EIOPA-BoS-18/320
27 September 2018

Decision of the Board of Supervisors

on the collaboration of the competent authorities of the Member States of the European Economic Area with regard to the application of Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs)

THE BOARD OF SUPERVISORS OF THE EUROPEAN INSURANCE AND OCCUPATIONAL PENSIONS AUTHORITY,

Having regard to Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, in particular Article 29 thereof,

Whereas: This Decision reflects the joint decision of the Competent Authorities[1] to replace the 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 Activity (CEIOPS-DOC-08-06-Rev1) (Budapest Protocol) with a new arrangement, which is developed and agreed upon by EIOPA and the Competent Authorities with regard to the application of Directive (EU) 2016/2341/EU of the European Parliament and of the Council of 14 December 2016 on the Activities and Supervision of Institutions for Occupational Retirement Provision (IORPs);

[1] As defined in Article 6(8) of Directive (EU) 2016/2341 of the European Parliament and the Council.

HAS DECIDED AS FOLLOWS:

Article 1

The Budapest Protocol adopted by the Committee of European Insurance and Occupational Pensions Supervisors as EIOPA's legal predecessor is repealed with effect from 13 January 2019.

Article 2

The provisions relating to the collaboration of the Competent Authorities of the Member States of the European Economic Area with regard to the application of Directive (EU) 2016/2341, as set out in the Annex to this Decision, shall enter into force on 13 January 2019.

Notifications of cross-border activity which have been submitted by the date of entry into force of this Decision shall continue to be subject to the provisions of the Budapest Protocol.

Article 3

1. This Decision shall apply to:

(a) all national authorities competent for the supervision of IORPs, which are Members of the Board of Supervisors of the European Insurance and Occupational Pensions Authority (EIOPA), and

(b) the EEA EFTA Members of the Board of Supervisors of EIOPA to the extent to which Directive (EU) 2016/2341 is binding on them.

2. If certain supervisory tasks, as laid down in Directive (EU) 2016/2341, fall under the competence of other Competent Authorities that are not Members of the Board of Supervisors of EIOPA, those other Competent Authorities may, subject to approval by the Board of Supervisors of EIOPA, apply the provisions of this Decision set out in the Annex to this Decision by signing a declaration of commitment, if this contributes to further strengthening cross-border cooperation.

EIOPA-BoS-18-321
27 September 2018

Annex to the Board of Supervisors Decision

on collaboration of the competent authorities of the Member States of the European Economic Area (EEA) with regard to Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs)

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Part I: General considerations

1.1. General aims

1.1.1. This Decision should be read together with the relevant articles of Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (Directive)[1]. Other terms than those used in the Directive should be understood as defined in Appendix 1 to this Decision.

1.1.2. The Members of EIOPA have a long tradition of cooperation and exchange of information. It is recognised that the on-going development of the internal market requires increased collaboration between supervisors.

1.1.3. The Competent Authorities will endeavour to cooperate and use, as effectively as possible, all information available for supervisory purposes in order to achieve the objectives of pension supervision, in particular, the protection of members and beneficiaries and stability and soundness of the IORPs.

1.1.4. Nothing in this Decision should affect internal communication arrangements within a Member State. However, such arrangements should not hinder effective cross-border cooperation between the Competent Authorities.

1.1.5. Nothing in this Decision should diminish the responsibilities of the Competent Authorities under the Directive.

[1] Where reference is made in this Decision to a specific article or articles, these references should be read as referring to the articles of the Directive, unless stated otherwise. Appendix 1 resumes the definitions of the Directive and of the other terms used for the purpose of this Decision.

1.2. Principles of cooperation

1.2.1. The Competent Authorities acknowledge the importance of effective cooperation and constructive and open dialogue to facilitate the carrying out of their respective duties in line with the Directive.

1.2.2. This Decision aims to foster supervisory convergence and identify good practices for seamless and efficient cross-border transfers between IORPs and for the cross-border activities of IORPs, while offering adequate protection for members and benefiaries. It also aims to ensure efficient cooperation and exchange of information on cross-border issues relating to fit and proper requirements and on matters relating to outsourcing.

1.2.3. The Competent Authorities should give adequate consideration that the information exchange requirements described in this Decision are applied in proportion to the size, nature, scale and complexity of the activities of the IORPs.

1.2.4. The Competent Authorities acknowledge that the rules for cooperation set out in this Decision may be insufficient when faced with actual cases. The principles of cooperation described in this Decision do therefore not limit or restrict the ability of the Competent Authorities to exchange additional information or otherwise cooperate in their supervision of IORPs operating cross-border. The Competent Authorities are thus encouraged to initiate spontaneous exchanges of information where they consider a matter may be of concern or relevance to one or more other Competent Authorities for the proper discharge of their supervisory duties.

1.2.5. In the case of divergent views in terms of application of this Decision, 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[2].

1.3. Use of language and contact points

1.3.1. The Competent Authorities shall make every effort to ensure that the information to be exchanged between them by virtue of this Decision is in English, unless another common language is agreed upon between them or a specific provision of the national law applies (e.g. the requirements of social and labour law ("SLL") and information requirements often pertain to language matters). The Competent Authorities shall make every effort to be as flexible as possible in this respect.

1.3.2. The Competent Authorities shall set up a regularly updated contact point for any questions, requests and problems arising out of the exchange of

[2] See for the rules of procedure of the Mediation Panel: Decision of the Board of Supervisors concerning the Rules of procedure of the Mediation Panel pursuant to Article 41 of Regulation (EU) No1094/2010.

information between them in the application of this Decision. The details of this contact point, including email address and phone number, shall be published on EIOPA's extranet.

1.4. Rules on professional secrecy and data security

1.4.1. The Competent Authorities and, when applicable, EIOPA, agree to exchange relevant confidential information whenever possible, within the limits of the rules laid down in Articles 52 to 58 and in line with their national law.

1.4.2. The Competent Authorities and EIOPA shall ensure the confidential use of the information received in accordance with Article 70 of Regulation (EU) No 1094/2010[3].

1.4.3. The cross-border exchange of information between the Competent Authorities shall preferably be transmitted by electronic means and in an acceptable format with safeguards for the security of data transmission (for example, by certified email).

1.5. The occupational retirement provision business of life insurance undertakings

1.5.1. Article 4 allows Member States to apply the provisions of Articles 9 to 14, Articles 19 to 22, Article 23(1) and (2), and Articles 24 to 58 to the occupational retirement provision business of life insurance undertakings, which are covered by Directive 2009/138/EC[4].

1.5.2. Where a life insurance undertaking, located in a Member State that has chosen to apply the aforementioned provisions to the occupational retirement provision business of life insurance undertakings, wishes to operate cross-border in accordance with Articles 11 or 12, the provisions outlined in this Decision shall apply in respect of the assets and liabilities corresponding to the occupational retirement provision business which have been identified by the Home Competent Authority[5] as ring-fenced in accordance with the specific requirements of Article 4.

1.5.3. The Home Competent Authority shall notify the Host Competent Authority that the home Member State has chosen to apply Article 4 to the occupational retirement provision business of life insurance undertakings and shall ensure the verification of the undertaking's separation of its relevant

[3] Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC.
[4] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)
[5] In this case, the Authority responsible for the supervision of the life insurance undertaking concerned will be considered to be the Home Competent Authority.

occupational retirement provision business from its other business as part of the authorisation and notification procedures and ongoing supervision.

Part II: Cross-border activity and cross-border transfer procedures

Chapter 1: General provisions

1.1. Comprehensiveness

1.1.1 With a view to achieving the supervisory objective of protecting the rights of members and beneficiaries and of ensuring the stability and soundness of IORPs , the Competent Authorities recognise the importance of conducting a rigorous and comprehensive assessment of all the information deemed necessary for the assessment of cross-border operations and of seeking to ensure the uniform application of the assessment criteria.

1.1.2. The scope of such assessment shall be proportionate to the size, nature, scale and complexity of the proposed cross-border activity and/or transfer.

1.1.3. The Competent Authorities shall encourage IORPs to contribute to comprehensiveness by using standard templates for the exchange of information in the course of the cross-border procedures. Hence, the appendices to this Decision provide guidance for sharing this information.

1.2. Timeliness

1.2.1. The Competent Authorities shall ensure that the various cross-border procedures described in this Decision are handled within the periods prescribed in the Directive. Taking into account the need for comprehensiveness, they agree that

a) the *Competent Authorities shall ensure that all information necessary for the assessment of the cross-border operation is received in a timely manner.*

1.2.2. The assessment process of a proposed cross-border activity or transfer can only take place successfully if the Competent Authorities involved have a full understanding of the proposed cross-border operation. Therefore, any determination by a Competent Authority during the notification or authorisation process that information is lacking or is not sufficiently transparent, coherent or comprehensible, could give rise to a request for further necessary information (Article 50).

1.2.3. If, taking into account the size, nature, scale and complexity of the proposed cross-border activity or transfer, the relevant Competent Authority is of the opinion that the information already provided is in substance insufficiently transparent, coherent and/or comprehensible and therefore requires either further explanations, information or documentation, or revised documents in order for it to take a decision, it shall inform the IORP of that opinion and the underlying motivation.

1.2.4 In order to avoid that the Competent Authority would be required to take a negative decision regarding the proposed cross-border activity or transfer due to insufficient information to complete the assessment and that the IORP would therefore have to submit a new application, the Competent Authority shall set clear deadlines for the transmission of the necessary information.

b) *Information exchanges in the course of cross-border procedures shall take place as quickly and efficiently as possible*.

1.2.5. Where the Directive does not specify a time period for the exchange of certain information, the Competent Authorities, on a best effort basis shall exchange information between themselves or send information to the IORP as quickly and smoothly as possible ("promptly").

1.2.6. In light of this, the Competent Authorities shall strive for ensuring that the term "without delay" in Article 12(6) is interpreted as a time period of maximum two working days.

1.3. Transparency

1.3.1. Transparency shall be ensured before, during and at the conclusion of the cross-border procedures.

1.3.2. Before the cross-border procedures are launched, the expectations of the Competent Authorities regarding the different stages of the procedures and the necessary information shall be made sufficiently clear (Article 51(1) and 51(2)(a)).

1.3.3. During the cross-border procedures, the Competent Authorities shall ensure that all parties involved in the process are kept informed at all times about the stages of the procedure that are subject to a deadline.

1.3.4. 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.

1.3.5. The Competent Authorities shall ensure that they are timely informed by an IORP of the effective start or end date of a cross-border activity and of the effective transfer date for the cross-border transfer of liabilities and corresponding assets relating to a pension scheme. This information shall be shared promptly between all Competent Authorities involved in the process and with EIOPA in order to update the status of each cross-border activity in the Register of IORPs.

1.4. Contact point for IORPs

1.4.1. The Competent Authorities shall cooperate by establishing a regularly updated contact point for IORPs for all questions, requests and problems arising out of

the application of, and changes to, the cross-border procedures. The details of this contact point shall be published on EIOPA's website.

1.5. Public guidance

1.5.1. In order to increase transparency and accountability, the Competent Authorities shall publish easily accessible guidance for launching a cross-border activity or a cross-border transfer, outlining the information required and the procedures involved.

1.5.2. The Host Competent Authorities are encouraged to provide a regularly updated full version of their applicable SLL requirements, information requirements and, where applicable, depositary requirements (Article 33(1)), which can be easily found on their website. It is also recommended that at least an informative summary of the main requirements is made available in English. This summary, which will not be legally binding, may help IORPs to gather high-level information and facilitate informal discussions during the preparatory phase of a cross-border procedure.

1.6. Use of language by IORPs

1.6.1. In many cases, national legislation requires IORPs to submit their cross-border applications in one of the official languages of the home Member State. If no such national language requirement is in place, the Competent Authorites are encouraged to ask IORPs to use English or the common language that Competent Authorities agreed for the information exchange between them.

Chapter 2: Cross-border activity procedure

2.1. Identification of a cross-border activity

2.1.1. This chapter deals with the procedure for a cross-border activity not resulting from a cross-border transfer. The following situations can be distinguished:

a) a cross-border activity of an IORP that is not resulting from a cross-border transfer *between* IORPs that have been registered or authorised in different Member States.

This situation presumes the following:

- an IORP plans to operate a pension scheme where the relationship between the sponsoring undertaking and the members and beneficiaries concerned is governed by the SLL of a Member State other than the Member State where the IORP has been registered or authorised;

- the pension scheme in question can be a new one or an existing one for which only the future accrual of pension rights will be operated;

b) *a cross-border activity of an IORP resulting from a transfer of all or a part of a* pension *scheme's liabilities, technical provisions, and other obligations and rights, as well as corresponding assets or cash equivalent thereof, between IORPs registered or authorised in the same Member State, and where the pension scheme is governed by the SLL of another Member State.*

According to the definitions of Articles 6(12) and 6(13) and to Article 12(1) in such case there is indeed no cross-border transfer, since the Transferring and the Receiving IORPs are registered or authorised in the same Member State. Both the existing and future accrual of pension rights can be operated.

c) *if allowed by the national law of the Member State, a cross-border activity of an IORP resulting from a transfer of all or a part of the liabilities, technical provisions and other obligations and rights, as well as corresponding assets or cash equivalent thereof, of an occupational pension scheme governed by the SLL of another Member State but not operated by an IORP (e.g. an insurance company).*

2.1.2. Examples of situations giving rise to cross-border activity procedures and a flow chart of the cross-border activity procedure are presented in Appendix 3a-3b to this Decision.

2.2 Preliminary exchange of information and pre-notification phase

2.2.1. Preliminary exchange of information

2.2.1.1. The Competent Authorities shall encourage IORPs intending to pursue a cross-border activity to informally contact their Home Competent Authority to discuss the proposed activity prior to submitting a formal notification. If appropriate, taking into account the size, nature, scale and complexity of the proposed cross-border activity, the Home Competent Authority shall invite the Host Competent Authority and the IORP concerned to an informal and interactive exchange of information.

2.2.1.2. This preliminary contact is intended to:

- ensure that the IORP has a good understanding of what information and documentation is necessary for the notification and for the assessment of compatibility with the proposed cross-border activity;

- ensure that the Home Competent Authority understands the proposed activity and can identify, where possible, any important points requiring attention, whether prudential in nature or relating to SLL and information requirements and, where applicable, the depositary requirement (Article 33(1)); and

- minimise the risk of potential delays during the formal notification process by necessary requests to remedy the insufficient quality of information provided, and, as a result, decrease the risk of a negative decision about the proposed cross-border activity due to insufficient information to complete the assessment.

2.2.1.3. 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 is 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's supervisory functions. Appendix 2 to this Decision contains a questionnaire that may be used as a guide for this provision of information. This questionnaire shall not be interpreted as a comprehensive list of questions about the applicable SLL with potential impact on the aforementioned prudential requirements, but is intended as an example of the questions that can be raised prior to the formal notification process to gain a thorough insight into the specific elements of SLL with potential prudential impact.

2.2.1.4. Each assessment of a cross-border activity shall be conducted on a case-by-case basis. Competent Authorities are therefore encouraged to take advantage of early engagement through this preliminary exchange of information with the IORP and between themselves before the formal notification procedure is launched.

2.2.2. Pre-notification phase

2.2.2.1. Before the formal notification is submitted, Competent Authorities are encouraged, where appropriate and insofar as allowed by national law, to allow IORPs to request an informal check of the draft notification and to give their remarks on accompanying documents before the actual start of the formal notification procedure. The informal pre-notification is without prejudice to the formal decision to be taken by the Competent Authority about the proposed cross-border activity.

2.2.2.2. Such a voluntary pre-notification phase may allow IORPs to thoroughly prepare the formal notification and to gain good understanding of the notification requirements.

2.2.2.3. The Competent Authorities may wish to provide guidance for such pre-notification phase or to submit it to specific conditions. Such guidance or conditions may pertain to timeliness and other procedural issues. The Competent Authorities shall ensure transparency about these guidance or conditions.

2.2.2.4. It is, however, the IORP that decides whether or not and when to start the formal notification procedure which shall be subject to the timeframe set by the Directive.

2.3. Stages of the formal procedure

2.3.1. General provision

2.3.1.1. The notification requirements for carrying-out a specific cross-border activity (Article 11(3)) shall apply on every occasion when an IORP wishes to start a cross-border activity for a new sponsoring undertaking or a new host Member State or a new pension scheme. The principle of proportionality shall be taken into account when applying the procedural requirements in these cases (e.g. the addition of an identical pension scheme in a multi-employer IORP).

2.3.2. Start of the formal notification procedure

2.3.2.1. The notification of the cross-border activity shall be submitted by the IORP to its Home Competent Authority in accordance with Article 11(3).

2.3.2.2. Appendix 4a to this Decision contains a standard template aiming at providing the information referred to in Article 11(3) to the Home Competent Authority. This information shall be duly approved by the persons effectively running the IORP. It shall be forwarded to the Host Competent Authority if the Home Competent Authority has no reason to doubt that the IORP meets the conditions to carry-out the proposed cross-border activity.

2.3.2.3. The notification shall be considered complete if it contains all the information referred to in Article 11(3). Upon receipt of the notification, the Home Competent Authority is encouraged, as a good practice, to do a formal completeness check of the notification within 10 working days and to indicate, where appropriate, which information still has to be provided in accordance with Article 11(3).

2.3.2.4. The three-month period for the Home Competent Authority to assess whether or not to issue a reasoned decision opposing the proposed cross-border activity starts running on the day of receipt of the complete notification (Articles 11(4) and 11(5)). If not all the information referred to in Article 11(3) is supplied at the date of the submission, the date on which the Home Competent Authority received the missing information , shall be considered the start date of the three-month period. In order to ensure legal

certainty about the start date of the above mentioned three-month period (Article 11(4) and 11(15), the Home Competent Authority shall promptly confirm the receipt of the complete notification to the IORP, specifying the date of this receipt.

2.3.2.5. The submission of a complete notification does not, however, restrict the ability of the Home Competent Authority to request further information if deemed necessary for the assessment process .

2.3.3. Reasoned decision about the cross-border activity

2.3.3.1. Within three months from the receipt of the complete notification the Home Competent Authority shall assess whether or not the administrative structure or the financial situation of the IORP or the good repute or professional qualifications or experience of the persons running the IORP are compatible with the operations proposed in the host Member State. If this assessment is negative, the Home Competent Authority shall issue a reasoned decision about an incompatibility with the proposed cross-border activity (Article 11(4)).

2.3.3.2. The Competent Authorities may request all relevant information for this comprehensive assessment (Article 50).

2.3.3.3. It is recognised that each Home Competent Authority may have its own procedures to assess the fulfilment of each of the requirements referred to in Article 11(4), but these shall:

- meet the prime objective of prudential supervision (Article 45(1)), which is the protection of the rights of members and beneficiaries and the stability and soundness of the IORP;
- be assessed in application of the requirements laid down in the Directive as regards administrative structure (Article 48(1)), financial situation (Articles 14 to 18), the good repute and professional qualifications of the persons running the IORP (Article 22) and the information and, where applicable, depositary requirements (Articles 33(1) and 36 to 44);
- be proportionate to the size, nature, scale and complexity of the proposed cross-border activity;
- allow to respect the three-month assessment period (Article 11(4)).

2.3.3.4. Appendix 4b to this Decision contains a standard template providing the information deemed necessary for the Competent Authorities to assess whether or not to take a reasoned decision about the incompatibility with the proposed cross-border activity. It refers to the administrative structure and the financial situation of the IORP as well as to the professional qualifications and experience of the persons running the IORP, *as far as impacted by the proposed cross-border activity*. This information shall be duly approved by the persons effectively running the IORP.

2.3.3.5. IORPs are encouraged to submit this standard template and the accompanying documents simultaneously with or immediately after the

submission of the notification in order to allow the Home Competent Authority to promptly start the comprehensive assessment.

2.3.3.6 On the basis of the scrutiny of the received documents, the Home Competent Authority may consider that the information is in substance insufficiently transparent, coherent and/or comprehensible in order to make a comprehensive assessment whether or not to oppose the proposed cross-border activity. In such case, the Home Competent Authority shall require, pursuant to Article 50, further information or documentation and/or revised documents.

2.3.3.7. The Home Competent Authority shall:

- specify the necessary information or documents as well as the rationale of its request;
- set clear deadlines for the transmission of the information;
- inform the IORP that a failure to provide the requested information or documents in a timely manner may prevent the completion of the assessment and may lead the Home Competent Authority to issue a reasoned decision.

2.3.3.8. If the Home Competent Authority issues a reasoned decision on the basis of:

- the IORP failing to provide the requested information or documents in a timely manner and thus preventing the completion of a comprehensive assessment or,
- an incompability with the proposed cross-border activity on the basis of its comprehensive assessment,

the IORP shall not be permitted to engage in the proposed cross-border activity. In that case, the notification shall not be shared with the Host Competent Authority and the reasons for this shall be communicated to the IORP within three months upon receipt of the complete notification (Article 11(5)).The IORP has the right to lodge an appeal in its home Member State against the reasoned decision and the resulting non-communication of information, in accordance with the applicable national law (Article 11(5)).

2.3.3.9. If the Home Competent Authority has decided on the basis of the comprehensive assessment not to issue a reasoned decision as described above, then it shall forward the notification, within three months upon receipt of the complete notification, to the Host Competent Authority and shall promptly inform the IORP that it has forwarded the notification to the Host Competent Authority (Article 11(4)).

2.3.4. Information about the applicable SLL requirements, information requirements set in Title IV of the Directive and, where applicable, depositary requirements

2.3.4.1. The Host Competent Authority shall promptly acknowledge the date of receipt of the notification to the Home Competent Authority. This date marks the start of the six-week period within which the Host Competent Authority

shall inform the Home Competent Authority of the SLL requirements under which the pension scheme shall be operated and of the information requirements set in Title IV of the Directive that shall apply to the cross-border activity (Article 11(7)). The Home Competent Authority shall promptly communicate this date to the IORP.

2.3.4.2. Within the same period, the Host Competent Authority shall also inform whether the IORP shall appoint one or more depositaries (Article 33(1)).

2.3.4.3. Taking into account the fact that the IORP may start its cross-border activity at the latest six weeks after the date of receipt of the notification by the Host Competent Authority, the Host Competent Authority shall put all efforts into providing the SLL and information requirements and, where applicable, the depositary requirement (Article 33(1)) to the Home Competent Authority within sufficient time for the latter to forward that information to the IORP within the above mentioned six week-period (Articles 11(7) and 11(8)).

2.3.4.4. The Home Competent Authority shall promptly communicate the host Member State's SLL, the information requirements and, when applicable, the requirement to appoint a depositary to the IORP (Article 11(7)).

2.3.4.5. In the event the Host Competent Authority does not provide the relevant requirements to the Home Competent Authority within the above mentioned 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.

2.3.5. Start of the cross-border activity

2.3.5.1. An IORP can start to carry out the cross-border activity on the date it was informed of the host Member State's SLL and information requirements set in Title IV of the Directive or upon the expiry of the six-week period after the date of receipt of the notification by the Host Competent Authority, whichever is earlier (Article 11(8)).

2.3.5.2. The Home Competent Authority shall require that the IORP promptly informs it about the effective launch of the cross-border activity. This information shall be shared between Competent Authorities and EIOPA for the update of the Register of IORPs.

Chapter 3: Procedure for a cross-border transfer resulting in a cross-border activity

3.1. Identification of a cross-border transfer resulting in a cross-border activity

3.1.1. This chapter deals with the procedure for a cross-border transfer resulting in a cross-border activity. This transaction presumes the following:

- the Transferring and the Receiving IORPs have been registered or authorised in different Member States;
- a cross-border activity by the Receiving IORP resulting from the cross-border transfer as a consequence of the fact that the transferred pension scheme (or parts thereof) is governed by the SLL of a Member State other than the home Member State of the Receiving IORP;
- the SLL applicable to:
  (1) the relationship between the sponsoring undertaking and members and beneficiaries, or
  (2) the accrued pension benefits of the members and beneficiaries when there is no sponsoring undertaking anymore, may be the SLL of the Member State of the Transferring IORP or the SLL of another Member State; and
- the cross-border activity may relate to operating the accrued and future benefits of the pension scheme or to operating the accrued pension benefits of the pension scheme only.

3.1.2. In principle, the procedure described in this Chapter 3 also applies where a cross-border transfer concerns the accrued benefits on a given date of a pension scheme of which the future accruals are already operated cross-border since that date by the Receiving IORP. In that case, the purpose of the cross-border transfer is to allow the pension scheme in question to be operated entirely by the same IORP. This special case is dealt with under Chapter 4. In such situation the Receiving IORP is already managing the pension scheme on a cross-border basis.

3.1.3. Examples of situation giving rise to a cross-border transfer resulting in a cross-border activity and a flowchart of the procedure for the cross-border transfer resulting in cross-border activity are presented in Appendix 5a-5b to this Decision.

3.2. Points requiring specific attention

3.2.1. Authorisation

3.2.1.1. For the pursuit of a cross-border activity resulting from a cross-border transfer, only the authorisation procedure set out in Article 12 for the cross-border transfer shall be followed.

3.2.1.2. It follows that the approval of the transfer by the Receiving Competent Authority also implies that there are no grounds for taking a reasoned decision regarding the incompatibility of the administrative structure or the financial situation of the IORP nor of the good repute and professional qualifications of the persons running the Receiving IORP with the proposed cross-border activity resulting from the cross-border transfer (Article 12(7), b).

3.2.1.3. Conversely, a refusal to authorise the transfer by the Receiving Competent Authority does not necessarily constitute a reasoned decision regarding the incompatibility of the proposed cross-border activity, since the refusal of authorisation may be based solely on reasons related to the transfer, and that shall be made clear in the reasoning given for the refusal. If in this case the IORP decides, after refusal of the transfer, to pursue only a cross-border activity (by limiting the cross-border activity to the future accrual of the pension benefits), only the procedure of Article 11 shall be followed. This procedure shall however be followed as from the start (see Chapter 2).

3.2.2. Information about the applicable SLL requirements, information requirements set in Title IV of the Directive and, where applicable, depositary requirements

3.2.2.1. As part of fhe procedure set out in the Directive the Transferring Competent Authority shall inform the Receiving Competent Authority of the SLL and information requirements and, where applicable, the depositary requirement (Article 33(1)) that apply to the pension scheme.

3.2.2.2. It can happen, however, that the SLL, information and depositary requirements applicable to the pension scheme do not correspond to the requirements of the Member State of the Transferring IORP, and that compliance with that legislation will not be supervised by the Transferring Competent Authority (see Appendix 5a, examples 3 and 4). In order to enable the Transferring Competent Authority to duly provide the information required by the Directive, the Transferring Competent Authority and the Host Competent Authority of the (existing) cross-border activity shall work together to ensure that the information regarding the applicable SLL, information and depositary requirements are appropriately communicated to the Receiving Competent Authority. In most cases, one can presume that the Transferring Competent Authority already has this information, since the information was provided at the start of the existing cross-border activity and shall, on the basis of the ongoing information exchange (see Chapter 5), to be up-to-date.

3.2.3. Start of the cross-border activity resulting from the cross-border transfer

3.2.3.1. Since the cross-border activity by definition coincides with the cross-border transfer, the start date of the cross-border activity will coincide with that of the cross-border transfer.

3.3. Preliminary exchange of information and pre-application phase

3.3.1. Preliminary exchange of information

3.3.1.1. Paragraph 2.2.1 shall apply *mutatis mutandis* taking into account the following specific points:

- As both the Receiving and the Transferring Competent Authorities are involved in the comprehensive assessment of the transfer, the procedure for a cross-border transfer resulting in a cross-border activity requires close collaboration between both Competent Authorities.
- Therefore, at this informal stage, all Competent Authorities involved shall provide sufficient clarity regarding their expectations as to the information that shall be provided for the proposed cross-border transfer. They shall indeed assess the cross-border transfer based on a common application for authorisation that is assessed as to its formal completeness only by the Receiving Competent Authority (Article 12(7)(a)).
- If appropriate, the Receiving Competent Authority shall also invite the Host Comptetent Authority of the resulting cross-border activity if different from the Transferring Competent Authority, to an informal exchange of information.

3.3.2. Pre-application phase

3.3.2.1. Paragraph 2.2.2 shall apply *mutatis mutandis*.

3.4. Stages of the formal procedure

3.4.1. General provision

3.4.1.1. The application requirements for carrying out a specific cross-border transfer resulting in a cross-border activity shall apply on every occasion that an IORP wishes to start a new cross-border activity resulting from a cross-border transfer for a new sponsoring undertaking, host Member State or pension scheme. Nevertheless, if appropriate, the principle of proportionality shall be taken into account when applying the procedural requirements (e.g. the addition of an identical pension scheme in a multi-employer IORP).

3.4.2. Start of the formal authorisation procedure

3.4.2.1. In accordance with Article 12(3), the cross-border transfer shall be preceded by the prior approval by a majority of the members concerned and by a

majority of the beneficiaries concerned or, where applicable, by a majority of their representatives and by the prior approval of the sponsoring undertaking, where applicable. The approval process, the definition of the level of majority, the way in which the information on the conditions of the transfer shall be made available to the members and beneficiaries concerned and the outcome/documentation of this approval are governed by the relevant national law. The proof that this approval process has been successfully winded up, shall be part of the application for authorisation (Article 12(5), f)).

3.4.2.2. The application for authorisation of the cross-border transfer resulting in a new cross-border activity shall be submitted by the Receiving IORP (Article 12(4)).

3.4.2.3. Appendix 6a to this Decision contains a standard template aiming at providing the information referred to in Article 12(5) to the Receiving Competent Authority. This information shall be duly approved by the persons effectively running the IORP. It shall be forwarded without delay following its receipt to the Transferring Competent Authority (Article 12(6)).

3.4.2.4. The application for authorisation shall be considered complete if it contains all the information referred to in Article 12(5).

3.4.2.5. Upon receipt of the application for authorisation, the Receiving Competent Authority is encouraged, as a good practice, to do the formal completeness check within 10 working days whether all the information referred to in Article 12(5) has been provided (Article 12(7)(a)) and to indicate, where appropriate, which information still shall be provided in accordance with that article.

3.4.2.6. The three-month period for the Receiving Competent Authority to authorise or refuse the cross-border transfer starts running on the day of receipt of the complete application for authorisation. If not all the information referred to in Article 12(5) is supplied at the date of submission, the date on which the Receiving Competent Authority receives the missing information that completes the application for authorisation shall be considered the start day.

3.4.2.7. In order to provide legal certainty about the start date of the above mentioned three-month period (Article 12(4)), the Receiving Competent Autority shall promptly confirm the receipt of the complete application for authorisation to the Receiving IORP, specifying the date of this receipt.

3.4.2.8. The submission of a complete application for authorisation does not, however, restrict the ability of the Competent Authorities to request further information if deemed necessary for the assessment process.

3.4.3. Authorisation of the cross-border transfer resulting in a new cross-border activity

3.4.3.1. The cross-border transfer resulting in a new cross-border activity can only take place with the authorisation of the Receiving Competent Authority after

having obtained the prior consent of the Transferring Competent Authority (Article 12(4)). As mentioned under 3.2.1., the authorisation of the cross-border transfer resulting in a cross-border activity encompasses a decision of the Receiving Competent Authority not to oppose the resulting cross-border activity.

3.4.3.2. The Receiving Competent Authority shall forward the application for authorisation to the Transferring Competent Authority without delay, following its receipt (Article 12(6)). If not all the information referred to in Article 12(5) is supplied at the same time, the Receiving Competent Authority shall promptly forward the missing information that completes the application for authorisation to the Transferring Competent Authority.

3.4.3.3. The decision of the Transferring Competent Authority whether or not to consent with the cross-border transfer shall be taken within eight weeks of receipt of the complete application for authorisation from the Receiving Competent Authority (Article 12(9)).

3.4.3.4. It is recognised that the decisions regarding authorisation by the Receiving Competent Authority and prior consent of the Transferring Competent Authority are made autonomously by the Competent Authorities concerned, based on the restrictive criteria set out in Articles 12(7) and 12(8), as implemented in national law and that each Competent Authority may have its own assessment procedures.

3.4.3.5. The Competent Authorities may request all information relevant for their assessment (Article 50).

3.4.3.6. The assessment procedures shall:

- meet the prime objective of prudential supervision (Article 45(1)), which is the protection of the rights of members and beneficiaries and the stability and soundness of the IORPs;
- look at the requirements laid down in the Articles 12(7) and 12(8);
- be proportionate to the size, nature, scale and complexity of the proposed cross-border transfer resulting in a cross-border activity;
- allow to respect the three-month and eight-week assessment periods (Articles 12(4) and 12(9)).

3.4.3.7. In assessing the transfer of the accrued pension rights, the Competent Authorities shall check whether the transfer meets the requirements of Articles 12(7) and 12(8). The guiding principle of these criteria is that the interests of members and beneficiaries of the IORPs involved may not be impaired by the transfer. According to these articles of the Directive, the Receiving Competent Authority shall assess whether the long term interests of both the members and beneficiaries that are already present in the Receiving IORP and the transferred part of the scheme are adequately

protected during and after the transfer, while the Transferring Competent Authority will look at the adequate protection of the long term interests of the members and beneficiaries of the remaining part of the scheme in case of a partial transfer. The Competent Authorities shall expect IORPs to justify how they meet these criteria.

3.4.3.8. Appendix 6b to this Decision contains a standard template providing the information deemed necessary for the Receiving Competent Authority to assess the application for a cross-border transfer resulting in cross-border activity.

3.4.3.9. IORPs are encouraged to submit this standard template and the accompanying documents to the Receiving Competent Authority simultaneously with or immediately after the submission of the application for authorisation, in order to allow the Receiving Competent Authority to promptly start the comprehensive assessment.

3.4.3.10. On the basis of the scrutiny of the received documents, one or both of the Competent Authorities may consider that the information is in substance insufficiently transparent, coherent and/or comprehensible in order to take a comprehensive decision. In such case, the Competent Authorities shall require explanatory information or documentation and/or revised documents. They shall inform each other of their request and its rationale.

3.4.3.11. Such further information request shall be centralised with the Receiving Competent Authority. As it is only incumbent on the Receiving IORP to apply for authorisation by the Receiving Competent Authority, it is up to the Receiving Competent Authority to send any information request to the Receiving IORP, including a request addressed by any of the Competent Authorities involved to the Transferring IORP.

3.4.3.12. Therefore, the Receiving Competent Authority shall

- inform the Receiving IORP about the request indicating the necessary information and/or documents as well as the rationale of the request;
- set clear deadlines for the transmission of the information; and
- inform the Receiving IORP that a failure to provide the requested information or documents in a timely manner may prevent a comprehensive assessment and may lead to a reasoned decision.

3.4.3.13. However, in order to ensure the timeliness and transparency of the procedure, the Competent Authorities shall be able to promptly access the requested information in the most efficient way. To this end, the Competent Authorities shall also directly inform the IORP concerned about any further information request while the IORP concerned shall be asked to send any requested information simultaneously to both Competent Authorities.

3.4.3.14. The cross-border transfer and activity cannot take place if the authorisation is refused, either because the Transferring Competent Authority refuses to provide the necessary prior consent, or because the Receiving Competent

Authority refuses to authorise the transfer based on its own assessment or for both reasons. The decision tree in Appendix 5c to this Decision describes the intermediary decisions required at each stage of the process and the final outcome on the authorisation of the cross-border transfer resulting in a new cross-border activity.

3.4.3.15. The decision by the Receiving Competent Authority to authorise or refuse the cross-border transfer and activity shall be communicated to the Receiving IORP within three months of receipt of the complete application for authorisation (Article 12(4)). It shall also be communicated to the Transferring Competent Authority within two weeks of the decision date (first sub-paragraph of Article 12(11)) and simultaneously, as a good practice, to the Transferring IORP.

3.4.3.16. Where the authorisation is refused, or if the Receiving Competent Authority has issued no decision within three months of receiving the complete application for authorisation ("failure to act"), the Receiving IORP has the right to appeal to the courts in its home Member State, in accordance with the applicable domestic law. A decision to refuse authorisation shall explicitly set out the reasoning for such refusal (second sub-paragraph of Article 12(10)).

3.4.4. Information about the applicable SLL requirements, information requirements set in Title IV of the Directive and, where applicable, depositary requirements

3.4.4.1. The Transferring Competent Authority shall promptly acknowledge receipt of the decision to grant authorisation and communicate the date of this receipt. The date of this receipt marks the beginning of the four-week period in which it shall inform the Receiving Competent Authority of the SLL requirements under which the pension scheme shall be operated and of the information requirements set in Title IV of the Directive that shall apply to the new cross-border activity (Article 12(11)).

3.4.4.2. Within the same period, the Host Competent Authority shall also inform whether the IORP shall appoint one or more depositaries (Article 33(1)[6]).

3.4.4.3. In a situation where the SLL and the information requirements and, where applicable, the depositary requirement (Article 33(1)) of the Member State of the Transferring IORP are not applicable to the proposed cross-border activity, the Transferring Competent Authority shall promptly forward the application for authorisation to the Host Competent Authority of the new cross-border activity, with a request to provide the applicable SLL, information and, where applicable, depositary requirements before the expiry

[6] Article 33(1) stipulates that the host Member State may require IORPs carrying out cross-border activity by operating an occupational pension scheme where members and beneficiaries fully bear the investment risk, to appoint one or more depositaries for the safe-keeping of assets and oversight duties in accordance with Articles 34 and 35, provided that the appointment of a depositary is required under its national law.

of the four-week period. The Transferring Competent Authority shall promptly forward these requirements to the Receiving Competent Authority .

3.4.4.4. The Receiving Competent Authority shall inform the Receiving IORP of the applicable SLL, information and depositary requirements[7] within one week of their receipt (Article 12(11)).

3.4.4.5. If the applicable SLL, information and depositary requirements have not been received by the Receiving Competent Authority upon expiry of the four-week period, the Receiving Competent Authority shall forward that information to the Receiving IORP as soon as it receives them.

3.4.5. Execution of the cross-border transfer and start of the cross-border activity

3.4.5.1. The cross-border transfer can take place and the Receiving IORP may start to operate the cross-border pension scheme either (a) upon receipt of the decision to grant authorisation or (b) if no information on the decision is received from the Receiving Competent Authority, upon expiry of the time period set forth in Article 12(12), i.e. 3 months and 7 weeks.

3.4.5.2. The Receiving Competent Authority shall require the Receiving IORP to promptly inform it about the execution of the cross-border transfer and the simultaneous start of the new cross-border activity. This information shall be shared between the Competent Authorities and EIOPA for the update of the Register of IORPs.

[7] Although the Directive does not provide for a specific procedure for communicating the depositary requirement referred to in Article 33(1) to the Receiving IORP, it is recommended to follow for this communication the same rules as those provided for the communication of SLL and of the information requirements set in Title IV of the Directive.

Chapter 4 : Cross-border transfer procedure

4.1. Identification of a cross-border transfer

4.1.1. This chapter deals with the procedure for a cross-border transfer not resulting in a cross-border activity. This transaction presumes the following:

- the transferred pension scheme (or parts thereof) is subject to the SLL of the Member State of the Receiving IORP[8];
- the Receiving and the Transferring IORPs have been registered or authorised in different Member States.

4.1.2 The procedure described in this part shall also be applied where the cross-border transfer concerns the accrued benefits on a given date of a pension scheme of which the future accruals are already operated by the Receiving IORP according to the same pension scheme rules since that date. In that case, the purpose of the cross-border transfer is to allow the pension scheme in question to be operated entirely by the same (cross-border) IORP. In such a case, the transferred pension scheme is governed by the SLL and information requirements, and, where applicable, the depositary requirements (Article 33(1)), that were already communicated to the Receiving Competent Authority under the previous notification process regarding the future accrual of the pension rights of the same cross-border pension scheme. The information exchange specified in Article 12(11) is therefore not necessarily applicable for all its components.

4.1.3. Examples of situations giving rise to cross-border transfer procedures and a flowchart of the cross-border transfer procedure are presented in Appendix 7a-7b to this Decision.

4.2. Preliminary exchange of information and pre-notification phase

4.2.1. Preliminary exchange of information

4.2.1.1. Paragraph 2.2.1. shall apply *mutatis mutandis* taking into account the following specific points:

- As both – the Receiving and the Transferring Competent Authority – are involved in the comprehensive assessment of the transfer, the procedure for a cross-border transfer requires a close collaboration between both Competent Authorities.
- If appropriate, taking into account the size, nature, scale and complexity of the proposed cross-border transfer, the Receiving Competent Authority shall invite the Transferring Competent Authority and the IORPs concerned for an informal exchange of information.

[8] If the SLL of a Member State other than the Member State of the Receiving IORP is concerned, then the cross-border transfer results in a cross-border activity.

- As the Competent Authorities shall assess the cross-border transfer based on a common application for authorisation that is assessed as to its formal completeness only by the Receiving Competent Authority (Article 12(7)) during this informal stage, the Competent Authorities involved shall provide sufficient clarity regarding their expectations as to the information that shall be provided.

4.2.2. Possibility of a pre-application phase

4.2.2.1. Paragraph 2.2.2. shall apply *mutatis mutandis.*

4.3. The stages of the formal procedure

4.3.1. Start of the formal authorisation procedure

4.3.1.1. Paragraph 3.4.2. shall apply *mutatis mutandis*.

4.3.2. Authorisation of the cross-border transfer

4.3.2.1. Paragraph 3.4.3. shall apply *mutatis mutandis* taking into account – irrespective of the fact that the cross-border transfer will not result in a cross-border activity - the following specific point:

When the authorisation procedure relates to a cross-border transfer concerning the accrued benefits of a pension scheme of which the future accruals are already operated by the Receiving IORP, IORPs are encouraged to submit the standard template contained in Appendix 6b simultaneously or immediately after the submission of the application for authorisation, in order to allow the Receiving Competent Authority to assess whether the additional management of the accrued rights will significantly change the financial position or the administrative structure of the Receiving IORP.

4.3.3. Execution of the cross-border transfer

4.3.3.1. The cross-border transfer can take place either (a) upon receipt of the decision to grant authorisation or (b) if no information on the decision is received from the Receiving Competent Authority, upon expiry of the time period set forth in Article 12(12), i.e. 3 months and 7 weeks.

4.3.3.2. The Receiving Competent Authority shall require the Receiving IORP to promptly inform it about the effective execution of the cross-border transfer. This information shall be shared between the Competent Authorities and EIOPA for the update of the Register of IORPs.

Chapter 5: Ongoing information exchange between the Competent Authorities and ongoing supervision after the cross-border procedures

5.1. Ongoing information exchange

5.1.1. This chapter sets out provisions regarding the information exchange between the Competent Authorities after completion of the cross-border procedures.

5.1.2. Information sharing and ongoing cooperation is essential for the Home Competent Authorities to perform effective prudential supervision and for the Host Competent Authorities to ensure compliance with the host Member State's SLL and information requirements.

5.1.3. A flowchart of ongoing information exchange and supervision is presented in Appendix 8 to this Decision.

5.1.1 Changes involving IORPs or pension schemes

5.1.1.1. After completion of the cross-border procedures, the Competent Authorities shall exchange information about significant changes or events affecting the cross-border IORPs or the pension schemes operated across borders.

5.1.1.2. These significant changes or events may relate to:

- changes to the information exchanged during the cross-border procedures, or
- instances which give rise to general concerns that the security of the benefits being or to be provided by the cross-border IORP to members and beneficiaries or of the assets of the cross-border IORP is threatened. In these instances, the Home Competent Authority shall consider sharing information of prudential nature with the Host Competent Authority in a proportionate and reasonable manner if deemed necessary for the supervision of SLL or information requirements. These instances may include, but are not limited to:
    - discontinuity or a serious risk of discontinuity of the IORP,
    - material changes to the IORP's structure,
    - substantial changes in the membership of the IORP,
    - discontinuity in the payment of contributions to the IORP, and
    - bankruptcy or liquidation of a sponsoring undertaking of the IORP.

5.1.1.3. The Competent Authorities shall require that they are informed immediately by the relevant IORPs of any request to end a cross-border procedure already in progress, of the effective start or end date of a cross-border activity and of the effective cross-border transfer of a pension scheme.

5.1.1.4. Relevant information concerning the effective start or end date of a cross-border activity shall also be promptly shared with EIOPA for the update of the Register of IORPs.

5.1.2. Changes to information about the applicable SLL requirements, information requirements and, where applicable, depositary requirements

5.1.2.1. The Host Competent Authority shall inform the Home Competent Authority as soon as possible about any significant changes with respect to the applicable SLL, information and depositary requirements (Article 33(1)) which may affect the cross-border pension scheme or the requirements to be met.

5.1.2.2. Upon being informed of these changes, the Home Competent Authority shall forward the information to the cross-border IORP without delay and confirm to the Host Competent Authority that it has fowarded the information to the IORP and the date it did so.

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

5.2 Ongoing supervision related to the cross-border activity

5.2.1. Scope of the ongoing supervision

5.2.1.1. The Directive assigns the ongoing supervision of IORPs carrying out a cross-border activity as follows:

- the Home Competent Authority shall be responsible for the prudential supervision of the IORP (Article 47(1)). The scope of the prudential supervision is defined by Article 46;

- the Host Competent Authority shall be responsible for the supervision of the compliance of the activities of the IORP with the host Member State's SLL and information requirements set in Title IV of the Directive. Therefore, it is up to the national rules of the host Member State to determine the modalities of the supervision of their SLL and information requirements, including reporting obligations.

5.2.1.2. The Competent Authorities may exchange information for supervisory purposes. Home Competent Authorities are encouraged to provide to Host Competent Authorities, at their request and on a voluntary basis, periodic or ad hoc information on the number of members, the contributions and the assets and liabilities pertaining to the pension schemes which are subject to the SLL, information and depositary requirements of the host Member State concerned.

5.2.1.3. Where a pension scheme is managed across borders by insurance undertakings under the freedom of establishment or freedom to provide services, the Competent Authorities are encouraged to liaise with the supervisory authorities of the home Member State of these insurance undertakings in order to forward them a request from the supervisory

authority charged with the supervision of SLL applicable to the pension scheme for providing periodically or ad hoc the same information as referred to above (i.e. the number of members, the contributions and the assets and liabilities pertaining to the pension schemes which are subject to the SLL).

5.2.2 Enforcement

5.2.2.1. There can be instances of an IORP carrying out a cross-border activity failing to comply with the requirements that apply to the cross-border activity:

- SLL requirements;
- information requirements;
- where applicable, the requirement to appoint a depositary (Article 33(1));
- prudential requirements, including fully funding requirements and, where appropriate, the requirement for solvency margin as provided for in Article 17.

5.2.2.2. If the *Home Competent Authority identifies non-compliance with any of the prudential requirements of the home Member State or with the depositary requirement that is laid upon the IORP through the host Member State's legislation,* it shall take appropriate action, and, depending on the nature of the matter at hand and its relevance for the discharge by the Host Competent Authorities of its supervisory duties, notify the Host Competent Authority of the details of that event, the name of the IORP and the sponsoring undertaking (if any) involved and any action taken under Article 48.

5.2.2.3. If the *Host Competent Authority identifies non-compliance with its relevant SLL or information requirements*, it shall immediately notify the Home Competent Authorities of the details of the matter and the name of the IORP and the sponsoring undertaking, if any, involved. The notification shall include any request that enforcement action should be taken against the IORP. The Home Competent Authorities shall – in coordination with the Host Competent Authorities – take action to ensure future compliance (Article 11(10)).

5.2.2.4. Where this action proves ineffective, or because appropriate measures are lacking in the home Member State, then, and only after informing the Home Competent Authorities, the Host Competent Authorities may take appropriate measures to prevent or penalise further irregularities, including, insofar as strictly necessary, preventing the IORP from operating in the host Member State for the sponsoring undertaking (Article 11(11)).

5.2.2.5. Any decision of the Home Competent Authorities to prohibit or restrict the activities of an IORP, in the context of addressing non-compliance of a cross-

border IORP with any of the requirements applicable to the IORP or its activities, shall contain detailed reasons and be notified to the IORP[9]. That decision shall also be notified to EIOPA which shall communicate it to all Competent Authorities involved in the supervision of the cross-border activity of the IORP (Article 48(5)).

[9] Including the request to another Competent Authority to prohibit the free disposal of assets held by a depositary or custodian located within its territory (Article 33(4).

Part III : Collaboration and exchange of information in other fields

Chapter 1: Complaints from members and beneficiaries

1.1. Complaints handling systems in Member States

1.1.1. In the context of the development of the single market for financial services, it is important that all complaints from members and beneficiaries are dealt with by the relevant complaints handling body, irrespective of whether the complaint involves cross-border activity. However, references to complaints in this Decision refer to complaints from members and beneficiaries of pension schemes operated by IORPs engaging in cross-border activity.

1.1.2. The manner in which complaints handling is organised within a Member State is a matter for each Member State and therefore not subject to this Decision. There are a wide variety of complaints handling systems in Member States. In some Member States, complaints are dealt with by the Competent Authorities, whilst others have developed other systems, such as Ombudsmen, or have a combination of both. The ways in which these systems operate vary considerably across the Member States.

1.1.3. Where complaints have a cross-border component, it is important for individual members and beneficiaries and for consumer confidence generally, that the differences in complaints handling systems do not prevent or deter complaints from being directed to the relevant bodies and subsequently dealt with.

1.1.4. The procedures outlined in this part of the Decision are intended to facilitate the process of identifying the relevant complaints handling body and ensure that complaints filed with a Competent Authority are addressed and arrive at the body that is competent to deal with the complaint.

1.1.5. A flowchart of this complaints handling process is presented in Appendix 9 to this Decision.

1.2. Complaints handling procedures

1.2.1. It is important that a complaint is assessed by the Competent Authority which initially receives it, to establish which body is responsible for dealing with the complaint.

1.2.2. In cases where the Competent Authority that receives the complaint is competent to deal with the complaint, it shall inform the complainant promptly of applicable national procedures.

1.2.3. In cases where the Competent Authority that receives the complaint is not competent to deal with the complaint, but another body in the same Member State is, the Competent Authority shall promptly:

- if legally possible, forward the complaint directly to the body competent to deal with the complaint and inform the complainant of the referral;

- if legally not possible to forward the complaint directly to the competent body, provide the complainant with any relevant information about the body competent to deal with the complaint, to facilitate the referral of the complaint by the complainant.

1.2.4. In cases where the Competent Authority that receives the complaint is not competent to deal with the complaint and the complaint needs to be addressed in another Member State, the Competent Authority that receives the complaint shall promptly:

- if it knows who the competent body in the other Member State is and it is legally possible, forward the complaint directly to the competent body and inform the complainant of the referral;

- if it knows who the competent body in the other Member State is but it is legally not possible to directly forward the complaint to the competent body, provide the complainant with any relevant information about the competent body in the other Member State, in order to facilitate the referral of the complaint by the complainant;

- if it does not know who the competent body in the other Member State is, inform the Competent Authority of the other Member State of the complaint and inform the complainant of the referral.

1.2.5. If a complaint contains issues relevant to the prudential supervision of an IORP, the Host Competent Authority that receives the complaint shall promptly, and if legally possible, provide the Home Competent Authority with relevant information on the complaint.

1.2.6. In the cases where the Competent Authority receiving the initial complaint is not competent to deal with the complaint, it shall explain to the complainant why it considers itself not to be competent to deal with the complaint, and why it considers the other Competent Authority or body to be competent.

1.2.7. If a complaint contains issues that are known by the Home Competent Authority to be relevant to the supervision by the Host Competent Authority, the Home Competent Authority shall promptly, and if legally possible, provide the Host Competent Authority with relevant information on the complaint.

1.3. Dispute over responsibilities

1.3.1. Where differences of opinion exist as to who assumes responsibility for the complaint, every best endeavour shall be made by the Competent Authorities to resolve the issue in good faith within four weeks from the date on which the complaint was initially received from the complainant.

1.3.2. If the question of responsibility cannot be settled, the Competent Authority which initially received the complaint from the complainant may refer the

matter to EIOPA for the purpose of settling the disagreement through non-binding mediation.

1.4. Information to be made available to the public

1.4.1. The Competent Authorities shall make information about their national complaints handling systems, including updates as necessary, available to the public. This information shall include, at a minimum, contact details of bodies involved in the complaints handling systems.

1.4.2. Each Competent Authority shall make the aforementioned information available through its public website. The Public Area of the EIOPA website shall provide links to the relevant national websites.

Chapter 2: Fit and proper requirements of persons effectively running the IORP or carrying out key functions

2.1. In accordance with Article 22, Member States shall ensure that the Competent Authorities are able to assess whether the persons who effectively run the IORP and carry out key functions or, when applicable, persons or entities to which a key function has been outsourced, fulfil the fit and proper requirements.

2.2. The main responsibility for the assessment of the fit and proper requirements lies with the IORP itself (Article 22(1)). Therefore, Competent Authorities shall require IORPs to ensure that this requirement is met by setting standards of integrity and maintaining a sufficient degree of knowledge.

2.3. With regard to the importance of the supervision of the fit and proper requirements, the Competent Authorities shall have adequate procedures to assess the compliance with the fit and proper requirements and to allow intervention where necessary. They shall endeavour to exchange among themselves the information available related to this area.

2.4. A cross-border information exchange is necessary if it relates to persons who are nationals of other Member States or to persons for which relevant information can be expected to be available in other Member States, e.g. as a result of a current or past residency in that Member State or of the fact that these persons had or have a professional activity in that Member State.

2.5. The principle of proportionality shall apply to the cross-border information exchange relating to the fit and proper assessment. The Competent Authorities shall adapt their approaches to ensure they are proportionate to the nature, scale and complexity of the activities of the IORP.

2.6. For the assessment of the proper requirement, Article 22 stipulates that Member States shall accept as sufficient evidence for the proof of good repute, proof of no previous bankruptcy, or both, of nationals of another Member State an extract from the judicial record of that Member State, an equivalent document, a declaration on oath or a solemn declaration.

2.7. Apart from the issue of evidence of proof of good repute as regulated by Article 22, the Directive does not contain any special provisions for the cross-border exchange of information on the fit or proper requirement. Therefore, the general provisions on the cross-border exchange of information between authorities (Articles 55 to 58) shall apply to obtain information about the fit and proper requirement from persons that are nationals of other Member States or that can be expected to be known to the Competent Authorities or other parties (as referred to in Article 55) from other Member States, e.g. on the basis of the professional activity carried on by those persons in those

other Member States. These general provisions shall be applied in accordance with the General Data Protection Regulation[10].

2.8. The Competent Authorities shall establish a contact point in the form of a dedicated institutional email address for the exchange of information required for the fit and proper assessment of all persons who effectively run the IORP or carry out key functions.

2.9. Without prejudice to privacy requirements, EIOPA shall develop an appropriate tool that makes the above contact points available to the the Competent Authorities. This shall be available on the EIOPA Extranet. The Competent Authorities shall be responsible for keeping that information up to date.

2.10. Depending on the question of which entity in another Member State has the information relevant for the fit and proper assessment, the Competent Authority responsible for the fit and proper assessment (hereinafter "the Requesting Competent Authority") shall explore the possibility of applying one or more provisions of Article 55 in order to obtain the necessary information about persons who are nationals of another Member State or who can be expected to be known to the Competent Authority or other parties of another Member State.

2.11. The following situations can be distinguished:

a) the Competent Authority of a different Member State holds the information needed for the fit and proper assessment (Article 55(1)(b)).

2.12. Article 55(1)(b) stipulates that Competent Authorities in *different Member States* may exchange information in the discharge of their supervisory functions.

2.13. When there are indications that the information needed for the fit and proper assessment is held by the Competent Authority of another Member State, the Requesting Competent Authority shall, subject to compliance with the conditions set out in Article 58, request that information from the Competent Authority of the other Member State concerned (hereinafter "the Requested Competent Authority").

2.14. The Requested Competent Authority shall, as soon as possible, preferably within 2 weeks of receipt of the request, provide any relevant information in its possession to the Requesting Competent Authority or it shall inform the Requesting Competent Authority that it does not have any such information.

[10] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance).

b) *one of the authorities, bodies or persons mentioned in Article 55(1)(c) and situated in another Member State than the Requesting Competent Authority holds the information needed for the fit and proper assessment (Article 55(1)(c)).*

2.15. Article 55(1)(c) stipulates that Competent Authorities may exchange information, in the discharge of their supervisory functions, with any of the following parties which are situated in the *same Member State*:

(i) authorities responsible for the supervision of financial sector entities and other financial organisations and the authorities responsible for the supervision of financial markets;

(ii) authorities or bodies charged with responsibility for maintaining the stability of the financial system in Member States through the use of macro-prudential rules;

(iii) bodies involved in the winding up of a pension scheme and in other similar procedures;

(iv) reorganisation bodies or authorities aiming at protecting the stability of the financial system;

(v) persons responsible for carrying out statutory audits of the accounts of IORPs, insurance undertakings and other financial institutions.

2.16. When there are indications that the information needed for the fit and proper assessment is held by any of the parties mentioned in Article 55(1),(c), situated in another Member State than the Requesting Competent Authority, the Requesting Competent Authority shall examine whether:

(i) the information can be obtained from the Competent Authority of the Member State of one of the above referred parties (the Requested Competent Authority) by application of Articles 55(1)(b) and 55 (1)(c), considering that:

- Article 55(1)(b) permits the exchange of information between Competent Authorities in different Member States in the discharge of their supervisory functions; and
- Article 55(1)(c) allows for the exchange of information between Competent Authorities and other parties within the same Member State.

The Directive does not specify whether the Requested Competent Authority can transmit the information obtained from the aforementioned parties to the Requesting Competent Authority of another Member State. Therefore, subject to compliance with the conditions set out in Article 58 and taking into account its national legislation, the Requested Competent Authority shall cooperate on a best effort basis to transmit the information needed for the fit and proper assessment to the Requesting Competent Authority or, where appropriate, to provide sufficient information to the Requesting Competent Authority in order to allow

direct contact between the Requesting Competent Authority and one of the parties within its Member State referred to in Article 55(1)(c);

(ii) the information can be obtained from one of the parties mentioned in Article 55(1)(c) situated *in the same Member State* as the Requesting Competent Authority and whether such party, subject to compliance with the conditions set out in Article 58 and taking into account its national legislation and the supervisory rules it may be subject to, can obtain the information from an (equivalent) party situated in another Member State that is permitted to transmit the information needed for the fit and proper assessment, for use by the Requesting Competent Authority.

c) *a party mentioned in Article 55(3) and situated in another Member State than the Requesting Competent Authority holds the information needed for the fit and proper assessment.*

2.17. Article 55(3) stipulates that Member States may permit the exchange of information between the Competent Authorities and one of the following parties, whether or not situated in the same Member State:

(i) the authorities responsible for overseeing the bodies involved in the winding up of pension schemes and other similar procedures;

(ii) the authorities responsible for overseeing the persons charged with carrying out statutory audits of the accounts of IORPs, insurance undertakings and other financial institutions;

(iii) independent actuaries of IORPs carrying out supervision of those IORPs and the bodies responsible for overseeing such actuaries.

2.18. When there are indications that the information needed for the fit and proper assessment is held by any of the parties mentioned in Article 55(3) situated in *another Member State* than the Requesting Competent Authority, the Requesting Competent Authority shall examine whether:

(i) insofar as authorised by the Member States concerned, the information can be obtained from one of the parties mentioned in Article 55(3) situated in another Member State, subject to compliance with the conditions set out in Article 58;

(ii) the information can be obtained from the Competent Authority of another Member State (the Requested Competent Authority) by application of Articles 55(1)(b) and 55(3), considering that:

- Article 55(1)(b) permits the exchange of information between the Competent Authorities of different Member States; and
- Article 55(3) allows, if authorised by the Member State concerned, the exchange of information between the Competent Authority and other parties situated in the same Member State.

The Directive does not specify whether the Requested Competent Authority can transmit the information obtained from the aforementioned parties to the Requesting Competent Authority of another Member State. Therefore, subject to compliance with the conditions set out in Article 58 and taking into account its national legislation, the Requested Competent Authority shall cooperate on a best effort basis to transmit the information needed for the fit and proper assessment to the Requesting Competent Authority or, where appropriate, to provide sufficient information to the Requesting Competent Authority to allow direct contact between the Requesting Competent Authority and one of the parties within its Member State referred to in Article 55(3).

(iii) insofar as authorised by the Member State concerned, the information can be obtained from one of the parties mentioned in Article 55(3) situated in the same Member State as the Requesting Competent Authority, if one of these parties, subject to compliance with the conditions set out in Article 58 and taking into account its national legislation and the supervisory rules it may be subject to, can obtain the information from an (equivalent) party situated in another Member State that is permitted to transmit the information for the fit and proper assessment, for use by the Requesting Competent Authority.

2.19. Diagrams presenting these different situations are presented in Appendix 10 to this Decision.

Chapter 3: Cross-border outsourcing

3.1. The requirements regarding outsourcing are set out in Article 31. These provisions apply to outsourcing of any activity, including the carrying out of key functions or the management of IORPs, to a service provider

- regardless of whether or not this provider is located outside the Member State where the main administration of the IORP is located and
- regardless of whether or not the IORP carries out a cross-border activity.

3.2. Cross-border outsourcing by IORPs, particularly those carrying out cross-border activities, has important implications for an effective prudential supervision. The assessment by Competent Authorities of outsourcing by IORPs shall take additional issues into account such as:

(i) *the legal and regulatory profile of the foreign jurisdiction*.
The Competent Authorities shall consider whether their powers to issue orders or instructions to the outsourcing IORP can be reliably enforced without being compromised by instructions issued by other supervising authorities to the service provider of the outsourced function or activity;

(ii) *the right to request information from service providers about outsourced key functions or any other activity* (Article 31(7)).
To ensure this right, the Competent Authorities are encouraged to prescribe that the written agreement on outsourcing stipulates that the service provider of the outsourced function or activity shall grant access to the Competent Authority of the outsourcing IORP for all relevant data in its possession and that the Competent Authority of the outsourcing IORP should be able to obtain promptly from the service provider any relevant books, records and other information relating to the outsourced activity, regardless whether the service provider is a regulated or unregulated entity;

(iii) *the right of the Competent Authorities to carry out on-site inspections* (Article 50(e)[11] and (f)).
The Competent Authorities are encouraged to prescribe that the written agreement on outsourcing stipulates that the service provider of the outsourced function or activity will not oppose to an on-site inspection on request of the Home Competent Authority should the case arise. This contractual obligation should provide the Home Competent Authority of the outsourcing IORP with sufficient legal certainty[12] to have access to

[11] Given the fact that a Competent Authority's competence to conduct on-site inspections with access to the places where outsourced services are provided may be limited to its own territory.
[12] It being understood that it is not directly enforceable against the service provider. Should the service provider of the outsourced function or activity refuse to submit to an on-site inspection, the Competent Authority can indeed impose sanctions on the outsourcing IORP only.

the premises of the service provider of the outsourced function or activity, where necessary.

3.3. Where appropriate and insofar as allowed by their respective national laws, the on-site inspections shall be conducted by:

(i) the Home Competent Authority of the outsourcing IORP;

(ii) the Host Competent Authority (and/or another Supervisory Authority) of the Member State in which the (regulated) service provider is located;

(iii) both – the Home Competent Authority of the outsourcing IORP and the Host Competent Authority (and/or another Supervisory Authority) of the Member State in which the (regulated) service provider is located.

3.4. The Competent Authorities of the different Member States are encouraged to conclude Memorandums of Understanding (MoU) for carrying out cross-border on-site inspections. These MoUs may include agreements to delegate on-site investigative powers, carry out joint on-site inspections, provide assistance for on-site inspections or agreements with other supervisory authorities of service providers of the outsourced function or activity which are subject to prudential or other specific supervision.

Done at Frankfurt am Main, 27 September 2018

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(For the European Insurance and Occupational Pensions Authority)

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(For Finanzmarktaufsicht / the Financial Market Authority, Austria)

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(For Nationale Bank van België/ Banque nationale de Belgique / the National Bank of Belgium, Belgium)

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(For Autoriteit voor Financiële Diensten en Markten / Autorité des Services et Marchés Financiers / the Financial Services and Markets Authority, Belgium)

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(For Комисия за Финансов Надзор / the Financial Supervision Commission, Bulgaria)

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(For Hrvatska Agencija za Nadzor Financijskih Usluga / the Financial Services Supervisory Agency, Croatia)

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(For Υπηρεσία Ελέγχου Ασφαλιστικών Εταιρειών / the Insurance Companies Control Service, Cyprus)

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(For Έφορος Ταμείων Επαγγελματικών Συνταξιοδοτικών Παροχών - Υπουργείο Εργασίας, Πρόνοιας και Κοινωνικών Ασφαλίσεων / the Registrar of Occupational Retirement Benefit Funds - Ministry of Labour, Welfare and Social Insurance, Cyprus)

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(For Česká národní banka / the Czech National Bank, Czech Republic)

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(For Finanstilsynet / the Danish Financial Supervisory Authority, Denmark)

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(For Finantsinspektsioon / the Estonian Financial Supervision Authority, Estonia)

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(For Finanssivalvonta / the Finnish Financial Supervisory Authority, Finland)

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(For Autorité de Contrôle Prudentiel et de Résolution / the Prudential Supervision and Resolution Authority, France)

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(For Bundesanstalt für Finanzdienstleistungsaufsicht / the Federal Financial Supervisory Authority, Germany)

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(For Τράπεζα της Ελλάδος / the Bank of Greece, Greece)

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(For Υπουργείο Εργασίας, Κοινωνικής Ασφάλισης & Κοινωνικής Αλληλεγγύης/ Hellenic Ministry of Labour, Social Security and Social Solidarity, Greece)

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(For Magyar Nemzeti Bank / the Central Bank of Hungary, Hungary)

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(For Fjármálaeftirlitið / the Financial Supervisory Authority, Iceland)

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(For Banc Ceannais na hÉireann / the Central Bank of Ireland)

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(For An tÚdarás Pinsean / the Pensions Authority, Ireland)

_____

(For Istituto per la Vigilanza sulle Assicurazioni / Institute for Insurance Supervison, Italy)

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(For Commissione di Vigilanza sui Fondi Pensione / Pension Funds Supervisory Commission, Italy)

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(For Finanšu un Kapitāla Tirgus Komisija / the Financial Capital Market Commission, Latvia)

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(For Finanzmarktaufsicht / the Financial Market Authority, Liechtenstein)

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(For Lietuvos Bankas / the Bank of Lithuania, Lithuania)

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(For Commissariat aux Assurances / Luxembourg Insurance Commission, Luxembourg)

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(For Commission de Surveillance du Secteur Financier / Commsision for the Supervision of the Financial Sector, Luxembourg)

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(For Malta Financial Services Authority, Malta)

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(For De Nederlandsche Bank / the National Bank of Netherlands, the Netherlands)

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(For Finanstilsynet / the Financial Supervisory Authority of Norway, Norway)

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(For Komisja Nadzoru Finansowego / the Polish Financial Supervision Authority, Poland)

_____

(For Autoridade de Supervisão de Seguros e Fundos de Pensões / the Portuguese Insurance and Pension Funds Supervisory Authority, Portugal)

_____

(For Autoritatea de Supraveghere Financiară / the Financial Supervisory Authority, Romania)

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(For Národná Banka Slovenska / the National Bank of Slovakia, Slovakia)

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(For Agencija za Zavarovalni Nadzor / the Insurance Supervision Agency, Slovenia)

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(For Dirección General de Seguros y Fondos de Pensiones - Ministerio de Economía y Competitividad/General Directorate of Insurance and Pension Funds – Ministry of Economy and Competitiveness, Spain)

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(For Finansinspektionen / the Financial Supervisory Authority, Sweden)

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(For the Bank of England’s Prudential Regulation Authority, United Kingdom)

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(For the Pensions Regulator, United Kingdom)