

Protocol

Relating to the Collaboration of the Relevant Competent Authorities of the Member States of the European Union in Particular in the Application of the 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 (IORPs) Operating Cross-Border

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Executive summary

This Protocol provides a framework for the cooperation of competent authorities in the implementation of Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision (IORPs) in relation to the supervision of IORPs that operate cross-border.

It sets out the agreement between competent authorities to co-operate in the supervision of cross-border activities of IORPs.

The relevant competent authorities, which are Members of CEIOPS, and other competent authorities, which accept this document by signing it individually, are referred to as the Competent Authorities throughout this document.

The Protocol is in three parts and has seven appendices.

Part 1 covers general considerations and sets out:

- the origins and general aims;
- the general principles for cooperation between the Competent Authorities and aspirations for furthering effective supervision; and
- the power to amend the Protocol.

Part 2 covers the authorisation of IORPs and the notification process. It includes:

- reference to the requirement that only authorised IORPs can operate cross-border;
- the exchanges of information required in the notification process between the home Member State Competent Authority and the IORP, and between the home and host Member State Competent Authorities.

Part 3 covers the ongoing supervision and the exchange of additional information after the notification process between the Competent Authorities for ongoing supervision of IORPs including the following:

- the respective roles of the home Member State Competent Authority and the host Member State Competent Authority;
- changes to the information previously provided in the notification process;
- changes to a host Member State's requirements in respect of social and labour law, investment restrictions and the provision of information; and
- non-compliance.

Part 1: General considerations

1.1. Origins and general aims

1.1.1. Directive 2003/41/EC (the Directive) sets out the principles for the activities and supervision of IORPs. The Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) considers that the adoption of the Directive makes necessary the agreement of a framework for their cooperation in the area of cross-border activity as referred to in Article 20 of the Directive. This Protocol sets out the framework.

1.1.2. CEIOPS considers that all aspects of the cooperation between Member States regarding cross-border activities should be addressed. This could not be achieved by limiting the Protocol to Members of CEIOPS. Therefore the Protocol is open to competent authorities with regard to every cross-border aspect of the Directive, including social and labour law relevant to the field of occupational pension schemes (see Appendix 7).

1.1.3. This Protocol applies to the competent authorities of non-EU Member States that are parties to the EEA agreement as if they were the competent authorities of EU Member States.

Consequently, where in the Protocol the term 'Member States' is used, this includes the non-EU Member States that are parties to the EEA Agreement. Furthermore, where the terms 'European Union' ('EU') is used, this should be understood to apply to the whole European Economic Area (EEA).

1.1.4. This Protocol describes how practical cooperation between the Competent Authorities can take place.

1.1.5. The Protocol is to be followed by the Competent Authorities. The Protocol relates to the exchange of the information and actions required for the supervision of cross-border arrangements.

1.1.6. Nothing in this Protocol is to be taken as hindering in any way the free exchange of general information for use in the supervision of IORPs, either specifically or generally between Competent Authorities.

1.2. Cooperation between Competent Authorities

1.2.1. The Competent Authorities will co-operate in all cases where it is required under the Directive.

1.2.2. The Competent Authorities agree there should be a constructive and open dialogue between the home and host Member State Competent Authorities with a view to developing best practices in this sphere and closer cooperation, and, by so doing, preventing distortions of competition and creating the conditions required for unproblematic cross-border membership.

1.2.3. The Competent Authority of the home Member State retains the responsibility for principal supervisory control over an IORP operating cross-border.

1.2.4. The principles of cooperation described in this Protocol do not limit or restrict the ability of Competent Authorities to exchange information or otherwise co-operate in their supervision of IORPs operating cross-border. Competent Authorities are encouraged to initiate spontaneous exchanges of information where they consider a matter may be of concern or interest to one or more other Competent Authorities.

1.3. Harmonisation of documents used

1.3.1. The Protocol recognises that each home Member State Competent Authority will use a variety of supervisory methods and these will differ between Competent Authorities as will their practices in relation to documents, reporting, statistics and record keeping.

1.3.2. However, through the regular exchange of information and experience necessary for effective cooperation and the development of best practice, it is anticipated that there will be a gradual harmonisation of supervision and supervisory approaches.

1.3.3. The supervision of IORPs operating cross-border is facilitated by using a standard document for the exchange of the information Competent Authorities need to share, such as the information described in Article 20 (3) of the Directive.

1.3.4. Hence the Competent Authorities have developed a standard document to share information on the main characteristics of a pension scheme to be operated cross-border including the legal form of an IORP (see Appendices 2 and 3). This document will not restrict Competent Authorities that require or wish to share additional information, and its content will be reviewed periodically in the light of experience and use.

1.4. Language

1.4.1. The Competent Authorities agree that communications between any two Competent Authorities should be conducted in a manner conducive to effective supervision of IORPs operating cross-border. Bearing this in mind they have agreed the languages that they will normally use for the exchange of information.

1.4.2. They agree that

- the main characteristics of the scheme provided by the home Member State Competent Authority to the host Member State Competent Authority during the notification process shall be in the language of the host Member State or such other language as they agree;
- relevant social and labour law and all communications relating to it will be conducted in the language of the host Member State;
- the disclosure and potential investment provisions shall be communicated in the language of the host Member State requiring them to be applied.

The host Member State Competent Authority may additionally provide a full or summary version of the applicable social and labour law and disclosure and investment provisions translated into the language of the home Member State or other agreed language.

1.5. Rules on confidentiality

1.5.1. The Competent Authorities agree to exchange relevant confidential information where necessary and as permitted by their national law, where it may be useful to facilitate effective supervision of IORPs operating cross-border.

1.5.2. The Competent Authorities agree that when they exchange confidential information they will each respect its confidentiality.

1.6. Power to amend the Protocol

1.6.1. The Protocol may be altered by CEIOPS at any time. If it is altered, Competent Authorities, which are not Members of CEIOPS and which wish to continue to accept it, will need to sign the altered Protocol on an individual basis.

1.6.2. The role of the Protocol in the satisfactory supervision of cross-border activities will be subject to periodic review, with the first review taking place not later than three years from its introduction.

1.7. Additional cooperation

1.7.1. Given the importance to supervision of the good reputation, competence and professional experience of the persons running the IORP, the Competent Authorities shall endeavour to share the information available to them in those fields.

1.7.2. In addition, the Competent Authorities agree that their cooperation may extend to areas not expressly covered by the Directive or this Protocol where they consider it appropriate for the effective supervision of an IORP.

1.8. Exemption from legal liability

No Competent Authority shall incur any legal liability in respect of the accuracy or completeness of the information it provides under this Protocol.

Part 2: Authorised IORPs and the exchange of information for the notification process

2.1. IORPs with prior authorisation

2.1.1. Only authorised IORPs can start operating cross-border. Such authorisation has to be granted only once, not for each cross-border activity.

2.2. Requirements for an initial dialogue when an IORP expresses its intention to accept sponsorship as a Guest IORP from a sponsoring undertaking located in another Member State – the notification process

2.2.1. In this Protocol an authorised IORP which starts to operate in another Member State is called a Guest IORP in this other Member State.

2.2.2. When an undertaking located in another Member State wishes to sponsor a Guest IORP, the IORP shall inform its home Member State Competent Authority of its intention to accept the proposed sponsorship. This notification starts a process of exchanging information between

- the IORP and its home Member State Competent Authority; and
- the home Member State Competent Authority and the host Member State Competent Authority.

2.2.3. These requirements will apply on each occasion that a sponsoring undertaking located in any host Member State wishes to sponsor a Guest IORP.

2.2.4. The matters to be addressed in the exchange of information are described in paragraphs 2.3. and 2.5. of the Protocol.

2.3. Initial dialogue between the IORP and its home Member State Competent Authority

2.3.1. The home Member State Competent Authority shall receive the following information from the IORP:

- the name of the host Member State(s) in which it intends to operate;
- the name of the sponsoring undertaking in the host Member State(s); and

- the main characteristics of the pension scheme to be operated for the sponsoring undertaking in the host Member State(s) (see paragraph 1.3.4 and Appendices 2 and 3).

2.3.2. The date the home Member State Competent Authority receives this information is called the 'Start Date' in this Protocol. If the information required is not all supplied at the same time, the date on which it receives the last item of information will be the Start Date.

2.4. Home Member State Competent Authority's doubts as to an IORP's proposed acceptance of sponsorship

2.4.1. An IORP can operate as a Guest IORP for a sponsoring undertaking in another Member State unless the home Member State Competent Authority has reason to doubt that

- the administrative structure of the IORP or
- the financial situation of the IORP or
- the good repute and professional qualifications or experience of the persons running the IORP

are compatible with the operations proposed in the host Member State.

2.4.2. It is recognised that each home Member State Competent Authority will have its own procedures to satisfy itself about each of these requirements.

2.4.3. If, during the notification process, the home Member State Competent Authority has reason to doubt that these requirements are met, the IORP shall not be permitted to engage in the proposed cross-border activity with that particular sponsoring undertaking. The home Member State Competent Authority will make its own arrangements to inform the IORP and, where it considers it appropriate, the proposed host Member State Competent Authority.

2.5. Dialogue during the notification process between the Competent Authorities, and between the home Member State Competent Authority and the IORP

2.5.1. The home Member State Competent Authority has a maximum period of three months from the Start Date to decide whether it has reason to doubt that the IORP meets the requirements to operate cross-border as proposed in the host Member State(s). If the home Member State Competent Authority has no reason to doubt then, within three months from the 'Start Date', it must

- pass in writing the information described in paragraph 2.3.1. to the host Member State Competent Authority;
- inform the IORP that it has passed the information to the host Member State Competent Authority and of the date it did so.

2.5.2. The host Member State Competent Authority shall acknowledge receipt of the information described in paragraph 2.3.1. as soon as possible. The date the information is received by the host Member State Competent Authority starts the two months time limit in which it shall provide, if appropriate, the home Member State Competent Authority with any information noted in paragraph 2.5.4.

2.5.3. Having regard to the principle of cooperation between Competent Authorities as described in paragraph 1.2., but without affecting the Start Date, in addition to the initial information requirements described in paragraph 2.3.1.,

- the home Member State Competent Authority may at its discretion supply such other information, where it is competent to do so, that it considers will be helpful to the host Member State Competent Authority;
- the host Member State Competent Authority may ask the home Member State Competent Authority to supply further information.

2.5.4. Having received the information described in paragraph 2.3.1. from the home Member State Competent Authority, the host Member State Competent Authority shall notify the home Member State Competent Authority of its requirements for compliance with any

- social and labour law relevant to the field of occupational pensions under which the pension scheme must be operated in the host Member State; special rules about investment that are to apply to those assets of the Guest IORP attributable to activities carried out in the host Member State, as allowed by Article 18 (7) of the Directive (investment rules); and
- additional information requirements to be met by IORPs operating in the host Member State, as allowed by Article 20 (7) of the Directive (information to be given to the members and beneficiaries).

2.5.5. The information in paragraph 2.5.4. must be provided to the home Member State Competent Authority within two months (the 'Expiry Date') of the

host Member State Competent Authority receiving the information referred to in paragraph 2.3.1.

2.5.6. The host Member State Competent Authority will provide the requirements described in paragraph 2.5.4. in sufficient time for the home Member State Competent Authority to pass the information about the host Member State's requirements to the IORP by the Expiry Date at the latest.

2.5.7. After receiving the information described in paragraph 2.5.4, the home Member State Competent Authority will pass it to the IORP. The date this information is received by the IORP is called the 'Information Date' in this Protocol.

2.5.8. In the event that the host Member State Competent Authority has not provided the information described in paragraph 2.5.4. to the home Member State Competent Authority before the Expiry Date, the home Member State Competent Authority will pass the information to the IORP when it has been received.

2.5.9. An IORP can operate as a Guest IORP on the earlier of

- the Information Date; or
- the Expiry Date.

2.5.10. However, irrespective of the time taken by the Competent Authorities for this exchange of information, it remains the responsibility of the IORP to ensure compliance with the required provisions (described in paragraph 2.5.4.) at all times.

Part 3: Ongoing supervision and the exchange of additional information – after the notification process

3.1. Ongoing supervision

The Competent Authorities confirm that

- the home Member State Competent Authority will be responsible for supervision of the IORP as a whole, including the appropriate governance of, and compliance generally by, the Guest IORP, and enforcement, in accordance with the Competent Authority's normal supervisory practices. This will include supervision of compliance with the investment restrictions (if applied);
- the host Member State Competent Authority will supervise the activities of the Guest IORP in the host Member State in relation to compliance with any social and labour law relevant to the field of occupational pensions, and in relation to additional information requirements applied in accordance with Article 20 (7) of the Directive (information to be given to the members and beneficiaries), and report to the home Member State Competent Authority any suspected breaches or issues about which it is concerned.

3.2. Dialogue between the home and host Member State Competent Authorities

The Competent Authorities agree there may be a need for additional communications between the home Member State and host Member State Competent Authorities. The kinds of situations which will give rise to additional dialogue can include, but are not limited to

- changes to the information previously supplied about
 - (1) social and labour law relevant to the field of occupational pensions under which the pension scheme must be operated in the host Member State;
 - (2) investment restrictions (if any) that are to apply to those assets of the Guest IORP attributable to activities carried out in the host Member State, as allowed by Article 18 (7) of the Directive (investment rules); and
 - (3) information requirements in respect of members and beneficiaries of the host Member State as allowed by Article 20 (7) of the Directive;
- changes to the information previously supplied about an IORP; and
- identification of possible non-compliance or other concerns by the home or host Member State Competent Authorities.

3.3. Changes to information previously supplied about relevant social and labour law, investment and disclosure of information provisions applicable to the operation in the host Member State

3.3.1. The home Member State Competent Authority will need to be informed about any significant changes to the information, with which it was previously supplied, about

- relevant social and labour law;
- any applicable investment rules; and
- applicable requirements for the disclosure of information

as soon as possible and in any event by the later of the date the changes take effect or the date that the host Member State Competent Authority has been able to give full and due consideration to the changes.

3.3.2. The host Member State Competent Authority informs the home Member State Competent Authority in writing of any significant changes in respect of the relevant social and labour law, the applicable investment rules and disclosure requirements.

3.3.3. Upon being advised of a change to the information it has been given, the home Member State Competent Authority will

- as soon as possible pass on the information to the IORP and, if it has been provided with it, information about the likely impact of the change;
- confirm to the host Member State Competent Authority, in writing, that it has passed on the information to the IORP and the date it did so.

3.3.4. However, irrespective of the time taken by the Competent Authorities for this exchange of information, it remains the responsibility of the IORP to ensure compliance with the required provisions at all times.

3.4. Changes to information previously supplied about an IORP

3.4.1. The Competent Authorities recognise that events, or significant changes to an IORP, will give rise to a need for the Competent Authorities to exchange information. These may include changes to the information passed between the Competent Authorities during the notification process and other significant changes to an IORP or its sponsoring undertakings.

3.4.2. Where any information about such changes may be needed by either Competent Authority for supervision purposes or could result in significant risk to the interests of members or beneficiaries, the information about the event or change will be shared.

3.4.3. On receiving information about an event or change to the IORP, the home Member State Competent Authority will take any supervisory actions it considers necessary and which it is competent to perform, informing the host Member State Competent Authority as appropriate.

3.4.4. Such actions may include those set out under Articles 14 and 19 (3) of the Directive.

3.5. Home or host Member State Competent Authority identifies non-compliance or has other concerns

3.5.1. The Competent Authorities recognise that there can be instances, or persistent instances, of a Guest IORP failing to comply with the requirements for the operation of cross-border arrangements, or which give rise to general concerns that threaten the security of

- the benefits being or to be provided by the Guest IORP; or
- the assets of the Guest IORP.

Those instances will give rise to the need for communication between host and home Member State Competent Authorities.

3.5.2. Some examples of the matters involving a Guest IORP which might give rise to concerns by the host Member State Competent Authority and require communication between host and home Member State Competent Authorities are listed below:

- non-compliance with any relevant social and labour law;
- non-compliance with any host Member State information requirements imposed on IORPs operating in the host Member State, as described in Article 20 (7) of the Directive (information to be given to the members and beneficiaries);
- complaints by a member or sponsoring undertaking to the host Member State Competent Authority;
- activity in non-authorized areas – e.g. non-retirement related activities.

3.5.3. If a host Member State Competent Authority has concerns of the type described in paragraph 3.5.1. it will immediately notify in writing the home

Member State Competent Authority of the details of the matter and the name of the Guest IORP involved. The notification will include

- its concerns and the possible impact of the event on the situation or activities of the Guest IORP in the host Member State and,
- if appropriate, any request that enforcement action should be taken against the IORP.

3.5.4. The home Member State Competent Authority will – in coordination with the host Member State Competent Authority – take action to ensure future compliance, including, where appropriate, any actions set out under Article 14. Where, in respect of the host Member State's relevant requirements of social and labour law, such actions prove ineffective, or because appropriate measures are lacking in the home Member State, then, and only after informing the home Member State Competent Authority of its intentions, the host Member State Competent Authority may take action against the Guest IORP, but only in the circumstances and to the extent permitted by the Directive.

3.5.5. Any action taken under paragraph 3.5.4. by the host Member State Competent Authority to penalise a Guest IORP must be notified to the home Member State Competent Authority before it is taken.

3.5.6. Examples of the matters involving a Guest IORP which might give rise to concerns by the home Member State Competent Authority include

- possible non-compliance with any host Member State rules about investment that apply to the assets of the Guest IORP, as allowed by Article 18 (7) of the Directive;
- failure to comply with the full funding requirements determined by the home Member State and, where appropriate, the requirement for regulatory own funds as provided for in Article 17.

3.5.7. If the home Member State Competent Authority has such concerns it will take appropriate action, and, depending on the nature of the concern, it will notify, in writing, the host Member State Competent Authority of the details of that event, the name of the Guest IORP, and sponsoring undertaking involved.

3.6. Sharing information about interventions

3.6.1. The home Member State Competent Authority will advise the host Member State Competent Authority of any action taken under Article 14 in respect of an IORP in so far as it may significantly affect the operation of the Guest IORP in the host Member State.

3.6.2. The host Member State Competent Authority will inform the home Member State Competent Authority of any action to be taken in respect of a Guest IORP under Article 20 (10) before such action is taken.

3.7. Ring fencing of an IORP's assets and liabilities

3.7.1. Under Article 21 (5) the host Member State Competent Authority may ask the home Member State Competent Authority to decide on "ring-fencing" of the assets and liabilities of a Guest IORP which are attributable to its activities in the host Member State, so that these assets are kept separate from the remaining assets and liabilities of the IORP.

3.7.2. If the home Member State Competent Authority decides that the assets and liabilities of a Guest IORP should be ring-fenced, the home Member State Competent Authority will notify

- the IORP that appropriate forms of ring-fencing, as envisaged in Articles 16 (3), 18 (7) and 21 (5) apply. It will also notify the IORP of which parts of its assets and liabilities are to be kept separate under the appropriate forms of ring-fencing; and
- the host Member State Competent Authority that ring-fencing is to apply to the assets and liabilities of the Guest IORP and the date from which the ring-fencing will apply.

3.7.3. Where ring-fencing applies to some or all of the assets and liabilities of an IORP, this Protocol will apply individually to each part that is ring fenced, if appropriate.

3.8. Interaction with the Life Directive

3.8.1. Member States may choose to apply Article 4 of the Directive to the occupational retirement pensions business of insurance undertakings, which are covered by Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance.

3.8.2. Where an insurance undertaking to which this applies wishes to operate a cross-border arrangement in accordance with Article 20 of the Directive, the provisions outlined in this Protocol will apply in respect of the assets and liabilities of the business which have been identified by the home Member State Competent Authority as ring-fenced in accordance with the specific requirements of Article 4.

3.8.3. The home Member State Competent Authority will notify the host Member State Competent Authority that Article 4 applies.

3.8.4. The home Member State Competent Authority shall ensure there is verification of the insurance undertaking's separation of its relevant occupational retirement provision business from its other business as part of the authorisation and notification procedures and ongoing supervision.