Brussels, the 13th of January 2019

Position paper on possible legal inconsistency with EU provisions on cross border transfers of pension schemes with regards to the establishment of excessive and unjustified majorities of members and beneficiaries left to national legislations (art. 12, paragraph 3 of the IORP II Directive)

Preamble about the Cross Border Benefits Alliance-Europe (CBBA-Europe)

The Cross Border Benefits Alliance-Europe (CBBA-Europe), is a Brussels based advocacy organization (Belgian AISBL) promoting the creation of cross border and pan-European social benefits in the European Economic Area (EEA), including pensions (occupational and individual), healthcare insurance, unemployment benefits, long term care insurance, etc.

Indeed, CBBA-Europe considers the current excessive fragmentation of national social systems as detrimental to the creation of a European common market based on economies of scale and on the removal of costly and burdensome barriers in particular for citizens; but also detrimental to free movement of services, capitals and persons; and to the potential accumulation of huge capitals to be invested in the European economy, in accordance with the Capital Markets Union (CMU) to foster much needed growth and employment.

More generally, CBBA-Europe wishes the European Union to become a more interconnected economic and social area, where both economic competitiveness, with more efficiency in delivering benefits, and the protection of social rights assured to companies and citizens.

As for its structure, CBBA-Europe is a transversal Alliance made up of stakeholders with different backgrounds, including multinational companies, trade unions, asset managers, pension funds, insurance companies, consumers' organizations, national and international trade associations. Just created in October 2017, CBBA-Europe already has twenty members, and is still rapidly growing.

CBBA-Europe also relies on a Scientific Council made up of well-known experts and professors from the most prestigious Universities of Europe. The Scientific Council provides content for the half-yearly CBBA-Europe Review, which is available on the website of the Association.

Finally, in addition to its activities of monitoring and publication of position papers, CBBA-Europe organizes several public meetings throughout Europe with national and European decision makers and stakeholders.

For more information about CBBA-Europe, please visit our website: www.cbba-europe.eu

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CROSS BORDER BENEFITS ALLIANCE EUROPE

Executive summary

The Cross Border Benefits Alliance-Europe (CBBA-Europe) believes that the manner in which the Dutch government transposed article 12 paragraph 3 of the Directive (EU) 2016/2341, better known as the "IORP 2" Directive, to be inconsistent with EU law.

Article 12(3) IORP 2, refers to cross border transfers of pension schemes, provides for prior approval of a majority of members and beneficiaries, and allows member states to define such a majority "in accordance with national law".

The Dutch Ministry of Social Affairs, however, is currently requiring a majority of 2/3 of both the members and beneficiaries for such approval. Such a "super-majority" requirement not only creates a significant obstacle to cross-border transfers of Dutch based pension schemes, which is the apparent purpose of new IORP 2; but it also violates the EU principle of non-discrimination based on nationality of the pension scheme[1], which is a pillar of EU law, because it would generate an unequal treatment between domestic transfers of pension schemes in the Netherlands, and cross border transfers to pension schemes in other parts of the European Economic Area.

CBBA-Europe believes that the most reasonable interpretation of the sentence "in accordance with national law" should be in the sense that the same majorities of members and beneficiaries requested to approve transfers of domestic transfers provided by national laws, should be equally applicable to cross border transfers.

Unequal treatments between national and European situations might be legally acceptable only if justified. One possible argument would be the aim of protecting members and beneficiaries in case of cross border transfers due to unclarity and/or shortcomings of the Directive. However, in the view of CBBA-Europe, the provisions of the IORP 2 Directive sufficiently protect members and beneficiaries in these situations. Therefore, majority requirements unreasonably strict, or in any way higher than the national rules on transfers are not justified.

Finally, if article 12(3) IORP 2 were meant to provide a generic and unlimited freedom to member states to define the said requested majorities, then such a freedom might raise questions about the consistency of the said article with the overall spirit of the IORP Directive, as well as with the general principles of European legislation.

CBBA-Europe wishes that cross border transfers will be possible after the entry into force of the new IORP Directive; that 'deal breakers' to these opportunities not be introduced by the member states; and that legal clarity be provided concerning article 12(3) of the Directive, with particular regard to the general nondiscrimination principles of EU law.

[1] How this is established: H. van Meerten, 'Pensionreform in the EU: recent developments after the implementation of the IORP Directive', Pensions: An International Journal, 14, 4, 2009.

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CROSS BORDER BENEFITS ALLIANCE EUROPE

Position paper

Introduction

Article 12(3) of the IORP 2 Directive provides as following:

"The transfer shall be subject to prior approval by:

(a) ***a majority of members and a majority of the beneficiaries concerned or, where applicable, by a majority of their representatives. The majority shall be defined in accordance with national law*** *[…]*

(b) the sponsoring undertaking, where applicable".

The phrase "in accordance with national law" should not give a sort of *"carte blanche"* to some member states to practically forbid cross-border transfers.

Would, for example a 95% threshold be in accordance with EU law and the IORP 2? After all, two provisions of the new IORP Directive (recitals 11 and 12) clearly state that a goal of the new legislation is precisely to facilitate cross border activities and cross border transfers. In particular, the recital 12 provides that *"[…] facilitating the cross-border activity of IORPs and the cross-border transfer of pension schemes by clarifying the relevant procedures and removing unnecessary obstacles could have a positive impact […]*"

The first practical question on the interpretation on the discretion of member states to establish such majorities under the new Directive was raised with an initiative of the Dutch Ministry of Social Affairs[2] to propose a majority of 2/3 of members and beneficiaries for such approval[3]. In the meantime, the new IORP Directive was implemented in the Netherlands, and this requirement was inserted.
But such a requirement will make it highly difficult, if not practically impossible, to effectuate cross border transfers of Dutch based pension schemes. This is presumably its intent, and it is clearly not in line with the goals of IORP 2[4].

[2] On September 26, 2018, an amendment was submitted to the Dutch implementation Act of IORP II directive with regard to article 12, paragraph 3 of this directive. In this amendment it is proposed that a cross-border collective transfer requires approval by a two-thirds majority of the participants.
[3] More precisely, the restrictive approval under stake relates to bulk asset transfers of past services, and does not apply to transferring a scheme if it aims at future accruals only. However; in practical terms, as the one impacts the other, cross border transfers will be made anyway much more difficult.
[4] Another obstacle to cross border transfers was added by the Netherlands: the requirement of mentioning the funding status for DB schemes on individual benefit statements in accordance with the local Dutch funding regulation. In other words, the Netherlands requires to add the host state's funding rate –next to the home state funding rate- to the member statement.
Such an additional information will not only create confusion on the Dutch scheme members (comparing data explained differently), but it will also create a substantial administrative burden to the IORPs running cross border activities in the Netherlands.
This matter is not part of the scope of this paper, and so it will be not faced here. However, CBBA-Europe will likely deepen it on another different position paper.

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The case should be analyzed under three perspectives:

First, the possible legal meaning of the statement "The majority shall be defined in accordance with national law […]" contained in article 12(3), in order to avoid discriminatory treatments based on nationality;

Second, if high majorities requirements defined by member states potentially restricting the possibility to set up cross border transfers would be justifiable in order to better protect members and beneficiaries. And, if so, under which conditions;

Third, if it were alternatively assumed that the Directive did grant a total and unlimited discretion to member states in defining these majorities, would article 12(3) contradict the overall spirit of the Directive, or even potentially infringe the general principles of European legislation?

Reasoning and considerations

1) Possible legal meaning of the statement "The majority shall be defined in accordance with national law […]" contained in article 12(3), in order to avoid discriminatory treatments based on nationality.

A national legislation implementing the IORP 2 Directive providing for majorities of participants higher than the ones provided for domestic transfers[5], would imply a discrimination between domestic and cross border transfers[6], and a consequent unequal treatment based on nationality.

As an example, this risk was avoided in article 19 of the Directive (Investment rules), which grants the possibility to member states to impose *"more detailed rules, including quantitative rules, provided they are prudentially justified, to reflect the total range of pension schemes operated by those IORPs"* (paragraph 6).

Such stricter rules on investments -even if subject to the requirement of "being prudentially justified"- are also applicable to foreigner IORPs operating in their territories, granted that the same treatment will be made to domestic IORPs, and therefore no discrimination will be made.

Paragraph 8 of the same article 19 makes it very clear in order to prevent any discrimination based on the nationality of the pension fund. Indeed, in case of cross border activity, this paragraph states that the host member state *"[...] shall not lay down investment rules in addition to those set out in paragraphs 1 to 6 [...]"*, as to say those aforementioned "more detailed rules, including quantitative rules", to which both domestic and foreigner IORPs will be required to comply with.

[5] In the Netherlands there are not even legislative specific quantitative requirements to approve domestic transfers.

[6] How the nationality of a pension scheme can be established, see: H. van Meerten, 'Pension reform in the EU: recent developments after the implementation of the IORP Directive', *Pensions: An International Journal*, 14, 4, 2009.

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Granted that CBBA-Europe considers even such a possibility provided by article 19(6) (to allow member states to impose stricter rules on investments) as a potential barrier to easier and smoother cross border activities, nevertheless, no legal question on its legitimacy is raised: it stands for that member states are allowed to lay down stricter rules on investments, provided they are consistently and coherently applied to both domestic and foreign IORPs carrying out a cross border activity in their territory.

Therefore, when coming back to the article 12(3), an immediate – and we believe, the most reasonable - possible interpretation of the meaning of the statement "*in accordance with national law […]"* would be that the said accordance is in line with the same majorities requested for domestic transfers, and so the word "*accordance*" should be interpreted as a synonymous with "*alignment*" of existing national provisions on domestic transfers with cross border ones.

If this interpretation were followed by member states, similarly to the aforementioned provisions of article 19, no legal question on the grounds of the discrimination based on nationality would ever raise, and whatever the majority requested for domestic transfers, that would also be consistent with the European law.

With this regard, a 2/3 majority for domestic transfers is not requested in the Netherlands. Therefore, this should be considered incompatible with the European law.

And what if in some member states no majorities were requested by national laws for domestic transfers, or if no majorities were anyway findable when looking at their local habits/traditions? In such a case, it might be concluded that transfers of pension schemes under the IORP do not represent material issues for those domestic legal systems.

Therefore, as a logical result, in those member states only a minimum majority requirement should be introduced for cross border transfers in order to comply with the new IORP 2 Directive. A majority is here clearly requested by the Directive, at least as a minimum imperative condition (*The transfer shall be subject to prior approval to […] a majority of members and a majority of the beneficiaries […]."* Thus, any different treatment between domestic transfers (in case no majority approval is required) and cross border ones ("a majority", i.e., more than fifty percent, as provided by the Directive), would find its legal justification in the Directive itself.

In conclusion, in the view of CBBA-Europe, the first question on the possible legal meaning of the statement "The majority shall be defined in accordance with national law […]" contained in article 12(3), and more in particular the wording "in accordance with national law […]" should be interpreted in the sense that the same majorities requested for domestic transfers provided by the respective national laws should be requested for cross border transfers as well.

Otherwise, if majorities higher than the local ones were required by member states, as with the present initiative of the Netherlands, legal questions should be raised on different/discriminatory treatments based on nationality of the scheme, and the initiative should be considered as inconsistent with the European law.

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Of course, in case no majority for domestic transfers was legally required by some member states, or no majorities were findable from their local habits/traditions, then a minimum majority should be introduced by member states through a *new, ad hoc* legislation implementing article 12 of the IORP 2 Directive. In such a case, a different treatment between national situations (no majority requested) and cross border situations would be justified by the Directive itself, which requests a majority when cross border transfers are at stake.

2) If high majorities requirements defined by member states potentially restricting the possibility to set up cross border transfers would be justifiable in order to better protect members and beneficiaries. And, if so, under which conditions;

As explained below, it is well-established case law that EU law admits discriminations only when they are justified.

Granted that no member state could invoke the necessity of higher majorities on the argument of its manifest mistrust towards other member states' jurisdictions or on protectionism, which are both obviously unmentionable because prohibited by EU case law, a possible justification would be the aim of protecting members and beneficiaries because of the insufficient/unclear provisions of the Directive.

In fact, the IORP 2 Directive makes a difference between cross border transfers and cross border activities, by stating that the two initiatives should be treated differently[7], and that cross-border transfers do not automatically lead to a cross border activity, but if they do, provisions on cross border activities would then apply,[8] by assuring a major protection to members and beneficiaries.

In particular, the Directive states that *only when* cross border transfers lead to a cross border activity, *the competent authority of the host state* –where members and beneficiaries are based- *would play a role*[9] in interacting with the competent authority of the home state of the receiving IORP[10].

[7] Recital 13 of the IORP 2 Directive: "*[…] Cross-border activity and the cross-border transfer of pension schemes are distinct and should be governed by different provisions […]"*

[8] Recital 13 of the IORP 2 Directive: *[…] If a cross-border transfer of a pension scheme leads to cross-border activity, the provisions on cross-border activity should then apply"*

[9] Article 12 (14) of the IORP 2 Directive: *'Where the receiving IORP carries out a cross-border activity, Article 11(9), (10) and (11) shall apply.'*

[10] Article 11 "[…] *9. The competent authority of the host Member State shall inform the competent authority of the home Member State of any significant change in the host Member State's requirements of social and labour law relevant to the field of occupational pension schemes which may affect the characteristics of the pension scheme insofar as it concerns the cross-border activity, and any significant change in the host Member State's information requirements as referred to in paragraph 7. The competent authority of the home Member State shall communicate that information to the IORP.*

10. The IORP shall be subject to on-going supervision by the competent authority of the host Member State as to the compliance of its activities with the host Member State's requirements of social and labour law relevant to the field of occupational pension schemes and of the host Member State's information requirements as referred to in paragraph 7. Should this supervision bring irregularities to light, the competent authority of the host Member State shall inform the competent authority of the home Member State immediately. The competent authority of the home Member State shall, in coordination with the competent

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Yet, the Directive is quite vague in making a distinction on cases when a cross border transfer might lead to a cross border activity. Cross border activity is defined[11] but cross border transfer is not. We, however, assume that in most cases cross border transfers lead *eo ipso* to cross border activity, and hence giving both the receiving and incoming supervisory authorities sufficient means to supervise the scheme.

This is confirmed by the recent Decision of EIOPA's Board of Supervisors[12] replacing the former Budapest Protocol, which took care of assessing possible scenarios of cross border transfers. The Decision clarified that in most cases (the most controversial) cross border transfers will *eo ipso* lead to cross border activities and so the related provisions on cross border activities – in particular an active role of the competent authority of the host state- will apply to them.

In conclusion, the combined provisions of article 11 (on cross border activities) and article 12 (on cross border transfers) will provide national competent authorities with sufficient roles, powers and involvement to protect the interests of members and beneficiaries in case of cross border transfers.

Therefore, higher majority requirements than a 'normal' majority, aiming at protecting participants, should be not justified; unless, of course, these higher majorities will also apply to domestic transfers.

3) Alternatively, if it were assumed that the Directive did grant a total and unlimited discretion to member states in defining these majorities, would article 12(3) contradict the overall spirit of the Directive, or even potentially infringe the general principles of European legislation?

When asked to explain the reasons why such a high majority requirement was proposed, the Dutch Ministry stated that different prudential rules in other EU Member States justifies the different treatment of transfers.

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authority of the host Member State, take the necessary measures to ensure that the IORP puts a stop to the detected breach.
11. If, despite the measures taken by the competent authority of the home Member State or because appropriate measures are lacking in the home Member State, the IORP persists in breaching the applicable provisions of the host Member State's requirements of social and labour law relevant to the field of occupational pension schemes or the host Member State's information requirements as referred to in paragraph 7, the competent authority of the host Member State may, after informing the competent authority of the home Member State, take appropriate measures to prevent or penalise further irregularities, including, insofar as is strictly necessary, preventing the IORP from operating in the host Member State for the sponsoring undertaking".

[11] 'Cross-border activity' means operating a pension scheme where the relationship between the sponsoring undertaking, and the members and beneficiaries concerned, is governed by the social and labour law relevant to the field of occupational pension schemes of a Member State other than the home Member State.

[12] 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)
EIOPA-BoS-18/320 27 September 2018, available at: https://eiopa.europa.eu/publications/protocols-decisions-and-memoranda

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According to the Dutch Council of State, the legal adviser of the Government, the different treatment is justified. In other words, the Ministry thinks that this discrimination results from the IORP 2 itself, and that the national transposition legislation thus is EU ' proof '. However, CBBA-Europe does not believe that the Directive can be used to support an effort to prevent cross-border pension transfers, for a number of reasons.

First of all, even within The Netherlands there are different prudential frameworks. This, in and of itself, cannot be the reason for imposing super-majorities on approving transfers.

Second, the Dutch government states that the ‘’pension scheme will be largely outside the influence of the Netherlands” because the Dutch supervisor is not in the lead.

However, as demonstrated above, this argument does not seem to be consistent with the other provisions of the Directive. Indeed, not only does the Dutch supervisor control the supervision of the scheme, but also the combined provisions of articles 11 and 12 of the Directive will assure sufficient protection to members and beneficiaries in case of cross border transfers.

In other words, the Dutch government would have to justify any supermajority on deficiencies in the other EU Member States or the Directive and how such a super-majority would address that deficiency. CBBA-Europe does not believe there are such deficiencies, but in any event, merely pointing to differences is not legally sufficient.

If otherwise article 12(3) had to interpreted as a free rein for member states to establish whatever majorities to approve cross border transfers without limitation, such article would not only contradict some provisions of the Directive; but it would also contrast with the legal basis of the IORP Directive itself and the general principles of the EU legal system, including the European economic freedoms, which are the fundamental basis of the EU law and the IORP Directive itself.

The potential contradiction with other provisions of the Directive was already highlighted above at the question 1) [13].

As for the inconsistency with legal basis of the Directive and the general principles of the EU legal system, it should be reminded that the IORP 2 is based on three articles of the Treaty on Functioning of the European Union (TFEU):

- On art. 114 TFEU (approximation of laws in order to *achieve the goals of the internal market*, as described in article 26 TFEU);

- And articles 53 and 62 TFEU aiming at a implementing the principle of *mutual recognition* of companies operating in the EU, on the presumption that they are all equally reliable, and hence allowed to trade and provide services among them.

[13] The potential contradictions of article 12(3) if interpreted as a free rein with recitals 11 and 12, and with the regulatory approach of article 19 were already expounded above.

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With regards to art. 114 TFEU and the related goals of art. 26 TFEU, a Directive's provision interpreted as an unlimited *carte blanche* allowing any kind of vetoes would be not in line with the spirit of article 26 TFEU, which precisely aims at the creation, for the EU, of *an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured*[14].

After all, this goal, precisely referred to private pensions, was also recently recognized by the EU Court of Justice in the case *ING Pensii*[15].

With regards to articles 53 TFEU and 62 TFEU, instead, the provision of article 12(3) of the Directive would manifestly violate the European Treaties on the aforementioned principles of mutual recognition and non-discrimination based on nationality, which are now also considered as general principles of the EU internal market. In such a scenario, article 12(3) of the new IORP 2 Directive would also lead to a judgment of incompatibility with both the EU Charter on Fundamental Rights and the EU case law[16], and even potentially annulled by the EU Court of Justice.[17]

Moreover, a violation forbidden by the EU Charter of Fundamental Rights might be even invoked directly by an individual, as was held in the recent jurisprudence[18].

That would theoretically mean that even a member of a pension scheme, part of a majority in favor of a cross border transfer, might be allowed to open a case claiming that the impediment to proceed with that transfer is unjust, if the majority required for cross border transfers was unreasonably higher compared to the one provided for domestic ones.

In conclusion, CBBA-Europe believes that article 12(3) of IORP 2 Directive cannot be interpreted as giving free rein, granting total and unlimited discretion to member states in defining majorities to approve cross border transfers. Otherwise, article 12(3) would

[14] Paragraph 2 of article 26 TFEU. This is not merely a European principle. It is also found in the Convention on the Organization for Economic Co-operation and Development, the founding document of the OECD, of which the Netherlands is a member state. ("the Members agree that they will, both individually and jointly:…pursue their efforts to reduce or abolish obstacles to the exchange of goods and services and current payments and maintain and extend the liberalization of capital movements…." Article 2 of the Convention.)

[15] Bauer C-569/12.

[16] Article 21 (2) of the EU Charter reads: *"Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited".*
In the case of Dassonville, the ECJ held: *"Whereas all trading rules enacted by Member States which intra-Community trade are capable of hindering, directly or indirectly, actually or potentially, as a measure having an effect equivalent to quantitative restrictions can be considered"* Case 8/74.

[17] See the research of Vandamme: https://dare.uva.nl/search?identifier=c70842f0-7aad-41f0-88fd-3514c9d1ec07
In the case of *Test-Achats ASBL*, the Court held that a provision in a directive was incompatible with articles 21 and 23 of the Charter of fundamental rights of the European Union. C-236/09
In 2014, in *Digital Rights Ireland*, the ECJ declared the data retention directive invalid, because considered that the directive is contrary to article 7 and 8 of the Charter of fundamental rights of the European Union. C-293/12 and C-594/12

[18] C-172/14, ING Pensii.

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contradict not only the overall spirit of the Directive, including its goals and its legal basis; but would also infringe the general principles of the European legislation.

Conclusions

When implementing IORP 2 Directive, the Dutch Government required a 2/3 majority of members and beneficiaries to approve cross border transfers according to article 12(3) of the said Directive.

This requirement raises questions on its compatibly with EU law and the interpretation of said provision, and in particular on the criteria according to which the "majority" should be established by member states.

According to CBBA-Europe, in this paper it is concluded that:

1) The possible legal meaning of the statement "The majority shall be defined in accordance with national law […]" contained in article 12(3), and more in particular the wording "in accordance with national law […]" should be interpreted in the sense that the same majority requested for domestic transfers provided by the respective national laws should be required for cross border transfers as well.

Otherwise, if a higher majority than the local one were requested by member states, as with the present initiative of the Netherlands, legal questions should be raised on different/discriminatory treatments based on nationality of the scheme, and the higher majorities should be considered as inconsistent with EU law.

Of course, in case no majority for domestic transfers was legally required by some member states, or no majority is findable from local habits/traditions, then a minimum majority should be introduced by member states through a new, ad hoc legislation implementing article 11 of the IORP 2 Directive. In such a case, a different treatment between national situations (no majority requested) and cross border situations would be justified by the Directive itself, which requests a majority (that is, more than 50%) when cross border transfers are at stake.

2) Protection of members and beneficiaries (participants) might in principle justify higher majority requirements to approve transfers, when an intervention of the competent authority of the member state where these participants are based might be necessary for such protection, but is excluded.

Indeed, a cross border transfer does not automatically imply, as such, a cross border activity and the application of its related provisions. The Directive itself is quite vague in making a distinction on cases when a cross border transfer might lead to a cross border activity or not.

However, the recent Decision of EIOPA's Board of Supervisors replacing the former Budapest Protocol took care of identifying the most controversial scenarios left by the Directive in particular when those transfers will lead to cross border activities.

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The Decision clarified that in most cases (the most controversial) cross border transfers will also lead to cross border activities and so the related provisions on cross border activities will apply to them.

The combined provisions of article 11 (on cross border activities) and article 12 (on cross border transfers) provide national competent authorities with sufficient roles, powers and involvement to protect the interests of members and beneficiaries in case of cross border transfers.

Therefore, it is the view of CBBA-Europe, considering that the members and beneficiaries will be protected by their national competent authority, higher majority requirements aiming at protecting them are not justified.

3) CBBA-Europe believes that article 12(3) of IORP 2 Directive cannot be interpreted as giving free rein, granting total and unlimited discretion to member states in defining majorities to approve (cross border) transfers.

Otherwise, article 12(3) would contradict not only the overall spirit of the Directive, including its goals and its legal basis; but would also infringe the general principles of European legislation and case law.

For the aforementioned reasons, CBBA-Europe wishes that cross border transfers will be possible after the entry into force of the new IORP Directive; that 'deal breakers' to these opportunities -such as a 2/3 majority requested by the Netherlands- will be not introduced by member states; and that further legal clarity will be made about the article 12(3) of the Directive, with particular regard to the general principles of EU law.

Otherwise, such uncertainties and legal doubts should be definitely brought to the European Court of Justice (ECJ) as soon as possible, in order to get a clear answer on the interpretation of article 12(3) of the IORP 2 Directive, and its consistency with the overall spirit of the Directive and the general principles of the European legal system.

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