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⁽¹⁾ Text with EEA relevance

III

(Preparatory acts)

COUNCIL

POSITION (EU) No 2/2014 OF THE COUNCIL AT FIRST READING**with a view to the adoption of a Directive of the European Parliament and of the Council on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights****Adopted by the Council on 17 February 2014****(Text with EEA relevance)****(2014/C 77 E/01)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 46 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

(1) The free movement of persons is one of the fundamental freedoms of the Union. Article 46 of the Treaty on the Functioning of the European Union (TFEU) provides that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, are to issue Directives setting out the measures required to bring about freedom of movement for workers as laid

down in Article 45 TFEU. Article 45 TFEU provides that the freedom of movement for workers entails, inter alia, the right to accept offers of employment and to move freely within the territory of Member States for this purpose. This Directive aims to promote worker mobility by reducing the obstacles to that mobility created by certain rules concerning supplementary pension schemes linked to an employment relationship.

(2) The social protection of workers with regard to pensions is guaranteed by statutory social security schemes, together with supplementary pension schemes linked to the employment contract which are becoming increasingly common in the Member States.

(3) The European Parliament and the Council have wide powers of discretion regarding the choice of measures which are the most appropriate when it comes to achieving the objective of Article 46 TFEU. The system of coordination provided for in Council Regulation (EEC) No 1408/71 ⁽³⁾ and in Regulation (EC) No 883/2004 of the European Parliament and of the Council ⁽⁴⁾ and, in particular, the rules that apply to aggregation, do not relate to supplementary pension schemes, except for schemes defined as legislation in those Regulations, or which have been the subject of a declaration to that effect by a Member State pursuant to those Regulations.

⁽¹⁾ OJ C 185, 8.8.2006, p. 37.

⁽²⁾ Position of the European Parliament of 20 June 2007 (OJ C 146 E, 12.6.2008, p. 217) and position of the Council at first reading of 17 February 2014. Position of the European Parliament of ... (not yet published in the Official Journal).

⁽³⁾ Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ L 149, 5.7.1971, p. 2).

⁽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 (OJ L 166, 30.4.2004, p. 1).

- (4) Council Directive 98/49/EC ⁽¹⁾ represents an initial specific measure designed to improve the exercise of the right of freedom of movement for workers as regards supplementary pension schemes.
- (5) The objective of this Directive is to further facilitate worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights of members of those supplementary pension schemes.
- (6) This Directive is not applicable to the acquisition and preservation of supplementary pension rights of workers moving within a single Member State. Member States may consider using their national competences in order to extend the rules applicable pursuant to this Directive to scheme members who change employment within a single Member State.
- (7) A Member State may request that outgoing workers who move to another Member State notify their supplementary pension schemes accordingly.
- (8) Account should be taken of the characteristics and the special nature of supplementary pension schemes and of the way they differ within and among the Member States. The introduction of new schemes, the sustainability of existing schemes and the expectations and rights of current pension scheme members should be adequately protected. This Directive should also take particular account of the role of the social partners in designing and implementing supplementary pension schemes.
- (9) This Directive does not call into question the right of Member States to organise their own pension systems. Member States retain full responsibility for the organisation of such systems, and when transposing this Directive into national law they are not obliged to introduce legislation providing for the setting up of supplementary pension schemes.
- (10) This Directive does not limit the autonomy of the social partners where they are responsible for setting up and managing pension schemes, provided they can ensure the outcomes set out by this Directive.
- (11) This Directive should apply to all supplementary pension schemes established in accordance with national law and practice that offer supplementary pensions for workers, such as group insurance contracts, pay-as-you-go schemes agreed by one or more branches or sectors, funded schemes or pension promises backed by book reserves, or any collective or other comparable arrangement.
- (12) This Directive should not apply to supplementary pension schemes or, where applicable, sub-sections of such schemes that have been closed with the effect that no new members can be accepted because the introduction of new rules could place an unjustifiable burden on such schemes.
- (13) This Directive should not affect any arrangements for insolvency guarantee or compensation arrangements which are not part of a supplementary pension scheme linked to an employment relationship and which aim to protect the pension rights of workers in the event of insolvency of the undertaking or the pension scheme. Similarly, this Directive should not affect national pension reserve funds.
- (14) This Directive should apply only to supplementary pension schemes where entitlement exists by virtue of an employment relationship and is linked to reaching retirement age or to fulfilling other requirements, as laid down by the scheme or by national legislation. This Directive does not apply to individual pension arrangements, other than those concluded through an employment relationship. Where invalidity or survivor's benefits are attached to supplementary pension schemes, special rules may govern the entitlement to such benefits. This Directive does not affect existing national law and rules of supplementary pension schemes concerning such special rules.
- (15) A one-off payment which is unrelated to contributions made for the purpose of supplementary retirement provision, that is paid directly or indirectly at the end of an employment relationship, and that is financed solely by the employer, should not be considered to be a supplementary pension within the meaning of this Directive.
- (16) Since supplementary retirement provision is becoming increasingly important in many Member States as a means to secure people's standard of living in old age, the conditions for acquiring and preserving pension rights should be improved in order to reduce obstacles to workers' freedom of movement between Member States.
- (17) The fact that in some supplementary pension schemes pension rights can be forfeited if a worker's employment relationship ends before he or she has completed a minimum period of scheme membership ('vesting period'), or before he or she has reached the minimum age ('vesting age'), can prevent workers who move between Member States from acquiring adequate pension rights. The requirement of a lengthy waiting period before a worker can become a member of a pension scheme can have a similar effect. Such conditions therefore represent obstacles to workers' freedom of movement. By contrast, minimum age requirements for membership do not constitute an obstacle to freedom of movement, and are therefore not addressed by this Directive.

⁽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 (OJ L 209, 25.7.1998, p. 46).

- (18) Vesting requirements should not be likened to other conditions laid down for the acquisition of a right to an annuity made with regard to the payout phase under national law or under the rules of certain supplementary pension schemes, in particular in defined contribution schemes. For instance, a period of active scheme membership which a member needs to complete after becoming entitled to a supplementary pension in order to claim his or her pension in the form of an annuity or capital sum does not constitute a vesting period.
- (19) Where an employment relationship is terminated before an outgoing worker has accrued vested pension rights and when the scheme or the employer bears the investment risk, in particular in defined benefit schemes, the scheme should always refund the pension contributions of that outgoing worker. Where an employment relationship is terminated before an outgoing worker has accrued vested pension rights and when the outgoing worker bears the investment risk, in particular in defined contribution schemes, the scheme may refund the value of the investments derived from those contributions. The value may be more or less than the contributions paid by the outgoing worker. Alternatively, the scheme may reimburse the sum of the contributions.
- (20) Outgoing workers should have the right to leave their vested pension rights as dormant pension rights in the supplementary pension scheme in which their entitlement was established. As regards the preservation of dormant pension rights, the level of protection may be considered equivalent where, particularly in the context of a defined contribution scheme, the outgoing workers are afforded the possibility of having the value of their vested pension rights discharged to a supplementary pension scheme which meets the conditions laid down in this Directive.
- (21) In accordance with national law and practice, steps should be taken to ensure the preservation of dormant pension rights or their value. The value of those rights at the time when the member leaves the scheme should be established in accordance with national law and practice. Where the value of those rights is adjusted, account should be taken of the particular nature of the scheme, the interests of the deferred beneficiaries, the interests of the remaining active scheme members and the interests of retired beneficiaries.
- (22) This Directive does not create any obligation to establish more favourable conditions for dormant pension rights than for the rights of active scheme members.
- (23) When the vested pension rights or the value of the vested pension rights of an outgoing worker do not exceed an applicable threshold established by the Member State concerned, and in order to avoid excessive administrative costs resulting from the management of a large number of low-value dormant pension rights, pension schemes may be given the option not to preserve those vested rights but, instead, to pay the outgoing worker a capital sum equivalent to the value of the vested pension rights. Where applicable, the transfer value or the capital payment should be established in accordance with national law and practice. Member States should set, where applicable, a threshold for such payments, taking into account the adequacy of workers' future retirement income.
- (24) This Directive does not provide for the transfer of vested pension rights. However, in order to facilitate worker mobility between Member States, Member States should endeavour, as far as possible, and in particular when introducing new supplementary pension schemes, to improve the transferability of vested pension rights.
- (25) Without prejudice to Directive 2003/41/EC of the European Parliament and of the Council⁽¹⁾, active scheme members and deferred beneficiaries who exercise or plan to exercise their right to freedom of movement should be suitably informed, upon request, about their supplementary pension rights. Where survivor's benefits are attached to schemes, surviving beneficiaries should also have the same right to information as deferred beneficiaries. Member States should be able to stipulate that such information need not be provided more than once a year.
- (26) In view of the diverse nature of supplementary pension schemes, the Union should confine itself to establishing the objectives to be achieved in general terms, which means that a Directive is the appropriate legal instrument.
- (27) Since the objective of this Directive, namely facilitating the exercise of the right of workers to freedom of movement between Member States, cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- ⁽¹⁾ Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ L 235, 23.9.2003, p. 10).

- (28) This Directive establishes minimum requirements, thus enabling the Member States to adopt or maintain more favourable provisions. The implementation of this Directive cannot be used to justify a regression vis-à-vis the existing situation in each Member State.
- (29) The Commission should draw up a report on the application of this Directive no later than six years after its date of entry into force.
- (30) In accordance with the national provisions governing the organisation of supplementary pension schemes, the Member States may grant the social partners, at their joint request, responsibility for implementing this Directive as regards the provisions relating to collective agreements, provided that the Member States take all the necessary steps to ensure that they are at all times able to guarantee the outcomes set out in this Directive,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter

This Directive lays down rules aimed at facilitating the exercise of the right of workers to freedom of movement between Member States by reducing the obstacles created by certain rules concerning supplementary pension schemes linked to an employment relationship.

Article 2

Scope

1. This Directive applies to supplementary pension schemes with the exception of schemes covered by Regulation (EC) No 883/2004.
2. This Directive does not apply to the following:
 - (a) supplementary pension schemes that, on the date of entry into force of this Directive, no longer accept new active members and remain closed to them;
 - (b) supplementary pension schemes that are subject to measures involving the intervention of administrative bodies established by national legislation or judicial authorities, which are intended to preserve or restore their financial situation, including winding-up proceedings. This exclusion shall not extend beyond the end of that intervention;
 - (c) insolvency guarantee schemes, compensation schemes and national pension reserve funds; and
 - (d) a one-off payment made by an employer to an employee at the end of that employee's employment relationship which is not related to retirement provision.

3. This Directive does not apply to invalidity and/or survivor's benefits attached to supplementary pension schemes, with the exception of the specific provisions of Articles 5 and 6 relating to survivor's benefits.

4. This Directive applies only to periods of employment falling after its transposition in accordance with Article 8.

5. This Directive does not apply to the acquisition and preservation of supplementary pension rights of workers moving within a single Member State.

Article 3

Definitions

For the purposes of this Directive the following definitions apply:

- (a) 'supplementary pension' means a retirement pension provided for by the rules of a supplementary pension scheme established in accordance with national law and practice;
- (b) 'supplementary pension scheme' means any occupational retirement pension scheme established in accordance with national law and practice and linked to an employment relationship, intended to provide a supplementary pension for employed persons;
- (c) 'active scheme members' means workers whose current employment relationship entitles them or is likely to entitle them, after fulfilling any acquisition conditions, to a supplementary pension in accordance with the provisions of a supplementary pension scheme;
- (d) 'waiting period' means the period of employment, required under national law or by the rules of a supplementary pension scheme or by the employer, before a worker becomes eligible for membership of a scheme;
- (e) 'vesting period' means the period of active membership of a scheme, required under national law or the rules of a supplementary pension scheme, in order to trigger entitlement to the accumulated supplementary pension rights;
- (f) 'vested pension rights' means any entitlement to the accumulated supplementary pension rights after the fulfilment of any acquisition conditions, under the rules of a supplementary pension scheme and, where applicable, under national law;
- (g) 'outgoing worker' means an active scheme member whose current employment relationship terminates for reasons other than becoming eligible for a supplementary pension and who moves between Member States;

- (h) 'deferred beneficiary' means a former active scheme member who has vested pension rights in a supplementary pension scheme and is not yet in receipt of a supplementary pension from that scheme;
- (i) 'dormant pension rights' means vested pension rights retained within the scheme in which they have been accrued by a deferred beneficiary;
- (j) 'value of the dormant pension rights' means the capital value of the pension rights calculated in accordance with national law and practice.

Article 4

Conditions governing the acquisition of rights under supplementary pension schemes

1. The Member States shall take all necessary steps to ensure that:
 - (a) where a vesting period or a waiting period, or both, is applied, the total combined period shall under no circumstances exceed three years for outgoing workers;
 - (b) where a minimum age is stipulated for the vesting of pension rights, that age shall not exceed 21 years for outgoing workers;
 - (c) where an outgoing worker has not yet acquired vested pension rights when the employment relationship is terminated, the supplementary pension scheme shall reimburse the contributions paid by the outgoing worker, or paid on behalf of the outgoing worker, in accordance with national law or collective agreements or contracts, or, where the outgoing worker bears the investment risk, either the sum of the contributions made or the investment value arising from these contributions.

2. Member States shall have the option of allowing the social partners to lay down different provisions by collective agreement, to the extent that those provisions provide no less favourable protection and do not create obstacles to the freedom of movement for workers.

Article 5

Preservation of dormant pension rights

1. Subject to paragraphs 3 and 4, Member States shall adopt the measures necessary to ensure that the vested pension rights of outgoing workers can remain in the supplementary pension scheme in which they vested. The initial value of those rights for the purposes of paragraph 2 shall be calculated at the moment in time when an outgoing worker's current employment relationship terminates.

2. Member States shall, having regard to the nature of the pension scheme rules and practice, adopt the measures

necessary to ensure that outgoing workers' and their survivors' dormant pension rights or their values are treated in line with the value of the rights of active scheme members or the development of pension benefits currently in payment, or are treated in other ways which are considered as fair, such as:

- (a) where the pension rights in the supplementary pension scheme are acquired as an entitlement to a nominal sum, by safeguarding the nominal value of the dormant pension rights;
- (b) where the value of accrued pensions rights changes over time, by adjusting the value of the dormant pension rights by applying:
 - (i) a rate of interest built into the supplementary pension scheme, or
 - (ii) the return on investments derived by the supplementary pension scheme;

or

- (c) where the value of the accrued pension rights is adjusted, for instance, in accordance with the inflation rate or salary levels, by adjusting the value of the dormant pension rights accordingly subject to any proportionate limit set by national law or agreed by the social partners.

3. Member States may allow supplementary pension schemes not to retain the vested rights of an outgoing worker but to pay, with the worker's informed consent, including as regards applicable charges, a capital sum equivalent to the value of the vested pension rights to the outgoing worker, as long as the value of the vested pension rights does not exceed a threshold established by the Member State concerned. The Member State shall inform the Commission of the threshold applied.

4. Member States shall have the option of allowing the social partners to lay down different provisions by collective agreement, to the extent that those provisions provide no less favourable protection and do not create obstacles to the freedom of movement for workers.

Article 6

Information

1. Member States shall ensure that active scheme members can obtain, on request, information on how a termination of employment would affect their supplementary pension rights.

In particular, information relating to the following shall be provided:

- (a) the conditions governing the acquisition of supplementary pension rights and the effects of applying them when the employment relationship is terminated;

- (b) the value of their vested pension rights or an assessment of the vested pension rights that has been carried out no more than 12 months preceding the date of the request; and
- (c) the conditions governing the future treatment of dormant pension rights.

Where the scheme allows early access to vested pension rights through the payment of a capital sum, the information provided shall also include a written statement that the member should consider taking advice on investing that capital sum for retirement provision.

2. Member States shall ensure that deferred beneficiaries obtain, on request, information regarding the following:

- (a) the value of their dormant pension rights or an assessment of the dormant pension rights that has been carried out no more than 12 months preceding the date of the request; and
- (b) the conditions governing the treatment of dormant pension rights.

3. For survivor's benefits attached to supplementary pension schemes, paragraph 2 shall apply to surviving beneficiaries as regards the payment of survivor's benefits.

4. Information shall be provided clearly, in writing, and within a reasonable period of time. Member States may provide that such information need not be provided more than once a year.

5. The obligations under this Article shall be without prejudice to and shall be in addition to the obligations of the institutions for occupational retirement provision under Article 11 of Directive 2003/41/EC.

Article 7

Minimum requirements and non-regression

1. Member States may adopt or maintain provisions on the acquisition of supplementary pension rights for workers, on the preservation of supplementary pension rights of outgoing workers and on active scheme members' and deferred beneficiaries' right to information which are more favourable than those set out in this Directive.

2. The transposition of this Directive shall not under any circumstances be used as a reason for reducing existing rights for the acquisition and preservation of supplementary pensions or to scheme members' or beneficiaries' right to information in the Member States.

Article 8

Transposition

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by ... (*), or shall ensure that the social partners introduce the required provisions by way of agreement by that date. Member States are required to take the necessary steps enabling them to guarantee the results imposed by this Directive. They shall immediately inform the Commission thereof.

2. When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

Article 9

Report

1. Member States shall communicate all available information concerning the application of this Directive to the Commission by ... (**).

2. By ... (***), the Commission shall draw up a report on the application of this Directive and submit it to the European Parliament, to the Council and to the European Economic and Social Committee.

Article 10

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 11

Addressees

This Directive is addressed to the Member States.

Done, ...

For the European Parliament
The President

...

For the Council
The President

...

(*) 4 years after the date of entry into force of this Directive.
(**) 5 years after the date of entry into force of this Directive.
(***) 6 years after the date of entry into force of this Directive.

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

On 20 October 2005, the Commission adopted a proposal for a Directive on improving the portability of supplementary pension rights.

Following the adoption by the European Parliament of its Opinion ⁽¹⁾ in first reading on 20 June 2007, the Commission adopted an amended proposal, which was presented on 15 October 2007 ⁽²⁾. In its amended proposal, the Commission incorporated many parliamentary amendments and also took into account the discussions that had taken place in the Council. The amended proposal focused on the acquisition and preservation of rights, dropping the transferability aspect.

The Economic and Social Committee gave its opinion on 20 April 2006 ⁽³⁾.

The Council reached a general approach on 20 June 2013 ⁽⁴⁾.

Following informal negotiations, a provisional agreement with a view to an early second-reading agreement was reached between the co-legislators on 26 November 2013.

On 16 December 2013, the Council reached a political agreement on its position at first reading ⁽⁵⁾.

II. OBJECTIVE

The objective of the draft Directive is to facilitate worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights of scheme members.

III. ANALYSIS OF THE MAIN FEATURES OF THE COUNCIL'S POSITION AT FIRST READING

A. *Procedural context*

On the basis of the amended proposal of the Commission, the European Parliament and the Council conducted negotiations with a view to concluding an agreement at the stage of the Council's position at first reading ('early second-reading agreement'). The text of the Council position reflects the compromise reached between the two co-legislators.

B. *Summary of main issues*

1. Legal basis

The legal basis chosen in the compromise text reflected in the Council's position at first reading is Article 46 TFEU.

2. Scope and definition of 'an outgoing worker' (Article 2, Article 3(g) and Recital 6)

The compromise text provides that the Directive shall apply to outgoing workers who move between Member States. It will not apply to workers moving within a single Member State. However, Recital 6 notes that Member States may nevertheless consider using their national competences to extend the rules applicable pursuant to the Directive to scheme members who change employment within a single Member State.

⁽¹⁾ 10933/07.

⁽²⁾ 13857/1/07 REV 1.

⁽³⁾ SOC/217.

⁽⁴⁾ 11459/13.

⁽⁵⁾ 17221/13 ADD 1.

Moreover, the compromise text specifies that the Directive shall only apply to periods of employment falling after its implementation. It will not apply to pension schemes covered by Regulation (EC) No 883/2004, nor to schemes which no longer accept new active members or schemes that are subject to measures such as winding-up proceedings. Nor will it apply to insolvency guarantee schemes, compensation schemes, national reserve funds or one-off payments unrelated to retirement provision. Invalidity benefits are also excluded from the scope. Certain provisions regarding the preservation of vested and dormant pension rights (Article 5) and Information (Article 6) apply to survivor's benefits which are otherwise excluded.

3. Protection of pension rights (Articles 4 and 5 and Recital 23)

In the compromise text reflected in the position at first reading, the conditions governing the acquisition of pension rights are strengthened to the effect that, where a vesting period and/or a waiting period is applied, the total combined period shall not exceed three years. The minimum age for vesting shall not exceed 21 years.

As regards the preservation of vested pension rights, the compromise text provides for national measures to ensure that the vested pension rights of outgoing workers can remain in the scheme in which they vested. However, schemes also have the option of paying the worker a capital sum up to a certain nationally established threshold and with the worker's informed consent, including as regards applicable charges. As explained in Recital 23, the aim is to avoid excessive administrative costs resulting from the management of a large number of low-value dormant rights; on the other hand, when setting thresholds for the payment of capital sums, the Member States should take into account the adequacy of workers' future retirement income.

The compromise text provides that outgoing workers' and their survivors' dormant pension rights or their values are treated in line with the value of the rights of active scheme members, or the development of pension benefits currently in payment, or by other means which are considered fair treatment.

4. Information (Article 6)

The compromise text also improves the information rights of active scheme members as well as deferred beneficiaries and survivors. The Member States shall ensure that active scheme members can obtain on request information on how a termination of employment would affect their pension rights. Where the scheme allows for early access to vested pension rights through the payment of a capital sum, the information shall also include a written statement that the scheme member should consider taking advice on investing that capital sum for retirement provision.

Deferred beneficiaries are also to obtain, on request, information regarding the value of their dormant rights and the conditions regarding their treatment. Under the Directive, surviving beneficiaries also have the right to the information as regards the payment of survivor's benefits attached to supplementary pension schemes.

5. Transposition (Article 8)

The compromise text provides for a transposition period of four years from the date of adoption.

6. Report (Article 9)

The following reporting calendar is included in the compromise text: the Member States shall report to the Commission concerning the application of the Directive within five years of its entry into force. A year later, the Commission is to report back to the European Parliament, the Council and the Economic and Social Committee on the application of the Directive.

IV. CONCLUSION

The Council's position at first reading reflects the compromise reached in negotiations between the Council and the European Parliament, facilitated by the Commission. This compromise is confirmed by the letter of the Chair of the European Parliament's Committee on Employment and Social Affairs (EMPL) to the Chair of the Permanent Representatives Committee (letter dated 9 December 2013). In this letter, the Chair indicates that she will recommend to the members of the EMPL Committee, and subsequently to the plenary, that they accept the Council's position at first reading without amendments at Parliament's second reading, subject to verification by the lawyer-linguists of both institutions.

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