelissen R (2015) *EU Social Security Law*, Beck/Hart/Nomos.
- Pennings F (2015) *European Social Security Law*, 6<sup>th</sup> ed, Intersentia.
- Paju J (2019) On the lack of legal reasoning in Case C-308/14, *European Commission v United Kingdom*. *Industrial Law Journal*, 48(1) 117-136.
- Westerhäll L (1995) Kommentar till förordningen 1408/71 om tillämpningen av systemen för social trygghet när anställda, egenföretagare eller deras familjemedlemmar flyttar inom Gemenskapen, Santérus.
- Swedish Pensions Agency (Pensionsmyndigheten) (2022) Alternativ för ett enklare grundskydd, Rapport nr 1 i vägvalserie om pensionerna. Available at: <https://www.pensionsmyndigheten.se/statistik-och-rapporter/rapporter/alternativ-for-ett-enklare-grundskydd>

### ***Other documents***

- European Commission (2012) *Pension Adequacy in the European Union 2010-2050*, Luxembourg: Publications Office of the European Union.
- European Commission, White Paper - An Agenda for Adequate, Safe and Sustainable Pensions COM/2012/055 final.
- European Commission (2018) *Pension Adequacy Report 2018 – Current and future income adequacy in old age on the EU*. Publications Office of the European Union.
- European Commission (2021) Directorate-General for Employment, Social Affairs and Inclusion, 2021 pension adequacy report : current and future income adequacy in old age in the EU. Volume 1, Publications Office of the European Union.
- European Commission (2021) Directorate-General for Employment, Social Affairs and Inclusion, 2021 pension adequacy report: current and future income adequacy in old age in the EU. Volume 2, Publications Office of the European Union.

### **Swedish official publications**

#### ***Government bills***

- Proposition 1992/93:7, Om rätten till folkpension.
- Proposition 1997/98:152, Garantipension, m.m.
- Proposition 2017/18:275, Fortsatt utbetalning av garantipension inom EES.

Proposition 2018/19:131, Ytterligare fortsatt utbetalning av garantipension inom EU/EES och Schweiz samt inom Förenade Kungariket.

Proposition 2018/19:133, En riktålder för höjda pensioner och följsamhet till ett längre liv.

Proposition 2018/19:134, Förbättrat grundskydd för pensionärer.

Proposition 2020/21:1, Budgetproposition.

### ***Governmental reports etc.***

SOU 2019:53 Grundpension. Delbetänkande av Garantipensionsutredningen.

Ministry of Social Affairs, Ds 2009:53 Detta är pensionsöverenskommelsen.

Ministry of Social Affairs Ds 2018:8, Översyn av grundskyddet för pensionärer - Inriktning för ett nytt grundskydd.

Ministry of Social Affairs, Pensionsgruppens överenskommelse om långsiktigt trygga och höjda pensioner. PM 2017-12-14.

Ministry of Social Affairs, Promemoria, Förbättrat grundskydd för pensionärer, S2019/00462/SF.

Ministry of Social Affairs DS 2020:7, Inkomstpensionstillägg.

Swedish Social Insurance Agency (Försäkringskassan), Rättsligt ställningstagande, 2007:2.

Swedish Pensions Agency (Pensionsmyndigheten) Rättsligt ställningstagande, PRS 2018:6.

### ***Court of justice of the European Union***

Case 43/75 *Defrenne* ECLI:EU:1975:43

Case 64/77 *Torri* ECLI:EU:C:1977:197

Case 22/81 *Browning* ECLI:EU:C:1981:316,

Case C -65/92 *Levatino* ECLI:EU:C:1993:149,

Case C-132/96 *Stinco och Panfilo* ECLI:EU:C:1998:427

Case C-30/04 *Koschitzki* ECLI:EU:C:2005:492.

Case C-189/16 *Zaniewicz-Dybeck* ECLI:EU:C:2017:946

### ***Swedish Supreme Administrative Court (Högsta förvaltningsdomstolen, HFD)***

HFD 2018 ref. 38

HFD 2022 ref 9.



# Minimum Income in Old Age in the Netherlands

---

Frans PENNING

## 1. The Pension System in the Netherlands

The Dutch statutory act that regulates old-age pensions in the Netherlands is the *Algemene Ouderdomswet* (AOW - General Old-Age Pensions Law). It was adopted in 1956 and entered into force on 1 January 1957 as part of the project to introduce schemes for the protection of all residents. This project was inspired by the British *Beveridge Report* (1942), which proposed the introduction of schemes for all residents to protect them from falling into poverty. The Dutch government, which at the time was in exile in London, created the *Van Rhijn* Committee to elaborate recommendations for the Netherlands inspired by the *Beveridge Report*. The Committee's report ultimately resulted in the adoption of national insurance schemes, including the AOW (1957), which continues to be in force today.<sup>1</sup>

Some of the AOW's characteristics have been maintained over time. One of these is that AOW is a pay-as-you-go system and is paid from contributions (and a State subsidy) by those having an income. However, residing in the Netherlands is sufficient to acquire benefit rights for every year of residence. The AOW pension amount is flat rate and is contingent on type of household (see section 2 below). It is not means-tested, i.e., neither the beneficiary's income (from gainful activity or from other sources such as pensions) nor his/her capital play a role.

The AOW is one of the pillars of old-age pension provisions. It is the first pillar and provides for a basic income. The second pillar consists of occupational pension schemes for employees, which are non-statutory. There is no general obligation for employers to offer employees participation in an occupational pension scheme, but the majority of employees

---

1. Other schemes that were introduced were a survivors' benefit scheme, a family benefits act and a general insurance for special medical expenses (currently the *Wet langdurige zorg*, see Section 4).

(90 per cent) are covered by such a scheme. One of the reasons for such broad coverage is that collective labour agreements frequently require employers bound by such an agreement to join an occupational pension scheme. Employees' and employers' organisations that made the collective labour agreement can request the Minister of Social Affairs and Employment to make membership in the occupational pension scheme for the given sector generally binding.

The third pillar of pensions consists of private schemes.

Currently, approximately 20 per cent of the elderly receive an AOW pension only. Among them are persons with income other than from a pension scheme, e.g. from capital or selling their business, but some do not have additional income. The share of single women who do not have a supplementary income in addition to their AOW pension is higher than the average.

The statutory old-age pension makes up a considerable amount of pensioners' income, even among those entitled to an occupational pension. The average gross income of a pensioner's household in 2017 was EUR 3,830 per month. The AOW pension makes up 35 per cent of this gross income, while a supplementary pension contributes 36 per cent and assets or income from work constitute 29 per cent.<sup>2</sup>

The AOW pension of single female pensioners makes up 50 per cent of their gross income, while a supplementary pension contributes 33 per cent. The AOW pension of single male pensioners and of couples makes up 40 per cent of their gross income, a supplementary pension contributes 40 per cent, with the remainder consisting of other forms of income, a third pillar pension or other assets.<sup>3</sup>

## 2. The AOW System

### *2.1. The personal scope and the acquisition of pension rights*

The AOW insures all residents of the Netherlands as well as non-residents employed in the Netherlands who are subject to Dutch income tax. In addition, the AOW Act provides that persons are insured under the AOW when this follows from the application of a treaty or decision of an international public organisation and that they are excluded from insur-

---

2. CBS (2019).

3. CBS (2019, p. 32).

ance when this follows from a treaty or decision of an international organisation. Such an inclusion or exclusion from AOW insurance follows from, inter alia, Regulation 883/2004.<sup>4</sup> The main impact of this Regulation on the coverage by the AOW is that self-employed persons who do not reside in the Netherlands but who work there are also covered by this Act.

Persons covered by the AOW are referred to as 'insured persons'. Persons over the age of 65 years are not insured persons, i.e. they cannot acquire further rights to an old-age pension. Persons who illegally reside in the Netherlands are fully excluded from insurance for the AOW.

According to the case law of the Netherlands' highest court on social security matters (*Centrale Raad van Beroep*), the term 'resident' has been aligned with the interpretation of the term 'residence' laid down in the rules determining the applicable of Regulation 883/2004: that is, as soon as persons are subject to Dutch legislation as a result of the application of the Regulation, they are insured under the AOW, and there is no waiting period. The approach in cases where the Coordination Regulation does not apply is different: then a permanent personal link must have been established between the individual and the Netherlands before the person is considered as resident for the purposes of the Act. Whether there is a link has to be established in the individual case, in which objective and subjective factors, such as the person's living and work situation, family, finances, registration in the civil registry and his/her intentions as regards residing in the country are taken into consideration to determine whether such a link has in fact been established.<sup>5</sup> Compared to this criterion, persons covered by Regulation 883/2004 have easier and quicker access to insurance for the AOW.

AOW pensions are paid from contributions that have been made by insured persons (if they have an income), and is a pay-as-you-go system; the contributions comprise 17.9 per cent of the insured person's income up to maximum EUR 35,472 annually. Residents (and those equated as such) who only have a low or no income do not make contributions, still they acquire benefit rights for each year of residence in the same way as

---

4. Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems. In addition, other instruments have the effect of extending or restricting the personal scope of the Act, e.g. for employees of foreign embassies or international organisations based in the Netherlands.

5. SVB, *Beleidsregels* (Policy Rules) SB1022.

contributors. The sum of contributions that is paid to the AOW fund has been supplemented by a State subsidy since 2003 to ensure availability of the necessary means, on the one hand, and to alleviate the costs for the contributors (and thus restrict the costs of labour), on the other. Pensions are paid by the Sociale Verzekeringsbank (SVB) while the contributions are collected by the Tax Office.

The insured person acquires 2 per cent of his/her full pension for every year of insurance. A total of 50 years of insurance is required to be entitled to a full pension.

The years considered for this purpose are the 50 years before the statutory retirement age is reached. This reference period used to range from 15 years to 65 years of age, but as the statutory retirement age has gradually increased, it has changed. In 2022, for instance, the statutory retirement age is 66 years and 7 months, hence the years between the day the individual turned 16 years and 7 months and the day he/she reaches the statutory retirement age of 66 years and 7 months are considered. In 2024, the statutory retirement age will be increased again to 67 and the starting age for acquiring benefit rights will be 17.

Consequently, a person who has been insured in the Netherlands for a total of 50 years, on the basis of residence or on other grounds, e.g., employment in the Netherlands, is entitled to a full pension. In other words, proof of employment or of qualifying contributions is not necessary, and also persons who are, in a particular year, pupils, students, housewives or otherwise economically inactive acquire pension rights over that year.

As the statutory retirement age has increased since 2013, some individuals were confronted by the problem that they earlier planned to retire at the age of 65. For instance, they may have concluded an employment contract that ends at the initial statutory retirement age of 65. Or they may have stopped working at 60 under the expectation that they will receive pension at the age of 65. Consequently, there may be a gap in their income until the actual retirement age. An *Overbruggingsregeling* (Bridging Scheme) was introduced for such situations, which supplements the income of those aged 65 years and over until they reach the statutory retirement age.

## ***2.2. The system of acquiring AOW pension rights and periods abroad***

If a person's AOW insurance periods are interrupted, e.g., because he/she takes up a job in another country, a reduction of 2 per cent will



apply to his/her AOW pension amount for each year he/she works abroad. No additional pension rights are acquired by continuing to work after the statutory retirement age has been reached.

Claimants do not have to have been insured immediately before reaching the statutory retirement age to be entitled to an old-age pension. The minimum insurance period for entitlement to an AOW pension is one calendar year; however, such a short period of insurance will result in a very small pension. Other social security benefits (e.g. disability benefits) end on the first day of the month in which the individual reaches the statutory retirement age.

The AOW is a system that fits well with the EU coordination system of old-age pensions; it is included in the Annex to Regulation 883/2004 as one of the schemes for which it is not necessary to calculate the pro rata amount in accordance with the coordination rules, since the AOW system itself is a pro rata system.<sup>6</sup>

### *2.3. Transitional advantages*

The rules on transitional advantages are a special component of the AOW, which played a crucial role in fighting poverty among persons close to or above the retirement age at the time of the Act's introduction in 1957. One of the AOW's main objectives at the time was to protect the elderly from poverty, but, as we have seen, under the system of the Act a full pension was only paid after 50 years of insurance. As a consequence, for large groups of persons the Act would not ensure the intended protection against poverty.

Therefore, provisions on so-called transitional advantages were included in the Act. They stipulated that any non-insured years prior to 1 January 1957 would be considered periods of insurance for all persons aged between 15 years and 65 years on 1 January 1957 (other rules applied for persons who had already reached retirement age at that moment, that ensured a full pension). As such these transitional advantages are a compelling example of intergenerational solidarity.

An example to better illustrate this system: a person, born in 1935, was 22 years old in 1957. By the time she reached the retirement age (65 years) in 2000, she had been insured for a total of 43 years, which amounts to a benefit of 86 per cent of the applicable rate. In addition, the

---

6. For an introduction to the coordination system, see Pennings (2022).

years from 1950 - when she turned 15 - to 1957 are included in the calculation as transitional advantages. This gave the pensioner a transitional advantage of 14 per cent (i.e., 7 years, ensuring 2 per cent a year). The sum leads to a pension of 100 per cent of the applicable amount.

The transitional advantages do not apply to persons who have reached the statutory retirement age after 1 January 2007, since they are able to acquire 50 qualifying years after 1957 and therefore do not need the transitional advantages. In short, no new pensioners will benefit from transitional advantages.

To be entitled to the transitional advantages, the beneficiary had to have resided in the Netherlands, the Netherlands Antilles or Aruba for at least six years after the age of 59, either continuously or with interruptions and at the time of application, the claimant must be a Dutch national who resided in the Netherlands. If he/she loses Dutch nationality or does no longer reside in the Netherlands, he/she is no longer entitled to the transitional advantages.

In a regulation based on the Act certain categories of foreigners were equated with Dutch nationals. In addition to these rules, Annex VI of Regulation 1408/71 had some assimilation rules: it provided that if a person was older than 15 years prior to 1957 and had resided or had been employed in the Netherlands at the time, any periods before 1957 were considered periods of insurance for the purpose of calculating the transitional advantages. Consequently, the nationality condition was waived, but residence remained a prerequisite for applicability of the transitional advantages.

The question that arose was whether this residence requirement of the Annex was compatible with Article 10 of Regulation 1408/71. This dispute was started by Mrs Winter-Lutzins, who was not entitled to transitional advantages because she lived in Germany during the respective period. In the *Winter-Lutzins* ruling,<sup>7</sup> the Court of Justice (CJEU) ruled that the residence requirement in the AOW's transitional provisions was not precluded by Article 10 of Regulation 1408/71. It argued that a rule that overrules residence requirements cannot be fully applied to a scheme in which the requirement of residence is the only condition for entitlement to benefit. The effect of Article 10 can therefore be restricted, as is done by Annex VI. Mrs Winter-Lutzins did not have any ties with the Netherlands

---

7. Case 293/88, [1990] ECR 1623, ECLI:EU:C:1990:170.

before 1957 and could therefore not benefit from the rules contained in Annex VI, which equated periods of residence abroad with periods of residence in the Netherlands.

As was already mentioned, the transitional advantages do not apply to new pensioners and will therefore no longer be a matter of dispute. It is nonetheless an interesting example of the interplay between residence requirements and solidarity.

#### *2.4. The level of AOW pensions*

The net level of an AOW pension for a single pensioner is the same as 70 per cent of the statutory net minimum wage.<sup>8</sup> The net level for a pensioner who is married<sup>9</sup> is 50 per cent of the net statutory minimum wage (i.e. the two spouses together, the couple, receive the same net amount as the net minimum wage).<sup>10</sup>

---

8. In 2022, the gross monthly rate is EUR 1,316 for a single person, which is net EUR 1,244; in 2023 the gross rate is EUR 1,430, and the net rate is EUR 1,353 for a single person. For a married person, it amounts to EUR 889.70 (gross), which is net EUR 838.55 in 2022; and EURO 973 (gross) and EUR 920 (net) in 2023.

9. 'Married' has a broad meaning and includes cohabitants as well.

10. The system has been criticised as not being fully compatible with ILO Convention 121. This Convention requires benefits to amount to at least 60 per cent of the beneficiary's total previous earnings or –if a lower amount is chosen– the wage of an ordinary adult male labourer on the basis of the rates for normal working hours established by a collective agreement, by laws, or by custom (Art. 20). Article 19(10) provides that no periodical old-age benefit shall be lower than the minimum amount specified in the Convention, which is 60 per cent of the reference earnings discussed above.

The amount of the periodical payment, such as the AOW benefit, which is supplemented by family allowances, must therefore be at least 60 per cent of the reference wage. The AOW benefit is 50 per cent of the statutory minimum wage which is lower than stipulated in the provisions of the Convention. Another problem is that persons who have not been insured for a total of 50 years receive an AOW benefit that is lower than the rate established in the Convention. Persons who have suffered an occupational accident or disease are also not treated differently, which also contravenes the Convention's provisions. The ILO Committee of Experts enquired how the government would resolve these gaps. The government referred to the Public Assistance Law, which would cover the gap in protection. The Committee, however, asserted that the benefits provided under the Public Assistance Law are means-tested, which breaches the Convention's provisions. Consequently, this problem has not yet been satisfactorily resolved.

Thus the AOW pension amounts are linked to the net statutory wage; this system confirms that for a couple the statutory net minimum wage is considered the minimum subsistence level. In the Dutch system this link is made with all subsistence (minimum) benefits, including the Public Assistance Act. Some minor differences exist in the precise calculation of the minimum amount. For instance, pensioners do not have to pay all contributions that are required from persons in work, and tax reductions apply to employed persons to encourage them to remain in the labour market. Therefore, the amounts of the statutory minimum wage and the benefits are linked at a net, and not at the gross level. This principle is a strong one; e.g., in 2022, when labour market shortages and high inflation rates forced the government to substantially increase the minimum wage as from 2023, they did not want to increase the AOW pensions, as this would lead to substantially higher expenses for the State budget. However, Parliament heavily opposed this approach, and the AOW benefits were increased as well by the same amount as the minimum wages.

If a pensioner who is single moves or stays for more than three months outside the territory of the Netherlands, his/her AOW pension is reduced to 50 per cent of the statutory net wage (i.e. the rate for a married person), unless an international treaty provides otherwise. Since Regulation 883/2004 provides that 'cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated' (Art. 7), this rule does not apply to persons who move to another EU or EEA Member State or Switzerland. However, if the pensioner moves to a third country, the pension is decreased. This rule was introduced to make it easier to monitor the applicable requirements of the Act: as a result of the reduction, it is not necessary to check whether the pensioner concerned does in fact continue to remain single or whether he/she is cohabitating with someone else.

### **3. The Supplement for the Younger Partner**

It follows from the AOW system that AOW rights are individual rights. This individualised system was introduced in 1985. One problem that may arise occurs if the beneficiary reaches the statutory retirement age before his/her partner does and the younger spouse has no income or only a low

income. According to the AOW regulations, the beneficiary's pension is, as we saw in Section 2.4, 50 per cent of the full benefit only. If neither of the spouses has other sources of income, the household income could, as a result, fall below the minimum income that is deemed necessary for a couple.

To address this problem, a supplement was introduced in 1985 for the recipient of an AOW pension to ensure that the household receives the guaranteed minimum income.

This supplement is being phased out, however; persons who have reached the statutory retirement age after 2015 are no longer entitled to this supplement for their partner. Persons who reached retirement age prior to 2015 and qualified for the supplement, continue to receive the supplement.<sup>11</sup>

The reason for the phasing out of this supplement is to encourage persons to be economically independent from their partner, and, in particular, to motivate women to enter and stay in paid work when they are young in order not to become dependent on public assistance in old age.

The supplement has been subject of a ruling of the CJEU, as it was considered to constitute indirect discrimination against women and therefore as infringing Article 4 of Directive 79/7. This case concerned a Dutch disability scheme, resulting in the *Teuling-Worms* judgment.<sup>12</sup> According to the Dutch Law on Insurance against Incapacity for Work (WAO), the benefit amount could be increased by means of supplements for dependent family members. Consequently, the case did not concern AOW supplements, but it concerned the same problem as these supplements. Mrs Teuling-Worms was not entitled to this AOW supplement because the household income (from or in connection with her husband's work) exceeded the applicable threshold. She claimed that this system of supplements constituted indirect discrimination against women. The Court pointed out that the supplement subject to the proceedings was not directly linked to the sex of the beneficiary but took account of the beneficiary's marital status or family situation. It found that a considerably smaller share of women than men was in fact entitled to such supplements and

---

11. This means that changes in income, changes in the household (i.e. when a person starts cohabitating with a partner after having reached retirement age) and moving to the Netherlands or another EU Member State do not create new entitlements.

12. Case 30/85, [1987] ECR 2497, ECLI:EU:C:1987:271.

therefore it contravenes Article 4(1) of the Directive, unless such benefit system can be justified by reasons that exclude discrimination on the grounds of sex.

The national courts were tasked with answering this question, and arrived at diverging answers, in particular in view of the question whether the system of supplements was really necessary for achieving the measure's objective, i.e., ensuring a guaranteed minimum income for households.

In later judgments, the CJEU decided that supplements and calculation rules for these supplements were not discriminatory. The first judgment in this regard was a ruling in an infringement procedure, *Commission v. Belgium*.<sup>13</sup> The Court argued that to be objectively justified, the regulation in question had to correspond to a necessary objective of a State's social policy, which had to be appropriate and necessary for attaining the given objective. The Belgian government responded that the national scheme's objective was to grant claimants, within the bounds of available financing, a minimum replacement income, taking the claimant's family situation into consideration. The Court ruled that these principles of the national system were part of the State's social policy, and that Member States were warranted a reasonable margin of discretion in relation to their social policy. That is, as regards minimum social assistance schemes, Community law does not prevent Member States from taking the relatively higher needs of beneficiaries with dependants into consideration.

In this judgment, the CJEU left Member States considerable room for discretion in respect of their minimum social assistance schemes and deviated from the *Teuling-Worms* approach, in any case as it had been interpreted. In the later judgment *Molenbroek*,<sup>14</sup> the Court followed the same approach as in *Commission v. Belgium*, which concerned supplements to Dutch old-age pensions, the topic of this section. This judgment concerned AOW supplements, the topic of this section.

Although the CJEU's ruling upheld the supplements to AOW pensions, they might become the topic of future disputes when social and economic circumstances change, so it was risky for the Government to maintain them. Moreover, the government desired an increase in labour participation of women and this was a forceful argument for discontinuing this par-

---

13. Case C-229/89, [1991] ECR I-2205, ECLI:EU:C:1991:187.

14. Case C-226/91, [1992] ECR I-5943, ECLI:EU:C:1992:451.

ticular AOW supplement. The idea was that already at a young age women should be encouraged to enter work in order not to become dependent on their partner's income later.

The AOW supplement is currently provided to individuals who reached the statutory retirement age prior to 2015 for a partner who is below the statutory retirement age and whose income is less than the amount of the supplement. The income of the AOW pension recipient him or herself is irrelevant to entitlement to the supplement as well as for the supplement's amount. In other words, only the partner's income is considered.

The maximum supplement is 50 per cent of the statutory minimum wage; this is paid when the AOW pension recipient's partner earns no income. The supplement amount is reduced or is not paid at all if the partner has an income. To ensure that the partner is not discouraged from entering or remaining in the labour market certain disregard rules for income apply. These include that income from or related to employment is only considered insofar as a certain threshold is exceeded. Income related to employment includes, for instance, social security benefits and pre-retirement payments. Capital is disregarded for the purpose of calculating the supplement's amount. This, in addition to other disregard rules, makes the supplement more attractive than public assistance, for which capital is relevant.

The claimant is not entitled to the supplement if he/she resides in another country or stays in another country for more than three months, unless an international treaty provides otherwise (Art. 8a AOW). Pensioners who move to another EU Member State thus remain entitled to the supplement due to the application of Regulation 883/2004.

A new public assistance benefit (the AIO) has replaced the AOW supplement and applies to persons who have reached the statutory retirement age since 2015. This AIO has, however, less attractive rules than the AOW supplement, as we will see in Section 6.

## 5. Pensioners with Gaps in their Insurance Periods

The amount of AOW pension is reduced for migrants who moved to the Netherlands at an age later than the starting age for the acquisition of pension rights (currently, 16 years and 7 months, and as of 2024, 17 years), due to the missing years of insurance coverage.<sup>15</sup>

---

15. Persons who migrated to the Netherlands have an insurance record of 77, on average (2015) (Source: Netherlands Statistics).

For instance, a person born in 1957, who moved to the Netherlands at the age of 40, and who will have an insurance period of 27 years in 2024, will receive a pension of 54 per cent of the full pension amount. Note that the increase in the statutory retirement age in recent past years from 65 to 67 years is beneficial for such person, since under the previous rules, the acquisition of insurance periods ceased at the age of 65 years. Under that rule, the individual in our example would have been insured for 25 years only, which is a difference of 4 per cent in total compared to the current rules. According to statistical data, the gaps in years of insurance coverage seem indeed to have decreased in recent years.<sup>16</sup>

Since persons with a gap in insurance periods may have acquired pro-rata insurance periods in another country, problems primarily arise when the individual has no, or only a low number of qualifying periods outside the Netherlands. This is predominantly the case for third-country nationals (first generation), as well as for migrants from Eastern European countries in case they acquired low pensions in these countries only.

The discussion on insurance gaps currently centres mainly on persons from Surinam who came to the Netherlands shortly before Surinam's independence in 1975. The years they lived in Surinam prior to 1975 are not included in the calculation of their insurance periods, and this is considered problematic, since Surinam was part of the Kingdom of the Netherlands prior to Surinam's independence. Since the coverage of the AOW is restricted to the European part of the Kingdom, persons who moved to the Netherlands from Surinam are considered to not have been insured before their arrival. The *Centrale Raad van Beroep*<sup>17</sup> and the *Commissie gelijke behandeling*<sup>18</sup> (Equal Treatment Commission) decided that the exclusion of such persons is objectively justified and is not a form of discrimination. At the time of writing, this issue has still not been resolved, as it is difficult to find a solution for this group while not addressing the situation of others.<sup>19</sup>

In 2020, a total of 654,200 AOW beneficiaries (so not only Surinamese) had gaps in their insurance periods. It is expected that this number will rise, since more migrants will soon be reaching the statutory retirement

---

16. Rekenkamer 2019.

17. CRvB 1 April 2016, ECLI:NL:CRVB:2016:1225.

18. Commissie gelijke behandeling 2007-4.

19. *Tweede Kamer* 2019-2020, 20 361, No.183 (Parliamentary Papers).



age. There are currently 338,000 of them residing in the Netherlands, and 23 per cent have gaps in their insurance periods; 316,200 live outside the Netherlands of whom 70 per cent have gaps.

Such gaps have a serious impact on the amount of AOW benefits the individual is entitled to; voluntary insurance can mitigate these effects. Voluntary insurance is an option when compulsory insurance ceases, for instance when the individual starts to work or to reside abroad. Also a person who *becomes* compulsorily insured has the option of 'buying' insurance years preceding his/her compulsory insurance period.

The request for voluntary insurance must be submitted within a year of cessation of his/her compulsory insurance or, in the case of a person who becomes compulsorily insured, within a year of the commencement of his/her compulsory insurance.<sup>20</sup> Since 2001 voluntary insurance for persons residing abroad has been limited to a maximum period of ten continuous years. Another 10-year period can only commence after at least one year of compulsory insurance.

For persons who have an income below the applicable AOW rate a special scheme applies, AIO, discussed in Section 6.

## 6. Supplement Scheme for Persons with an Income under the AOW Pension Rates

The *Participatiewet* (Social Assistance Act) includes a special section (Section 5.4) on subsistence income for pensioners, called *Aanvullende Inkomensvoorziening ouderen* (AIO - Income Supplement for the Elderly). It targets AOW pensioners whose income is less than the applicable AOW rates. This means that specific rules apply to pensioners who apply for social assistance, which are more attractive than the general public assistance rules under the *Participatiewet*. The AIO benefit was administered by the municipalities until 2010, but is now implemented by the administra-

---

20. The rules on voluntary insurance were considered in the *Cabanis* judgment (Case 308/93, [1996] ECR 2097, ECLI:EU:C:1996:169). The Dutch benefit administration offered the widow of a French employee voluntary insurance to make up for the gaps in her insurance period for the Dutch statutory old-age pension. The contribution rules were less attractive for foreigners than for Dutch nationals. The question was whether this was permissible. The Court ruled that family members and survivors can invoke Article 3 of Regulation 1408/71, which means that they can fight discriminatory rules such as the one on voluntary insurance under dispute.

tion of the AOW, the SVB, so beneficiaries do not have to deal with two different offices.

The AIO is of particular relevance, inter alia, for persons with insurance gaps whose income is lower than the guaranteed minimum income, as well as for pensioners with a partner who does not earn an adequate income but who is not entitled to a supplement because of his/her partner's level of income.

The income supplement ensures that pensioners receive an income at the amount of a full AOW pension (i.e. the AOW rate applicable to them). In other words, the AIO benefit supplements AOW pension rights acquired by the respective person. However, these AIO supplements are, unlike AOW pensions themselves, means-tested. Income such as an occupational pension, the partner's income and income from capital (house and other property) are included in the calculation of the amount of the supplement. As a result, the sum of the AOW pension concerned and the supplement do not have to be equivalent with an ordinary full AOW pension; the supplement can be lower since income from other sources and the amount of capital are considered in the calculation of the AIO. Other rules of the *Participatiewet* are relevant to the AIO supplement as well, such as that the maximum period the recipient may stay abroad is 4 weeks. The AOW pensioner him or herself is allowed to stay abroad for a maximum of 13 weeks annually, so this can be a problem for a couple.

There is a huge difference between applications for ordinary AOW pensions and the AIO. Nearly all persons (99.06 per cent of all eligible persons)<sup>21</sup> entitled to an AOW pension do in fact receive it. This high rate of take-up of benefit is attributable to the fact that the AOW administration obtains the data on eligible persons from the civil registry and also manages its own insurance data. The administration thus automatically knows who is eligible for the AOW pension and how many years of insurance the person has fulfilled.

Take up of the AIO is low. Around 50,000 persons receive AIO benefits,<sup>22</sup> and between 48 per cent and 56 per cent of persons who are eligible for AIO do not claim it, i.e., between 34,000 and 41,000 households.<sup>23</sup>

---

21. Algemene Rekenkamer (2019, p. 28).

22. Algemene Rekenkamer (2019, p. 7).

23. Algemene Rekenkamer (2019, p. 29).

The reasons why individuals do not apply for the benefits they are entitled to have not been investigated yet. One reason could be that since the AIO supplements pensioners' income up to the minimum subsistence level, in some situations their amount is very low, which may deter persons from going through the trouble of applying for it and accepting its conditions. The data privacy regulations have as result that the SVB, in charge of the AIO, does not have access to data on the income of the partners and pensioners, and can therefore not automatically grant the AIO.

Moreover, the conditions for receiving and maintaining AIO benefit, e.g. that the partner can only stay abroad for a maximum period of 4 weeks (and the pensioner him or herself 13 weeks) may be a reason why persons do not claim the AIO. Another problem is that of homeowners. Persons who own a home of which the actual value exceeds their mortgage loan may still be entitled to the AIO, but this is provided in the form of a loan only. For example, when at the time they bought the house they needed a mortgage loan of EURO 100,000 and now the value of the house is EURO 200,000. In such case they can stay in the house and receive an AIO loan, but the AIO loan has to be paid back once the home is sold. That may also be a reason why pensioners do not apply for the AIO.

It also seems that persons who do not have a migrant past are more likely to refrain from applying for AIO benefits than persons with such past.<sup>24</sup> One reason for this may be that persons with a migrant past have networks that share information about the availability of the AIO scheme; an additional reason may be that migrants, who claim public assistance more often than non-migrants, are more likely to be informed by the public assistance administration about their possibilities when they reach retirement age than persons without a migrant past, since they are known by that administration.

#### *Residence requirement*

Entitlement to the AIO benefit - which is a social assistance benefit - requires residence in the Netherlands. That is, if beneficiaries move to another country, they lose their right to the AIO supplement; AOW pension itself is unaffected because, as already mentioned, it is exportable.

The previous AOW supplement system was more attractive, as it only considered the partner's income and was exportable.

---

24. Algemene Rekenkamer (2019, p. 30).

## 7. Persons who Enter the Netherlands after Retirement Age

Also persons who have not acquired any AOW rights at all, i.e., persons who arrived in the Netherlands after reaching retirement age, are eligible for the AIO. However, as it is a public assistance benefit, certain requirements need to be met. Consequently, claimants must fulfil the condition of having established legal residence in the Netherlands. Directive 2004/38 is relevant in this regard, which means that the permit to legally reside in the Netherlands can be rejected or withdrawn if the respective person does not have sufficient resources.

The *Centrale Raad van Beroep* (the Central Appeals Court - the highest social security court in the Netherlands) ruled that the benefit administration must assume that a person with a residence permit legally resides in the Netherlands when he/she claims public assistance. Consequently, claims for public assistance cannot be a reason for the administration to decide that the person no longer legally resides in the Netherlands. It is exclusively the task of the Immigration Authority (IND) to take such decisions.<sup>25</sup>

The IND in practice takes either a Dano-type<sup>26</sup> or a Grzelczyk-type<sup>27</sup> decision called after the judgments of the CJEU. The Dano-approach is followed when the IND comes at the conclusion that the EU citizen has never, or at least not for a long time, satisfied the conditions of Article 7 of Directive 2004/38 (namely he/she does not have sufficient means for subsistence) and in this case no further test whether he/she presents an unreasonable burden for the public assistance system is carried out. Consequently, the individual is deemed to never have had a right to reside in the Netherlands and may therefore be expelled. The Grzelczyk-approach is applied if the IND does not conclude that the individual has never, or at least not for a long time, fulfilled the conditions of having sufficient means for subsistence, for instance, if only after some years of residence the person applies for social assistance benefit. In that situation, the duration of his/her stay so far and the period for which public assistance is claimed are considered. This is a proportional approach: the longer the person has

---

25. CRvB 18 March 2013, ECLI:NL:CRVB:2013:BZ3855; CRvB 20 January 2015, ECLI:NL:CRVB:2015:57.

26. Case C-333/13, *Dano*, ECLI:EU:C:2014:2358.

27. Case C-184/99, *Grzelczyk*, [2001] ECR I-6193, ECLI:EU:C:2001:458.

provided for him or herself, the less problematic will his/her claim for public assistance be for the right to residence.<sup>28</sup>

## 8. Additional Income Provisions

### 8.1. Intensive health care

Health care costs do not have to be paid by the AOW pension, as separate schemes exist for their coverage. The Health Insurance Act (the *Zorgverzekeringswet* - Zvw) covers all residents, including pensioners. It requires that all residents have to buy a health insurance from a private health insurance company, which covers the costs defined in statutory decrees. The contributions are set by the health insurance company contracted by the individual (in 2023, the average contribution amount is EUR 138 per month per person). Persons with a low income may be eligible for a so-called *zorgtoeslag* (care supplement), paid by the Tax Office, to compensate for the costs of health insurance contributions. This supplement depends on the composition of the household (single, married) and the household income. The claimant's and the household's assets are of relevance as well. The maximum amount of the care supplement in 2023 is EUR 153 per month for an individual.

For persons who require more intensive care (e.g., in a nursing home) than covered by the Zvw, the *Wet langdurige zorg* (Wlz - Act on Long-term Care) is relevant. The Wlz is a national insurance scheme that covers all residents in the Netherlands; the benefits provided by the Wlz are defined in various decrees. The Act is implemented by the health insurance company from which the patient has bought his or her health care insurance (the Zvw insurance).

The Wlz pays for care if a person is dependent on care by an institution or on 24-hour care and supervision. To be eligible for coverage of this care, a so-called indication by the *Centrale Indicatiestelling Zorg* (CIZ - Office for Care Assessments) is required, that assesses the level of care needed by the applicant. The care needed may include stays in a medical care institution, personal treatment, pharmaceutical treatment, dental care or transport, provided that the prerequisites stipulated in the Act and the *Besluit langdurige zorg* (Decree on Long-term Care) are met.

---

28. See also Kramer 2016.

As a general condition, the insured person must reasonably need care and be dependent on it on account of a physical or psychogeriatric disability, another type of restriction or a mental or physical disability which requires permanent supervision or 24-hour care.

Under the Wlz, insured persons can choose between care in kind and a so-called individual personal budget.

When an insured person prefers care in kind, he/she has to contact a care provider who has contracted with his/her health insurance company. If the insured person prefers to receive care from a care provider who has not contracted with his/her health insurance company, he/she must request permission from his/her own health insurance company.

The individual personal budget allows the insured person to organise the care he/she needs on his/her own terms. The personal budget gives insured persons much more freedom to choose their care in kind, as he/she can conclude an agreement with a care provider on the personal care needed. Thereby, the care can be adjusted to the individual's personal needs.

Decisions on individual personal budgets are taken by the CIZ, which assesses which treatment is necessary and the budget required for it.

In many cases, cost-sharing by the insured person is a precondition for obtaining care under the Wlz. This is stipulated in the already mentioned *Besluit langdurige zorg*. The cost-sharing amount depends on the insured person's income and capital and whether he/she is married (i.e. on the partner's income). If the person's income and/or capital lie under the given threshold, the principle of cost-sharing does not apply.

Medical care is provided that the person is a resident of the Netherlands. For this purpose, the conditions for residence apply, which were discussed in Section 2.1.

For persons who move to the Netherlands from another country, a waiting period may apply before they become eligible for care under the Wlz. The maximum waiting period is 12 months, one month for each year the person was insured in the (maximum) 12 years before he/she became insured in the Netherlands). During the waiting period, the individual has to bear medical costs him or herself.

The maximum waiting period of 12 months is reduced if the individual was covered by the statutory health insurance of a country with which a treaty has been concluded. As a result, for persons from an EU or EEA Member State or Switzerland, who have been insured under a statutory

health care system, each year of insurance reduces the waiting period by one month (Article 6 of Regulation 883/2004). For this purpose, only the applicant's statutory insurance contributions apply. The *Besluit langdurige zorg* also exempts other categories of persons from the waiting period.

As a result, the waiting period is particularly relevant for persons who move to the Netherlands from a country outside the EU, EEA or Switzerland, and who do not belong to the exempted categories.

Persons who move to another country and who no longer are residents in the Netherlands lose their insurance protection under the Wlz, unless they have been posted to that other country. If a person remains a resident of the Netherlands, he/she may, under specific conditions, receive care and treatment abroad, if Regulation 883/2004 and Directive 2011/24 on the application of individual rights in cross-border health care apply.<sup>29</sup>

A claimant can use his/her personal budget to purchase care in another Member State, EEA State and Switzerland, provided that he/she continues to be insured in the Netherlands. The insured person can have care paid by the Wlz outside the EU/EEA for a maximum of 13 weeks in a calendar year, provided that the care is a continuation of care he/she started in the Netherlands.

## **8.2 Non-medical care**

Those who are not entitled to medical care under the Wlz (on the ground that their medical condition does not require care as provided for under this Act), may be eligible for benefits under the *Wet maatschappelijke ondersteuning* (WMO - Act on Societal Support). This Act is administered by the municipalities, that are responsible for providing support to individuals to ensure that they can participate in society and lead, to the extent possible, their lives in their own homes, carry out daily activities and participate in society (self-support). Municipalities have to develop policy plans for this purpose and plans for implementing these policies. The actual rules are laid down in the municipality's WMO regulation; such regulations may vary from municipality to municipality.

The provisions provided by the municipality consist of general and individual provisions. Also a personal budget can be paid.

General provisions seek to promote self-support and the participation in social life and to provide shelter. Examples include transport provisions

---

29. [2011] OJ L 88/45. See also Pennings (2011).

for persons with disabilities, provisions for helping the individuals to spend the day in a meaningful way and to give support to prevent loneliness.

Individual provisions consider the claimant's personal circumstances, including his/her needs, personal circumstances and options for specific services, adjusted to the person's needs with the aim of supporting him/her in his/her daily activities, participation in social life or to provide shelter. This support is meant to ensure that the individual can continue living on his/her own for as long as possible. This may require adjustments to his/her home and the provision of equipment that is not considered 'usual expenses'. It may also entail reimbursement for the pay of someone who cleans the beneficiary's home.

When a request for support is made, the municipality first reviews whether the claimant needs support or whether he/she can actually take care of him-/herself, if possible, with help (to the extent that is common) from his/her social network, persons who provide care in his/her neighbourhood or from volunteers. After the examination whether there is an alternative the municipality lies its finding down in a well-motivated decision, that can be challenged in a revision procedure before the municipality and in appeal before a court, if the claimant disagrees with the decision.

The municipality can decide that in a particular case a general provision suffices; in that case, the general provision has priority over an individual provision. This may imply that the person has to rely on a collective transport arrangement instead of receiving a subsidy for adjusting his/her car.

If the examination by the municipality concludes that the claimant meets the conditions for an individual provision, he/she is informed in writing on the type of provision is available and whether it will be provided in kind or in cash. If the applicant is granted financial assistance, he/she will also be informed about the applicable conditions and on any cost-sharing modalities.

### ***8.3. Rent supplement***

The *huurtoeslag* (rent supplement) supplements the claimant's rental fees. Several conditions must be met for eligibility to the rent supplement. These include that the accommodation is suitable and detached (i.e. not a room only). Certain thresholds and ceilings for the amount of the rent apply to the rent supplement. Moreover, the person's income and capital



must fall below a specific ceiling. The supplements for both rent and care are paid by the Tax Office.

## 9. Conclusion

The AOW pension guarantees a minimum income at the rate of the statutory minimum wage. It is a social security benefit, and not a special non-contributory benefit and is thus exportable abroad, even if it is, during some years or even during the whole life of the pensioner, acquired on the basis of residence periods during which no contributions were paid at all.

For single persons who move *outside* the EU/EEA, the benefit is reduced to half the pension of a couple, in order to avoid administrative problems, such as having to examine that the person is still single. A move to another EU/EEA Member State does not affect the AOW pension amount.

AOW pensioners are entitled to several supplements if their income is below or not much higher than the AOW rates. Initially, the supplement for the younger partner were part of the AOW system, and therefore exportable; in the course of time, however, these provisions were replaced with public assistance supplements. Even if these are more generous than the ordinary public assistance benefits, they remain public assistance benefits and are thus not exportable. The AIO is not exportable, any other income and assets may affect the amount of the AIO benefit, and restrictions apply to stays abroad.

Income supplements for care and for rent are available separately from the AOW pension and are therefore also not exportable. The same is true for provisions of medical care and support to continue living independently (WMO).

The AOW benefit harmonises with the coordination system and provides relatively smooth access for incoming migrants and is exportable for outgoing migrants. However, the separate regulations may have negative effects for those who move to the country (they must meet a number of conditions and have to overcome administrative hurdles) and for those who leave the country. Administrative reasons (the high work intensity for the benefit administration since it has to examine whether the requirements continue to be fulfilled by the recipient) play an important role in limiting benefits to the territory of the Netherlands.

## Bibliography

- Algemene Rekenkamer (2019), *Ouderdomsregelingen ontleed*, Den Haag, Algemene Rekenkamer, p. 7.
- Beveridge report (1942) *Social Security and Allied Services*, London, Cmnd. 6404.
- CBS (2019) *Welvaart in Nederland 2019*, The Hague: CBS.
- Kramer, D (2016) 'Earning Social Citizenship in the European Union: Free movement and access to social assistance benefits reconstructed', *Cambridge Yearbook of European Legal Studies* (18), pp. 270-301, 2016.
- Pennings, F (2011) 'The Cross-Border Health Care Directive: More Free Movement for Citizens and More Coherent EU Law?', 13(4) *European Journal of Social Security* (2011), pp. 424-452.
- Pennings, F (2022) *European social security law*, Cambridge: Intersentia.

## Minimum income in old age: The case of Poland

---

Leszek MITRUS

### 1. Introductory remarks

In Poland, social security protection has a constitutional basis. According to Art. 67 of the Constitution, a citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age. The scope and forms of social security shall be specified by statute (item 1). A citizen who is involuntarily without work and has no other means of support shall have the right to social security, the scope of which shall be specified by statute (item 2).<sup>1</sup> In other words, old-age risk ("attainment of retirement age") is explicitly recognised in constitutional law. The Polish social security system is primarily based on the Bismarckian social insurance model and on the repartition system ("pay-as-you-go"), although a number of non-contributory benefits have been introduced in recent years.<sup>2</sup>

The current pension scheme entered into force on 1 January 1999.<sup>3</sup> The scheme's legal framework consists of two major acts: the Law of 13 October 1998 on the Social Insurance System<sup>4</sup> and the Law of 17 December 1998 on Old-age Pensions and Pensions from the Social Insurance Fund.<sup>5</sup> The statutory retirement age in Poland is 65 years for men and 60

---

1. The text of the Constitution is available at <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (last accessed: 3.10.2022).

2. See also Ślebzak K (2019) The right to social security in the Constitution of the Republic of Poland. *Praca i Zabezpieczenie Społeczne* 2019(12), pp. 8-13.

3. Kalina-Prasznic U (2012) *Społeczne zabezpieczenie emerytalne pracowników – między prawem a rynkiem*, Warsaw: Wydawnictwo C.H. Beck, pp. 144-150; Uścińska G (2021) *Prawo zabezpieczenia społecznego*, Warsaw: Wydawnictwo C.H. Beck, pp. 193-200.

4. Consolidated text: *Journal of Laws* 2022, item 1009.

5. Consolidated text: *Journal of Laws* 2022, item 504. Moreover, there are statutes concerning the second and the third pillar of the retirement scheme. Those legal acts remain outside the scope of the present elaboration.

years for women. The reform of 2012 envisioned the retirement age to gradually increase to 67 years for both sexes. In November 2016, however, this proposal was set aside. Hence, the retirement age continues to be 65 years for men and 60 years for women.<sup>6</sup>

A person's date of birth is decisive for determining the conditions for entitlement to an old-age pension. The former pension scheme applies to persons who were born up to the year 1948, while the new one applies to persons born in 1949 or beyond. These systems operate in parallel. The former scheme is based on the rules that were in place before 1999. In a nutshell, it is a defined-benefit system. The new pension scheme, on the other hand, combines a pay-as-you-go model with a pension fund model, i.e. contributions are collected by the Social Insurance Fund and the Open Pension Fund. Participation in the pension fund model was voluntary for economically active persons born between 1949–1968 when this scheme was first introduced, whereas participation was mandatory for insured persons born in 1969 or beyond. This approach was eventually modified, and participation in the Open Pension Fund (and the investment of contributions in the capital market with future profit potential) is now voluntary for persons in gainful activity. An insured person can choose whether his/her full contribution shall be paid into an individual retirement account managed by the Social Insurance Institution (pol. *Zakład Ubezpieczeń Społecznych*), or whether it is split between the Social Security Institution and the Open Pension Fund. The latter manages the second pillar of the (new) pension scheme.<sup>7</sup> The State guarantees minimum old-age pensions under both pension schemes.<sup>8</sup>

A number of new non-contributory benefits have been introduced in Poland in recent years. They provide financial assistance for persons with childcare responsibilities, persons with disabilities, and persons who have reached the statutory retirement age. Since 2019, pensioners –have alongside their “regular” old-age pension– been entitled to the so-called 13<sup>th</sup>

---

6. Dzienisiuk D (2012) Projekt ustawy podwyższającej i zrównującej powszechny wiek emerytalny kobiet i mężczyzn, *Praca i Zabezpieczenie Społeczne* 2012(4), pp. 2-9.

7. Kolek A and Sobolewski O (2021) *Polski system emerytalny. Prawne uwarunkowania trzech filarów*. Warsaw: Wolters Kluwer, pp. 145-205.

8. The first statutory guarantee for a minimum old-age pension was introduced by the Law of 14 December 1982 on retirement compensation for employees and their families, *Journal of Laws* 1982, No. 40, item 267 (no longer in force).

and 14<sup>th</sup> old-age pension benefit. The supplementary parental benefit was also introduced in 2019. It is reserved for individuals who had at least four children and do not have adequate means of subsistence. In 2022, a new tax allowance for recipients of low social security benefits was introduced. All of these components need to be considered when assessing the guaranteed minimum income for elderly persons in Poland.

## 2. Statutory minimum old-age pension

The amount of statutory minimum old-age pension is determined by the legislature. Article 85 of the Law on Pensions and Old-age Pensions sets the minimum amount of old-age pension. Due to indexation, the amount of minimum old-age pension has gradually increased in recent years. The figures are as follows:

- 2018: PLN 1,029.80 gross per month,
- 2019: PLN 1,100 gross per month
- 2020: PLN 1,200 gross per month
- 2021: PLN 1,250.88 gross per month
- 2022: PLN 1,388.44 gross per month (i.e. around EUR 300)<sup>9</sup>.

In 2023, the minimum old-age pension is set to amount to PLN 1,588.44 gross per month.

The amount of old-age pension is determined in accordance with statutory provisions. The former and new pension schemes differ in this respect.<sup>10</sup>

Under the previous pension scheme, i.e. for individuals born up to 31 December 1948, two cumulative conditions must be met for them to qualify for an old-age pension (Arts. 27-45 of the Law on Old-age Pensions and Pensions). Firstly, the individual must have reached the statutory retirement age, which is 65 years for men and 60 years for women. Secondly, he/she must have acquired the minimum insurance period which consists of the sum of all of his/her contributory and non-contributory periods, and must amount to 25 years for men and 20 years for women. Contributory periods are acquired during gainful activity, e.g. within the scope of an employment

---

9. For the sake of comparison, an average old-age pension in 2022 is PLN 2.833, and the minimum level of subsistence is PLN 719 for a one-person household, and PLN 600 per person in a shared household.

10. Kalina-Prasznica U (2019) Social solidarity in pension insurance, *Ubezpieczenia społeczne. Teoria i praktyka* 2019(2), pp. 17-28.

contract, self-employment or other type of civil law contract. During these periods, contributions are paid. However, other periods are recognised by law as contributory periods as well. Non-contributory periods refer to periods of inactivity on the labour market. Such periods are included in the calculation to determine the individual's entitlement to an old-age pension and its amount. For example, a non-contributory period includes the number of years spent in higher education (provided this level of education was completed), or periods during which a sickness benefit was received. Only that part of an individual's non-contributory periods is included that does not exceed 1/3 of his/her contributory periods.

The former pension scheme is a benefit-defined scheme. The amount of an old-age pension only depends to a limited extent on the amount of contributions the individual made during his/her professional career. Article 53 of the Law on Old-age Pensions and Pensions stipulates that old-age pension consists of two components: (i) the social security component, and (ii) the individual component. The social security component is a permanent and fixed component of an individual's pension. It amounts to 24 per cent of the average remuneration in the national economy, after contributions have been deducted. The individual component reflects the pensioner's professional career path, i.e. his/her total insurance periods, which consist of his/her contributory and non-contributory periods. The pension amount is determined by calculating 1.3 per cent of the old-age pension assessment basis for each contributory year and 0.7 per cent of the old-age pension assessment basis for each non-contributory year. Where the amount of an old-age pension is lower than the abovementioned minimum statutory pension, it is automatically topped up by the Social Insurance Institution.<sup>11</sup>

Once the statutory retirement age is reached, individuals can claim an old age pension, even if their insurance period (which consists of contributory periods and non-contributory periods) is shorter than the abovementioned 25 years for men and 20 years for women. Such an insurance period should amount to at least 20 years for men, and at least 15 years for women. However, in such a situation, the individual will not be entitled to the statutory minimum old-age pension amount (Arts. 28 and 54 of the Law on Old-age Pensions and Pensions).

---

11. Jędrasik-Jankowska I (2016) *Pojęcia i konstrukcje prawne ubezpieczenia społecznego*. Warsaw: Wolters Kluwer, pp. 147-149.

Under the new pension scheme, which applies to persons born from 1 January 1949 onwards (Arts. 24-26c of the Law on Old-age Pensions and Pensions), the only condition that must be met for entitlement to an old-age pension is the attainment of the statutory retirement age, namely 65 years for men and 60 years for women. The new scheme is a contribution-defined system, and the amount of the individual's old-age pension depends first and foremost on his/her contributory and non-contributory periods. Contributions are credited to the insured person's individual account(s). The pension base rate is equivalent to his/her total contributions. The amount of the individual's old-age pension thus depends on the amount of contributions he/she has made, the amount of his/her initial capital<sup>12</sup>, the amount of funds accumulated in a sub-account<sup>13</sup> and the average life expectancy of persons of an age equal to retirement age.<sup>14</sup> In other words, there is a direct link between the amount of contributions paid and the amount of the individual's old-age pension.<sup>15</sup>

In principle, the amount of old-age pension should not be lower than the abovementioned statutory minimum pension. However, there are exceptions to that rule. According to Art. 87 item 1 of the Law on Old-age Pensions and Pensions, an individual is not guaranteed the minimum pension if he/she does not have contributory and non-contributory periods that amount to a total of 25 years for men and 20 years for women. According to Art. 10 of the Law on Social Security System, the individual is not guaranteed a minimum old-age pension if he/she has been insured on a voluntary basis for a period of more than 10 years and he/she does not have sufficient financial resources in his/her individual account.<sup>16</sup>

---

12. For individuals who were already employed before 1 January 1999, the initial capital reflects the contributions made during contributory and non-contributory periods before the new pension scheme took effect.

13. This refers to the contributions originally allocated to the Open Pension Fund, and which were subsequently (i.e. following the legislative reform) transferred to the individual's account managed by the Social Security Institution.

14. As estimated on an annual basis by the Central Statistics Office.

15. Wantoch-Rekowski J (2014) System ubezpieczeń społecznych a budżet państwa. Studium prawnofinansowe. Warsaw: Wolters Kluwer business, pp. 115-149.

16. Krajewski M (2014) Dobrowolne ubezpieczenie emerytalne i rentowe na gruncie art. 7 i 10 ustawy o systemie ubezpieczeń społecznych, *Praca i Zabezpieczenie Społeczne* 2014(4), pp. 9-15.

There is certainly no obligation to retire. Upon reaching the statutory retirement age, an individual may exercise his/her right to retire, but may also continue working. The longer he/she is engaged in gainful employment and, consequently, the longer he/she pays contributions, the higher his/her old-age pension will be.

Fiscal measures should be mentioned here as well. In principle, social security benefits are subject to taxation as is any other income. However, one important modification was introduced by the Law of 29 October 2021 on the amendment to the Law on Income Tax for Individuals.<sup>17</sup> The amendment set an annual tax-free threshold of PLN 30,000. Social security benefits, including old-age pensions that do not exceed PLN 2,500 per month, are not subject to taxation. In practice, the abovementioned amendment is a tax relief that was introduced in 2022 and increases the amount of income of those who receive the lowest level of social security benefits.

### **3. "13<sup>th</sup> and 14<sup>th</sup> old-age pension benefit"**

The legislature has gradually introduced new non-contributory benefits since 2019, which aim to supplement the income of individuals who have reached the statutory retirement age.

The first legal act in this regard was the Law of 4 April 2019 on a one-time cash benefit for retirees and pensioners in 2019.<sup>18</sup> This law introduced the so-called "13<sup>th</sup> old-age pension benefit", which initially was intended to be a one-time supplementary payment. However, only one year later, by the Law of 9 January 2020 on the additional annual benefit for retirees and pensioners<sup>19</sup>, the abovementioned benefit became a permanent component of the social security system. It is financed from the State budget and provided once a year.

The personal scope of application of the abovementioned law is quite broad. Retirees, pensioners and other beneficiaries (e.g. persons entitled to a survivor's pension or a pre-retirement benefit) are entitled to the 13<sup>th</sup> old-age pension benefit, provided that they have the right to a "basic" benefit on 31 March of the given calendar year. The amount of the addi-

---

17. Journal of Laws 2021, item 2105. The law took effect on 1 January 2022.

18. Journal of Laws 2019, item 743.

19. Consolidated text: Journal of Laws 2021, item 1808.



tional annual cash benefit is equal to the statutory minimum old-age pension. It is paid *ex officio* in April. No beneficiary's motion is required. This benefit is not means-tested, and is granted to all recipients of "basic" benefits as established by law. In practice, however, it makes a difference, especially for individuals with a very low income.<sup>20</sup>

The legislator's generosity did not stop there, however. The Law of 21 January 2021 on the additional annual cash benefit for pensioners and retirees in 2021<sup>21</sup>, and one year later the Law of 26 May 2022 on the additional annual cash benefit for pensioners and retirees in 2022<sup>22</sup>, introduced a one-time "14<sup>th</sup> old-age pension benefit" for 2021 and 2022, respectively. The regulation of the 13<sup>th</sup> and 14<sup>th</sup> old-age pension benefit are based on similar assumptions. The personal scope of application of the laws is the same, and both benefits are financed from the State budget.

The aim of the 14<sup>th</sup> old-age pension benefit is to provide financial assistance to those who receive the lowest level of social security benefits. According to the law, it was intended to be provided once in 2021 and in 2022, respectively. If the individual's old age pension is lower than PLN 2.900, the amount of the 14<sup>th</sup> old-age pension benefit is equal to the amount of the statutory minimum old-age pension. The 14<sup>th</sup> old-age pension benefit is proportionately reduced for beneficiaries who receive a higher old-age pension. Entitlement to this additional cash benefit and its amount thus depends to a certain extent on the pensioner's income.

In practice, the 13<sup>th</sup> and 14<sup>th</sup> old-age pension benefit supplements "regular" statutory old-age pensions as well as other social security benefits. The aim is to fight social exclusion and poverty of social security beneficiaries, including those who have reached the statutory retirement age. Since these additional benefits are non-contributory benefits, they are a significant burden for the State budget.

#### 4. Supplementary parental benefit

An additional financial assistance benefit for elderly persons was added by the Law of 31 January 2019 on the supplementary parental

---

20. Kamińska K (2021) Charakter prawny "trzynastej emerytury", *Praca i Zabezpieczenie Społeczne* 2021(1): pp. 38-44.

21. *Journal of Laws* 2021, item 432.

22. *Journal of Laws* 2022, item 1358.

benefit.<sup>23</sup> This benefit provides a supplement to pensioners who did not have the opportunity to be engaged in gainful employment or another paid activity because they cared for a large number of children. It targets individuals who have reached the statutory retirement age, had at least four children and do not have adequate means of subsistence, e.g. because they did not acquire the right to a (minimum) old-age pension. This new benefit is commonly referred to as the "Mama 4+ benefit" or "mothers' old-age pension".

The supplementary parental benefit is granted to women who have reached the age of 60 years and to men who have reached the age of 65 years<sup>24</sup> and whose income does not correspond to the minimum means of subsistence. The supplementary parental benefit is a non-contributory, means-tested benefit that is granted on a discretionary basis. It is financed by the State budget and its amount may not exceed the amount of statutory minimum old-age pension. The supplementary parental benefit tops up the statutory minimum old-age pension of those with an income lower than the minimum. It is provided by the Social Security Institution upon the beneficiary's request.

This benefit falls under the family support scheme rather than under the pension scheme, although it is explicitly reserved for women who have reached the age of 60 years and men who have reached the age of 65 years. It intends to provide an income for elderly persons who dedicated their lives to care for their children. This is certainly a legitimate reason for granting an elderly person an additional income. It would be fair, however, to also consider the situation of parents who combined their professional career with family responsibilities, e.g. by providing them with a childcare supplement in addition to their regular old-age pension.<sup>25</sup>

---

23. Consolidated text: Journal of Laws 2022, item 1051.

24. It is mostly women who are entitled to this benefit. Men can only apply for the benefit if the child's mother has passed away or has abandoned the child(ren). This regulation seems to violate the prohibition of discrimination based on sex to detriment of men.

25. Kumor - Jezierska E (2021) Rodzicielskie świadczenie uzupełniające – MAMA 4+ - ocze-  
kiwania i realia. In: Baran KB, Lekston M, Rogacka – Łukasik A. (Eds.), *Roczniki Adminis-  
tracji i Prawa*, Rok 2021, Tom specjalny I, Nr XXI, *Ius est ars boni et aequi*. Księga Jubil-  
euszowa prof. Bolesława Macieja Ćwiertniaka, Sosnowiec: Oficyna Wydawnicza Hu-  
manitas, pp. 487-496.

## 5. European aspects

The State guarantees a minimum old-age pension under Polish law which is covered by Art. 58 of Regulation 883/04 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems<sup>26</sup> on awarding a supplement to old-age pensions and survivor's benefits. According to item 1, a recipient of a benefit to whom the chapter on old-age and survivor's pension applies may not, in the Member State of residence and under whose legislation a benefit is payable to him/her, be provided with a benefit that is lower than the minimum benefit established by that legislation for a period of insurance or residence equal to all periods included in the calculation for eligibility to the benefit. Item 2 states that the competent institution of that Member State shall pay the beneficiary a supplement throughout his/her period of residence in its territory that is equal to the difference between the total amount of benefits due under the coordination regulations and the amount of the minimum benefit.

As far as minimum income in old age is concerned, no case law or academic discussion on the free movement of elderly in the context of Regulation 883/04 have been reported. The reason for this is not surprising. The level of wages and social security benefits in Poland is lower in comparison to that in the "old" Member States. In practice, the amount of old-age pension of EU citizens who migrate to Poland would be higher than the minimum Polish statutory old-age pension. There would therefore be no grounds to supplement the income of elderly EU migrants from old Member States to ensure they receive the statutory minimum old-age pension in Poland. From a theoretical perspective, the obligation to supplement the income of elderly persons to provide them with the statutory minimum old-age pension could arise for migrants from Central and Eastern European Member States. Such situations have not been reported, either, however.

The 13<sup>th</sup> and 14<sup>th</sup> old-age pension benefits would automatically be granted to retired EU migrants who apply for an old-age pension in Poland. There are no restrictions to the export of these benefits.

The right to the supplementary parental benefit can be analysed from the perspective of the right of residence of non-economically active EU

---

26. OJ L 166, 30.04.2004, p. 1.

citizens, as regulated in Art. 21 of the Treaty on the Functioning of the European Union, and Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of Union citizens and their family members to freely move and reside within the territory of the EU.<sup>27</sup> As already mentioned above, this benefit can be granted to individuals who have reached the statutory retirement age, had at least four children, and do not have sufficient means of subsistence in old age. The supplementary parental benefit can be granted to an individual who resides in Poland and who – from the age of 16 years onwards– has lived in Poland for at least 10 years. Polish nationals and citizens of EU or EFTA Member States, who have the right of residence or the right of permanent residence in Poland, as well as third-country nationals who legally reside in Poland, are eligible for this benefit. The beneficiary must continue to reside in Poland while receiving the benefit. In other words, residence requirements apply, and the benefit is not exported in case the beneficiary moves to another country.

## 6. Concluding remarks

A State guaranteed minimum old-age pension is provided for the elderly in Poland. The minimum insurance period (which consists of contributory and non-contributory periods) must have been acquired under both the former and the new pension schemes. The new pension scheme is more advantageous for individuals who have had a continuous professional career path, e.g. those with an employment contract of indefinite duration and with a relatively high level of remuneration and social insurance contributions. The system is less advantageous for those in a precarious position, e.g. individuals who perform casual and low-paid jobs, carry out irregular work in the “grey economy” without social security insurance, and/or whose professional career was frequently interrupted by periods of unemployment. In the years 2015–2016, slightly over 100,000 pensioners had an old-age pension that was below the statutory minimum income. By 2017, this number exceeded 200,000. In 2022, 341,000 beneficiaries (i.e. 5.7 per cent of all pensioners) are receiving an old-age pension that is below the statutory minimum income.

---

27. OJ L 158, 30.04.2004, p. 77.

The pension scheme has been subject to political discourse and public debate.<sup>28</sup> A number of new non-contributory benefits have been introduced in recent years with the aim of providing or supplementing the income of those who have reached the statutory retirement age. On the one hand, this development can be considered a major achievement of social policy. On the other, however, poverty among the elderly is widespread, and the 13<sup>th</sup> and 14<sup>th</sup> old-age pension benefit as well as the supplementary parental benefit are a heavy burden for the State budget. A high indexation of all old-age pensions is expected in 2023. Moreover, according to declarations of the ruling "Law and Justice" party, the 14<sup>th</sup> old-age pension benefit will become a permanent component of the social security system from 2023 onwards. It is difficult not to connect this announcement with the forthcoming parliamentary elections in autumn 2023.

Regardless of the further legislative developments, the problem of low income among the elderly is intensifying, especially for economically active individuals who are covered by the new pension scheme.

## Bibliography

- Dziesięniuk D (2012) Projekt ustawy podwyższającej i zrównującej powszechny wiek emerytalny kobiet i mężczyzn, *Praca i Zabezpieczenie Społeczne*. (4): 2-9.
- Jędrasik - Jankowska I (2016) *Pojęcia i konstrukcje prawne ubezpieczenia społecznego*. Warsaw: Wolters Kluwer.
- Kalina-Prasznic U (2019) Social solidarity in pension insurance, *Ubezpieczenia społeczne. Teoria i praktyka*. 2: 17-28.
- Kalina-Prasznic U (2012) *Społeczne zabezpieczenie emerytalne pracowników – między prawem a rynkiem*, Warsaw: Wydawnictwo C.H. Beck.
- Kamińska K (2021) Charakter prawny „trzynastej emerytury”, *Praca i Zabezpieczenie Społeczne*. 1: 38-44.
- Kolek A and SOBOLEWSKI O (2021) *Polski system emerytalny. Prawne uwarunkowania trzech filarów*. Warsaw: Wolters Kluwer.

---

28. Seredyńska M (2019), Political discourse on old-age pension issues in the election programmes of the largest political parties in Poland, *Ubezpieczenia społeczne. Teoria i praktyka* 2019(3), pp. 3-20.

- Kumor - Jezierska E (2021) Rodzicielskie świadczenie uzupełniające – MAMA 4+ - oczekiwania i realia. In: BARAN KB, LEKSTON M, ROGACKA - ŁUKASIK A (Eds.), *Roczniki Administracji i Prawa*, Rok 2021, Tom specjalny I, Nr XXI, *Ius est ars boni et aequi. Księga Jubileuszowa prof. Bolesława Macieja Ćwiertniaka*, Sosnowiec: Oficyna Wydawnicza Humanitas. XXI: 487-496.
- Krajewski M (2014) Dobrowolne ubezpieczenie emerytalne i rentowe na gruncie art. 7 i 10 ustawy o systemie ubezpieczeń społecznych, *Praca i Zabezpieczenie Społeczne*. 4: 9-15.
- Seredyńska M (2019), Political discourse on old-age pension issues in the election programmes of the largest political parties in Poland, *Ubezpieczenia społeczne. Teoria i praktyka*. 3: 3-20.
- Ślęzak K (2019) The right to social security in the Constitution of the Republic of Poland. *Praca i Zabezpieczenie Społeczne*. 12: 8-13.
- Uścińska G (2021) *Prawo zabezpieczenia społecznego*, Warsaw: Wydawnictwo C.H. Beck.
- Wantoch-Rekowski J (2014) *System ubezpieczeń społecznych a budżet państwa. Studium prawnofinansowe*. Warsaw: Wolters Kluwer business.

# Minimum income in old age - a human rights perspective and approach

---

Effrosyni Bakirtzi

## 1. Introduction

Social security and social assistance systems are not harmonised across Europe, resulting in significant variations in resources and limits for social security/assistance benefits from one country to another because they primarily depend on the systems' financing and/or the capacity of the national budget. Resources play a crucial role in shaping policies and schemes designed to ensure comprehensive coverage for older persons. Pension systems in European countries are thus organised differently. The most prevalent model for pension systems in the world combines contributory and non-contributory schemes.<sup>1</sup>

Contributory and non-contributory old-age benefits can be combined when the income replacement for economically active persons retiring from work falls short of ensuring a decent standard of living and needs to be supplemented by social assistance benefits to reach a specified minimum income.<sup>2</sup> Ideally, a minimum income in old age should serve as a guarantee against poverty in old age, a phenomenon that is widespread in both developing and developed countries.<sup>3</sup> The increased risk of poverty

- 
1. According to the ILO World Social Protection Database (ILO World Social Protection Report 2020-22: Social protection at the crossroads – in pursuit of a better future, October 2021, Chapter 4, Social protection for older women and men, pp. 167-8, available at: [https://www.ilo.org/global/research/global-reports/world-social-security-report/2020-22/WCMS\\_821426/lang--en/index.htm](https://www.ilo.org/global/research/global-reports/world-social-security-report/2020-22/WCMS_821426/lang--en/index.htm)).
  2. There is also the possibility to combine a pension income with employment. In Germany, 1.066.895 of the total of 38.531.395 employees are above the age of 67 years old (31/3/2022). Reference: Deutscher Bundestag - 20. Wahlperiode, Drucksache 20/5046, p. 69.
  3. The rising old-age poverty in Germany has been investigated and its development on the basis of pension reforms until 2050 is analysed in Geyer J, Buslei H, Gallego Granados P, Haan P, Anstieg der Altersarmut in Deutschland: Wie wirken verschiedene Rentenreformen? Deutsches Institut für Wirtschaftsforschung, Bertelsmann Stiftung, 2019.

in old age is related to inequities in earlier life stages, including gaps in contributions such as part-time work due to family obligations or precarious/low-paying jobs,<sup>4</sup> which in turn have a significant impact on the amount and entitlement to old-age pension. In fact, systemic income inequalities that affect women and result from gender-based disadvantages (low-paying jobs, part-time work, jobs in the informal economy as well as interruptions in their careers due to pregnancy, childbirth or caregiving work) contribute to women's *retirement vulnerability*, resulting in higher poverty rates in old age compared to older men<sup>5</sup> and thus rendering them more vulnerable to economic insecurity. Another group of older persons at risk of old-age poverty are those who were employed in the informal economy during their working years because they lack social security contributions and consequently only qualify for a lower or no pension. Poverty prevents older persons from being active members of society, resulting in social inclusion and impacting access to their human rights.

Moreover, the ageing of populations is transforming the structures of economic (in)activity of older persons, with a growing number participating in paid labour or wanting to continue working beyond retirement/pension age, primarily due to financial considerations. This trend has emerged due to the low purchasing power/inadequacy of pensions (exacerbated by the current high inflation and the rising cost of living) as well as the trend towards reducing the replacement rates of statutory/public pensions<sup>6</sup> in the future to ensure the sustainability of pension funds and

---

4. This phenomenon has been termed 'in-work poverty' or the 'working poor' in the current debate (Eurofound defines working poor as those with an equivalised yearly disposable income below 60 per cent of the national household median income level (<https://www.eurofound.europa.eu/topic/working-poor>)).

5. The need for an effective and comprehensive regulatory framework extends beyond the social security and social assistance regulations and encompasses policies and measures that could help compensate for disadvantages that cumulate over a lifetime. See Bisom Rapp S and Sargeant M, *Lifetime Disadvantage, Discrimination and the Gendered Workforce*, Cambridge University Press, 2016. For Germany an OECD report examines how the promotion of equal partnerships can support work-life balance and strengthen gender equality: OECD, *Dare to Share: Germany's Experience Promoting Equal Partnership in Families*, 2017, <https://doi.org/10.1787/9789264259157-en>.

6. See Figure 4.42 on the average replacement rates at retirement in earnings-related public pension schemes in selected European countries in 2016 and projected for 2070, ILO World Social Protection Report 2020-22, p. 181 (available at: <https://www.ilo.org/>



public social security schemes. Consequently, ageism,<sup>7</sup> i.e. discrimination against individuals on the basis of their age (e.g. in employment) and their disproportionate exclusion from the labour market becomes increasingly relevant in the context of older persons' human rights. This issue needs to be properly addressed. Moreover, mandatory retirement age in some countries may limit older persons' right to work.<sup>8</sup>

Finally, ensuring adequate social protection in old age remains a challenge for older migrants who usually have gaps in their insurance periods and interruptions in their work histories due to relocations/mobility. While the Social Security Coordination Regulation<sup>9</sup> facilitates the mobility, recognition and transfer of social security benefits and entitlements within Europe, migrants may encounter barriers in meeting national requirements for supplementary mechanisms for minimum income in old age due to long-term residence requirements or mobility after retirement.

The present chapter focuses on the human rights perspective of minimum income in old age. First, the applicable international human rights framework and standards for the rights of older persons to a minimum income are analysed. Then, an overview of the existing regional human rights instruments is presented together with their relevance for older persons' social protection and poverty alleviation. The last section highlights the most pertinent current issues.

---

global/publications/books/WCMS\_817572/lang--en/index.htm). In addition, information on the replacement rates of pensions in European countries and the EU-27 for the year 2021 can be retrieved from the website of Eurostat (available at: <https://ec.europa.eu/eurostat/databrowser/view/tespn070/default/bar?lang=en>).

7. Ageism is a social construct of old age that represents ageing and older persons in a stereotypical, often negative, way. See Ayalon L, Tesch-Römer C (eds), *Contemporary Perspectives on Ageism*, vol 19. Springer, Cham, 2018.
8. See the discussion on compulsory retirement from an EU law perspective, Doron I, Numhauser Henning A, Spanier B, Georgantzi N, Mantovani E, *Ageism and Anti-Ageism in the Legal System: A Review of Key Themes*, in Ayalon L, Tesch-Römer C (eds), *Contemporary Perspectives on Ageism*, vol 19. Springer, Cham, 2018, [https://doi.org/10.1007/978-3-319-73820-8\\_19](https://doi.org/10.1007/978-3-319-73820-8_19), pp. 308 ff.
9. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166 30.4.2004, p. 1).

## 2. International human rights law framework

### *2.1 Minimum income in old age and international human rights law*

#### *2.1.1 Applicable human rights instruments*

The most relevant human rights instruments in international human rights law are the Universal Declaration of Human Rights (hereafter UDHR) of 1948, which recognises the right to social security as a human right (Articles 22 and 25(1) of the UDHR) and the International Covenant on Economic, Social and Cultural Rights (hereafter ICESCR), which protects global economic, social and cultural rights. There is no explicit reference in the latter instrument to the rights of older persons because it applies universally to all humans. When this instrument was initially adopted, the problem of demographic ageing was not as conspicuous as it is today. The rising longevity of populations is a consequence of enhanced living standards and basic healthcare systems, which, coupled with declining fertility rates, significantly contribute to demographic ageing. There are several provisions that may be of relevance for the rights of older persons, as emphasised by the Committee on the Economic Social and Cultural Rights (hereafter CESCR) in its General Comments interpreting the provisions of the ICESCR.

#### *2.1.2 The right to social security*

Article 9 of the ICESCR on the right to social security, including social insurance, is one of the key provisions for older persons. The right to minimum income in old age falls under the obligations of State parties to the ICESCR as outlined in this article: the right of all to social security, which is crucial for upholding *human dignity*.<sup>10</sup> This provision implicitly recognises the right to *access* and *maintain* old-age benefits<sup>11</sup> without discrimination and applies universally. The term "social security" as used in this article "implicitly covers all the risks involved in the loss of means of subsistence for reasons beyond a person's control".<sup>12</sup> According to the

---

10. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, para. 1.

11. See General Comment of the UN CESCR No. 6 on the economic, social and cultural rights of the older persons, 1995, para. 10.

12. See General Comment of the UN CESCR No. 6 on the economic, social and cultural rights of the older persons, 1995, para. 26.

analysis of the normative content of this right by the CESCR in General Comment Number 19 on the right to social security adopted on 23 November 2007,<sup>13</sup> social security systems of State parties to the ICESCR shall provide coverage for *old-age risks*.<sup>14</sup> This implies that social security systems are designed to provide benefits that ensure protection against the loss of work-related income resulting from old age.<sup>15</sup>

Other elements of the right to social security are specified as well: the system's availability and sustainability for present and future generations,<sup>16</sup> the adequacy of benefits in terms of their amount and the duration for fully realising the right to an adequate standard of living<sup>17</sup> and accessibility to this right through coverage without discrimination,<sup>18</sup> reasonable, proportionate and transparent qualifying conditions for benefits,<sup>19</sup> affordable contributions,<sup>20</sup> participation in the administration of the social security system<sup>21</sup> and physical access to social security services.<sup>22</sup> Social security's *redistributive* nature plays an important role in poverty reduction and alleviation, preventing social exclusion and thus promoting social in-

---

13. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, paras 9-28.

14. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, para. 15 which repeats the interpretation of the Article 9 included in the General Comment No. 6.

15. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, para. 2.

16. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, para. 11.

17. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, para. 22.

18. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, para. 23.

19. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, para. 24.

20. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, para. 25.

21. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, para. 26.

22. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, para. 27.

clusion in old age. There is no universally accepted definition of poverty. The CESCR endorses a multi-dimensional understanding of poverty, reflecting the indivisible and interdependent nature of all human rights.<sup>23</sup>

### 2.1.3 State obligations

The obligations arising from Article 9 ICESCR encompass the adoption of effective measures by State parties (relating to both contributory and non-contributory schemes) in line with their maximum available resources,<sup>24</sup> which must be periodically revised as deemed necessary. These measures should aim to achieve the full realisation of the right of all persons to social security without discrimination.<sup>25</sup> The CESCR acknowledged that the *progressive realisation* of the right to social security carries significant *financial implications* for the State parties, but the fundamental importance of social security in upholding human dignity justifies the appropriate priority it should receive in both law and policy.<sup>26</sup> Failure to enforce relevant laws, or to implement policies designed to uphold the right to social security or to ensure the State pension scheme's financial sustainability may be a *violation* of the specific obligations enshrined in Article 9 ICESCR by omission.<sup>27</sup> Finally, "any person or groups who have experienced violations of their right to social security should have access to ef-

---

23. "Poverty may be defined as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights." (Statement of the UN CESCR on substantive issues arising in the implementation of the ICESCR: poverty and the ICESCR, A/CONF.191/BP/7, 2001, para. 8).

24. On the methodologies for evaluating the progressive realisation within the context of resource availability and their complications, see Ssenyonjo M, Economic, social and cultural rights: an examination of state obligations, in Joseph S and McBeth A, Research Handbook on International Human Rights Law, Edward Elgar, Cheltenham and Northampton, 2010, pp. 51 et seq.

25. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, para. 4.

26. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, para. 41.

27. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, para. 65.

fective judicial or other remedies at both national and international levels" and "be entitled to adequate reparation" and legal assistance.<sup>28</sup>

Article 9 of the ICESCR should be read together with the ILO's Social Security (Minimum Standards) Convention, 1952 (No. 102) and the ILO Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128). The State Parties to the ICESCR "must take appropriate measures to establish general regimes of compulsory old-age insurance, starting at a particular age, to be prescribed by national law" based on these three instruments.<sup>29</sup> These regimes also aim to "guarantee the provision of *survivors' and orphans' benefits* on the death of the breadwinner who was covered by social security or receiving a pension".<sup>30</sup> In so far as special measures must be implemented to ensure the respect for older persons, the State parties to the ICESCR are required –*within the limits of their available resources*– to "provide non-contributory old-age benefits and other assistance for all older persons who, when reaching the age prescribed in national legislation, have not completed a qualifying period of contribution and are not entitled to an old-age pension or other social security benefits or assistance and have no other source of income".<sup>31</sup> Moreover, invoking the ILO Older Workers Recommendation, 1980 (No. 162) "the CESCR invites State parties to establish *retirement age* so that it is flexible, depending on the occupations performed and the working ability of elderly persons, with due regard to demographic, economic and social factors".<sup>32</sup>

#### 2.1.4 Gender dimension

Another set of relevant ICESCR provisions is provided in Article 4 and Article 9 of the ICESCR in combination with paragraph 2(h) of the Proclamation on Aging, which calls for national initiatives on ageing for older

---

28. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, para. 77.

29. See General Comment of the UN CESCR No. 6 on the economic, social and cultural rights of the older persons, 1995, para. 27.

30. See General Comment of the UN CESCR No. 6 on the economic, social and cultural rights of the older persons, 1995, para. 29.

31. See General Comment of the UN CESCR No. 6 on the economic, social and cultural rights of the older persons, 1995, para. 30.

32. See General Comment of the UN CESCR No. 6 on the economic, social and cultural rights of the older persons, 1995, para. 28.

women “for their largely unrecognised contributions to the economy and the well-being of society”.<sup>33</sup> In light of the general obligation of gender equality with regard to entitlement of all economic, social and cultural rights enshrined in the ICESCR, State parties “should take steps to eliminate the factors that prevent women from making equal contributions to social security schemes” that link benefits with contributions (due to intermittent participation in the workforce owing to family responsibilities and unusual wage outcomes, exposing them to the risk of career fragmentation) or to “ensure that schemes take into account such factors in the design of the benefit formulas” (e.g. by including periods of child rearing or caring for a dependent adult when determining pension entitlements and compensating for temporary work interruptions, i.e. reconciliation policies).<sup>34</sup> The right to both adequate social security and financial support in retirement requires a life course approach to mitigate the cumulative effects of discrimination against female workers.<sup>35</sup> In addition, the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the international human rights instrument targeting women, reaffirms that “gender-based discrimination in employment through the lives of older women has a cumulative effect on old age, compelling older women to face disproportionately lower income and lower or no access to pensions compared with older men”.<sup>36</sup> Furthermore, retirement age for women should not be mandatory, but “optional in order to protect older women’s right to continue working if they choose to and to accumulate increased pension benefits where applicable at par with men”.<sup>37</sup>

---

33. Proclamation on Ageing: resolution / adopted by the UN General Assembly adopted at the 42nd plenary meeting, 16 Oct. 1992.

34. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, para. 32.

35. General Comment of the UN CESCR No. 23, on the right to just and favourable conditions of work (Article 7 of the ICESCR), E/C.12/GC/23, 2016, para. 47(b): “The cumulative effects of discrimination against female workers through the life cycle might require targeted measures to achieve equality and guarantee fair wages, equal opportunities for promotion and equal pension rights”.

36. General recommendation of the UN Committee on the Elimination of Discrimination against Women No. 27 on older women and protection of their human rights, CEDAW/C/2010/47/GC.1, 2010, para. 20.

37. *Ibid.* The State obligations under the CEDAW on work and pension benefits for older women are provided for in paragraphs 41-44 of the Recommendation.

### 2.1.5 Pre-retirement phase

A special case of rights related to work could apply to older workers who have not yet reached retirement age and who face challenges finding and retaining jobs. In this context and in alignment with Articles 6-8 of the ICERSC, the CESCR emphasises the need for measures to prevent age-based discrimination in employment and the implementation of retirement-preparation programmes.<sup>38</sup> The ICESCR explicitly prohibits any form of discrimination, whether in law or in fact, whether direct or indirect on the grounds of age. Nevertheless, certain distinctions can be made on the basis of age, for example entitlement to a pension, but any such distinction must be reasonable and justified by the specific circumstances.<sup>39</sup>

### 2.1.6 The case of migrants

Regarding non-nationals, meaning *migrants*, Article 2(2) of the ICESCR prohibits discrimination on the grounds of nationality. According to the CESCR, migrants should be able to benefit from their contributions to a social security system or eventually retrieve their contributions if they leave the country and to have access to non-contributory schemes for income support. Any restrictions to their eligibility for income support, including a qualification period, should be *proportionate* and *reasonable*.<sup>40</sup>

### 2.1.7 An international convention on the rights of older persons?

At the time of writing, there is still no comprehensive international convention on the rights of older persons,<sup>41</sup> unlike the existing instrument for children (United Nations Convention on the Rights of the Child) or for women (United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)). The adoption of a new interna-

---

38. See General Comment of the UN CESCR No. 6 on the economic, social and cultural rights of the older persons, 1995, paras 22-24.

39. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, para. 29.

40. General Comment of the UN CESCR No. 19 on the right to social security, E/C.12/GC/19, 2007, paras 36-37.

41. The lack of such a comprehensive instrument is recognised in the UN General Comment No 6 on the economic, social and cultural rights of the older persons, 1995, para. 13.

tional treaty protecting the human rights of older persons has been proposed and the issue has been highlighted by NGOs.<sup>42</sup>

### 2.1.8 Other initiatives

Several initiatives have been introduced to address the rights of older persons. The UN organised two World Assemblies on ageing which yielded policy and programme proposals. The first one took place in 1982 in Vienna and led to the endorsement of the International Plan of Action on Ageing.<sup>43</sup> The United Nations Principles for Older Persons were adopted by the General Assembly in 1991 between the first and second World Assembly on Ageing, encompassing five principles to be incorporated into national programmes: independence, participation, care, self-fulfilment and dignity.<sup>44</sup> Reaffirming these principles and recommendations for action, the Madrid International Plan of Action on Ageing (MIPAA) and the Political Declaration were adopted at the Second World Assembly on Ageing in April 2002, introducing a bold agenda to address ageing in the 21<sup>st</sup> century. It focusses on three priority areas: older persons and development; advancing health and well-being into old age; and ensuring an enabling and supportive environment.<sup>45</sup>

To advance the policy principles set out in the MIPAA, a working group on ageing was initially established in 2008 as an intergovernmental body subsidiary to the Executive Committee of UNECE. This working group achieved permanent standing in 2020 (SWGA). Its members consist of national focal points on ageing, who represent the UNECE's Member States, NGO representatives, academia and international organisations. The group meets annually.<sup>46</sup>

---

42. Such as the Global Alliance for the Rights for Older People which consists of a network of international age-related NGOs that support the conclusion of a new convention (<https://rightsofolderpeople.org/>).

43. World Assembly on Ageing (26 July–6 August 1982), Vienna International Plan of Action on Ageing.

44. UNGA, Resolution 46/91 on Implementation of the International Plan of Action on Ageing and Related Activities, 16 December 1991, UN Doc. A/RES/46/91.

45. Second World Assembly on Ageing (8 April–12 April 2002), Political Declaration and Madrid International Plan on Ageing; see UN, Report of the Second World Assembly on Ageing, 2002, UN Doc. A/CONF.197/9.

46. Further information on the objectives and work of the SWGA can be found at: <https://unece.org/population/standing-working-group-ageing>.



An Open-Ended Working Group of Ageing (OEWGA) was established within the UN Department of Economic and Social Affairs on Ageing (UN-DESA)<sup>47</sup> by the UN General Assembly by Resolution 65/182 on 21 December 2010. This group continuously examines the existing international framework of human rights of older persons and identifies possible gaps and how to address these. The discussions are centred on minimum income in old age in relation to older persons' economic (in)security.<sup>48</sup> More specifically, the issues related to social security rights emphasised during the working group's most recent session included the weaknesses of current social protection coverage and inadequate social benefits, the complexity of social protection systems and the difficulty of understanding one's entitlements, the financial, fiscal and economic unsustainability of pension funds, restrictions to receiving two or more social benefits simultaneously, contribution gaps arising from informal sector employment with negative implications for the pension amount, the vulnerability of older women to economic insecurity and the evolving dynamics of family structures.<sup>49</sup>

## *2.2 International social security standards*

Within the framework of the International Labour Organization (ILO),<sup>50</sup> social protection assumes a pivotal role in securing the human right to social security for older persons and ensuring income security as well as access to essential services (health and care) in old age. To this end, specific instruments have been established with a focus on minimum social secu-

---

47. Official website of UNDESA: <https://www.un.org/development/desa/ageing/>, where information on all UN initiatives on ageing are available. UNDESA is the home of the Sustainable Development Goals (SDGs) and provides intergovernmental support, analyses and capacity development supporting the implementation of the 2030 Agenda.

48. See, for example the substantive inputs on the focus area "economic security" – working document submitted by the Office of the High Commissioner for Human Rights (Twelfth Session of the Open-ended Working Group on Ageing, 11-14 April 2022), A/AC.278/2022/CRP.4.

49. Ibid, paras 6-14. This report also analyses the implications of economic (in)security on the right to health (paras 14-35).

50. ILO is the tripartite agency of the United Nations that has been bringing together governments, employers and workers of 187 Member States since 1919 to establish labour standards, develop policies and devise programmes that promote decent work for all.

rity standards to promote a dignified and secure life for older persons. They provide a comprehensive framework of core principles and benchmarks for the establishment, development and maintenance of adequate old-age pension systems at the national level.<sup>51</sup>

### *2.2.1 Income security in old age*

The ILO framework specifically refers to “income security” in old age as an essential element of social security. Income security is “about the level of income (absolute and relative to needs), assurance of receipt, expectation of income adequacy now and improvement or deterioration in the future, both during a person’s working life and in old age or disability retirement. Income security is about actual, perceived and expected income”.<sup>52</sup> Income security for older persons is crucial for preventing poverty and vulnerability among them. It is also relevant for achieving Target 1.3 of the Sustainable Development Goals<sup>53</sup>: “Implement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable”.

### *2.2.2 Minimum Social Security Standards Conventions*

One of the cornerstones of the international reference framework for pensions and other social security benefits to ensure income security and access to healthcare in old age is the ILO’s Social Security (Minimum Standards) Convention of 1952 (No. 102), which sets out minimum standards for social security benefits and the conditions for entitlement. Furthermore, under the ILO’s Invalidity, Old-Age and Survivors’ Benefits Convention of 1967 (No. 128), Member States are required to protect employees by providing invalidity, old-age and survivors’ benefits.<sup>54</sup>

---

51. World Social Protection Report 2020–22: Social protection at the crossroads – in pursuit of a better future International Labour Office – Geneva: ILO, 2021, p. 167. This report provides statistical information about legal and effective coverage for old-age protection worldwide.

52. According to the definition used in the ILO’s Income Security Index: [https://www.ilo.org/sesame/SESHHELP.NoteISI#:~:text=Definition,old%20age%20or%20%20%20disability%20retirement.\(accessed October 2023\)](https://www.ilo.org/sesame/SESHHELP.NoteISI#:~:text=Definition,old%20age%20or%20%20%20disability%20retirement.(accessed%20October%202023).).

53. The Sustainable Development Goals (SDGs), also known as the Global Goals, were adopted by the United Nations in 2015 as a universal call to action to end poverty, protect the planet, and ensure that by 2030 all people enjoy peace and prosperity.

54. Only seven EU Member States have ratified this Convention so far.

### 2.2.3 ILO Social Protection Floors Recommendation (No. 202)

Moreover, the Social Protection Floors Recommendation (No. 202) was adopted in 2012 by the governments and the representatives of both employers and workers of ILO's –at that time– 185 Member States.<sup>55</sup> The instrument provides guidance to countries on the establishment and maintenance of nationally-defined social protection floors as a fundamental element of their national social security systems and in implementing such social protection floors within strategies aimed at extending social security that progressively ensure higher levels of social security benefits to as many people as possible, guided by the ILO's social security standards.<sup>56</sup>

Social protection floors are nationally defined sets of basic social security guarantees aimed at preventing or alleviating poverty, vulnerability and social exclusion.<sup>57</sup> Specifically, social protection floors should, at minimum, include the essential social security guarantee of basic income security for older persons, at least at a nationally defined minimum level.<sup>58</sup> When defining basic social security guarantees, Member States should give due consideration –among others– to basic income security with the aim of enabling a life in dignity. Nationally defined minimum income levels may correspond to the monetary value of a set of necessary goods and services, national poverty lines, income thresholds for social assistance or other comparable thresholds established by national law or practice and may take regional differences into account.<sup>59</sup> In addition, the levels of basic social security guarantees should be regularly reviewed through a transparent procedure established by national laws, regulations or practice, as appropriate.<sup>60</sup> The participation of representative employer and worker organizations, as well as consultations with other relevant and representative organizations of persons concerned should be ensured when establishing and reviewing the levels of these guarantees.<sup>61</sup>

---

55. Only ten EU Member States have ratified this Convention so far.

56. ILO Social Protection Floors Recommendation, 2012, para. 1.

57. ILO Social Protection Floors Recommendation, 2012, para. 2.

58. ILO Social Protection Floors Recommendation, 2012, para. 5(d).

59. ILO Social Protection Floors Recommendation, 2012, para. 8(b).

60. ILO Social Protection Floors Recommendation, 2012, para. 8(c).

61. ILO Social Protection Floors Recommendation, 2012, para. 8(d).

Social Protection Floors Recommendation (No. 202) reaffirms social security as a human right for all persons and clearly establishes the minimum core content of this right.<sup>62</sup> According to the ILO's General Survey on the Social Protection Floors Recommendation of 2012 (No. 202), the implementation of this Recommendation brings States closer to meeting their international human rights obligations.<sup>63</sup> This Recommendation should be considered an authoritative interpretation of the scope and content of the right to social security under the ICESCR complementing General Comment No. 19 on the right to social security adopted by the CESCR in 2018.<sup>64</sup>

#### *2.2.4 ILO and the social security rights of migrant workers*

A special ILO Convention, the Maintenance of Social Security Rights Convention of 1982 (No. 157) addresses migrant workers and is accompanied by the ILO Maintenance of Social Security Rights Recommendation of 1983 (No. 167). The Maintenance of Social Security Rights Convention promotes a flexible and comprehensive form of coordination between national social security schemes and, more specifically, the conclusion of bilateral or multilateral social security agreements. Migrant workers' social security rights can thereby be maintained. This Convention applies to all branches of social security, irrespective of the type of scheme (e.g. contributory or non-contributory). The Maintenance of Social Security Rights Recommendation No. 167 proposes model provisions for the conclusion of such agreements and provides rules on maintaining social security rights in the course of acquiring and acquired rights and the provision of benefits abroad.

### **3. Regional human rights instruments for minimum income in old age**

Apart from the international legal framework for the protection of human rights of older persons, regional human rights instruments exist that

---

62. Sepúlveda M, The Right to Social Security, in Dugard J, Porter B, Ikawa D and Chenwi L (eds.), *Research Handbook on Economic, Social and Cultural Rights as Human Rights*, Edward Elgar Publishing, 2020, p. 92.

63. ILO Report, *Universal social protection for human dignity, social justice and sustainable development*, INTERNATIONAL LABOUR CONFERENCE 108th SESSION, 2019, available at [Universal social protection for human dignity, social justice and sustainable development \(ilo.org\)](https://www.ilo.org/public/libdoc/iloorg/2019/02/190201.pdf).

64. *Ibid.* P. 93.

either specifically address older persons or contain provisions on minimum income in old age.

### ***3.1 The Inter-American System***

An instrument ensuring the economic, social and cultural rights of older persons exists within the framework of the Inter-American System of Human Rights (hereafter IASHR), i.e. the Inter-American Convention on Protecting the Human Rights of Older Persons, which was adopted by the Organization of American States (OAS). This Convention entered into force in 2017 and includes seven State Parties. In its Preamble, it recognises the “need to address matters of old age and ageism from a human rights perspective that recognizes the valuable current and potential contributions of older persons to the common good, to cultural identity, to the diversity of their communities, to human, social, and economic development, and to the eradication of poverty.” A definition of an older person is given in Article 2 of the Convention: “A person aged 60 or older, except where legislation has determined a minimum age that is lesser or greater, provided that it is not over 65 years. This concept includes, among others, elderly persons.”

Article 17 of the Inter-American Convention on Protecting the Human Rights of Older Persons includes the right to social security in terms of leading a life in dignity. The second paragraph of Article 17 states: “State Parties shall progressively promote, within available resources, the provision of income to ensure a dignified life for older persons through social security systems and other flexible social protection mechanisms.” In the third paragraph of the same article, special provision is made for the recognition and portability of older migrant workers’ social security entitlements.

Moreover, Article 18 of the Inter-American Convention on Protecting the Human Rights of Older Persons recognises the right of older persons to decent and dignified work and to equal opportunities and treatment, irrespective of age. Interestingly, State Parties to this Convention have the obligation to promote programmes and measures that will facilitate a gradual transition to retirement.

The Convention provides a follow-up mechanism in Articles 33-36 with a monitoring system and a system of individual petitions. However, due to the low number of ratifications of this Convention (only seven countries), the follow-up mechanism has not yet been established.

### ***3.2 The African Human Rights System (AHR)***

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons<sup>65</sup> supplements the provisions of the African Charter on Human and Peoples' Rights to address the needs of older persons, such as access to regular income. It was adopted in 2016 and has so far been ratified by 12 African countries.<sup>66</sup>

The Protocol includes a definition of older persons in Article 1, and includes persons aged 60+ years. Article 7 of the Protocol sets out special provisions for the social protection of older persons in the form of adequate pensions or other forms of social security for those who contributed to the social security system during their employment (Article 7, paragraph 1) or in the form of universal protection mechanisms providing income security to those who have not contributed to any social security scheme (Article 7, paragraph 2). A further requirement of decentralised, simple and dignified processes and procedures to access pensions is included in paragraph 3 of the Protocol's Article 7.

The Protocol entails special provisions for its implementation in Article 22. Under Article 22, paragraph 4, the African Court of Human Rights and Peoples' Rights has the mandate to hear disputes that arise from the provisions of this Protocol.

### ***3.3 The European system***

#### ***3.3.1 The Council of Europe***

##### ***3.3.1.1 European Social Charter***

At the regional level of the Council of Europe's legal framework, Article 23 was introduced with the Additional Protocol 1988 in the revised European Social Charter (RESC). This Article is a human rights treaty standard that specifically protects the rights of older persons. The article's main ob-

---

65. For a brief description of the specific economic, social and cultural rights of older persons included in this Protocol as well as States' duties, see Chenwi L, *The African System*, in Dugard J, Porter B, Ikawa D and Chewni L (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights*, Edward Elgar, 2020, pp. 36-37.

66. The ratifications (as well as signatures/deposits) are available at: [https://au.int/sites/default/files/treaties/36438-sl-PROTOCOL\\_TO\\_THE\\_AFRICAN\\_CHARTER\\_ON\\_HUMAN\\_AND\\_PEOPLES\\_RIGHTS\\_ON\\_THE\\_RIGHTS\\_OF\\_OLDER\\_PERSONS\\_0.pdf](https://au.int/sites/default/files/treaties/36438-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_OLDER_PERSONS_0.pdf) (last accessed October 2023).

jective is to support older persons in remaining “full members of society” with its main focus on social protection outside employment. This Article overlaps with other articles of the European Social Charter, such as Article 12 (the right to social security) and Article 13 (the right to social and medical assistance) and requires Member States to implement targeted measures in view of older persons’ specific needs.<sup>67</sup> According to Article 23 RESC a category of measures to adopt or encourage would be designed in particular:

“to enable elderly persons to remain full members of society for as long as possible, by means of a. adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life.”

As this article is quite broad, the interpretation by the European Committee of Social Rights (ECSR) is decisive for specifying its provisions. The Committee focussed –among other issues– on the provision of adequate resources and services in line with Articles 12 and 13 of the RESC. The primary focus of the right to adequate resources is on pensions, contributory or non-contributory as well as other complementary cash benefits available to older persons in accordance with the ESCR Conclusions of 2013, Statement of interpretation of Article 23 (adequate resources for the elderly).<sup>68</sup> When the ESCR assesses the adequacy of such resources, it takes the social protection measures guaranteed to older persons into consideration, which allow them to lead a “decent life” and participate actively in public, social and cultural life, and examines all the aforementioned categories of pensions or other complementary cash benefits. The latter are then compared with the median equivalised income. Since the Committee is responsible for the assessment of not only the law, but also the compliance of practice with the obligations arising from the RESC, it takes into account relevant indicators relating to at-risk-of-poverty rates for persons aged 65 and over.<sup>69</sup>

### 3.3.1.2 *European Convention of Human Rights*

The European Convention of Human Rights (ECHR) may not include social human rights provisions for older persons, but the European Court of Human Rights (ECtHR) has developed case law in the field of social se-

---

67. Lukas K, *The Revised European Social Charter, An Article by Article Commentary*, Edward Elgar Publishing, 2021, p. 281.

68. Internet source: [https://hudoc.esc.coe.int/eng?i=2013\\_163\\_04/Ob/EN](https://hudoc.esc.coe.int/eng?i=2013_163_04/Ob/EN).

69. *Digest of the Case Law of the European Committee of Social Right*, Council of Europe Publications, 2022, p. 180.

curity in the context of the protection of the right to property, thus expanding the ECHR's social aspect. Certain obligations therefore arise under the ECHR as regards the civil and political rights protection that spill over into the realm of social rights.<sup>70</sup>

### 3.3.1.3 *Soft law on the promotion of human rights of older persons*

The Committee of Ministers of the Council of Europe adopted the Recommendation CM/Rec(2014)2 to Member States in 2014 on the promotion of human rights of older persons.<sup>71</sup> In Part V of the Appendix to this Recommendation under the title 'social protection and employment', the principle that older persons should receive *appropriate resources* enabling them to lead an adequate standard of living and participate in public, economic, social and cultural life, is included. The Committee of Ministers recommends Member State governments to ensure that the principle enshrined in Part V is complied with in national legislation and practice and to evaluate the effectiveness of the measures being implemented. In addition, although the principles are non-binding, the Recommendation encourages Member States to examine, within a period of five years since its adoption, the implementation of this principle in cooperation with the Council of Europe.<sup>72</sup> Member States are therefore bound to ensure a minimum level of well-being for older persons. According to the implementation report of this Recommendation, many Member States have reported new measures aimed at granting additional resources to older persons at risk of exclusion and to improve their living conditions. States that do not have such a minimum social income in place are encouraged to introduce measures to provide for it in light of this Recommendation.<sup>73</sup>

---

70. Leijtjen I, *Core Socio-Economic Rights and the European Court of Human Rights*, Cambridge University Press, 2018.

71. See Recommendation CM/Rec(2014)2, adopted by the Committee of Ministers of the Council of Europe on 19 February 2014 and explanatory memorandum, available at: <https://rm.coe.int/1680695bce> (accessed October 2023).

72. Martin C, Rodríguez-Pinzón D, Brown B, *Human Rights of Older People: Universal and Regional Legal Perspectives*, Springer, 2015, p. 128.

73. CDDH Report on the implementation of the Committee of Ministers Recommendation CM/REC(2014)2 on the promotion of human rights of older persons, paragraph 42 (page 50).



The recommendation is a soft law instrument<sup>74</sup> and summarises the part of Article 23 of the revised European Social Charter. Given that Article 23 specifically relates to older persons who have stopped working, the term “resources” refers to retirement pensions and any other benefits that States may grant. The European Committee of Social Rights has asserted that pensions should be indexed, linked and compared to average wage levels and the cost of living, including the costs of transport and medical care. The Committee usually assesses older persons’ resources in relation to the poverty line, which is calculated by Eurostat or by the Committee itself on the basis of national poverty lines.<sup>75</sup>

### 3.3.2 *The European Union*

There is no instrument in European Union law that specifically covers the human rights of older persons, but there is a special provision in Article 25 of the Charter of Fundamental Rights of the European Union (EUCFR) that could be relevant to minimum income in old age which provides that:

“The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.”

This Article introduces a basis for developing comprehensive policies at EU and national level to implement a right-based approach towards older people by ensuring a life in dignity and independence.

In addition, a voluntary long-term savings personal pension product was introduced in 2022, the “pan-European Personal Pension Product” (PEPP), which is provided by a financial institution under a PEPP contract, and subscribed to by a PEPP saver or by an independent PEPP savers’ association on behalf of its members. It entails no or only a limited possibility for early redemption and is registered in accordance with Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a PEPP.

The European Semester offers an EU tool to influence national policies through Country-Specific Recommendations to Member States.

---

74. Spanier B, Doron I, Milman-Sivan F, In Course of Change: Soft Law, Elder Rights, and the European Court of Human Rights, *Minnesota Journal of Law & Inequality*, Vol. 34, Issue 1 (2016).

75. Recommendation CM/Rec(2014)2, adopted by the Committee of Ministers of the Council of Europe on 19 February 2014 and explanatory memorandum, pp. 41-42.

Member States adopt appropriate policy decisions in line with these Recommendations. Until recently, the focus was on employment issues, but lately, references to active ageing within the context of these Recommendations have been on the rise.

Finally, the European Pillar of Social Rights includes Principle 14 on minimum income<sup>76</sup> which states:

“Everyone lacking sufficient resources has the right to adequate minimum income benefits ensuring a life in dignity at all stages of life, and effective access to enabling goods and services. For those who can work, minimum income benefits should be combined with incentives to (re)integrate into the labour market.”

The European Pillar of Social Rights also reaffirms and builds upon the concept of active ageing as already reflected in Article 25 of the CFREU. The European Pillar of Social Rights, despite being non-binding, offers an opportunity for EU institutions and Member States to transform their political commitment into concrete legal action and policies.<sup>77</sup>

#### 4. Concluding remarks

The overview of the existing legal framework on the human rights of older persons, particularly in the context of minimum income, reveals a plurality of sources and instruments. These can play an important role in guiding national policies and encouraging reforms as well as safeguarding the established rights of older persons. However, the enforcement mechanisms of these instruments are less effective due to the overall problem of enforcing individual rights within the legal framework of international human rights.

Notably, there is an increasing emphasis on the recognition of older persons' needs in current social policies and legislative measures. This is also reflected in the addition of provisions in legal instruments specific to the rights of older persons. In some regional systems, specialised instruments exist for

---

76. See also the proposed Council Recommendation on adequate minimum income, available at: <https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=10417&furtherNews=yes#navItem-1> (last accessed October 2023).

77. Report of the European Union Agency for Fundamental Rights, *Shifting perceptions: towards a rights-based approach to ageing*, Luxembourg, Publications Office of the European Union, 2018, p. 20.

the protection of human rights of older persons, such as the Inter-American Convention on Protecting the Human Rights of Older Persons and the Protocol to the African Charter on Human and Peoples' Rights to address the needs of older persons. The issues affecting older persons are gradually increasing in importance in many stakeholders' policy agendas.

The right to social security and social assistance plays a pivotal role in safeguarding income security in old age and consequently, a dignified and decent standard of living. Several aspects can increase the risk of poverty in old age, a reality that is currently prevalent in many developing and developed countries. These aspects relate primarily to employment types (part-time work, periods of economic inactivity due to care responsibilities, new forms of work, casual work with a low level of social security contributions, precarious work) during a person's working life which may result in retirement vulnerability in old age, especially in the case of older women or migrant workers. Such retirement vulnerability can be addressed by complying with existing minimum social standards and levels of well-being for older persons. The compulsory retirement requirement may pose limits to the desire of older persons to extend their working life and complement their (old-age pension) income, which may not be sufficient to lead a life in dignity.

Minimum income in old age is also linked to other aspects of the rights of older persons, such as the right to housing or the right to health-care, particularly affordable long-term care. All of these aspects are interconnected and contribute to leading a decent life in dignity in old age, allowing older persons to actively participate in political, social and cultural life, eliminating the risk of discrimination, exclusion and poverty.

The discussion on the adoption of a distinct Convention on the rights of older persons at UN level, comparable to other group-specific conventions, remains open, although many ongoing initiatives are actively endorsing this direction.

## **Bibliography**

Ayalon L and Tesch-Römer C (eds) (2018) *Contemporary Perspectives on Ageism*, vol 19. Springer, Cham, 2018.

Bisom Rapp S and Sargeant Malcolm (2016) *Lifetime Disadvantage, Discrimination and the Gendered Workforce*, Cambridge University Press.

Chenwi L, The African System, in Dugard J, Porter B, Ikawa D, Chenwi L (eds) (2020) *Research Handbook on Economic, Social and Cultural Rights as Human Rights*, Edward Elgar.

- Doron I, Numhauser-Henning A, Spanier B, Georgantzi N, Mantovani E (2018) Ageism And Anti-Ageism In The Legal System: A Review of Key Themes, in AYALON Liat, TESCH-RÖMER Clemens (eds), Contemporary Perspectives on Ageism, vol 19. Springer, Cham, 2018.
- Dugard J, Porter B, Ikawa D, Chenwi L (eds) (2020) Research Handbook on Economic, Social and Cultural Rights as Human Rights, Edward Elgar.
- Geyer J, Buslei H, Gallego-Granados P, Haan P (2019) Anstieg der Altersarmut in Deutschland: Wie wirken verschiedene Rentenreformen? Deutsches Institut für Wirtschaftsforschung, Bertelsmann Stiftung.
- Leitjen I (2018) Core Socio-Economic Rights and the European Court of Human Rights, Cambridge University Press.
- Lukas K (2021) The Revised European Social Charter, An Article by Article Commentary, Edward Elgar Publishing.
- Martin C, Rodríguez-Pinzón D, Brown B (2015) Human Rights Of Older People: Universal and Regional Legal Perspectives, Springer.
- Spanier B, Doron I, Milman-Sivan F (2016) In Course Of Change: Soft Law, Elder Rights, and the European Court of Human Rights, Minnesota Journal of Law & Inequality, Vol. 34, Issue 1, 55-86.
- Ssenyonjo M (2019) Economic, social and cultural rights: an examination of state obligations, in Joseph S and McBeth A, Research Handbook on International Human Rights Law, Edward Elgar, Cheltenham and Northampton.

# **Minimum income in old age: comparative aspects and European law issues**

---

Stamatia Devetzi

## **1. Introduction**

This book presents and discusses the provision of minimum income guarantees for the elderly in selected European countries. The key questions this study sought to address were: what types of national (pension) benefits are being provided to guarantee minimum income protection for the elderly? Have any recent reforms been adopted?

The focus is also turned to the European law dimension of minimum income provisions for the elderly. One main question in this regard was: how does the “free movement of pensioners” align with the Coordination Regulation (EC) 883/04,<sup>1</sup> on the one hand, and residence clauses in the Member States, on the other? Moreover, questions on the “nature” of these benefits (e.g. whether they are considered “social security” benefits, “social assistance” or “special non-contributory benefits”) were also explored: this is important to determine whether they are “exportable” to other European countries or whether pensioners who move to another European Union (EU) Member State can apply for them.

This chapter introduces a typology of the systems of minimum income for the elderly in selected countries; we also review the trends and tendencies in the design of minimum income provisions. In a second step, we discuss European law questions and challenges.

## **2. Minimum income for the elderly: a typology**

All countries included in this publication offer at least one type of minimum income guarantee for elderly persons. The types of minimum income measures provided for the elderly vary considerably between the se-

---

1. Regulation (EC) 833/2004 of the European Parliament and Council on the coordination of social security systems [2004] OJ L166/1.

lected EU Member States. By examining the different measures from a comparative law perspective, we can create a typology to better grasp the “nature” of these benefits. A typology drawn from a comparative law perspective also helps us identify common developments or trends, or to better understand the differences between the systems.

When discussing minimum income schemes for the elderly, we can distinguish between three major types: 1) various types of pensions or guarantees *within* (i.e. *as part of*) a country’s pension system or of statutory social security pensions; 2) (special) non-contributory income guarantees targeted *only* or *especially* at the elderly, and 3) residual/general social assistance schemes.<sup>2</sup>

## ***2.1. Different types of pensions or guarantees within the pension system***

### ***2.1.1. (Contributory) minimum pensions***

Governments provide for different measures to guarantee a minimum income for the elderly *within* the pension system itself. One measure is the **minimum pension**: minimum pensions *top up* pension income from an (earnings-related) scheme to a predefined level.<sup>3</sup> Entitlement usually depends on a *minimum contribution record*. Among the countries selected for our study, Belgium is a typical example of a country with a minimum pension system: not only eligibility, but also the amount of minimum pension depends on the individual’s contribution record. In fact, Belgium has not only one minimum pension system, but three different systems or methods of calculation (within the country’s pension insurance schemes), which can be explained by historical reasons.<sup>4</sup>

---

2. This typology is inspired by T. Goedemé’s analysis in: Minimum Income Protection for Europe’s Elderly, What and How Much has been guaranteed during the 2000s? in: Marx, I. and Nelson, K. (eds.), *Minimum income protection in flux*, Hampshire, 2012, pp. 108-136. However, our comparison does not precisely follow this typology, mainly because the differentiation between contributory and non-contributory income guarantees has become fluid in many cases in recent years.

3. Goedemé, T. (2012), *op. cit.* p. 110.

4. The first method of calculation applies to employees and self-employed persons; the second is only relevant for “regular” employees, and the third applies to civil servants: Stevens, Y. and Schoukens, P., *Minimum income in old age – the case of Belgium: plea for a universal income for pensioners?*, in this volume.

Poland also provides for a minimum pension; the legislator determines the amount and due to indexation, it has gradually increased in recent years. To receive the minimum pension, individuals must have accumulated both contributory and non-contributory periods that amount to a total of at least 25 years for men and 20 years for women.<sup>5</sup>

Greece's provisions for minimum pensions were quite "generous" in the past as well, but were abolished in 2016.<sup>6</sup> Since then, the minimum pension consists of two new schemes: the "national pension" (a flat-rate<sup>7</sup> benefit for those who have legally and permanently resided in Greece for 40 years<sup>8</sup>) and the "contributory pension".

### 2.1.2. Pension supplements

Another means for guaranteeing minimum income for the elderly within the pension system is **pension supplements**: they supplement individuals' pension income through either a fixed amount or up to a predetermined level. Contrary to minimum pensions, eligibility hinges not only on contribution records and on the amount of the pension benefit: entitlement to pension supplements is often contingent on more comprehensive income- or means-tests as well.<sup>9</sup> Among the countries included in our study, Spain, Austria and Germany have introduced such pension supplements; this is also the case in Italy for persons insured before 1996.<sup>10</sup>

The specific design of pension supplements can vary substantially. In Spain, the "minimum pension supplement" is a social security benefit within the meaning of Regulation (EC) 883/2004.<sup>11</sup> It is linked to the con-

- 
5. Mitrus, L., Minimum income in old age: The case of Poland, in this volume.
  6. Tsetoura, A., Guaranteed minimum pensions under the Regulation of Coordination of social security systems – the case of Greece, in this volume, p. 158.
  7. Currently EUR 413; Angelopoulou, O., Ongoing crises and limits to reductions of social security rights: the case of Greece, in this volume, p. 167.
  8. According to the 2021 Pension Adequacy Report of the European Commission, the "national pension" is a "contributory minimum pension": European Commission, 2021 Pension Adequacy Report, p. 146.
  9. Goedemé, T., op. cit., p. 110-111.
  10. Sena, E., Minimum income in old age: The case of Italy, in this volume, pp. 105-106.
  11. Salas Porras, M., The situation of retired and displaced elderly people in Europe. A review of legal mechanisms to fight poverty from the Spanish perspective, in this volume.

tributory pension: the recipients of the supplement are beneficiaries of a contributory pension whose habitual residence is in Spain and whose pensions fall below a certain threshold.<sup>12</sup> Due to its supplementary character, it is considered a social security benefit that can be exported to other EU Member States.<sup>13</sup>

The Austrian “compensatory supplement” (“Ausgleichszulage”) targets pensioners who receive an old-age or disability pension that lies below a certain threshold; the difference between the individual’s pension income and the given threshold determines the amount of the supplement. It is thus directly linked to entitlement to a pension benefit, is considered a social insurance benefit and is income-tested.<sup>14</sup> The Austrian “compensatory supplement” –unlike the Spanish supplement– was included in Annex X of Regulation (EC) 883/2004 as a “special non-contributory” benefit, which means that is not subject to the export obligation and its payment can be limited to pensioners who reside in Austria. Another supplement, however, the “premium on the compensatory supplement”, is specifically targeted at recipients of the compensatory supplement with long insurance periods (at least 30 years) and, because it rests on the number of insurance periods, is exportable.<sup>15</sup>

The German “basic pension supplement”, which was introduced on 1 January 2022, targets pensioners who have a relatively long insurance career (at least 33 years) but who did not accrue sufficient “earning points” because they were low earners.<sup>16</sup> It is income- but not means-tested.<sup>17</sup> Due to the complicated formula used to calculate it, the rigid prerequisites, the high administrative burden and the exclusion of low-income workers<sup>18</sup>, it has been criticised for feigning to be a guaranteed minimum pension for the elderly.<sup>19</sup>

---

12. Salas Porras, M., *op. cit.*, pp. 86-87.

13. Salas Porras, M., *op. cit.* p. 89.

14. and not means-tested: Felten, E., *The Austrian compensatory supplement*, in this volume, p. 41.

15. Felten, E., *op. cit.*, p. 46.

16. OECD (2021), *Pensions at a glance*, , p. 124.

17. Reinhard, H.-J., *The new basic pension supplement in Germany*, in this volume, p. 56.

18. Especially part-time workers or so-called “mini-jobbers”.

19. Reinhard, H.-J., *op. cit.*, p. 64.



Italy provided a “minimum pension supplement” in the past (at least for those insured before 1996, who had contributed to the former salary-based system); it does not apply to pensions calculated exclusively under the current contributions-based system.<sup>20</sup>

Finally, two countries provide for special supplements that specifically target parents/ persons who have raised children: in Spain, the “pension supplement to reduce the gender gap”, which was introduced in 2021, provides for a special minimum amount for persons who interrupted their career to care for minors and who consequently do not earn an adequate pension; it complements the contributory pension.<sup>21</sup> In Poland, the “supplementary pension benefit” targets individuals who have reached statutory retirement age, had at least four children and do not have adequate means of subsistence; it is a non-contributory, means-tested benefit.<sup>22</sup>

### 2.1.3 Basic pensions/ conditional basic pensions in residence-based systems

Two countries in our study traditionally provide for a “basic pension” in a residence-based system: the Netherlands and Sweden. In the Netherlands, a basic (flat rate) pension (AOW) is provided to all elderly persons. It is contingent on household type and is not means- or income-tested. AOW pensions are paid from contributions that were made by insured persons, i.e. those who earned an income (and a State subsidy); residents who earn only a low or no income do not pay contributions, but still acquire benefit rights for each year of residence. A total of 50 years of insurance/ residence is necessary for entitlement to a full pension.<sup>23</sup> Compared to other minimum income schemes for the elderly presented in this study, a “basic pension” such as the Dutch AOW pension represents the cornerstone of the overall public pension scheme.<sup>24</sup>

Sweden used to provide a basic pension or a flat-rate universal benefit (*folkpension*) as well; from 2001 onwards, a new system was gradually rolled out.<sup>25</sup> Since then, a tax-financed *guarantee pension* based on resi-

---

20. Sena, E., op. cit., p. 107.

21. Porras Salas, M., op. cit., pp. 89-90.

22. Mitrus, L., op. cit., pp. 235-236.

23. Pennings, F., Minimum income in old age in the Netherlands, in this volume.

24. Goedemé, T., op. cit., p. 111.

25. Erhag, T., Guaranteeing a minimum income in old age – the case of Sweden, in this volume, p. 183.

dence criteria is provided for those aged 65+ who receive an inadequate income-related pension.<sup>26</sup> Beneficiaries must have resided in Sweden for a minimum of three years to be eligible; 40 years of residence are required for eligibility to a full *guarantee pension*, which can be characterised as a "conditional basic pension".<sup>27</sup> Eligibility is "pension-tested", i.e. it supplements or tops up total benefits provided by the income-related public pension scheme. Moreover, the right to a *guarantee pension* is contingent on periods of residence, referred to as insurance periods. Moreover, the level of the benefit depends on the number of years of residence in the country.<sup>28</sup>

## ***2.2. Income guarantees targeted only or specifically at the elderly***

The majority of countries included in our study protect the elderly through *non-contributory* minimum income guarantees which are provided from a certain age onwards, often the legal retirement age. These guarantees for the elderly do not hinge on a minimum contribution record; means- or income-tests and residence conditions usually apply.

In Belgium, the "*guaranteed minimum income for the elderly*" is a means-tested benefit that guarantees pension beneficiaries a minimum level of subsistence.<sup>29</sup> The recipient must have reached 65 years of age and be a resident in Belgium. A prior residence condition was introduced in 2017: the beneficiary must have resided in Belgium for at least 10 years, of which 5 years must have been continuous, prior to applying for the benefit.<sup>30</sup> The benefit consists of a predetermined monthly amount, which is increased if the beneficiary lives in a single person household.

Spain also provides for non-contributory benefits for persons aged 65+. The requirements for eligibility are residence status and level of income, which must fall below a certain threshold and must be verified annually. A residence history condition applies: the beneficiary must have resided on Spanish territory or in the territory of EU Member States for a 10-

---

26. The income pension is based on contributions paid (notional contribution-defined).

27. Goedemé, T., op. cit., p. 112.

28. Erhag, T., op. cit., p. 184.

29. Stevens, Y. and Schoukens, P., Minimum income in old age - the case of Belgium: plea for a universal income for pensioners?, in this volume, p. 14.

30. This provision of prior residence was annulled by the Belgian Constitutional Court in 2019, see Stevens, Y. and Schoukens, P., op. cit., p. 23.

year period between his or her 16<sup>th</sup> birthday and his/her date of application for a retirement pension; a minimum of two years of residence must fall within the years immediately preceding the date of application.<sup>31</sup>

In Italy, elderly persons with an income below the minimum threshold and at risk of poverty can apply for a social allowance; to be eligible, recipients must be 66 years and 7 months old.<sup>32</sup> Eligibility for this benefit requires 10 years of continuous residence in Italy. Another measure targeted at the elderly, namely the “citizenship pension”, is addressed at people aged 67+ and is a measure intended for families (not for single households) that find themselves in a situation of economic hardship. Residence in Italy of at least 10 years is also a prerequisite for entitlement to the citizenship pension; the last two years of residence must have been continuous.<sup>33</sup>

German legislation also includes a special social allowance benefit targeted at old-age pensioners and disabled persons (“*basic income support for the elderly and for persons with reduced earnings capacity*”). The amounts are comparable to those provided under the general social assistance scheme, but the earnings limit for the income- and means-test differ. The benefit is only payable to elderly persons who permanently reside in Germany.<sup>34</sup>

The Greek “*allowance of social solidarity for pensioners*” (EKAS), which was introduced in 1996, was gradually retracted until the end of 2019; in its place, the legislator introduced compensatory social assistance measures.<sup>35</sup> A social solidarity allowance targeted especially at *uninsured* elderly persons was introduced in 2016; it is provided to poor elderly persons aged 67+ who are uninsured or who do not meet the necessary requirements for a pension.<sup>36</sup>

In Sweden, the *maintenance support* benefit for the elderly ensures that persons aged 65+ do not have to apply for social assistance. It guarantees a

---

31. Salas Porras, M., op. cit., p. 92.

32. The age may be periodically adjusted in accordance with life expectancy.

33. Sena, E., Minimum income in old age: The case of Italy, in this volume, pp. 109-110.

34. Reinhard, H.-J., op. cit., p. 55.

35. Tsetoura, A., Guaranteed minimum pensions under the Regulation of Coordination of social security systems – the case of Greece, in this volume, p. 158.

36. The amount of the social solidarity allowance for uninsured elderly persons is set at EUR 360 per month: Angelopoulou, O., Ongoing crises and limits to reductions of social security rights: the case of Greece, in this volume, p. 178.

decent standard of living for elderly persons who have a very low or no pension and no other means of income. Any other benefits the pensioner is entitled to must be claimed before he/she can apply for the maintenance support benefit. An additional benefit provided for the elderly with a low income is the means-tested "*housing supplement*".<sup>37</sup>

The Dutch "*income supplement for the elderly*" (AIO) targets AOW pensioners whose income is less than the AOW pension rates, i.e. those with gaps in their insurance periods in the Netherlands. It supplements AOW pensions; these supplements are means-tested (unlike the AOW pensions). Entitlement to this benefit requires residence status in the Netherlands.<sup>38</sup>

### ***2.3 General social assistance schemes***

A general social assistance scheme is in place in countries that do not provide non-contributory minimum income guarantees that are specifically targeted at the elderly. As a result of the debt crisis, Greece abandoned its generous benefits package for pensioners and adopted a universal social assistance measure for the entire population. This "guaranteed minimum income" amounts to only EUR 200 monthly.<sup>39</sup>

## **3. Common developments and trends**

A general trend of recent pension reforms in some of the countries covered in this book has been to *strengthen the link between contributions and benefits*: this has particularly been the case in Italy, Greece and Poland, and to a certain extent in Sweden<sup>40</sup> as well. As similar trends are likely to increasingly affect future pension levels, the significance of minimum income benefits for the elderly is set to rise in the future.

A trend observed in relation to systems providing minimum income guarantees to the elderly is an increasing *differentiation* and rising *complexity* of these systems. Rather than simplifying the systems that guarantee a minimum level of "dignity" in old age, many countries included in our study seem to be heading in the opposite direction. This is either reflected in a) further distinctions between different groups of persons ac-

---

37. Erhag, T., op. cit., p. 184.

38. Pennings, op. cit., p. 219.

39. Tsetoura, A., op.cit., (25) Angelopoulou, O., op. cit., p. 177.

40. Swedish "Income pension".

ording to their residence status or economic activity (the Belgian case), or b) introductions of new very detailed provisions, for example for persons with long employment or insurance histories (such as in the case of Austria or Germany) or for parents who meet specific criteria (such as in the case of Poland or Spain). These distinct rules may generally contribute to “social fairness”,<sup>41</sup> which is certainly most welcome from the perspective of solidarity in social security systems; special minimum old-age benefits can serve as an important safety net for those with short careers or low incomes.<sup>42</sup> However, they also tend to make the existing systems less transparent<sup>43</sup> or further complicate the administrative procedures.<sup>44</sup>

The exact “opposite” solution, i.e. abolishing all minimum income guarantees for the elderly and simply adopting a general residual social allowance scheme for the entire population, as in the case of Greece, cannot be considered a “role model”, either – especially considering the very low amounts of these benefits. This “oversimplification” can only be explained by the general reduction and/ or abolition of social security benefits in response to the debt crisis that began in 2010.<sup>45</sup>

Another trend we can observe is a (stricter) linking of minimum income non-contributory benefits for the elderly to *special residence conditions, long(er) residence histories or minimum periods of prior residence*: this is the case in Belgium,<sup>46</sup> Spain<sup>47</sup> and Italy.<sup>48</sup>

---

41. For a definition and discussion on the notion of “social fairness of pensions”, see European Commission, 2021 Pension Adequacy Report: Current and future income adequacy in old age in the EU, pp. 97-98.

42. European Commission, op. cit., p. 15.

43. See the critique by Stevens, Y. and Schoukens, P., op. cit., p. 33, p. 36.

44. See the critique by Reinhard, H.-J., in this volume, pp. 58-62.

45. Angelopoulou, op. cit., p. 165.

46. For the guaranteed minimum income for the elderly, the beneficiary must have resided in Belgium for at least 10 years prior to applying for the benefit of which 5 years must have been continuous (law of 2017).

47. The applicant must have resided on Spanish territory or in the territory of EU Member States for a 10-year period between his or her 16<sup>th</sup> birthday and his/her date of application for a retirement pension; two years must fall within the years immediately preceding the date of application.

48. Residence in Italy for at least 10 years is a prerequisite for entitlement to the citizenship pension; the last two years of residence must have been continuous.

#### 4. European (coordination) law questions

The provisions on minimum income for the elderly in the different Member States included in this study raise some interesting European law questions –or even challenges– especially in the field of EU social security coordination law.<sup>49</sup> One “challenge” is the paradoxical effect of the Court of Justice of the European Union’s (CJEU) case law on “minimum benefits” paid under Art. 58 Regulation (EC) 883/2004. Another question concerns the classification of certain minimum benefits for the elderly as “special non-contributory benefits”, which are usually not “exportable” to other EU Member States. Also, the linking of minimum income benefits for the elderly to residence conditions or minimum periods of prior residence in *one* country may violate EU coordination law. And, last but not least, the relationship between EU coordination law and Directive 2004/38 and its effects on minimum income for the elderly is worth questioning.

##### *4.1 “Supplement” or “minimum benefit” according to Art. 58 Regulation (EC) 883/2004*

Regulation (EC) 883/2004 on coordination of social security systems includes a series of provisions on pension benefits, including, inter alia, a “supplement” to which pensioners who have worked in different Member States may be entitled to in their country of residence. This supplement is equal to the difference between the total public pension the retiree receives from the Member State(s) he/she previously worked and lived in, and the “minimum benefit” provided for in the legislation of the country of residence<sup>50</sup> and under whose legislation a benefit is payable to him/her (Art. 58 Regulation (EC) 883/2004).

This provision has recently shown to have paradoxical effects, as shown by the discussion on the CJEU’s ruling in *Zaniewicz-Dybeck*.<sup>51</sup> As

---

49. Regulation (EC) 833/2004 of the European Parliament and Council on the coordination of social security systems [2004] OJ L166/1; Regulation (EC) 987/2009 of the European Parliament and of the Council of 16 September 2009, laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems [2009] OJ L284/1.

50. And under whose legislation a benefit is payable to him/her: Art. 58 Para 1 Reg (EC) 883/2004.

51. Case C-189/16 *Bogusława Zaniewicz-Dybeck* ECLI: EU: C:2017:946.

this case is comprehensively treated in our book<sup>52</sup>, the details of the ruling will not be presented here again. In a nutshell, the Court decided that the Swedish *guarantee pension* should not be calculated according to Articles 52 and 56, i.e. according to the pro-rata calculation method, but according to Article 58 of Regulation 883/2004 (former Articles 46, 47 and 50 of Regulation 1408/71). This means that the *guarantee pension* is to be classified as a “minimum benefit” in accordance with the Regulation. It furthermore means that the Member State’s obligation to pay the difference between the individual’s total pension benefit and the amount of the “minimum benefit” is linked to the requirement of *residence* in that country: in relation to the general provision of Art. 7 of the Regulation on the abolition of residence clauses (“export of benefits”), this provision is a *lex specialis* and therefore takes precedence.<sup>53</sup>

Following the *Zaniewicz-Dybeck* ruling, the Swedish government concluded that a legal basis for continuing to grant and pay the *guarantee pension* to EU citizens residing in another Member State no longer existed; consequently, by 2022, 43,000 pensioners who had previously been entitled to the guarantee pension and were residing in other EU/EEA States lost their right to this benefit. This may generally undermine the principle of free movement.<sup>54</sup> In any case, it would be economically unwise in future to move out of Sweden as a pensioner because it means losing the minimum benefit.<sup>55</sup> The paradoxical effect of this case law is that a provision in a Regulation designed to promote free movement may actually lead to de facto “immobility” in practice.

#### ***4.2 Minimum benefits for the elderly as “special non-contributory benefits”***

Another “challenge” in terms of European social security coordination law is the classification of some of the minimum benefits for the elderly as

---

52. See the comprehensive presentation and discussion of the case in Erhag, T., op. cit. and Stevens, Y. and Schoukens, P., op. cit.

53. Schuler, R. (2015), Art. 58, in Fuchs, M./Cornelissen, R. (Eds.), *EU Social Security Law – A Commentary on EU Regulations 883/2004 and 987/2009*, p. 367.

54. Erhag, T., op. cit., p. 198.

55. Wallrabenstein, A. (2018), *Migrationsphänomene im sozialrechtlichen Kontext*, ZESAR 9/18, pp. 357-363 (361).

“special non-contributory benefits”. The consequence is that they are not exportable to other EU Member States. What is striking –when looking at the different provisions from a comparative law perspective– is that very similar benefits, such as the Spanish “minimum pension supplement” and the Austrian “compensatory supplement”, are treated differently with reference to coordination law. The Austrian “compensatory supplement” has been included in Annex X of Regulation (EC) 883/2004 as a “special non-contributory benefit”, whereas Spain’s “minimum pension supplement” has not. A closer look at both “supplements” shows clear similarities: both benefits are linked to entitlement to a (contributory) pension benefit; are considered a social insurance benefit, and are income- or pension-tested (but not means-tested).<sup>56</sup> Yet one benefit is exportable and the other is not. To complicate things even further, another Austrian supplement, the “premium on the compensatory supplement”, which is targeted at recipients of the compensatory supplement with a long history of insurance periods (at least 30 years), is exportable.<sup>57</sup> From the perspective of consistent application of EU coordination law, such differentiations make little sense and may potentially result in new future CJEU case law. Or to say it in *Vonk*’s words: “This state of affairs is illogical.”<sup>58</sup>

### ***4.3 Minimum (non-contributory) benefits and residence conditions***

The linking of minimum income non-contributory benefits for the elderly to *residence conditions or minimum periods of prior residence* also raises a coordination law question: must periods of residence in another EU Member State be taken into consideration? Art. 6 Regulation (EC) 883/2004 sets down the so-called “aggregation of periods”, which means that periods of insurance, employment (or self-employment) and residence in other Member States must be added up together. The Belgian Constitutional Court ruled that the introduction in 2017 of a minimum period of prior residence in *Belgium* to be eligible for the “guaranteed minimum income for the elderly” not only breaches Belgian constitutional law, but is also incompatible with Art. 6 of Regulation (EC) 883/2004, because

---

56. See the discussions of Felten, E. and Porras, M. in this book.

57. Felten, E., op. cit., p. 46.

58. Vonk, G. (2020), The EU (non) coordination of minimum subsistence benefits: What went wrong and what ways forward?, *European Journal of Social Security*, 22 (2), pp. 138-147, p. 143.



periods of residence in other EU Member States were not taken into account. As a result, the Constitutional Court annulled the (new) prior residence clause in 2019. By contrast, the “Spanish approach” should be mentioned here: to meet the prior residence condition for eligibility to the Spanish non-contributory benefit for the elderly, the applicant must have resided<sup>59</sup> on Spanish territory *or in* the territory of EU Member States. This makes the Spanish provision compatible with EU coordination law from the outset.

#### ***4.4. Open questions on the relationship between EU coordination law and Directive 2004/38***

An extended theoretic discussion<sup>60</sup> has already taken place on the coordination of minimum subsistence benefits in the EU. This specifically concerned the right to benefits under Regulation (EC) 883/004 and residence rights under Directive 2004/38, as well as their interrelationship in the context of several social security cases before the CJEU.<sup>61</sup> Under Directive 2004/38, the legal category under which EU citizens exercise their right to free movement –as workers, jobseekers, students or economically inactive– is decisive for their access to social rights in the host state (Art. 7 and 24 of the Directive). According to Art. 7, residence rights of non-economically active EU citizens depend on them having “sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State” and a comprehensive health insurance. This means that equal treatment works best

---

59. For a 10-year period between his or her 16th birthday and his or her date of application for a retirement pension.

60. See, among others: Verschueren, H., (2014), Free movement or benefit tourism: The unreasonable burden of Brey, *European Journal of Migration Law* 16, pp. 147-179.; Verschueren, H., (2015), Preventing “benefit tourism in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*?”, *Common Market Law Review* 52, pp. 363-390; Mantu, S. and Minderhoud, P. (2019), Exploring the links between residence and social rights for economically inactive EU citizens, *European Journal of Migration and Law* 21 (3), pp. 313-337; Mantu, S. and Minderhoud, P. (2023), Struggles over social rights: Restricting access to social assistance for EU citizens, *European Journal of Social Security*, 25(1), pp. 3-19.

61. CJEU *Brey* (C-140/12), ECLI:EU:C:2013:565; *Dano* (C-333/13), ECLI:EU:C:2014:2358; *Ali-manovic* (C-67/14), ECLI:EU:C:2015:597; *Garcia-Nieto* (C-299/14), ECLI:EU:C:114.

when citizens have an economic activity or are financially self-sufficient, but is less effective when citizens are economically inactive.<sup>62</sup>

In fact, it was a CJEU ruling on a “pension supplement” that guaranteed minimum income for the elderly that got the ball rolling: the *Brey* case (C-140/12). The Austrian *Pensionsversicherungsanstalt* had rejected a German national’s application for “compensatory supplement” (“*Ausgleichszulage*”) on the grounds that he did not have sufficient resources to establish lawful residence in Austria.<sup>63</sup> In its ruling, the Court qualified the “*Ausgleichszulage*”, which is a special non-contributory benefit within the meaning of Regulation (EC) 883/04, as a “social assistance” benefit within the meaning of Directive 2004/38. The Court prioritised the Directive over the Regulation. Thirdly, the Court used a very broad definition of social assistance. Consequently, the *Brey* ruling and the others that followed<sup>64</sup> have intensified the schism in the quality of social protection between economically inactive and economically active citizens.<sup>65</sup>

Yet the case of the elderly is a rather special one: in most cases, they *were* economically active, but no longer are. In the *Brey* case, according to the Court, the fact that an economically inactive EU national is eligible to receive the “compensatory supplement” benefit as a result of his/her low pension, *could be* an indication that the individual does not have “sufficient resources” according to the meaning of Art. 7 of the Directive. Nonetheless, the Court also stressed that although Member States may determine a specific sum as a reference amount, they may *not* impose a minimum income level below which it will be presumed that the individual does not have sufficient resources, irrespective of a specific examination of each individual’s financial situation.<sup>66</sup> National authorities must conduct an “*overall assessment*” of the specific burden which the granting of that benefit would have on the national social assistance system as a whole with reference to the individual’s personal circumstances in the light of the principle of proportionality.<sup>67</sup>

---

62. Mantu, S. and Minderhoud, P., (2023), *op.cit.*, p. 4

63. He was receiving a German invalidity pension of EUR 1.087,74 and had moved to Austria with his wife.

64. *Dano* (C-333/13), ECLI:EU:C:2014:2358; *Alimanovic* (C-67/14), ECLI:EU:C:2015:597; *Garcia-Nieto* (C-299/14), ECLI:EU:C:114.

65. Vonk, G., (2020), *op. cit.*, p. 144.

66. CJEU *Brey* (C-140/12), ECLI:EU:C:2013:565, para. 68.

67. *Ibid.*, para. 78.

This “overall assessment of the specific burden” seems to have been “ignored” in later cases (*Dano, Alimanovic...*). These cases concerned persons who were not employed or were jobseekers, not pensioners that *worked* in the past. In the case of pensioners, the issue cannot be how well they are or can be “integrated into the labour market” of their state of residence; they are pensioners and are no longer workers. The “degree of integration”<sup>68</sup> in the host state must therefore be linked to other criteria, such as previous residence, previous employment, family relations, etc.<sup>69</sup> These trends are worth criticising because they place all “economically inactive” persons in the same “basket” without differentiating whether they were economically active in the past, and disregard the special situation of the elderly.

## 5. Conclusion

Principle 15 of the European Pillar of Social Rights emphasises that “everyone in old age has the right to resources that ensure living in dignity”. All EU countries covered in this book offer at least one type of minimum income guarantee for elderly persons. Although the distinct minimum income provisions vary widely across the case countries, we were able to create a typology to categorise the different methods of preventing or fighting poverty in old age and to also better understand them.

Some common developments and trends emerged from our comparative analysis, such as the increasing differentiation and further complexity of the systems of minimum income protection for the elderly or the (stricter) linking of minimum income (non-contributory) benefits for the elderly to special residence conditions, long(er) residence histories or minimum periods of prior residence.

The provisions on minimum income for the elderly in the different EU Member States included in this study also raise some European law questions or problems that will need to be eventually addressed. “Europe is

---

68. It is not clear whether the CJEU’s previous “genuine link” case law has been abandoned: for an overview of this case law, the case by case approach and its relevance for EU citizenship, see Pennings, F., (2015) The development of EU citizenship by means of the link approach, in Devetzi, S. and Janda, C. (Eds.) *Freiheit -Gerechtigkeit - Soziales Recht*, Baden-Baden, pp. 490-508.

69. Wallrabenstein, A. (2018), *op. cit.*, p. 362.

turning increasingly grey<sup>70</sup> and it is therefore important to not only expand but also better coordinate minimum income protection for the elderly in European countries.

### **Bibliography**

- Angelopoulou O (2023) Ongoing crises and limits to reductions of social security rights: the case of Greece, in this volume.
- Erhag T (2023) Guaranteeing a minimum income in old age – the case of Sweden, in this volume.
- European Commission (2021) 2021 Pension Adequacy Report: Current and future income adequacy in old age in the EU.
- Felten E (2023) The Austrian compensatory supplement, in this volume.
- Goedemé T (2012) Minimum Income Protection for Europe's Elderly, What and How Much has been guaranteed during the 2000s? in: Marx, I and Nelson, K. (eds.), *Minimum income protection in flux*, Hampshire: Palgrave Mcmillan, 108-136.
- Mantu S and Minderhoud P (2019) Exploring the links between residence and social rights for economically inactive EU citizens, *European Journal of Migration and Law* 21 (3), 313-337.
- Mantu S and Minderhoud P (2023) Struggles over social rights: Restricting access to social assistance for EU citizens, *European Journal of Social Security*, 25(1), 3-19.
- Mitrus L (2023) Minimum income in old age: The case of Poland, in this volume.
- Pennings F (2015) The development of EU citizenship by means of the link approach, in: Devetzi, S and Janda C (Eds.) *Freiheit -Gerechtigkeit - Soziales Recht*, Baden-Baden: Nomos, 490-508.
- Pennings F (2023) Minimum income in old age in the Netherlands, in this volume.
- Porras Salas M (2023) The situation of retired and displaced elderly people in Europe. A review of legal mechanisms to fight poverty from the Spanish perspective, in this volume.
- Reinhard H-J (2023) The new basic pension supplement in Germany, in this volume.

---

70. European Commission (2015), *The 2015 Ageing Report*; European Commission, (2021) *Green Paper on Ageing*.

Sena E (2023) Minimum income in old age: The case of Italy, in this volume.

Schuler R (2015) Art. 58, in Fuchs, M./Cornelissen, R. (Eds.), *EU Social Security Law - A Commentary on EU Regulations 883/2004 and 987/2009*.

Stevens Y and Schoukens P (2023) Minimum income in old age – the case of Belgium: plea for a universal income for pensioners?, in this volume.

Tsetoura A (2023) Guaranteed minimum pensions under the Regulation of Coordination of social security systems – the case of Greece, in this volume

Verschueren H (2014), Free movement or benefit tourism: The unreasonable burden of Brey, *European Journal of Migration Law* 16, 147-179.

Verschueren H (2015) Preventing "benefit tourism in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in Dano?, *Common Market Law Review* 52, 363-390

Vonk G (2020) The EU (non) coordination of minimum subsistence benefits: What went wrong and what ways forward?, *European Journal of Social Security*, 22( 2), 138-147.

Wallrabenstein A (2018) Migrationsphänomene im sozialrechtlichen Kontext, *ZESAR* 9/18, 357-363.



© 2023



ISBN: 978-960-648-794-1