



EIOPA-BoS-14/262

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**Peer Review on Supervisory Practices in
respect of Article 9 of Directive
2003/41/EC (“Conditions of operation”)
Final Report**

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1. Introduction

In 2013 the EIOPA Review Panel conducted an analysis on Article 9 para. 1 and para. 5 of the IORP Directive (Conditions of Operation). In accordance with the EIOPA methodology for conducting peer reviews¹ ('Methodology'), on the basis of the analysis from the field work, the Review Panel has drafted this final report, which outlines the key conclusions from the reviewers' assessment of National Competent Authorities (NCAs) practices, as well as the best practices identified.

Through this peer review, the Review Panel aims at encouraging open dialogue that helps to clarify practices, achieve common understanding and exchange experiences, as well as to identify best practices where possible.

2. Approach

With respect to the number of supervisory authorities assessed during the peer review: given the objective of the peer review, and following an initial analysis of the responses the review concentrated the assessment of those Member States, which had significant experience of cross-border activity during the reference period. Therefore, as application of the proportionality principle, a number of Member States were subject to further analysis by the reviewers team.

Each of these Member States was assessed by two reviewers. The assessments included a review of the response from the Authority and an identification of further questions and points of clarification. These questions and points of clarification were then discussed by way of a telephone conference or written procedure with the Authority.

In line with the above mentioned approach, the evaluation reports were sent to the heads of the NCAs subject to further analysis, giving them an opportunity to provide a written response to the evaluation reports.

The assessment is based on the information received from the NCAs in response to the self-assessment questionnaire.

With respect to the communication means used during the field work phase (e.g. visit, conference call, written procedure), taking into consideration the results of the initial analysis of the self-assessment questionnaires, the Review Panel decided that the telephone conference would provide appropriate communication means for the majority of the NCAs subject to further analysis mentioned above. The NCAs of the other Member States were not subject to further analysis, calls or visits and did not receive an evaluation report. The information provided about these Member States in this report are drawn only from their self-assessments.

3. Scope and Reference Period of the Peer Review

This peer review focused on an assessment of Article 9 para.1 and para. 5 of the IORP Directive, and namely to assess the process of supervision by the NCAs and to identify any factors, in the context of Article 9 para.1 and para. 5 of the IORP Directive, that could in practice jeopardise the creation of a cross-border market for IORPs.

¹ <https://eiopa.europa.eu/Pages/Working%20Groups/ReviewPanel.aspx>

The reference period for this peer review is 1 January 2009 to 31 May 2013.

4. Key Findings

4.1. Authorisation (licensing) for operation at national level

According to Article 9, para. 1 of the Directive, the IORPs which wish to operate at national level must be registered in a national register by a NCA or authorised.

The peer review analysed, for each Member State, the type of authorisation or registration regime for IORPs operating at national level.

For the purpose of the review the following notions have been understood as:

- Authorisation (licensing): formal approval process;
- Registration: Process (alternative to the authorisation/licensing) for the inclusion of an IORP in a register without any formal authorisation (licensing) to start operations on a national level.

The majority of Member States have an authorisation process in place.

Only in a few cases there is a registration process in order to operate at national level. A registration process is mainly present in those Member States where there is a large number of institutions (this is in line with the consideration in Recital 21 of the Directive).

The majority of Member States with an authorisation process have a statutory time limit in order to provide the authorisation after receiving the application. The minimum statutory time limit is 90 days, the maximum is 9 months.

Most NCAs with a registration process do not have an on-line procedure to permit the IORP to obtain an automatic registration after the insertion of the information required.

There are great differences between Member States regarding the information and documentation required by NCAs in order to give an authorisation or to make a registration.

In general, NCAs give formal authorisation only after a detailed examination of the IORP (i.e. articles of association, operating plan, information to assess the reliability and qualification of the managers, etc.).

On the other hand, in the majority of cases with only a registration process, less information and documentation is required by the NCAs.

These differences seem to be in line with the Directive, considering that it does not clarify whether the NCAs have to check if the IORPs fulfil the requirements considered in Article 9, para.1, lett. b), c), d) e) and f). This means that in some Member States this control could be effected ex ante, and in others ex post.

All NCAs have a register in which IORPs that have been authorised or registered are listed. In the great majority of cases the register of IORPs is publicly available (on the web site of the NCA or in some cases through periodic publication in official publications). In a very limited number of cases the register is not publicly available.

4.2. Performing cross-border activity: Application and Conditions

According to Article 9 para. 5 of the IORP Directive, if an institution wishes to manage a scheme in another Member State, a prior authorisation granted by the competent Authority of the home Member State has to be required.

The peer review looked into whether those Member States with a registration process at national level have an authorisation process for the IORPs, intending to operate cross-border.

All Member States have a notification procedure that is very similar to the one foreseen in Article 20 of the IORP Directive and in the Budapest Protocol. In some Member States the information on the main characteristics of the IORP does not include the description of the eligibility criteria for membership of a pension scheme mentioned in Article 2.4.1 of the Appendix 2 of the Budapest Protocol.

In addition to these, no further administrative burden on IORPs has been identified by the peer review.

The majority of NCAs have declared to be open to having informal contact or an informal meeting with IORPs prior to application for authorisation of cross-border activity or notification according to Article 20 of the Directive.

There are differences between Member States about the situations that should be considered as cross-border activity.² It would be beneficial to clarify this issue in the legislation or relevant guidelines.

Article 16, para. 3, of the IORP Directive prescribes that the technical provisions shall at all times be "fully funded", i.e. be covered by sufficient and appropriate assets, where an IORP carries out cross-border activities.

Member States have taken quite different interpretations as to the meaning of "funded at all times".

Where funding of these schemes no longer satisfies the fully funded requirement, some NCAs have specified a recovery period. This may be something that needs to be better clarified in the legislation or relevant guidelines. Otherwise the admission of a recovery period could be seen as in contrast with Article 16, para 3, which in cases where the condition of fully funded is not met, requires the NCA of the home Member State to intervene in accordance with Article 14, and sets out the circumstances and procedures for intervention by the NCA.

4.3. Performing Cross-border Activity: Information and Documentation

The NCAs with a registration process at national level and a specific authorisation process for cross-border activity request information and documentation about the IORP (on financial aspects, governance, reputation of those operating the IORP and

² Member States tend to consider the location of the sponsoring undertaking and/or the applicable Social and Labour Law and/or the location of the members as the main factor for determining cross-border activity.

other issues) prior to granting authorisation. The content of the information and documentation required differ across Member States.

The IORP Directive does not clarify in detail the requirements that have to be controlled before granting an authorisation permitting an IORP to operate cross-border. This is not a problem considering that after the general authorisation there should be a notification process. In this case the Directive (Article 20, para. 4) clarifies that the NCA has to give the information specified in para. 3 to the host Member State only if it has no reason to doubt that the administrative structure 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 operation proposed in the host Member State.

4.4. Performing Cross-border Activity: Requirements

The NCAs were asked to confirm if, with reference to the national IORPs performing cross-border activity, they required an external asset custodian, a representative in the host Member State or ring-fencing of assets.

According to Article 19 of the IORP Directive, Member States are free to make the appointment of a custodian compulsory. Such requirement, where present, is prescribed by the legislation and not by the NCAs. The requirement to have a custodian applies in general at the level of the IORP, irrespective of the nature (local or cross-border) of the schemes operated by the IORP.

In some Member States the NCA must give its consent for the appointment or dismissal of a custodian and has the power to assess also the custodian's ability to assume its task on the basis of its size, its financial capacity, its organisation and, more generally, the compatibility of its business with the IORP's objectives.

None of the NCAs subject to further analysis has required a representative in the host Member State. Some NCAs have pointed out that the European freedom to provide services does not require representation.

According to Article 16 para. 3 of the IORP Directive the NCAs should have the power to impose ring-fencing to ensure that the IORP complies with the rule on 'fully funded', that is in Article 16 para. 1. In addition Article 21 para. 5 provides for a host NCA to ask the home NCA to decide on such ring-fencing. The Directive leaves it to the home NCA whether to adopt this decision. None of the NCAs subject to the in depth analysis has required ring-fencing from the IORPs with cross-border activity.

4.5. Performing cross-border activity: other information

In relation to other information, the review looked into the level of guidance documentation available on some NCAs websites.

Some of this documentation included information for foreign IORPs, the notification procedure to be used, cross-border application forms, briefing notes on the national social and labour laws and protocols for co-operation between NCAs. The issue of the provision of information and guidance documentation is considered in the best practice section below.

4.6. Assessment of Responses to IORPs Peer Review Questionnaire Not Included in the Initial Analysis

Following the initial analysis, with regard to the remaining NCAs the analysis aimed to establish whether the Member States are at least in a position to host a cross-border IORP in their jurisdiction.

These were reviewed from the perspective of any possible burdens to IORPs cross-border activity. The majority of them have an authorisation process for IORPs at national level.

5. General Considerations

It is evident that there are some differences in the interpretation of what constitutes cross-border activity. These differences could be addressed either in the law, most likely through European Legislation or EIOPA Guidelines.

In a similar vein there are differing approaches to the concept of the requirement to be "fully funded". Also these differences could be addressed either in the law, most likely through European Legislation or EIOPA Guidelines.

6. Best Practices

- 6.1. It is useful for the NCAs to have a public register of the IORPs authorised or registered, in order to allow the public to know how many IORPs there are in each Member State. If the register is publicly available, there could also be more attention on the accuracy of the data. This kind of information is deemed to be especially useful for those IORPs considering to begin cross-border activity and that there could be a general encouragement in relation to the provision, at least, of minimum basic information.
- 6.2. In order to increase openness and transparency it is considered to be a best practice for NCAs to publish easily accessible guidance outlining the information required and the process involved in receiving authorisation/registration to operate on a national or cross-border basis. As part of developing these guidance, NCAs should seek to identify opportunities to increase procedural efficiency for both NCAs and IORPs as well as how to cost effectively notify IORPs of the new, published guidance as part of already planned communications with IORPs.
- 6.3. A number of NCAs indicated that they encourage informal contact from a prospective cross-border IORP prior to a formal application to the NCA. It is worth highlighting this as a best practice as it allows the IORP to have a full understanding of what is required from the NCA's perspective. Such an approach is an efficient use of resources and may cut down on follow-up questions once the formal application process has begun and may also cut down on any potential delays to the application process.

7. Conclusions

7.1. Impact on Common Supervisory Culture

The peer review has contributed to the common supervisory culture by identifying best practices in relation to the authorisation/registration process at national and cross-border level.

The peer review has also identified best practices in relation to the conditions, information and documentation required by NCAs for IORPs operating at a cross-border level.

The assessment of Article 9 para. 1 and para. 5 of the IORP Directive did not identify any factors directly associated with the supervisory processes used by NCAs to verify the conditions of operations that may impede on the creation of a cross-border activity. However, this assessment is based solely on the scope of this peer review; obstacles to cross-border activity may arise in other areas outside the scope of the peer review.

7.2. Follow-up measures

This peer review concluded that no specific recommendations to NCAs were required, but it has identified a number of best practices that will be of use to all Member States, particularly those who to date have no experience of cross-border activity. In addition, EIOPA will continue to uncover any potential obstacles to cross-border activity through its Annual Work Programme activities. These include monitoring the level of cross-border activity in its annual market development report and hosting an annual meeting which facilitates the exchange of views between NCAs and practitioners on cross-border operations. As part of this evidence gathering, EIOPA may consider revisiting the topic of the peer review in the medium term.