DALDEWOLF

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## EDITO

Dear readers,

Our April/May newsletter is devoted to the transfer of pension rights from a national system to the EU pension scheme, or vice-versa, and to the analysis of a judgment concerning the granting of expatriation allowance if an official or agent works remotely, outside his or her place of employment.

In our "Belgian Law" section, we look at the general ban on unfair terms and the impact on private individuals.

Remember, this newsletter is also yours, and we welcome any suggestions you may have for future issues. Contact us at the following e-mail address: *theofficial@daldewolf.com*

We wish you an excellent read!

*The DALDEWOLF team*

## OUR TEAM

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## FOCUS

### TRANSFER OF PENSION RIGHTS OF EUROPEAN OFFICIALS AND AGENTS

The EU Staff Regulations allow officials and agents who have previously worked in a Member State to transfer their pension rights acquired from the national pension fund(s) to the European Union pension scheme, or vice versa (cf. article 11 of Annex VIII to the Staff Regulations).

Thus, an EU official who has worked in the public or private sector at national level (or even in another national or international organization) may, between the time he or she takes up his or her post and the time he or she obtains entitlement to a retirement pension (in principle after 10 years service), request to transfer to the Union the actuarial equivalent of his or her pension rights acquired at national level.

Conversely, an official or agent of the European institutions who leaves his or her post to join a national employer (or national or international organization) in order to take up duties in the context of which he or she will acquire pension rights, is entitled to transfer the actuarial equivalent of the retirement pension rights he or she has acquired with the Union to a national pension fund.

The *ratio legis* of this provision is to facilitate the free movement of workers within national and supranational institutions, such as the European institutions, and to enable the European Union to benefit from personnel with prior experience (ONEM / Marie-Rose Melchior, C-647/13).

The amount to be transferred from the national pension scheme to that of the Union is defined by the competent authority of the Member State. This amount will be converted into a number of pensionable years by the European Institution. If the official or servant accepts the amount to be transferred as calculated, the corresponding pension rights will be transferred by the national authorities to the EU pension scheme.

This number of pensionable years will be added to the pension rights accumulated by the official or agent during his or her career with the Institutions. In principle, all the pensionable years will be considered when calculating and granting the EU officials pension.

Before deciding to transfer pension rights, it is important to assess on an individual basis the appropriateness of such a transfer with a view to preparing for retirement.

In particular, it is important to be aware that the number of pensionable years determined by the European institutions does not necessarily have to correspond to the actual period of activity of the official or agent with their national employers (Celant / European Commission, 118/82). If this valuation is unattractive, it may not be in an official's or agent's interest to transfer. Similarly, for officials and agents with the lowest remunerations, the opportunity transfer their national pension rights to the EU pension scheme is not always obvious.

Officials and agents may find that, in some cases, due to the application of the minimum subsistence figure, the pension they receive from the Union is (almost) the same, whether or not they have transferred their national pension rights. Indeed, according to this rule, the amount of the pension cannot be less than 4% per year of the basic salary of an official at the first step of grade AST 1.

In a number of cases, claimants have argued that the refusal to return the uncredited contribution part of pension rights would constitute unjust enrichment of the Union. However, in a recent ruling (KY / European Court of Justice, C-100/22 P), the Court of Justice confirmed that such a situation could not be construed as unjust enrichment on the part of the European Union, since the minimum

subsistence rule in pension matters applies only in the alternative and by exclusion, when the application of the rules for calculating the amount of the retirement pension after transfer of national pension rights does not enable the official to reach the amount resulting from the minimum subsistence rule. The Court also added that the European pension system is not based on an à la carte application of these calculation rules, with the possibility of taking into account only a fraction of the capital transferred, depending on the amount that could be obtained to benefit from the minimum subsistence rule.

Therefore, be careful not to make hasty transfer decisions. There is a "pension calculator" tool available on Intracomm, which can be very useful in assessing each individual situation.

## CASE-LAW

### TELEWORKING OUTSIDE THE PLACE OF EMPLOYMENT AND EXPATRIATION ALLOWANCE

In a judgment of April 19, 2023 (PP and others / European Parliament, T-39/21), the General Court of the European Union ruled on whether, in the context of the Covid-19 pandemic, an official working in a European institution could have his expatriation allowance suspended when teleworking outside his place of employment.

More specifically, in the case, during the period of compulsory lockdown linked to the Covid-19 pandemic, the European Parliament had authorized officials and agents who wished to look after relatives not residing at their place of employment, to work outside their place of employment, from any Member State depending on the residence of their relatives.

In return, Parliament suspended payment of the expatriation allowance for these officials during this period of work outside their place of employment.

Several officials contested this decision, arguing in particular that the Parliament's decision was illegal and inconsistent with the provisions of the Staff Regulations governing the payment of expatriation allowances.

In its judgment, the General Court notes that the provisions of the EU Staff Regulations do not expressly provide for the possibility of reviewing an official's entitlement to an expatriation allowance during the course of his career. However, the Court considers that it does not mean that the entitlement to the expatriation allowance is an acquired right.

According to European case law, the expatriation allowance compensates the particular burdens and inconveniences resulting from taking up employment with the institutions of the European Union for officials and agents obliged to transfer their residence from the country of residence to the country of employment and to integrate into a new environment (Herta Adam / Commission européenne, C-211/06 P). More specifically, this allowance is intended to compensate for the material expenses and moral disadvantages resulting from the fact that the official is far from his place of origin and generally maintains family relations with his region of origin.

In the present case, the General Court is therefore examining whether, following a request by the official to telework from a Member State other than his place of employment, he continued to bear the particular burdens and disadvantages resulting from his taking up employment with the EU.

In this context, the Court notes that the applicants worked outside their place of employment for a brief period, intended to be only of a temporary nature, during which they continued to bear financial burdens at their place of employment, such as rent, energy bills or loan repayments, as well as the moral disadvantages resulting from performing their duties in another country within the Union.

Accordingly, the Court concluded that in the circumstances of the case, the payment of the expatriation allowance to the applicants had in no way lost its raison d'être and should not be suspended by the European Parliament.

Finally, the General Court was careful to point out that this reasoning was applicable in the exceptional circumstances of the Covid-19 pandemic, when the internal rules on teleworking and the physical presence of members of staff on the premises of the Institutions were temporarily no longer applicable. The judges stressed that, in principle, the granting of the expatriation allowance is intrinsically linked to the obligation of officials to reside at their place of employment (or at such a distance therefrom that they are not hindered in the performance of their duties) and to remain at the disposal of the institution where they work at all times, which means that they must be able to go to their place of work at any time.

## ADOPTION OF A GENERAL BAN ON UNFAIR TERMS - WHAT IMPACT FOR INDIVIDUALS?

The purchase of a diamond, whether or noIn article 5:52 of the new Civil Code, the Belgian legislator introduces for the very first time a general ban on unfair terms in consumer relationships, filling the gap left by the special regimes in force.

For several years, unfair terms have been prohibited in all consumer-business *(B2C)* and business-to-business *(B2B)* relationships. However, until now, there has been no provision for protection covering contractual relationships in general, such as those between private individuals.

Although this protection is of a general nature, it should be emphasized that it will apply to any agreement that does not fall within the scope of the special laws (mentioned above).

*What about protection ?*

Article 5:52 of the new Civil Code aims to protect the weaker party in any contractual relationship when a clause (unfavorable to the said party) has not been the subject of prior negotiation between the parties and also creates a manifest imbalance between their rights and obligations.

The aim of this prohibition is to protect private individuals in all their contractual relationships, from the simple sale of furniture to the rental of land between neighbours. It also applies to loan contracts.

The provision will also extend its scope to contracts for financial services in *B2B* relationships, which had been expressly excluded from the provisions applicable between companies.

This wording respects the contractual freedom of the parties by limiting the judge's review to non-negotiable contractual clauses, the unfairness of which will be assessed on the basis of the manifest imbalance created by the clause.

In view of this general prohibition, it would be interesting to consider the consequences that such an adoption could have on special legislation and the need for their existence.

To be continued...