



FUTURE IN BALANCE.

E A P S P I

Pensions for the Public Sector

THE NEWSLETTER OF EAPSPI

EURO PENSION BULLETIN

www.eapspi.eu

2/2010

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EDITORIAL

The economic situation and the austerity measures announced in Greece have recently made headlines in the media, to the extent that relatively little attention has been paid to developments in other countries. This is the case of Ireland, where measures were introduced over the last year to consolidate the state budget. The measures implemented also concern the public service and its pension system. They include a new deduction from the pay of public servants as compensation for a pension scheme considered to be more favourable than others, pay reductions and other cuts in pensions including raising the legal pension age.

Like Ireland, other countries have had no choice but to readjust their pension systems owing to the economic developments of recent months. Sweden has intervened in the pension indexing system, to compensate the losses recently suffered on capital markets. Belgium is also working on its pension reform, to adapt public service pension schemes to new circumstances.

Due to the ongoing discussions on the effects of the economic crisis on pension schemes, other developments in this field remain in the background. This is the case, for example, of the infringement proceedings against Germany, on the issue of whether or not local government employers are required to issue a call for tenders to choose the managing institution for deferred compensation. Ultimately, the core issue here is the priority of public procurement law or the freedom of collective bargaining, and this is an issue that concerns all pension schemes that are based on collective agreements. On April 14, the Advocate General delivered her opinion, meaning that the next and final step of the proceedings will be the decision of the Grand Chamber of the European Court of Justice.

With kind regards,

Kind regards,



Hagen Hügelschäffer

BUDGETARY CHANGES AFFECTING THE PAY OF PUBLIC SERVANTS

In March 2009 a number of financial emergency measures were introduced in the public interest. The main measure was the making of a new deduction from the pay of public servants who are members of a public service pension scheme in recognition of the favourable pension arrangements they enjoy as compared to most private sector workers.

The current deduction rates are as follows:

- First 15,000 € of income - exempt
- Next 5,000 € of income - 5%
- Income from 20,000 € to 60,000 € - 10%
- Income above 60,000 € - 10.5%.

The deduction is not paid into a pension fund or pension reserve fund but is remitted for the benefit of the Exchequer. Additional pension benefits do not arise as a result. The existing rates of pension contribution continue to apply in addition to this new deduction.

In December 2009, the Minister for Finance announced a number of further measures affecting public servants as part of his Budget 2010 speech. In his 2009 Supplementary Budget, the Minister announced his decision to have top level pay rates examined by the Review Body on Higher Remuneration in the Public Sector and benchmarked against those of other EU countries of comparable scale.

The Government considered the recommendations of the Review Body and announced its intention to apply reductions to all public servants in the higher pay bands. Based on the Review Body's recommendations the pay reductions proposed are:

- 8 per cent for those with salaries from 125,000 € to 165,000 €;
- 12 per cent for those earning between 165,000 € to 200,000 €, and
- 15 per cent for those earning €
- 200,000 € or more.

In relation to public servants earning less than 125,000 €, the Minister said the country could no longer afford a pay and pensions bill that accounts for more than a third of all current spending. He added that any reduction in the pay bill must be sustainable, must be applied in a progressive manner and must address the position beyond 2010. Accordingly, the pay of public servants earning less than 125,000 € is being reduced with effect from 1 January 2010 as follows:

- a reduction of 5 per cent on the first 30,000 € of salary;
- a reduction of 7½ per cent on the next 40,000 € of salary; and
- a reduction of 10 per cent on the next 55,000 € of salary.

The Minister concluded that the reductions now being made do not reflect any lack of recognition of public servants or of the quality of the work they do. He said they are simply a matter of budgetary necessity in these extraordinarily difficult times.

In order to avoid a destabilising rate of retirement among older public servants, the Minister announced that the pension entitlements of those retiring in 2010 would not be affected. In other words, their pension entitlements will be based on the December 2009 pay rates.

Public Service Pension Reform (extract from Minister's 2010 Budget 2010 speech)

"Exchequer spending on public service pensions will be over 2 billion € in 2010.

As life expectancy improves and the population ages, this cost is set to rise. The State's pensions bill will grow from about 5 per cent to 13 per cent of GDP by 2050, with two thirds of the increase in spending going on social welfare pensions and the remainder on public service pensions. Cost increases on this scale cannot be ignored by a re-

sponsible Government determined to secure our economic future.

The Government has decided to introduce a new single pension scheme for all new entrants to the public service. The legislation will be introduced in 2010 and the scheme will be in place by the end of the year.

The new scheme will bring public service pension terms more in line with private sector norms. Among other things, it will change the calculation of benefits so that pensions are based on "career average" earnings rather than final salary on retirement as at present. This will be more equitable than the present system which favours those with higher earnings later in their careers.

The minimum pension age for new public servants will also be increased from 65 to 66 and then linked to increases in the state pension age.

More details of the main elements of the new scheme are given in the Summary of Budget Measures.

The link to earnings or 'pay parity' basis for post-retirement pension increases is a feature of Irish public service schemes. The recent special report by the Comptroller and Auditor General estimated that the present actuarial cost of public service pensions is €108 billion. A change to a CPI (Consumer Price Index) basis for post-retirement increases would reduce that cost to €87 billion, a reduction of 20 per cent. On average, pay increases have been significantly greater than increases in the CPI.

As part of the reform of public service pension arrangements, I will review the current arrangements and consider linking pensions to increases in the cost of living. Pending that review, I do not intend to apply the pay cuts I have already outlined to existing public service pensioners.

These are significant changes. The Government is determined to meet the immediate fiscal problems Ireland faces and, at the same time, to make far-reaching reforms for the future."

Public Service Pensions - Extract from Summary of Budget Measures

"A new single scheme for all new entrants to the public service from 2010 onwards will be introduced – with main provisions as follows:

- **Raising the minimum public service pension age to 66 years** initially from 65 at present to bring it into line and link it henceforth with the State Pension age.
- **Setting a maximum retirement age of 70 years** – the Public Service Superannuation (Miscellaneous Provisions) Act 2004 removed the retirement age for most new entrants to the public service; for staff recruited before 2004, a maximum retirement age of 65 generally applies.
- **Pensions to be based on "career average" earnings rather than final salary as currently applies.** A specific "pension accrual rate" will be applied to pensionable pay so that each year public servants will earn or accrue a certain amount of pension payable on retirement. This is a fairer, more equitable and progressive system: it lowers the pensions of persons with high earnings especially in late career with less impact on the pensions of lower paid public servants with relatively "flat" career earnings such as nurses and manual workers.

These are significant reform measures. Legislation will be introduced early in 2010 to give effect to these measures.

The Government will consider using the CPI as the basis for post-retirement increases for both existing and future pensioners. This change would reduce the actuarial cost of public service pensions from an estimated 108 billion € to 87 billion €. The introduction of a single public service scheme will, in time, produce significant administrative advantages and efficiencies.

For existing public servants retiring after 2010 (or any longer period authorised by statutory instrument), the Minister will consider what legislative changes, if any, will be appropriate and bring for-

ward proposals as part of the legislation introducing the single new scheme.

It is proposed that other details of the single new scheme would be considered by Government in finalising relevant legislation following consultation between the Department of Finance and public service employers and unions. In developing the new scheme the Government will be considering:

- Employee pension contribution - the rate of employee pension contribution remains at 6.5% but may apply to all pensionable pay.
- Pension accrual rate applying to pensionable pay taking account of entitlement to a State Pension.
- Fast accrual terms – such terms generally apply at present to the Gardaí, Permanent Defence Forces, Prison Officers and Firefighters. These groups will retain early retirement ages which reflect operational needs and will continue to be paid their pensions at these early retirement ages where this is currently the position; other special terms such as added years and non-actuarially reduced early retirement benefits will be generally discontinued.
- The terms to apply to the President, Oireachtas members, the Judiciary and the Attorney General.”

Damian Smyth, Public Authority Pension Services Limited

NEWS FROM BELGIUM - CHANGES AT ONSSAPL

There have been some changes in the management of the National Office for Social Security of Provincial and Local Administrations (ONSSAPL), which is one of the two institutions representing Belgium within EAPSPI. Jan Gysen and Nicolas Jeurissen, who participated in many annual EAPSPI conferences, have retired and are enjoying a well-deserved rest. They have been replaced as managers by François Florizoone and Philippe Nys (who had in the past participated in the work of the legal commission).

News updates

The Belgian government is currently focusing on three major themes with respect to pensions:

- The supplementary pensions of contractual staff in the public service.
- New financing of pensions for civil servants appointed in local government.
- The national pensions Conference.

The supplementary pensions of contract staff in the public service

The second pillar of pensions is not very developed for contract staff members of the different levels of government in the Belgian public service (State, communities and regions, local authorities). The legislation applying to the private sector is in fact not adequate when the contract servant is later permanently appointed.

A contract staff member who finishes his career without a permanent appointment and who does not benefit from a second pension pillar therefore obtains only a general scheme social security pension for salaried employees. This pension is significantly lower than the pension granted by the special civil servants pension scheme, that applies to a civil servant who has a permanent appointment and who holds the same position with the same employer.

The Government is currently working on a bill that will introduce a legislative framework making it possible to grant additional pension advantages for all contract staff in the public sector.

The objective is to ensure greater fairness by compensating, to a certain extent, the difference between the pension of a salaried worker and that of an appointed civil servant doing the same job (but without a contract employee being able to receive more than an appointed civil servant).

New financing of the pensions of civil servants appointed in local government

There are solidarity-based pension schemes for local government (the common local government pension scheme and the scheme for new ONSSAPL members). Membership of these solidarity-based schemes is voluntary but irrevocable.

These solidarity-based schemes are pure pay-as-you-go schemes, based on a solidarity principle. A local government unit does not cover the liability of pensions for its former civil servants and survivor pensions for entitled beneficiaries alone. The pension liability for all the local authorities that take part in the solidarity-based scheme is pooled and broken down among them.

With a view to financing this global cost, member employers pay contributions that correspond to a certain percentage of the payroll for their active agents who have been permanently appointed. ONSSAPL receives the pension contributions for most of these local authorities, and the others contribute to insurance companies or to occupational pension institutions. Granting and management of pensions is undertaken by the SdPSP and some insurance companies or occupational pensions institutions.

Due to the general population ageing phenomenon and to reasons specific to these schemes (for example, a drop in the number of civil servants appointed, the consequences of the police reform, current scheme entrance terms for new members...), a significant increase in the contribution rates is to be expected in the future.

The Government considered that it was indispensable to launch a thought process on the financing of the pensions of civil servants appointed in local government, so as to ensure that these pension schemes are viable. The Government asked the Pensions Minister to prepare a bill that should take effect on January 1, 2011.

The idea is that the scheme remains "solidarity-based", but that this solidarity be "rebalanced", thanks to a new financing mode.

Balance will be sought between, on the one hand, solidarity (possible generalised membership – basic contribution level that is common and identical for all employers) and, on the other hand, "accountability" of each authority.

This accountability of the employer could be achieved thanks to a "correction factor" that would give rise to an additional invoice to be paid when the government unit has a specific rate (the one that would apply if it had remained alone, i.e. the ratio between its specific burden and its specific payroll) that is higher than the common base rate.

When this new financing system is prepared, certain negative effects of the police reform on pension schemes will be corrected.

The National Pensions Conference

In compliance with the majority agreement entered into at federal level, the Belgian Government has organised a national conference on pensions, in consultation with the social partners.

The objective of this Conference is to reform and strengthen our pension systems, for the common good of pensioners now and in the future.

The thought process focused on four main fields:

- Modernisation and simplification of our pension schemes;
- Statutory pensions;
- Supplementary pensions;
- Senior citizens and society.

A Task Force was created, including representatives of the main Ministries, of the government units concerned and of social partners.

Working groups compared the Belgian situation to that of other countries, and assessed the current situation as fully as possible.

Information was collected, experts were heard and observations were made. An interim report named "Green Paper", containing almost three hundred pages, was then drawn up.

The Cabinet duly noted the contents of the "Green Paper" and of the various attached questions, as well as of the schedule for continuation of the work.

The interim report will be presented to Parliament in the near future.

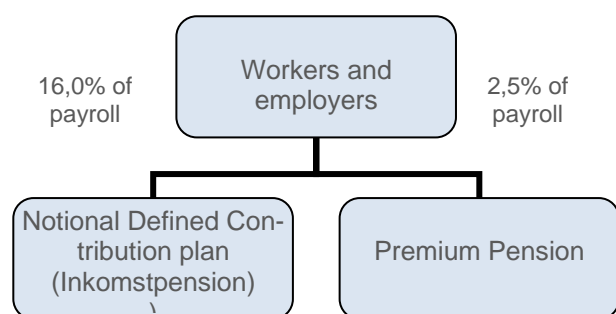
Round tables will be organised to inform citizens, enhance their awareness and collect any suggestions they may have.

These contributions will support the work of the Task Force and will make it possible to prepare a "White Paper" containing practical proposals with a view to ensuring social and financial sustainability of pensions in the years to come.

Philippe Nys, ONSSAPL

ACTIVATING THE BALANCING MECHANISM 2010

The Swedish pension system, which has a total contribution rate of 18.5 percent, has two components. The first, and major component is a pay-as-you-go Notional Defined Contribution (NDC) plan, which receives 16 percentage points of contributions. The second component is an individual account, the Premium Pension, which receives the remaining 2.5 percentage points.



The Swedish pension system reported a loss of SEK 261 billion for 2008, turning the system's surplus into a deficit of SEK 243 billion. This means that the balance ratio has dropped below 1.000 for the first time. The decrease in the assets of the National Pension Funds accounts for most of the negative outcome, but the result is also explained partly by a somewhat greater increase in the pension liability than in the contribution asset. The extremely serious financial crisis that struck the world's economies in 2008 has been followed by a sharp economic downturn, with slackening growth in income and mounting unemployment.

The pension system is designed to be financially stable and thus follows the economy as a whole. In good times, economic growth benefits pensioners and earners of pension credit. Until now this has meant that pension accounts have obtained a high return and that pension disbursements have been raised each year. In less prosperous times, the system ensures that pensioners and pension savers share the adverse consequences. The current dismal state of the economy will be reflected in the wallets of pensioners in 2010. The outlook for the

system in the next few years will be affected by the duration and severity of the present economic slump.

Since the reformed pension system was introduced, the SSIA (Swedish Social Insurance Agency) and the Premium Pension Authority (PPM) have sought to simplify and improve information on pensions. Year 2008 marks the tenth year for the annual account statement – Orange Envelope – that is distributed to more than six million recipients. The Envelope has become a familiar trademark, and today its orange colour symbolizes pensions as a concept rather than just the national public pension.

Despite all efforts to provide better information on pensions, further measures are needed. This is one of the main reasons for the comprehensive change soon to take place in the management of Sweden's pension system. As from 1 January 2010, a new pension agency will be formed by merging the current pension management provided by the SSIA and the PPM into a single administration.

The balancing mechanism

The interest on the inkomstpension account is normally determined by the growth in average income. Average income is measured by the *income index*

Annual Income Indexation and Return on Premium Pension System, Respectively, 1995-2008, Percent

	95	96	97	98	99	00	01	02	03	04	05	06	07	08
Income Indexation	1,8	1,8	2,8	3,4	1,7	1,4	2,9	5,3	3,4	2,4	2,7	3,2	4,5	6,2
Return , premium pension system	4,6	4,6	4,6	5	3,7	0,7	-8,6	-31,1	17,7	7,9	30,5	12,2	5,3	-34,3

Under certain demographic and economic conditions, it is not possible to earn interest on the inkomstpension account and the inkomstpension at a rate equal to the growth in average income and at the same time to finance payments of the inkomstpension with a fixed contribution. In order to maintain the contribution rate at 16 percent, income indexation must be suspended in such a situation. This is done by activation of so-called balancing.

Dividing the assets of the system by the pension liability, we obtain a measure of the financial position of the system, the *balance ratio*. If the balance ratio exceeds one (1), assets are greater than liabilities. If the balance ratio is less than one, liabilities exceed assets, and balancing is activated. When balancing is activated, pension balances and pensions will be indexed by the change in a *balance index* instead of the change in the income index.

The balance index changes as a result of the change in the income index and in the balance ratio. An example: If the balance ratio falls below 1.0000 to 0.9900 while the income index rises from 100.00 to 104.00, the balance index is calculated as the product of the balance ratio (0.9900) and the income index (104.00), for a balance index of 102.96. The indexation of pension balances is then 2.96 instead of 4 percent. Indexation of pensions is reduced to the same extent. If the balance ratio exceeds 1.0000 during a period when balancing is activated, pension balances and pensions will be indexed at a rate higher than the increase in the income index.

When pensions regain the value that they would have had if they had been indexed only by the change in the income index – that is, when the balance index reaches the level of the income index – balancing is deactivated, and the system returns to indexation solely by the change in the income index.

Rate of Return in the National Pension Funds

The role of the National Pension Funds is to serve as a financial buffer to smooth out periods of current surpluses and current deficits in the pension system. Beginning in 2009, the current expenditure of the system will exceed current revenue, requiring annual net supplements from the buffer funds.

AP-Fonds 1-4 und 6, Ertrag nach Abzug der Kosten in Prozent

AP-Fonds	08	07	06	05	04	Average 04 - 08
First	-21,9	4,6	9,6	17,4	11,2	3,2
Second	-24,1	4,0	12,8	18,5	11,4	3,3
Third	-19,8	2,4	10,4	16,8	10,5	3,8
Fourth	-21,0	14,1	13,7	8,9	8,7	2,9
Sixth	-16,6	14,1	13,7	8,9	8,7	5,1
Total	-21,6	4,2	10,7	17,4	10,9	3,3

The financial position and development of the inkomstpension in 2008

Change in Assets in 2008

In 2008 the buffer fund, i. e. the First–Fourth and Sixth National Pension Funds, decreased by SEK 191 billion, or 21.3 percent. The negative return on the buffer fund was SEK 194 billion. Pension contributions exceeded fund expenses, pension disbursements and costs of administration, by a posi-

tive contribution of SEK 3 billion. The contribution asset increased by SEK 361 billion, or 5.9 percent. Higher pension contributions added SEK 395 billion to the contribution asset, an increase of 6.5 percent. At the same time, however, the contribution asset was reduced by SEK 33 billion through a decrease of roughly two months in turnover duration. In total, the assets of the inkomst-pension system increased by SEK 170 billion, or 2.4 percent.

Seven-Year Review (Billions of SEK)

	2008	2007	2006	2005	2004	2003	2002
AP-Fonds	707	898	858	769	646	577	488
Contribution asset	6 477	6 116	5 945	5 712	5 607	5 465	5 301
Total asset	7 184	7 014	6 803	6 490	6 253	6 042	5 789
Pension liability	7 428	6 996	6 703	6 461	6 244	5 984	5 729
Results brought forward	-243	18	100	28	9	58	60
Balance ratio	0,9672	1,0026	1,0149	1,0044	1,0014	1,0097	1,0105

Change in the Pension Liability in 2008

The pension liability rose by SEK 431 billion, or 6.2 percent. Indexation accounted for SEK 385 billion, or 5.5 percentage points, of the increase. The liability to retirees has been affected by a change in life expectancy. Compared to 2007, the average payout duration of pensions (economic life expectancy) increased by an average of 27 days, adding SEK 27 billion to the pension liability. New pension credit earned and ATP points, including certain adjustments, exceeded the year's pension disbursements, increasing the pension liability by SEK 18 billion.

Result for 2008

The result of the inkomstpension system in 2008 was a net loss: SEK –261 billion. With the year's negative change in capital, results brought forward dropped from SEK 18 billion in 2007 to SEK –243 billion. The principal reason for the year's negative

result is the decrease in the assets of the National Pension Funds. Another factor affecting the outcome is that the contribution asset increased more slowly than the pension liability because of shorter turnover duration.

Financial Position as of December 31, 2008

As of December 31, 2008, assets were 3.28 percent less than the pension liability. The balance ratio of the system for 2010 is thus 0.9672.

Policy Response

Given the large effect of the economic crisis on the NDC plan, policymakers have begun to respond. The balance ratio was published in March 2009 and, almost immediately, the five political parties that stand behind the pension reform – known as the Pension Group – started to discuss whether to propose smoothing the adjustment of pension benefits (+4.5 in 2009 and -4.6 in 2010). In particu-

lar, the group discussed if it was reasonable that the stock market crash should affect NDC benefits so much. The Pension Group suggested that, instead of using the market value of the buffer funds, a three-year average should be used to value the funds. As a result, the deficit would be spread out over time with a smaller decrease in 2010 but a larger decrease in 2011 and 2012. During the official review of the proposed change, several agencies remarked that using a three-year average to value the buffer funds means that the balance ratio will be a less accurate measure of the system's financial stability. Moreover, the effect on reducing the variation in benefits is limited and a temporary downturn in the stock market will continue affecting benefits even after it has ended. However, the government, with the support of the Pension Group, decided to go forward with the change. Parliament passed the legislation in October 2009.

Conclusion

The economic crisis has provided a stress test for Sweden's new pension system. As designed, the automatic adjustments are kicking in to maintain financial balance in the system, with NDC pension benefits scheduled to decline by about 3 percent in 2010 and 2011 – a result that reflects recent policy changes. The policy changes moderate the effect on system stability following the sharp stock market decline by using a three-year average to value the buffer funds, a change that spreads out the required adjustment over a somewhat longer period.

Johan Sjöström, KPA

FREEDOM OF COLLECTIVE BARGAINING AND PUBLIC PROCUREMENT - INFRINGEMENT PROCEEDINGS AGAINST GERMANY MOVE TO THE NEXT PHASE

Do social partners in the local government sector have the right to appoint the institutions entrusted with deferred compensation themselves, by means of collective agreements? Or are municipalities required to issue a public call for tenders to choose the managing institution?

Conflict between freedom of collective bargaining and public procurement

The issue of how to solve the conflict between freedom of collective bargaining and public procurement law has been referred to the European Court of Justice within the framework of the infringement proceedings against the Federal Republic of Germany (C-271/08). The answer to that question concerns the clauses of a collective agreement for the approximately 2.3 million employees in the German local government sector that offers them the possibility of deferred compensation with a pension institution. The collective agreement governing this conversion stipulates that the conversion must be managed by public sector supplementary pension institutions, savings banks or local government mutual insurers. The European Commission takes the view that this provision of the collective agreement infringes European public procurement law. In 2008, the Commission therefore instituted infringement proceedings against the Federal Republic of Germany before the European Court of Justice (ECJ), claiming that municipalities, as from a certain size, are infringing Directives 92/50 and 2004/18 on coordination of procedures for the award of public service contracts through the provision in the collective agreement. Previously, in the *Albany* (C-67/96) and *Brentjens* (C-115-117/97) cases, the ECJ had ruled on a conflict between collective agreements and competition rules by deciding that collective agreements were excluded from competition rules. For that reason, in these proceedings, Germany takes the view that collective agreements should be excluded from public procurement rules, and is

supported in this view by Sweden and Denmark, as intervening parties.

The Advocate-General has just delivered her Opinion

Following the oral proceedings in January, Advocate-General Trstenjak delivered her Opinion on April 14, 2010. For proceedings before the ECJ, this is an important step as the ECJ follows the Opinion of the Advocate-General in a majority of cases. The Advocate-General proposes that the Court dismiss the application of the European Commission. She takes the view that although the burden of proof is on the Commission it has failed to prove that the total value of the framework agreement entered into by a Municipality concerning deferred compensation exceeds the threshold value falling within the scope of public procurement law.

The Advocate-General therefore bases her opinion, indicating that the application should be dismissed, on formal grounds. With regard to substance, she considers that no general exclusion of collective agreements from competition rules can be derived from the *Albany* ruling and expresses a view against transposing the *Albany* ruling to public procurement law. Moreover, the view of the Advocate-General is that considering the relationship between the fundamental right to collective bargaining, on the one hand, and public procurement rules, arising from the fundamental freedoms, on the other hand, one comes to the conclusion that the provision in the collective agreement does not comply with public procurement law.

No exclusion of collective agreements from competition rules based on the *Albany* ruling

The Advocate-General very clearly answers the question of principle, namely whether the directives on coordination of procedures for the award of

public service contracts apply to the framework agreements of municipal employers with pension institutions, as set forth in collective agreements, or whether they do not apply. Referring to the *Albany*, *Brentjens* and *Drijvende Bokkens* (C-219/97) cases, she rejects a general exclusion of collective agreements from competition laws. She considers that each case should be examined individually, to determine whether freedom of collective bargaining should be considered to take priority over competition law, in the event of conflict between the two. This would be possible only for collective agreements with specific content. Moreover, the Advocate-General considers that the principles of *Albany* case law pertaining to competition law cannot be transposed, without prior examination, to public procurement law, based on the fundamental freedoms. The Advocate-General did not look into the grounds put forward by the German government, explaining why a transposition of the ruling would be advisable in this specific case.

The Advocate-General goes on to say that public procurement law cannot be restricted by evoking a priority of freedom of collective bargaining. Although it is true that the autonomy of social partners has great importance at community level, this does not create a relationship of superiority or inferiority. On the contrary, her reasoning is that freedom of collective bargaining and public procurement law have an equivalent rank.

Relationship between freedom of collective bargaining and public procurement law

This equivalent ranking of freedom of collective bargaining and public procurement law should be considered as a positive factor. The important thing, however, is how to settle the conflict of laws in this specific case. The Advocate-General settles the conflict between the fundamental right to collective bargaining, on the one hand, and the fundamental freedom of establishment and freedom to provide services, concretely expressed by the directives on public procurement, on the other hand, by weighting interests based on the principle of proportionality. She therefore assesses whether it was necessary and proportionate to restrict fundamental freedoms (and the public procurement

law arising therefrom) to achieve the objectives of the fundamental right to collective bargaining. This appears to be a convincing way to proceed. The result of the proportionality assessment, however, should be considered critically.

Suitability

The Advocate-General acknowledges that a preliminary decision concerning deferred compensation, set forth in a collective agreement in favour of certain pension institutions, can be part of a trade-off in negotiations between employers and employees. She therefore acknowledges that this measure is suited to the defence of interests protected by the right to collective bargaining.

Necessity

Whilst recognising that the ECJ, in its consideration, must respect the room for manoeuvre and assessment of the social partners “to the greatest possible extent”, when it comes to necessity, however, the Advocate-General expresses the view that it would have been possible to enter into agreements that would have been less obstructive to freedom of establishment and freedom to provide services. Explicitly, she proposes a provision for the collective agreement stipulating that municipal employers are to choose pension institutions in compliance with public procurement law. With this type of solution, however, nothing of the fundamental community right to collective bargaining would remain. It would result in totally abandoning the participation of employees in the choice of the pension institution. The Advocate-General does not propose any alternative solution to guarantee how, in such a case, employees could participate in the selection process.

Proportion

Finally, the choice of pension institutions is referred to as disproportionate by the Advocate-General because, for a collective agreement, the selection process of the pension institution is a “more technical issue” that concerns working conditions only rather marginally, whereas it totally invalidates public procurement law as it arises from the free-

dom of establishment and freedom to provide services. On the contrary, the choice of the pension institution concerns the very core of working conditions, namely pay for work. The Federal Republic of Germany and the two intervening parties, Denmark and Sweden, take the view that the pension rights accrued by conversion of part of earnings represent a postponed salary payment (see below). The amount of the pension rights accrued as a result of the conversion, however, depends significantly on the choice of the pension institution.

No examination of the concept of “pay”

In the 43 pages of her Opinion, the Advocate General does not address the issue of whether deferred compensation constitutes “pay”. This is noteworthy, bearing in mind that the ECJ asked the parties to include the provisions of article 157 of the Treaty on the Functioning of the European Union in their arguments at the hearing. This article defines, amongst other things, what is understood by “pay”. If deferred compensation and the occupational pension arising from that conversion were considered as pay, we would be within the field of the employment contract and, economically speaking, this would be money belonging to the employee. There would therefore be no grounds to apply public procurement law. The Commission takes the view that pay is no longer such once it is converted into occupational pension rights. During the oral proceedings, Germany, like Denmark and Sweden, defended their view that this is still pay, even after the conversion, by referring to the case law of the ECJ (*Beune*, C-7/93).

Conclusions

For the countries involved, Germany, Sweden and Denmark, and for the social partners the opinion of the Advocate General in favour of dismissal of the Commission application is rather good news. With regard to substance, some of the points in the opinion of the Advocate-General should be considered critically, with respect to the fundamental freedom of collective bargaining. We now await the decision of the Grand Chamber of the ECJ. If the Grand Chamber follows the Opinion of the Advocate General, the grounds of the Ruling will be

decisive. The Ruling will be important for all public service occupational pension schemes based on collective agreements. The Ruling is expected within the coming months.

Eva Kiwit, AKA

E A P S P I

Pensions for the Public Sector

European Association of Public
Sector Pension Institutions

Association Européenne
des institutions de retraite
du secteur public

Europäischer Verband
der Versorgungseinrichtungen
des öffentlichen Dienstes

Denninger Straße 37
D - 81925 Munich (Germany)
Tel.: +49 (0) 89-9235-7575
Fax: +49 (0) 89-9235-8599
E-Mail: info@eapspi.eu
Internet: www.eapspi.eu
