

10 April 2018

## **OPSG informal feedback to EIOPA about the new draft Budapest Protocol**

The Budapest Protocol was approved on 30 October 2009. It provides a framework for the cooperation of competent authorities in the implementation of the IORP Directive (2003/41/EC) in relation to the supervision of IORPs that operate cross-border. The Protocol sets out the agreement between competent authorities to cooperate in the supervision of cross-border activities of IORPs.

The OPSG pointed out in its feedback statement in November 2016 ( EIOPA-OPSG-16-22 30 November 2016) the main reasons why the Budapest Protocol needs to be reviewed. Firstly, the problems with the current Protocol, which we identified, the IORP II Directive that has to be transposed by 13 January 2019 clarifies the IORPs' cross-border procedures and has to be reflected in the Protocol and the fact that the review of the Protocol was already overdue.

The OPSG wishes to thank EIOPA for the possibility to comment on this important issue but points out following concerns about the procedures behind the drafting of the new Budapest Protocol: In carrying on its works on the revision of the Budapest Protocol, EIOPA has only partially ensured the adequate level of transparency with the OPSG members and with the other pension stakeholders as the OPSG members have received the draft document on the revision of the Budapest Protocol on March 21<sup>st</sup> 2018, and were provided with a short time for reactions. Moreover, the document received does not include the appendices. Those appendices provide guidance for sharing information (1.1.1.) and can potentially have a strong impact on the content of the verification tests carried out by the NCAs. It is unfortunate that the OPSG is not able to provide feedback on these appendices.

In addition to shortcoming of the procedure in relation to the OPSG we note that relevant stakeholders outside EIOPA were not provided with draft documents at all. As the cross-border pension provision and the administrative procedures necessary for them are of most relevance for the sponsor companies of IORPs in question and their members and beneficiaries as well as the various service providers that help them, they should have had the opportunity to give their opinion about the draft Protocol and the other relevant documents. If the Budapest Protocol does not function well for these stakeholders it will not improve the opportunities to provide cross border pensions as is the intention of IORP II Directive.

The OPSG is pleased that:

1. the new rules acknowledge that the information exchange requirements set by the Protocol are weighted against the proportionality principle, as adequate consideration should be given to the fact that these rules are applied in proportion to the size, nature, scale and complexity of the activities of the IORPs. It remains to be seen how this is implemented.
2. the Budapest Protocol addresses the issue of the common language and the establishment of a contact point.

The OPSG would like to highlight the following points related to the draft document received:

1. In 1.1.3. is stated that if authorisation for a proposed cross-border transfer is refused, or a proposed cross-border activity is opposed, clear and detailed reasoning for such decision shall

be provided. Here could be added that this is important as this may lead to an appeal (see point 2.3.2, p.14).

2. In the presentation on the Review of the Budapest protocol, on page 8 and page 12 a “stop the clock procedure during substantive examination” was mentioned. However, this procedure is not included in the draft text received. This is very unfortunate because this procedure, if called upon by IORPs, allows them the time needed to complete the file. The procedure would have been a valuable instrument for the creation of cross border IOPRs and we wonder why EIOPA has decided not to include it.
3. Instead of a “stop the clock procedure”, and on top of the preliminary exchange of information, the new protocol introduces the “possibility of a pre-notification phase”. However, since no deadlines are included in this phase, the OPSG doubts that this procedure will facilitate the authorization of cross-border activities. A stop the clock procedure as presented at the OPSG meeting of 5/10/2017 would make this phase redundant.
4. Regarding point 1.1.4. we think that ideally EIOPA could play a role in this and that EIOPA and not each SA should give on their website an overview of the applicable Social and Labour law / depository requirements in the different countries. If gathering and disseminating correct and complete information is deemed not be feasible for EIOPA in practice , then the Host Competent authority should have an obligation to provide this information.
5. Insofar as the depository requirement is concerned it should be clear that the concrete requirements for the depository are also according to the law of the host country.
6. 2.2.1. states: “To allow the home competent authority to make a comprehensive assessment of the proposed cross-border activity, it is also very important that already at this informal stage the home competent authority be provided, also by the host competent authority, if relevant, with relevant insight into the applicable provisions of the SLL with a potential impact on the prudential requirements that need to be taken into account for the discharge of the home competent authority supervisory functions.” The OPSG believes suggests that, in order to facilitate cross border activities, the host SA should reply within a pre-defined period e.g. six weeks.
7. The OPSG regrets that the recommendation made to include a simplified procedure when an authorised IORP wishes to commence a cross-border activity for a new sponsoring undertaking is not reflected in the new Protocol.
8. It is not clear which rules should apply for a transfer between an insurance company and an IORP.
9. Regarding Section 2.3. of the paper (page 12), first paragraph: The way the authorisation is mentioned here raises the questions how Art. 11/2 relates to Art. 9/1 IORP II? Is it really required by Art. 11/2 IORP II to have an extra-authorisation for cross-border IORPs? Or does Art. 11/2 means that cross-borders IORPs must always be authorised und not just registered as Art. 9/1 IORP II would allow?
10. In point 2.3 para 2 it would be better to say “similar” than “identical” pension scheme.
11. Point 2.3.1 states “Upon receipt of the notification, the home competent authority is encouraged to do a formal completeness check of the notification within 10 working days...”It would be better to stipulate that it should as this should be an obligation and not an encouragement. The same comment for point 3.4.1.

12. In 2.3.3. para 1 and the second last para it would be better to say “without delay” than “promptly”. And the same comment for 3.4.2. which is in para 1 uses the expression “without delay” and defines it in a footnote.
13. According to 2.3.3. if the host competent authority does not provide the relevant requirements to the home competent authority within six-week period, the home competent authority shall forward this information to the IORP as soon as it receives the information from the Host competent authority. We would suggest that the home competent authority should also forward this information to EIOPA.
14. In the case of divergent views in terms of application of the Protocol, the relevant Competent Authorities should strive for a mutually agreed solution; in cases where no such solution can be reached, recourse may be made to EIOPA for mediation, but is not specified what happens if the mediation fails.
15. It should be clear that the principle of proportionality does not preclude the notification procedure (as maybe indicated in section 3.4., page 18) if - from a formal point of view - a very similar or even the same scheme is notified again for further employers/employees. This is so because the circumstances may have changed the composition of the members and beneficiaries of the involved IORPs could be very different from the earlier notification, the assets are different etc.
16. At the conclusion of a cross-border procedure, if authorisation for a proposed cross-border transfer is refused or a proposed cross-border activity is opposed, clear and detailed reasoning for such decision shall be provided and IORPs should have the right to appeal against such decision.
17. The public guidance described at page 9 should be mandatory for NA, not recommended.
18. The timing set by the Protocol to NA should be mandatory, and not only recommended on the basis of good practices.
19. The protocol could deal more specifically with the special problems arising from IORPs without legal personality.