UNICE
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**UNICE POSITION ON**

**THE EUROPEAN COMMISSION'S COMMUNICATION ON THE ELIMINATION OF TAX OBSTACLES TO THE CROSS-BORDER PROVISION OF OCCUPATIONAL PENSIONS [COM(2001)214]**

## Introduction

On April 19th 2001, the Commission sent its communication COM (2001) 214 to the Council, the European Parliament and the Economic and Social Committee. UNICE has welcomed the Commission's communication as an important step towards the elimination of tax obstacles to the cross-border provision of occupational pensions. In view of the recent introduction of the euro and the goals stated in Lisbon (and reinforced in Barcelona, especially for the free movement of workers), the time has come to free the Single Market as soon as possible of such obstacles.

The communication is the result of the Commission's past efforts that have led to the publication of numerous communications[1] on various aspects of occupational and supplementary retirement provisions. Whilst the previous communications strongly emphasised the tax obstacles but did not address them in detail, this gap is now fully filled with the Communication of 19 April 2001, in which the Commission lists the tax obstacles and tables a plan to deal with these impediments to the smooth functioning of the Single Market.

UNICE fully supports the Commission's assessment of the obstacles, as well as the steps the Commission suggests to be taken. In view of the great variety of pension arrangements and systems, open co-ordination – together with the urgent abolition of discriminatory national rules for the free movement of workers – is a logical and necessary first step. However, UNICE would like to stress that open co-ordination should not be an end in itself, but a step towards more far-reaching solutions. Therefore UNICE would like to urge the Commission and the Member States to use the period of open co-ordination to further explore these solutions, and puts forward a couple of ideas in the fourth paragraph of this paper.

## The tax obstacles identified by the communication

In the communication, the Commission gives a clear overview of the tax obstacles to the cross-border provision of occupational pensions. UNICE agrees with the Commission that these obstacles are the main impediments to the free movement of workers within the Single Market.

[1] Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, Communication from the Commission of 11 May 1999 (COM (1999) 134 final) "Towards a Single Market for supplementary pensions, results of the Green Paper on supplementary pensions in the Single Market" and Proposal for a directive of the European Parliament and of the Council on the activities of institutions for occupational retirement provision (11.10.2000).

The Commission identified the following obstacles:

- Member States have different systems of taxation exempting[2] either the contribution to the provision (EET-countries)[3] or the subsequent payment of the benefits (TEE)[4]. In the instance of an employee moving from one country to another he may be faced with either double (from TEE to EET) or non-taxation (from EET to TEE).

- Many countries of the EU have discriminatory rules, whereby contributions paid to an occupational pension institution in another Member State are not exempt / non-deductible. This creates obstacles for the cross border affiliation to a pension scheme, especially for migrant workers and highly mobile workers.

- The legislation of most Member States creates tax obstacles to the cross-border transferability of accrued pension capital; for example by taxing the value of the pension capital upon a cross-border transfer, where they would not tax a transfer within their territories.

**Actions proposed by the Commission**

In its communication, the Commission lists a number of steps:

- Consider broader application of the EET principle within the EU as this would help reduce double taxation and non-taxation arising from the divergence of Member States' systems. The Commission acknowledges that even among EET States there are significant differences. However, in view of the EU's ageing population the EET system is beneficial as it encourages the making of retirement provisions for such time as the demographic dependence ratio will be less favourable. Moreover, EET has also the beneficial effect that it preserves the future tax base at a time the active population will generate relatively less taxable income in terms of GDP.

UNICE endorses the Commission's conclusions regarding the desirability of a common approach towards the taxation model of occupational pensions as this would allow for a platform from which to develop a pan-European approach. Since most Member States have chosen EET as the guiding principle the most obvious way forward would be for the Member States that use the ETT or TEE system to explore the possibilities for a gradual move towards an EET system.

As this issue would be beyond the competence of the EU and would therefore have to be driven on a voluntary basis by Member States, UNICE also strongly supports the Commission's pragmatic conclusion that Members States should explore practical measures to deal with the co-existence of different systems which should be put into practice in the short term (by unilateral provisions – as in Denmark and Sweden - or bilateral provisions – based for example on the 1996 US Model Tax Convention).

- Enforce compliance with the Freedom of Movement as guaranteed by the EC Treaty through the European Court of Justice. According to the Commission, national rules that make the deductibility of occupational pension contributions conditional on those contributions being paid to national pension institutions are a violation of Articles 39,

[2] In the Communication exempting means both exempting the part of the contribution that the employer pays and allowing deduction for the part that the employee pays.

[3] EET stands for Exempt contributions, Exempt capital gains of the pension institution, Taxed benefits, which means: contributions exempt and pension payment taxed.

[4] TEE stands for Taxed contributions, Exempt capital gains of the pension institution, Exempt benefits.

43, 49, and 56 of the EC Treaty. The Commission further refers to the cases Bachman, Wielockx and Safir before the European Court of Justice.

UNICE welcomes the clear and strong position taken by the Commission regarding the discriminatory treatment of affiliation to foreign pension institutions, which is based on the decisions of the European Court of Justice (and which is reinforced by the recent position of the General Advocate in the Danner case). UNICE regrets that the Freedom of Movement that the EC Treaty aims to guarantee has not yet fully materialised, although the judgements of the European Court of Justice (ECJ) have pointed out important areas for improvement. It is therefore crucial that the Commission ensures that Member States comply with these judgements, but also that it develops a plan to implement ECJ judgements beyond the case in which they are handed down.

UNICE also urges the Commission to take initiatives in order to remove the tax obstacles to the free movement of workers which make cross border affiliation impossible. It fully agrees with its distinction between "sedentary" workers and migrant workers. In this respect, the priority is to ensure the deductibility/exemption in the host country of pension premiums paid in the country of origin by migrant workers, and, in the first instance, by employees temporarily posted to another country, in the sense of EU Regulation 1408/71[5]. Indeed, in the latter case, the host State cannot refuse to grant the tax deduction of contributions paid to an approved foreign scheme on the grounds that the scheme does not meet its conditions for tax approval.

UNICE believes that the deductibility of pension premiums paid for sedentary workers into a pension scheme in another country or into a pan-European pension scheme (see below) will be made contingent on: the mutual recognition of national pension schemes in the EU; a coordination/harmonisation of the rules for prudential controls and for the protection of pension rights; the improvement of mutual assistance and exchange of information, … UNICE agrees that a Member State would be allowed to require that a scheme located in another Member State meet its conditions for approval, for instance concerning the nature and level of benefits and retirement age. Indeed, a direct relation is generally made for the level of deduction of the contributions between what is built up in the first pillar (social security) and in the second pillar (which is on top of the first one)

- The Commission considers that there may be cross-border situations where national tax rules are contrary to the Treaty provisions on the freedom of movement for workers and/or the free movement of capital. This is the case when an EET or ETT State taxes the value of the pension capital upon cross-border transfer, where it does not tax a transfer within its territory, and where it applies the principle of residence taxation of pension benefits in its double tax treaties. The Commission will therefore examine national tax rules impeding the transferability of accrued pension capital and will take the necessary steps to enforce compliance with the Treaty rules.

UNICE fully agrees that impediments to the transferability of accrued pension capital are at odds with the EC Treaty and the logic of the Single Market and as such should be countered by the Commission with or without the help of the Member States. Transferability should be allowed within a foreign scheme, which is approved by the authorities of that foreign State, provided that the competent authorities certify that the accrued pension capital will be actually taxed at retirement age.

[5] See the Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community.

- Safeguard the application of Member States' tax rules with the help of the Mutual Assistance Directive. The Commission would request that consultations be held in the Committee provided for by Article 9 (1) of the Directive, to agree the detailed arrangements for automatic information exchange.

UNICE believes that the Mutual Assistance Directive, although not much used since it was adopted, provides an adequate framework for exchange of information with a view to safeguarding the proper application of the Member States' tax rules. UNICE would like to stress however that the resulting administration could be onerous on business and industry and should be kept as light as possible.

- Lastly, the Communication draws attention to the proposal that the European Federation for Retirement Provisions (EFRP) published in July 2000. This proposal is designed to enable employees of a MNE to stay with the same pension institution regardless of where they are actually employed within the EU. In practical terms, this pan-European institution located in one of the Member States would have different sections complying with the requirements for tax approval and the tax regulations of the State(s) where the employee is employed.

UNICE shares the Commission's opinion that the EFRP's proposal regarding the development of Pan-European Pension Funds deserves further attention as it has many advantages. Not only would such a Fund increase the ability of employees to move between different Member States, lower administrative and compliance costs and allow for more efficient investment of pension capital, but it could also provide a platform from which a more far-reaching solution could be developed.

**Vision for the future**

The Commission's communication is instrumental in bringing the issue of tax obstacles to the cross-border provision of occupational pensions to the table, and open co-ordination as the Commission envisages will provide a good starting point for this difficult dossier.

This communication is a major step forward, as it clearly establishes that discriminatory legislation is contrary to the freedoms of the Treaty and should be abolished. The Danner case will be another proof of this. UNICE therefore considers that Member States, currently implementing national tax rules that impede deductibility of pension contributions to foreign pension plans, be brought systematically before the European Court of Justice. As long as the veto right is still in force in the EU legislative process in the taxation area, ECJ infringement procedures seem to be the only realistic way to solve tax discrimination.

UNICE would also like to invite the Commission and Member States to keep an eye to the future and to use the period that will start with open co-ordination to explore more far-reaching solutions as well. A debate on other solutions is necessary because further challenging the Member States before the European Court of Justice is a time consuming process and will only achieve piecemeal solutions, even if it may provide an incentive for the Member States to engage in further study. Lastly, Court judgements will help to eliminate infringements, but will probably not result in a simplification of the EU's pension systems.

In UNICE's opinion shorter-term and longer-term solutions should be based on the following principles:

- Mutual recognition of national occupational pension schemes and their corresponding financing vehicles in the EU

- Exempt contribution and tax benefits

- Deductibility/exemption of cross-border contributions (both for personal tax and corporate tax purposes)

- Unhampered transfer of accrued pension capital within the EU

- Comprehensive solution that protects the interests of both the workers and the Member States (i.e. elimination of tax obstacles in combination with good exchange of information). Moreover, the Member State that facilitated the deduction/exemption of the contribution could somehow maintain a claim on the taxation of the payments of the benefits (e.g. under the form of a flat source tax, which would be credited in the State of residence, or the reverse solution).

These solutions could be found in the good practices within some existing double taxation treaties, and especially in the 1996 US Model Tax Treaty which deals with all aspects of pension taxation (being deduction/exemption of contributions, exemption of investment income in the host country, transferability of accrued pension rights, taxation of benefits, …).

A good example of the use of bilateral treaties is the recent tax treaty signed between the UK and the USA in July 2001. This avoids double taxation by dividing the taxation rights that each treaty partner has under its domestic law over the same income and gain. In addition, it provides additional protection for taxpayers by specific measures combating discriminatory tax treatment.

A multilateral Model Tax Treaty could also be drafted for the European Union, as proposed in the Commission communication of 23 October 2001 on corporate taxation.

For UNICE, the main priority is the elimination of tax obstacles to the free movement of workers (cross border affiliation and transferability of accrued pension rights). For the deduction of contributions, UNICE fully supports the Commission in its conclusion that different rules could apply to sedentary versus migrant workers. Regarding migrant workers, solutions must be implemented without any delay. A distinction could, however, be made between those who are respectively posted and transferred to an employer in the other Member State:

- for employees posted in another country and falling under the 1998 Directive, the host State cannot refuse to grant tax deduction of contributions paid to an approved foreign scheme on the grounds that the scheme does not meet its conditions for tax approval.

- for employees transferred (or moving themselves) to another country, one should ensure that the solution takes into account the relation which is generally made for the level of deduction of the contributions, between what is built up in the first pillar (social security which is due in the host country) and in the second pillar (which is additional to the first one). This means that the State of activity could impose its –

workable – conditions for approval, for instance concerning the nature and level of benefits and retirement age.

UNICE recognises that solutions would be found more easily if the Member State that facilitated the deduction/exemption of the contribution could somehow maintain a claim on the taxation of the payments of the benefits (e.g. under the form of a flat source tax, which would be credited in the State of residence, or the reverse solution).

As the Pan-European Pension Fund could be very instrumental in implementing the suggestions mentioned above, UNICE would like to encourage the Commission and the Member States to continue the work that the EFRP has started (and which still requires further development). The Pan-European Pension Fund could be an excellent tool to administer and monitor the different Member States' taxation rights. It would also provide a tailor-made solution for the specific needs of highly mobile workers making international careers (with no real country of origin).

Finally, as the pension systems of the Member States show great differences it is feasible that some Member States could be in a position to adopt a European solution before all other Member Sates would be able to do so. UNICE would therefore encourage the Commission to study and explore the possibilities of enhanced co-operation in the pensions field.

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