

Cross-border IORPs Note to the Commission

Introduction

The purpose of the IORP Directive is to create an internal market for occupational retirement provision. It enables an undertaking located in one Member State to sponsor an IORP located in another Member State and, conversely, an IORP located in one Member State to accept sponsorship from an undertaking in another Member State, whilst fully respecting the national social and labour legislation. This is described in Article 20(1) of the IORP Directive. Member States have, however, implemented differing definitions of what constitutes cross-border activity. This does not help the development of cross-border activity.

CEIOPS has examined the effect of this issue in a 2010 paper entitled 'Cross-border activity of IORPs – Practical issues'. The paper concluded that only a political decision could resolve the issues represented in the paper.

This note is a summary of the main issues identified in that paper and proposes options that could be considered for the future.

Current situation

Current main approaches

CEIOPS identified three different approaches currently used by member states in defining cross-border IORPs activity:

- **Location of the sponsoring undertaking** – a Member State that uses this criterion considers an activity to be cross-border if the sponsoring undertaking is located in another Member State than the IORP.
- **Nationality of the Social and Labour Law** – a Member State that uses this criterion considers an activity to be cross-border if the applicable social and labour law originates from a Member State other than the Member State where the IORP is established.
- **Nationality of the scheme** – a Member State that uses this criterion considers an activity to be cross-border if the scheme is from a different Member State to where the IORP is established.

Current issues

Because of the differing approaches, situations can arise where two (or more) Member States potentially involved in a cross-border activity come to different conclusions whether or not the proposed activity is actually a cross-border activity. This could happen if a notification by the Home State is not considered to be a cross-border activity under the approach used by the (intended) Host State. It could also happen that the (possible) Host State considers an activity to be a cross-border activity into their territory, yet the notification process does not start because the Home State legislation does not consider this to be a cross-border activity.

The following presents examples of possible clashes between approaches:

1. Home State uses a Sponsor location approach

Where the Home Member State defines cross-border activity on the basis of the location of the sponsoring undertaking the following issues arise if the Host Member State follows a different approach:

- Where **the Host State uses the approach based on the nationality of the applicable social and labour law**, the existence of the sponsoring undertaking in the intended Host Member State does not necessarily ensure that the social and labour law of that Member State is applicable. Therefore, a combination of these two definitions carries a risk of not being compatible;
- Where, **the Host State uses the nationality of the scheme**, the scheme and sponsor are likely to be in the same Member State. However, exceptions are possible. The agreement may be made by a branch in the Host Member State, yet this may not be compatible with the Host Member State definition of a sponsoring undertaking. Hence, this can also lead to a difference in opinion and so impact on the notification process.

This scenario has appeared in practice, but the different approaches led to the same outcome, so the case was defined as cross-border by both Member States.

2. Home State uses a Social and labour law approach

If the Home Member State defines cross-border activity on the basis of the applicable social and labour law and the intended **Host State applies the approach based on the location of the sponsoring undertaking or the nationality of the scheme**, this can lead to disagreements over cross-border activity. The applicable social and labour law does not necessarily imply the existence of a sponsoring undertaking in the proposed Host Member State or the nationality of the scheme to be the one of the Host Member State.

In practice, this combination has led to disagreement over several IORPs' status.

3. Home State uses a Scheme nationality approach

Where the Home Member State defines cross-border activity on the basis of the nationality of the scheme, the following issues could arise if the Host Member State follows a different approach:

- If ***the Host state applies the approach based on the location of the sponsoring undertaking***, then the nationality of the scheme and the location of the sponsoring undertaking are not necessarily the same. In this case, a Home State notification of a cross-border arrangement on the basis of scheme nationality may not be recognized by a Host who is looking at the location of the sponsoring undertaking.
- If ***the Host State uses the approach based on the nationality of the applicable social and labour law***, the nationality of a scheme may be different from the nationality of the applicable social and labour law. If the Host is of the opinion that his social and labour law is not applicable then on receipt of notification from the Home there will be disagreement over the existence of cross-border activity.

In practice neither of these scenarios has developed yet, as there is until now very little cross-border activity amongst those states using the nationality of the scheme approach.

Even if the Home State and the Host State happen to use the same approach to defining cross-border activity, issues could still emerge due to the different approaches to the constituent parts of the overall approach, i.e. divergence in defining the sponsoring undertaking, the applicable social and labour law, the nationality of the scheme.

Background reasons for the variety of current approaches

The reasons why different interpretations can arise is analysed thoroughly in CEIOPS “Practical issues” paper referred to above, and the following is a brief summary:

- The first issue is that it is not clear in the IORP Directive how to determine what is meant by ‘sponsoring undertaking’: is it the branch, the subsidiary, the head office ultimately paying the contribution, or some other entity? Article 6(c) of the IORP Directive defines the sponsoring undertaking as ‘any undertaking or other body, regardless of whether it includes or consists of one or more legal or natural persons, which acts as an employer or in a self-employed capacity or any combination thereof and which pays contributions into an IORP’.
- The second issue is to determine which national social and labour law applies. This is dealt with in Article 20(1) which requires cross-border activity to respect national social and labour law, and in Article 20(3) which introduces the Host Member State. The latter is defined in Article 6(j) as ‘the Member State whose social and labour law relevant to the field of occupational pension schemes is applicable to the relationship between the sponsoring undertaking and members’.

The members could be located in the same Member State as the sponsoring undertaking, or in another Member State. If sponsoring undertaking and members are located in the same Member State it is likely that the social and labour law of that Member State applies. If the members are located in a different Member State, the question arises as to whether (i) the social and labour law of the state where the member works, (ii) the social and labour law of the state where the sponsoring undertaking is situated or (iii) any other mutually agreed social and labour law applies.

- The third issue is how to define, if applicable, the nationality of the scheme. The scheme is the result of an agreement between the sponsoring undertaking and

members and will mostly be connected to the Member State where the head office of the sponsoring undertaking is located. As the subsidiary responsible for the actual payment of contribution can be located in another Member State, the nationality of the scheme must be determined on a case-specific basis.

Resolving the matter

The following options could be considered for the future:

1. Do nothing and monitor the situation while relying on enhanced supervisory cooperation provisions of the recently revised Budapest Protocol, including mediation.
2. Introduce a clear single definition of a cross-border activity. For a single definition, one of the three currently used main approaches could be considered, or an entirely new definition developed, based or not on a combination of all or some of the current approaches.

There is no consensus within CEIOPS about a 'correct' or a preferred definition. However, even if there were, such consensus would not be enough to resolve the conflicts. This is because each Member State's definition of a cross-border IORP is in many cases set out in legislation: changing this definition is therefore often not within the competence of the pension supervisory authority. A resolution of the differing interpretations will therefore require a change to legislation, which is likely to occur only as a result of transposition of a revision of the Directive.

This is the background to the view of CEIOPS that the present difference could only be resolved by political means, and that in particular an interpretation of the current Directive will not be sufficient to resolve this matter. In that respect, it should be noted that all Member States enacted their legislation as a good faith interpretation of the IORP Directive. As the Directive did not provide for a clear single definition, Member States chose their own approach using their own priorities. These priorities may include transcribing literally, following what they saw as the spirit of the Directive or minimising administrative costs. When resolving the matter, such priorities will again play an important role in the political process.

In most Member States, cross-border IORPs activity is defined in national legislation. If any change to the IORP Directive is agreed to resolve this matter, those Member States whose definition differs from the agreed approach will have to amend their relevant legislation.