CEIOPS
Committee of European Insurance and Occupational Pensions Supervisors

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Cross-border activity of IORPs
Practical issues paper

1. Introduction and Executive Summary

Under the IORP Directive[1], institutions for occupational retirement provision have the possibility to provide their services in other Member States, thereby allowing them to operate pension schemes with members and beneficiaries[2] in more than one Member State[3]. Article 20 of the Directive provides the basic framework for IORPs that wish to operate cross-border, including the procedure that needs to be followed before a cross-border activity can be started.

CEIOPS, in its Key Implementations Report[4], published initial findings on the implementation of the requirements for cross-border IORPs in Member States in March 2008. This report identified that there are differences in the approach used by states to determine what cross-border activity is. The different approaches lead to different notification practices and the possibility of states having competing views as to who the Host state is. The conclusion from that preliminary analysis was that the initial review, whilst very helpful, would benefit from further work based on actual operational experience.

The report was accompanied by a theoretical issues paper which was drafted at the same time as the report and focussed on the theoretical issues because of the paucity of practical experience. Some extracts from the original theoretical issues paper were updated and used as the basis for Annex A to this Practical Issues Paper, which provides the theoretical background.

The purpose of the further work detailed in this paper was to enhance our understanding of the differences evidenced in the initial findings, both practical and theoretical. The aim has been to identify and understand the complexities of this issue, in particular the consequences for members of those cross-border IORPs where there is a fundamental disagreement as to whether or not the activity is cross-border.

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[1] Directive 2003/41/EC on the Activities and Supervision of Institutions for Occupational Retirement Provision, OJ L 235/10.
[2] In this report, the term ´members´ must be read to include all members and beneficiaries.
[3] As described in Recital 36 of the Directive
[4] http://www.ceiops.eu/media/docman/public_files/publications/submissionstotheec/ReportIORPdirective.pdf

A survey was therefore launched in late 2008 to gather detailed information on the practical experience of Member States with respect to cross-border activity. Replies of the survey were collected during January and February 2009, with an extended deadline through to June. Some 20 Member States and 21 Member State Competent Authorities responded to the survey providing differing levels of experience.

This report represents an analysis of those replies and highlights the main issues and challenges arising from the notification procedures of existing cross-border arrangements, as identified by Member States in the 2009 survey. Where Member States are cited by name it is done so to provide a 'for example' illustration only and should not be read as representative of the cross-border definitional challenges that have arisen in practice.

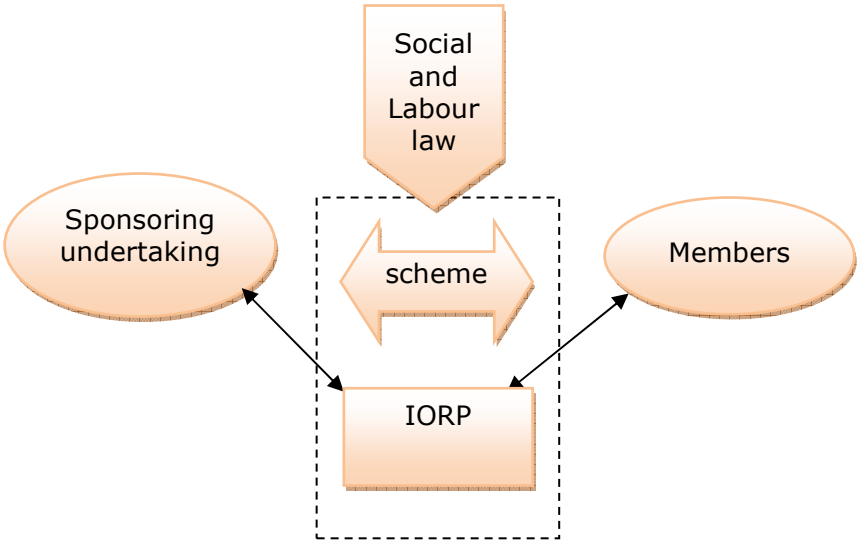
2. The relevant provisions of the IORP Directive

Article 20 of the Directive (see Annex A part 2.2) specifically relates to cross-border activities. Section 1 defines that the article refers to a situation where the IORP and the sponsoring undertaking are located in two different Member States.

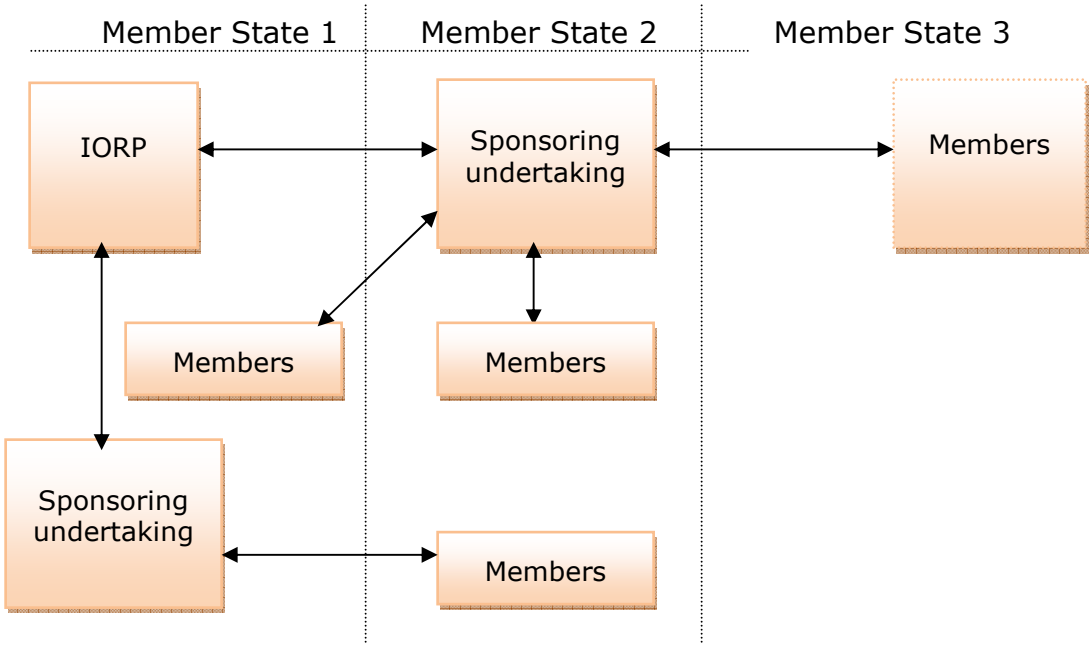
Section 2 covers the aspect that cross-border activity is subject to prior authorisation by the Home State Competent Authority.

Section 3 introduces the Host Member State, where it requires the IORP to submit a notification to the Home Member State Competent Authority including the name of the Host Member State(s), the name of the sponsoring undertaking and the main characteristics of the pension scheme to be operated for the sponsoring undertaking.

The following diagram shows the different elements which come into play:



Each of the elements in this diagram can 'belong' to a different Member State. All combinations are possible[5], for example:



With regard to this diagram, three issues need to be mentioned. It depends on the approach taken whether one or more of these issues play a determining role in a Member State deciding on the cross-border character of the operations of an IORP, and on the need to notify.

The first issue is that it is not clear in the Directive **how to determine what is meant by 'sponsoring undertaking'**: is it the branch, the subsidiary, the head office ultimately paying the contribution, or any 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 a component of Article 20(1) which requires cross-border activity to respect national social and labour law and 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'.

[5] In the trust based system the IORP represents the trust and is always located in the same Member State as the scheme

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.

There could also be more complex situations where the members are located permanently or temporarily in many different Member States, or in the same Member State as the IORP. The point is that the sponsoring undertaking should know which social and labour law applies to the relationship with its employees.

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.

3. The findings

The descriptions of key variables within the Directive, particularly the definitions of Host Member State and sponsoring undertaking, give rise to a number of approaches towards defining cross-border activity. The extensive surveying, collection and analysis of data, clearly demonstrated that this is the case. The survey confirmed that the different approaches used fall into approximately three categories.

The three different approaches can be categorised as follows (Member States which fall within the categories are identified in brackets. Note that a key to the abbreviations used for Member States is available in Annex D):

- ***Location of the sponsoring undertaking*** (for example, as used in AT, BG, DE LI, NO, CZ);
  A Member State that uses the location of the sponsoring undertaking as the decisive 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*** (for example, as used in BE, PT, IE, UK, FI);
  A Member State that uses the nationality of the social and labour law as the decisive 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*** (for example, as used in LU, NL)
  A Member State that uses the nationality of the scheme as the decisive

criterion, considers an activity to be cross-border if the scheme is from a different Member State to where the IORP is established.

Of course the categories are approximate only: they are not exact and, in practice, it is possible to find a combination of these approaches in varying degrees. For example, both the location of the sponsoring undertaking and the nationality of social and labour law are used to determine if a notification is necessary (PL). A combination of social and labour law and the nationality of the scheme is also used (ES).

3.1 Regulatory consequences of the different approaches:

As this paper concentrates on problems arising from the use of different definitions, it is important to note that even where different approaches are used by Home and Host Member States, the nature of most arrangements is such that it qualifies as cross-border activity under all approaches. In addition, the revised Budapest Protocol contains a procedure[6] to deal with (case-specific) conflicting approaches bilaterally, as far as is legally possible for the supervisors involved.

The table below shows in diagram form the different possible combinations of approaches resulting from the definitions in use.

Table A

	Host Member State		
Home Member State	location of sponsoring undertaking	the applicable social and labour law	nationality of scheme
→			
location of sponsoring undertaking	OK	not OK	not OK
applicable social and labour law	not OK	OK	not OK
nationality of scheme	not OK	not OK	OK

Taking each combination in turn, the consequences can be analysed as follows.

[6] 1.3.4 Budapest Protocol November 2009

3.1.a Both Home and Host have the same approach

The three green boxes marked 'OK' represent the situation where both Member States have the same approach to categorising cross-border IORPs. Therefore, in principle, there should be no problems with the Member States agreeing on the cross-border status of the IORP and this should be the most benign scenario.

- However, even in this most benign scenario, different conclusions could still emerge, due to the different approaches to the constituent parts of the approach. An example of this is where Member States attach different meanings to the term 'sponsoring undertaking'[7].

- Social and labour law cannot be defined through the IORP Directive. Thus, where Home and Host definitions both hinge on the ***nationality of the applicable social and labour law***, they may nevertheless adopt different ways to determine the applicable social and labour law, which could lead to different conclusions as to whether cross-border activity is taking place. In at least one concrete example, the two Member States concerned had a different view on which is the applicable social and labour law.

- Where Home and Host definitions both hinge on the ***nationality of the scheme,*** difficulties might arise if Member States use differing definitions for what constitutes the scheme being in another Member State. For example where the definition requires the 'agreement' to be made between the sponsoring undertaking and member in a different Member State to the IORP, what constitutes the agreement may not be the same and there may also be varying definitions of what constitutes the sponsoring undertaking(as above) in the agreement.

In practice, the results from the survey do not show many existing problems in these areas on a practical level, even though the possibility of variations in the detail of the approach exist.

3.1.b Home uses the location of the sponsor approach and Host uses a different approach (social and labour law or nationality of the scheme)

This is illustrated in Table A, reading across the first row (red boxes).

In this case, the Home Member State defines cross-border activity on the basis of the location of the sponsoring undertaking and the Host applies the approach based on the applicable social and labour law or the nationality of the scheme.

[7] Results of the survey show for example that the following situations existed: separate corporate entities domiciled in another Member State (DE), undertaking established in another Member State (LI, LU), a group of affiliated companies (LU) or Registered office of the undertaking in another Member State (PL).

- 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;

- Host state uses the approach based on the ***nationality of the scheme***;
  Where the nationality is defined as the location of the agreement between the sponsor and the members, the scheme and sponsor are likely to be in the same Member State. However, exceptions are possible, dependent on the definitions used for 'sponsoring undertaking'. 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.

In practice this scenario has appeared (for example, BE-NL) but the different approaches led to the same outcome, so the case was defined as cross-border by both Member States.

3.1.c Home uses the social and labour law approach and Host uses a different approach (sponsoring undertaking or nationality of the scheme)

This is illustrated in Table A, reading across the second row (yellow boxes).

In this case, the Home Member State defines cross-border activity on the basis of the applicable social and labour law and the Host applies the approach based on the location of the sponsoring undertaking or the nationality of the scheme.

- If the Home Member State defines cross-border activity on the basis of the applicable social and labour law and the intended Host applies the approach based on the location of the sponsoring undertaking or the nationality of the scheme, this can lead to disagreement 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. In these cases the Home recognised cross-border status under their definition and notified the respective intended Host Member States. However, these Member States had doubts whether notification was required, in some cases because the sponsoring undertakings are not located in their territory (for example, UK-DE and UK-CZ), in other cases because the nationality of the scheme was not considered to be the one of the intended Host Member State (UK-ES and UK-NL) and in one case because the sponsoring undertaking is not

located in its territory and additionally it was considered that its relevant social and labour law does not apply (UK-DE).

3.1.d Home uses the nationality of the scheme approach and Host uses a different approach (sponsoring undertaking or social and labour law)

This is illustrated in Table A, reading across the third row (orange boxes).

In this case, the Home Member State defines cross-border activity on the basis of the nationality of the scheme and the Host applies the approach based on the location of the sponsoring undertaking or the applicable social and labour law.

- Host state applies the approach based on the ***location of the sponsoring undertaking.***
  The nationality of the scheme and the location of the sponsoring undertaking are not necessarily the same, although this may be the case, as described in (b) above. 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.

- 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 have developed yet, as there is very little Member State experience amongst those states using the nationality of the scheme approach .

3.2 Supervisory consequences of definitional differences and approaches

As can be seen above, we have practical experience of Member States clashing in the definition of cross-border activity and in those practical cases we can see different responses emerging from the Host Member State. The consequences for supervision of the members in the Host state are also subject to diverse approaches. Table B provides the possible approaches. However, one should keep in mind that the fact that a clash in definition leading to a case not being supervised is not caused by unwillingness by the supervisor, but by legal restrictions.

Table B

Clash in definition	
Send Host requirements	**Supervise**
✓	✓
✓	x
x	x

3.2.a The Host Member State Competent Authority does not (or not negatively) assess as to whether they agree with the proposed cross-border activity. Host sends their social and labour law requirements and accepts to supervise its compliance (first row table B).

Under this scenario, the Host Member State Competent Authority accepts the notification of cross-border activity and agrees to supervise their social and labour law, even if they do not agree with the Home state's assessment. Both states' legal frameworks must allow for this to be the case. It provides for protection to the members of a cross-border IORP and is the most satisfactory outcome.

3.2.b The Host Member State Competent Authority disagrees with the categorisation of the cross-border activity, nevertheless sends their social and labour law but cannot supervise its compliance (second row table B).

Under this scenario, the sending of the social and labour law does not imply acceptance of the Home state's determination of the cross-border nature of the arrangement. The Host state makes its own analysis and comes to the view that it cannot supervise the compliance with social and labour law from its perspective. This non-supervision by neither Host nor Home Member State leaves the respective members of the IORP with less protection than members based in the Home state, whose social and labour law is supervised.

3.2.c The Host Member State Competent Authority disagrees with the activity, does not send their social and labour law and cannot supervise its compliance (third row table B).

This is a stricter version of the second outcome since, under this scenario, the co-operation does not even extend to the sending of the social and labour law.

However, the response of the intended Host state does not (directly) influence the activities of the IORP, as according to the IORP Directive, the IORP may start to operate the cross-border scheme to operate even if the social and labour law is not sent or not received after expiration of the deadline in the Directive (2 months). The revised Budapest Protocol foresees co-operation in these circumstances, but there is no practical experience yet.

The result, if it occurred, would be the same as in the second outcome: the supervisory authority cannot supervise the compliance with social and labour law. Therefore members in the Host state are left without supervision of important provisions of their protection, and they may not be aware of this gap.

4. Other Issues

As well as gaps in the supervision of the compliance of social and labour law, one further consequence of the different approaches is the potential for double regulation. The survey found at least one example of this situation.

5. Conclusions and next steps

The aim of the paper was to identify the issues related to the use of different definitions of a cross-border activity arising from the Directive. Therefore, additional differences in legal frameworks which could give rise to further challenges are not addressed here.

CEIOPS considers that only a political decision can provide the necessary steps to resolve the issues identified in this paper. We recommend therefore that this report is passed to the EIOPC for them to determine the way forward on providing a solution to the different interpretations of the IORP Directive for cross-border activity described in this report.

Annex A: Theoretical background

This annex focuses on potential theoretical issues arising from the application of the IORP Directive's provisions regarding the cross-border activity of an IORP into another Member State.

The annex is based on a paper which was drafted for the internal purposes at the same time as the Key Implementations report (publication March 2008) and, as an internal document, it was never published. It describes the issues arising among the CEIOPS members on definitions and common understanding and aims to support the understanding of the main report.

This annex consists of three parts. Firstly, (Part 1) contains a description of the social and labour law aspects of cross-border activities of IORPs. Secondly, (Part 2) provides a description of the notification process and Host State aspects of the Directive. These two parts set out the theoretical issues that (might) arise in cross-border situations. Finally, the conclusions are described in Part 3.

1. Social and labour law

1.1 What's the purpose of having the social and labour law of the Host Member State apply?

In most countries the occupational pension provision is an integral part of the country's pension system, consisting of a state pension, an occupational pension and a private pension.

The structure and organisation of a country's pension system is the result of a combination of economical, financial, social, labour and fiscal matters. Some of these matters are subject to EU harmonisation, others are solely national competence.

The conditions in which the pension promise is made are part of the labour contract and are normally subject to social and labour legislation. The choice of an IORP, even a foreign one, may not affect the pension promise made, nor impact on the social and labour law protection.

1. 2 How is this regulated in the IORP Directive?

Although the IORP Directive is a financial services directive[8], eminating from the DG Internal Markets, it touches on social matters, which are not harmonised. Already in the preamble a reference is made to the social and labour legislation:

> (37) The exercise of the right of an institution in one Member State to manage an occupational pension scheme contracted in another Member State should fully respect the provisions of the social and labour law in force in the host Member State insofar as it is relevant to occupational pensions, for example the definition and payment of retirement benefits and the conditions for transferability of pension rights.

Furthermore in the definitions (Article 6j), the Host Member State is defined 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 content of social and labour law relevant to the field of occupational pensions cannot be defined as such in the Directive because it is outside the scope of this (financial) directive. So therefore it is up to each Member State to define this content. The Directive though gives some examples:

- the definition and payment of retirement benefits and the conditions for transferability of pension rights
- the organisation of pension systems, including compulsory membership and the outcomes of collective bargaining agreements

A Member State involved in a cross-border notification as a Host, has to determine the content of its social and labour law relevant to the field of occupational pensions. The Host Member State has to pass on this information to the Home Member State competent authority for the attention of the IORP as part of the notification procedure (see below).

The OPC is collecting this information on the national social and labour law for the field of occupational pensions for the purpose of exchange of information. A public CEIOPS website was launched, containing up-to-date hyperlinks to the specific local websites of supervisory and/or regulatory authorities, for the purpose of facilitating understanding of each state's social and labour law (http://www.ceiops.eu/content/view/438/201/).

[8] It is, however, not a Lamfalussy directive.

1. 3 What problems arise with defining the applicable social and labour law?

In determining which social and labour law is applicable there are two elements which come into play: i.) the scope, and ii.) the nationality of the social and labour legislation.

i.) The *scope* of the relevant parts of social and labour law applicable to the field of occupational pensions must be defined by individual member states, which may give rise to further complication. What one state regards as financial services law, and therefore harmonized and within the jurisdiction of the Home Member State, another Member State may regard as social and labour law relevant to occupational pensions (not harmonized) and therefore within the scope of the Host Member State. This creates scope for both the Home and Host states to apply overlapping and possibly conflicting provisions, both to the same scheme members, plan sponsor and/or IORP.

ii.) The *nationality* of the social and labour law is even more tricky. In most cases, the nationality of the applicable legislation is the country of the employer and the employee, when both parties concluded a labour contract on the basis of that country's law. The pension promise, which is part of the labour contract, is subject to that country's social and labour law.

However, reality is much more complex. For example, the following possibilities may occur:

- the employee does not live in the same country as the registered office of his employer on a permanent basis;
- some employees have been (whether or not temporarily) sent out to work in another country than the registered office of their employer.

In these cases, it may not be clear from the outset which social and labour law is applicable to the relationship between the sponsoring undertaking and the members. We face a situation where the laws of different countries overlap. In this context, the rules of the *Regulation on the law applicable to contractual obligations*[9] (Rome I Regulation) are applicable. See Annex B for reference.

Perhaps another way of looking at the problem of concurrence of the laws of different countries can be found in the *Regulation n° 883/2004 on the coordination of social security systems*[10].See Annex C for reference.

Although the Rome I Regulation and the Regulation n° 883/2004 have the same point of departure, namely the country of employment principle, the rest of the reasoning differs. Which one has to be taken into account?

[9] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

[10] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems

The Regulation n° 883/2004 on the coordination of social security systems is applicable to state pensions, but it is not certain that it can be applied by analogy on pension schemes of the second pillar. On the contrary, the Rome I Regulation contains provisions specifically related to employment contracts. As a result, it is certain that these provisions are applicable to the relationship between the sponsoring undertaking and the members of a pension scheme.

2. The notification and host country

2. 1 What's the purpose of the notification procedure ?

When it comes to the supervision of cross-border activities of IORPs, the IORP Directive set forth the Home-Host country principle, in which the Home country supervisor is responsible for the prudential supervision of the IORP, and the Host country supervisor for the social and labour law supervision of the pension scheme, being managed by the IORP and additionally the information requirements.

The purpose of the notification is twofold:

- first, to enable the *Home* supervisor to verify if the technical provisions are fully funded (art. 16.3), if there is no reason to doubt that the IORP is capable of operating foreign pension schemes [in respect of the IORPs administrative structure and fitness of people] and to verify the implications on the IORP's financial stability and solvency (art. 20.4)
- second, to inform the *Host* Member State of the existence of an activity on which its social and labour legislation is applicable.

It is of utmost importance for a Host Member State to be informed about the cross-border activities in order to give it the opportunity to perform its social supervision.

2. 2 How is this regulated in the IORP Directive ?

The notification procedure is elaborated on in Article 20 of the IORP Directive:

> Article 20 Cross-border activities
>
> 1. Without prejudice to national social and labour legislation on the organisation of pension systems, including compulsory membership and the outcomes of collective bargaining agreements, Member States shall allow undertakings located within their territories to sponsor institutions for occupational retirement provision authorised in other Member States. They shall also allow institutions for occupational retirement provision authorised in their territories to accept sponsorship by undertakings located within the territories of other Member States.

2. An institution wishing to accept sponsorship from a sponsoring undertaking located within the territory of another Member State shall be subject to a prior authorisation by the competent authorities of its home Member State, as referred to in Article 9(5). It shall notify its intention to accept sponsorship from a sponsoring undertaking located within the territory of another Member State to the competent authorities of the home Member State where it is authorised.

3. Member States shall require institutions located within their territories and proposing to be sponsored by an undertaking located in the territory of another Member State to provide the following information when effecting a notification under paragraph 2:
(a) the host Member State(s);
(b) the name of the sponsoring undertaking;
(c) the main characteristics of the pension scheme to be operated for the sponsoring undertaking.

4. Where a competent authority of the home Member State is notified under paragraph 2, and unless it has reason to doubt that the administrative structure or the financial situation of the institution or the good repute and professional qualifications or experience of the persons running the institution are compatible with the operations proposed in the host Member State, it shall within three months of receiving all the information referred to in paragraph 3 communicate that information to the competent authorities of the host Member State and inform the institution accordingly.

5. Before the institution starts to operate a pension scheme for a sponsoring undertaking in another Member State, the competent authorities of the host Member State shall, within two months of receiving the information referred to in paragraph 3, inform the competent authorities of the home Member State, if appropriate, of the requirements of social and labour law relevant to the field of occupational pensions under which the pension scheme sponsored by an undertaking in the host Member State must be operated and any rules that are to be applied in accordance with Article 18(7) and with paragraph 7 of this Article. The competent authorities of the home Member State shall communicate this information to the institution.

6. On receiving the communication referred to in paragraph 5, or if no communication is received from the competent authorities of the home Member State on expiry of the period provided for in paragraph 5, the institution may start to operate the pension scheme sponsored by an undertaking in the host Member State in accordance with the host Member State's requirements of social and labour law relevant to the field of occupational pensions, and any rules that are to be applied in accordance with Article 18(7) and with paragraph 7 of this Article.

7. In particular, an institution sponsored by an undertaking located in another Member State shall also be subject, in respect of the corresponding members,

to any information requirements imposed by the competent authorities of the host Member State on institutions located in that Member State, in accordance with Article 11.

8. The competent authorities of the host Member State shall inform the competent authorities of the home Member State of any significant change in the host Member State's requirements of social and labour law relevant to the field of occupational pension schemes which may affect the characteristics of the pension scheme insofar as it concerns the operation of the pension scheme sponsored by an undertaking in the host Member State and in any rules that have to be applied in accordance with Article 18(7) and with paragraph 7 of this Article.

2. 3 How can this be interpreted?

The article refers on the one hand to "*sponsoring undertaking (located in the territory of) in another Member State*" and on the other hand to "*pension scheme sponsored by an undertaking in the host Member State*".

The simultaneous use of "*another Member state*" and "*host Member state*" is confusing, especially against the background of the definition of "host Member state" in Article 6.

Even more confusing is the direct link that is made between the location of the sponsoring undertaking and the Host Member State in Article 20. 5, 20.6 and 20.8 ("*an undertaking in the host Member State*"), although the location of an undertaking and the applicable social and labour law need not necessarily be related to the same Member State.

It could be the case that the social and labour law of a certain Member State is applicable even if the sponsoring undertaking (the employer) is not located in that Member State.

Article 20 could be interpreted as such that the starting point for the notification procedure is the location of the sponsoring undertaking, therefore limiting the number of situations in which a notification is requested.

As such, a notification should be carried out only in these cases where the sponsoring undertaking is located in another Member State than the IORP (Article 20.2.).

One interpretation of this is that, provided that the sponsoring undertaking and the IORP are both located in the same Member State, the pension scheme may have members in several Member States, without implying a cross-border activity on the part of the IORP. Notification is not necessary when a member of a pension scheme moves to another Member State. This is particularly clear for

scheme members who move to work in another Member State and who fall within Directive 98/49/EC[11] as posted workers.

Thus, the presence of a "host Member State" does not necessarily imply cross-border activity.

Article 20.3.a) creates the possibility of multiple host Member States. IORPs can manage various schemes next to each other, sponsored by different sponsoring undertakings or ruled by different social and labour laws. Multiple host Member States might also exist if, according to the "country of employment principle" of the Rome I Regulation, the social and labour law of different countries is applicable to a single pension scheme (e.g. employees set to work in different countries).

Article 20.5, 20.6 and 20.8 do not take full account of all reasons for this possibility of multiple host Member States and solely link the host state to "an undertaking in the host Member State".

According to the definition of article 6 (j), a "host Member State" is 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. But according to Articles 20.5, 20.6 and 20.8 the Host Member State is identified according to the location of the sponsoring undertaking.

The starting point for the notification could also be article 6 (j), implying that a notification should happen when the social and labour law of another country applies.

2. 4 Problems may arise with:

2.4.1 Defining the Host Member State

As stated above, there seems to be a contradiction between the definition of the Host Member State in Article 6(j), which does not make any reference to the location of the sponsoring undertaking but only to the applicable social and labour law and Article 20.

Also, limiting the notifications in only these cases as defined by Article 20, can lead to strange situations and could appear to create legal gaps (a real gap would not be created because there is always the law of a certain Member State applicable, it could only appear to be a gap because people are not aware of what law is applicable) and gaps in social supervision. This can be illustrated by means of some theoretical examples.

[11] Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community (OJ L 209/46 25.7.98)

example 1: The IORP is authorised in State A and the sponsoring undertaking is established in State X. All the relationships between the sponsoring undertaking and members fall under the scope of the social and labour legislation of State X.

→ all elements point to a cross-border activity so this is a clear-cut case of the need for a notification.

example 2: The IORP is authorised in State A and the sponsoring undertaking is established in State X. Some relationships between the sponsoring undertaking and members fall under the scope of the social and labour legislation of State X, other relationships fall under the scope of the social and labour law of State Y (not being State A).

→ the elements concerning state X point to a cross-border activity so this is a clear-cut case of the need for notifications to state X. In the case of State Y it depends on the approach taken by the Member State.

example 3: The IORP is authorised in State A and the sponsoring undertaking is established in State A. The relationship between the sponsoring undertaking and some employees of that undertaking fall under the scope of the social and labour law of State Y.

→ some elements point to a cross-border activity, however, it is not clear if a notification is necessary according to Art. 20 of the Directive. If the interpretation is adopted that the starting point is the location of the sponsoring undertaking, no notification is needed, although the sponsoring undertaking and the IORP have to comply with the social and labour legislation of State Y. In this case the Competent Authority of State Y will not be aware that a cross-border pension activity could be conducted on its territory.
If the interpretation is adopted that the starting point is whether the social and labour law of another country applies, a notification would need to take place.

From the perspective of State Y and the applicability of its social and labour law, there is no fundamental difference between example 2 and 3. The only difference is the location of the sponsoring undertaking, resulting, depending on the approach taken, in example 2 the Host Member State will be notified, in example 3 not.

example 4: The IORP is authorised in State A and the sponsoring undertaking is established in State X. The relationship between the sponsoring undertaking and the employees of that undertaking fall under the scope of the social and labour law of State A.

→ some elements point to a cross-border activity, however, it is not clear if a notification is necessary, because the State where the sponsoring undertaking is located is NOT the Host Member State, according to the definition in Article 6 (j).

4. 2. 2 Defining the sponsoring undertaking

In the definitions (Article 6), the sponsoring undertaking is defined as:

> (c) .. 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 institution for occupational retirement provision;

This definition is, however, not sufficiently detailed and therefore not clear on what exactly is a sponsoring undertaking under the meaning of the Directive.

Questions arise if this definition includes a branch situation or not or whether there must be a separate corporate entity for a sponsoring employer to be in a cross-border situation.

Related to this issue is the *location* of the sponsoring undertaking. The Directive refers to the location of the sponsoring undertaking throughout Article 20, but what does it mean: having activities somewhere, having a branch or having its registered domicile?

Also it is not evident to define *who pays the contributions*. Is it the entity that actually makes the payment or could it be another entity which reimburses the first one for the payments made? In multinationals it can be extremely difficult to find out who ultimately bears the burden.

Special attention has to go to the treatment of independent workers, which are, according to the Directive, a sponsoring undertaking. As a result of this definition, for each cross-border affiliation of an independent worker to the IORP, the notification procedure should be started. This could lead to thousands of information flows between home and host supervisory authority containing the same information. Is this necessary in the case of for example a group of independent workers having the same professional activity and underwriting the same pension scheme?

3. Conclusions

Article 20 of the Directive sets rules for IORPs which wish to operate cross-border, including the procedure that needs to be followed before a cross-border activity can be started.

CEIOPS has, in this annex, identified potential issues in this area on the basis of a theoretical analysis, without looking at practical experience of cross-border activity.

Outlining all the possible combinations of the elements in play gives an understanding of the different concepts of cross-border activity and host state which can lead to different notification practices and the possibility of states having competing views as to who the host state is. Also, IORPs in some states are subject to the more stringent requirements that the Directive imposes on cross-border arrangements which would not be considered to be cross-border in other states.

Annex B

Regulation on the law applicable to contractual obligations (Rome I)[12]

The basic concept of the Rome I Regulation is the parties' freedom to choose the applicable law (preamble 11) in matters of contractual obligations.

> Article 3 - Freedom of choice
>
> 1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.
>
> 2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Regulation. Any change in the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.
>
> 3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of law of that other country which cannot be derogated from by agreement.
>
> [...]

Furthermore, the Rome I Regulation contains provisions specifically related to employment contracts. Article 8 stipulates an important exception to the principle of freedom of choice: the freedom of choice may not result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement of the law which would be applicable in the absence of choice.

> Article 8 - Individual employment contracts
>
> 1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.
>
> 2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law

[12] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

Even more, the Rome I Regulation stresses that the application of overriding mandatory provisions shall not be restricted. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests.

Article 9 - Overriding mandatory provisions

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Preamble 37, however, tempers the use of this possibility stating that " The concept of "overriding mandatory provisions" should be distinguished from the expression "provisions which cannot be derogated from by agreement" and should be construed more restrictively."

Annex C

Regulation n° 883/2004 on the coordination of social security systems[13]

TITLE II
DETERMINATION OF THE LEGISLATION APPLICABLE

Article 11 - General rules

1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

2. For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity. This shall not apply to invalidity, old-age or survivors' pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period.

3. Subject to Articles 12 to 16:

(a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

[…]

Article 12 - Special rules

1. A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that he is not sent to replace another person.

2. A person who normally pursues an activity as a self-employed person in a Member State who goes to pursue a similar activity in another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed twenty-four months.

Article 13 - Pursuit of activities in two or more Member States

1. A person who normally pursues an activity as an employed person in two or more Member States shall be subject to:

(a) the legislation of the Member State of residence if he pursues a substantial part of his activity in that Member State or if he is employed by various undertakings or various employers whose registered office or place of business is in different Member States, or

[13] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems

(b) the legislation of the Member State in which the registered office or place of business of the undertaking or employer employing him is situated, if he does not pursue a substantial part of his activities in the Member State of residence.

[…]

Annex D

Member State Abbreviations

AT	Austria
BE	Belgium
BG	Bulgaria
CY	Cyprus
CZ	Czech Republic
DE	Germany
DK	Denmark
EE	Estonia
ES	Spain
FI	Finland
FR	France
GR	Greece
HU	Hungary
IE	Ireland
IS	Iceland
IT	Italy
LI	Liechtenstein
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
NO	Norway
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
UK	United Kingdom