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Position paper on possible legal inconsistency with EU provisions of the additional requirement of providing information on the coverage ratio of a foreigner pension fund operating in another member state (host state) according to the national parameters of the host state

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

Executive summary

The Cross Border Benefits Alliance-Europe (CBBA-Europe) believes that the manner in which the Dutch government has transposed article 39 paragraph 1 of the Directive (EU) 2016/2341, better known as the “IORP 2” Directive, is inconsistent with EU law.

Article 39 paragraph 1 of IORP 2 provides for the content of the Pension Benefit Statement, which is the information document to be annually provided to members and beneficiaries of a pension fund. Information to be provided by the pension fund through the said Pension Benefit Statement is well described in the said article and is accurate enough, according to CBBA.

The Dutch Parliament, in implementing the IORP 2 Directive, is, however, requiring that a pension fund located in a member state other than the Netherlands and running a Dutch pension scheme, should not only provide the information listed by the aforementioned Pension Benefit Statement (“UPO” in Dutch); but also add information about the coverage ratio of that foreign pension fund according to the Dutch standards, which obviously differ from the national ones of the member state where the pension fund is located (“home state” of the pension fund).

The IORP 2 Directive aims at making easier the cross-border activities of pension funds. This requirement, instead, not only creates a burden to foreign pension funds running Dutch pension schemes, but it also generates confusion among the receivers of the Pension Benefit Statement, who would be overloaded and likely confused with information provided according to different national parameters (the national ones of the home state of the pension fund; and the local Dutch parameters).

According to the IORP 2 Directive, the Pension Benefit Statement should provide clear and comprehensive information: the question, therefore, would be whether the new requirement would still make the UPO “clear”? And, in addition, would this additional information be relevant and appropriate?

The Dutch Authorities assert that the additional requirement to provide information on coverage ratio according to the Dutch parameters should be considered as part of their national social and labor law, and hence fully in line with the IORP 2 Directive. However, this appears to be a new position directed only at inhibiting the uniform application of IORP 2 in the Netherlands. Cross border activities for pension funds were introduced 16 years ago, through the first IORP Directive of 2003; and the additional information requirement was not introduced for foreigner pension funds operating in the Netherlands during all that time.

The new obligation was only inserted on occasion of the implementation of the new IORP Directive. In principle, member states should not create new social and labor law when a new EU Directive is implemented as a specific *ad hoc* measure trying to limit the development of cross border activities. After all, article 60 of the same EU Directive states that “*Member States shall ensure, in an appropriate manner, the uniform application of this Directive through regular exchanges of information and experience [...] creating the conditions required for unproblematic cross-border membership*”.

CBBA-Europe thinks that such requirement clearly contradicts both the IORP 2 Directive and the general provisions of the EU law: cross border activities of pension funds should be made simpler, not harder.

CBBA Europe recommends European authorities to remain vigilant on the current transposition of the IORP 2 Directive by National Competent Authorities (NCAs) in order to ensure that they fully respect the single market rules.

In particular, European authorities should work closely with NCAs in order to avoid additional unilateral conditions not included in the IORP 2 Directive that will be problematic for cross border activities.

Position paper

Introduction

Relevant Parts of the IORP 2 Directive

Article 39 of the IORP 2 Directive provides as following:

Pension Benefit Statement

1. The Pension Benefit Statement shall include, at least, the following key information for members:

[...]

(h) information on the funding level of the pension scheme as a whole.

2. In accordance with Article 60, Member States shall exchange best practices with regard to the format and the content of the Pension Benefit Statement.

Article 60 of the IORP 2 Directive:

Cooperation between Member States, the Commission and EIOPA

1. Member States shall ensure, in an appropriate manner, the uniform application of this Directive through regular exchanges of information and experience with a view to developing best practices in this sphere and closer cooperation with the involvement of the social partners where applicable, and by so doing, preventing distortions of competition and creating the conditions required for unproblematic cross-border membership.
2. The Commission and the competent authorities of the Member States shall collaborate closely with a view to facilitating supervision of the operations of IORPs.

3. The competent authorities of the Member States shall cooperate with EIOPA for the purposes of this Directive, in accordance with Regulation (EU) No 1094/2010 and shall without delay provide EIOPA with all information necessary to carry out its duties under this Directive and under Regulation (EU) No 1094/2010, in accordance with Article 35 of that Regulation.
4. Each Member State shall inform the Commission and EIOPA of any major difficulties to which the application of this Directive gives rise. The Commission, EIOPA and the competent authorities of the Member States concerned shall examine such difficulties as quickly as possible in order to find an appropriate solution.

Recital 11 of the IORP 2 Directive: “This Directive [...] as well as facilitating the cross-border activity of IORPs and the cross-border transfer of pension schemes. This Directive is to be implemented in accordance with those rights and principles”.

Recital 12 of the IORP 2 Directive: “In particular, 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 on the undertakings concerned and their employees, in whichever Member State they work, through the centralisation of the management of the retirement services provided”

Recital 66 of the IORP 2 Directive: “For members, IORPs should draw up a Pension Benefit Statement containing key personal and generic information about the pension scheme. The Pension Benefit Statement should be clear and comprehensive and should contain relevant and appropriate information to facilitate the understanding of pension entitlements over time and across schemes and serve labour mobility”

Reasoning and considerations

The facts: Netherlands adopts new amendment requesting a double information on the coverage ratio of a foreigner pension fund carrying out a cross border activity

On 18 December 2018, the Dutch Parliament adopted the implementation of the IORP 2 Directive. Among others, one amendment changed the content of the Pension Benefit Statement, called in Dutch the ‘Uniform Pensioenoverzicht’ (UPO).¹ The question is whether this amendment is consistent with the spirit of the IORP 2 Directive.

In order to implement article 39, first paragraph, section (h), of the Directive, the Dutch implementation of the IORP 2 Directive states that information must be included on the UPO regarding the coverage ratio of the pension fund. It further adds that the coverage ratio must be based on Dutch standards.

Of course, this adjustment has no impact when a pension scheme is administered in the Netherlands, as in this case the coverage ratio will be always determined by Dutch standards. However, the amendment does have consequences for the situation when a Dutch pension scheme is run by a pension fund based in another member state. Indeed,

¹ Kamerstukken II 2018/19, 34934, nr 12.

such amendment means that even if the pension is based in Belgium for example, the Pension Benefit Statement must contain the coverage ratio according to the Dutch standards.

The legal reasoning put forward by advocates of the amendment is that such obligation falls under the Dutch social and labor law², which includes information requirements from the ‘Pensioenwet’ (Pensions Act) and the ‘Wet verplichte beroepspensioenregeling’ (Obligatory Occupational Pension Scheme Act), including the regulations for the UPO. This information requirement is supervised by the Dutch supervisor.³

The UPO must also contain information about the entity in charge of the supervision of the pension fund, and the indication of its location (together with the information that the parliament can decide to levy taxes during the construction phase). The argument in favor of this amendment is that the UPO now clearly indicates whether the fund is based in the Netherlands or not, and it also offers participants the possibility to compare the coverage ratio in the different years. However, this amendment was quite controversial even within the same Government.

An unnecessary obstacle introduced in a doubtful moment

The aim of the IORP 2 Directive is, in particular, to facilitate the cross-border activity of IORPs and the cross-border transfer of pension schemes by clarifying the relevant procedures and removing unnecessary obstacles, as mentioned before in its recitals 11 and 12.⁴

The said amendment now creates an unnecessary obstacle which is contrary to the purpose of the IORP 2 Directive. If the UPO must contain the coverage ratio of the host member state by Dutch standard, this will create a substantial additional administrative burden to IORPs. The legal funding requirements of the host country must be identified, the coverage ratio of the host country state must be calculated, the home and host country supervisors will be discussing the correctness of the host country coverage ratio, and so on. This will lead to unnecessarily increasing expenses and unnecessary obstacles.

Moreover, the article 60 of the Directive clearly provides for cooperation between Member States, the European Commission and EIOPA to further “*the uniform application of this Directive*”, with the aim, among the others, of “*creating the conditions required for unproblematic cross-border membership*”.

More in general, it should be reminded again - as already stressed by CBBA-Europe in a previous position paper published the 13th of January 2019 - that the legal basis of the IORP 2 Directive are three articles of the Treaty on Functioning of the European Union (TFEU) that are relevant here:

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

² Kamerstukken II 2018/19, 34934, nr. F (Memorie van antwoord).

³ Article 201 & 202 Pensioenwet and article 195 en 196 Wet verplichte beroepspensioenregeling.

⁴ IORP 2 Directive, recital 12.

- Articles 53 and 62 TFEU aiming at 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.

With regards to article 114 TFEU and the related goals of article 26 TFEU, national legislation allowing any kind of burdens or limitations 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*⁵. After all, this goal, precisely as applied to private pensions, was also recently recognized by the EU Court of Justice in the case *ING Pensii*⁶.

With regards to articles 53 TFEU and 62 TFEU, instead, the new amendment 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 other words, such an amendment seems to express a kind of mistrust towards foreign pension funds operating in the Netherlands, and therefore an attitude in contrast with the principle of mutual recognition and even a discrimination on the basis of the nationality of the pension fund (here meant as a different treatment expected to foreigner pension funds that could not only provide a Pension Benefit Statement referring to the coverage ratio requested in their home member state, considering that such information would be not considered as sufficient for the Dutch jurisdiction).

In such a scenario, a discrimination on the basis of the nationality might lead to a judgment of incompatibility with both the EU Charter on Fundamental Rights and the EU case law⁷. Finally, a violation forbidden by the EU Charter of Fundamental Rights might even be invoked directly by an individual, as was held in the recent jurisprudence⁸.

We can therefore conclude that this amendment is against the main aim of the IORP 2 Directive to stimulate cross border activity and to remove unnecessary obstacles. With this regard, some representatives of the Dutch Government were right in opposing this amendment.

Finally, illustrating the true purpose of this requirement, we observe that it was introduced in occasion of the implementation of the new IORP 2 Directive in the Netherlands. However,

⁵ 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.)

⁶ Bauer C-569/12.

⁷ 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.

⁸ C-172/14, *ING Pensii*.

cross border activities have been in the Netherlands since introduced by the previous IORP Directive of 2003. We question why it was deemed as necessary to add a new requirement having the effect of making cross border activities more difficult and burdensome just at this time and not fourteen years ago. In other words, even if this requirement is justified on the argument of strengthening the protection of pension scheme's members and considered as a social and labor law provision, have the scheme's members been really unprotected and penalized in that Country so far under the first IORP Directive? We believe the answer is no. Even if presented as a useful means in favor of members of a pension fund, it seems that the new requirement has rather the untold political goal of discouraging cross border activities in that Country.

The Dutch amendment creates confusion for scheme members

We believe it is also likely to be confusing for Dutch scheme members to add the host member state coverage ratio to the home state coverage ratio in the UPO. More information does not always lead to more clarity for members. According to the IORP 2 Directive, IORPs should draw up a Pension Benefit Statement for members containing key personal and generic information about the pension scheme. The Pension Benefit Statement should be clear and comprehensive and should contain relevant and appropriate information to facilitate the understanding of pension entitlements over time and across schemes and serve labor mobility.⁹

The question is whether these requirements are still met with the introduction of this amendment. Dual and inconsistent information about the coverage ratio of the pension fund's home member state, where different from national (Dutch) standards, does not make the UPO 'clear', as required by the IORP 2 Directive. There seems no added value when the home member state information already meets the requirements of IORP 2, and a detraction of value by providing potentially conflicting information.

Moreover, this information would be distorted in its content. Indeed, when expounding the overall solvency of a pension fund, other security mechanisms – next to solvency buffers – not listed on the benefit statement should be taken into consideration, for instance sponsor covenant, national protection/guarantee fund, which further makes the two sets of information confusing.

Conclusions

According to CBBA-Europe, the new requirement on reporting the coverage ratio of a pension fund operating in another Country also according to host state standards, where information under home state standards, as provided by the IORP 2 Directive, is already provided, clearly contradicts EU law and the spirit of the Directive itself: cross border activity should be made simpler, not harder.

In particular, such requirement seems to be in contrast with:

- the goals expressed by the recitals 11 and 12 of the IORP 2 Directive (easier cross border activities);

⁹ IORP 2 Directive, Recital 66

- the provision of article 39 paragraph 1, letter h) of the IORP 2 Directive, referred to the standards of the state where the pension fund is located; and

- article 60 of the IORP 2 Directive and in particular of its paragraph 1, considering that the mutual cooperation between Member States, the Commission and EIOPA is aimed at assuring the uniform application of the Directive “[...] creating the conditions required for unproblematic cross-border membership”.

Moreover, the amendment at stake is also in contrast with the legal basis if the Directive itself, and in particular with articles 114 (and so 26), 53 and 62 TFEU, because it would create an unnecessary barrier to the creation of the internal market of pension funds, of which their cross border activities represent the main expression; it would violate the principle of mutual recognition towards pension funds not based in the Netherlands and consequently generate an unacceptable discrimination based on the nationality of the pension fund.

Even if this amendment were presented as a measure of social and labor law, justified on the grounds of better informing members of the pension scheme, according to CBBA-Europe, the last minute introduction of the new requirement should prove that the amendment was intentionally created not for that purpose, but with the specific goal of making cross border activities more difficult for foreigner pension funds willing to operate in the Netherlands. In fact, cross border activities have been existing for 14 years in the EU without this requirement that was just introduced at the time of the new law implementing the IORP 2 Directive.

Finally, CBBA-Europe considers this requirement also detrimental for pension scheme members, because too much and inconsistent information based on different national criteria would result be more burdensome and confusing to the recipients. The goal should be, as stated in Recital 66 of the IORP 2 Directive, that the information to members should be clear, comprehensive and appropriate to facilitate their understanding. That is not the case with this new amendment.

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