



An tÚdarás Pinsean
The Pensions Authority

Guidelines for cross-border schemes

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1. Introduction

1.1 Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision (the IORPs Directive) entered into force on 23 September 2003. Under Article 22 of the Directive, Member States were required to comply with the Directive before 23 September 2005.

1.2 Social Welfare and Pensions Act 2005 amended the Pensions Act 1990 thereby enacting in primary legislation the measures necessary to comply with the Directive. Subsequently, on 23 September, 2005 various Regulations were made to complete Ireland's transposition of the provisions of the Directive.

1.3 It might be noted that the national transposing legislation (at 1.2) enacted the measures which, in conjunction with already existing statutory requirements, were necessary to transpose the totality of the Directive's requirements. The transposing measures should therefore be read in conjunction with the other statutory requirements to which they are supplementary.

1.4 In relation to cross-border schemes, in particular, Social Welfare and Pensions Act, 2005 inserted into the Pensions Act 1990 a new Part XII entitled "Cross-border Schemes" and the "Occupational Pension Schemes (Cross-border) Regulations, 2005. (S.I. No. 592 of 2005) were made on 23 September, 2005. Including the amendments made in Social Welfare Law Reform and Pensions Act 2006 and Occupational Pension Schemes (Cross-border) Regulations 2006 (S.I. No 292 of 2006), these combined provisions provide the statutory framework for the regulation and supervision of cross-border schemes in Ireland.

1.5 As a member of the Committee of European Insurance and Occupational Pension Supervisors (CEIOPS), Ireland is an adherent to the Budapest Protocol adopted by CEIOPS in February, 2006. This Protocol (on the collaboration of the relevant competent authorities of the EU Member States in the application of Directive 2003/41/EC on IORPs operating cross-border) sets out the agreement reached between the competent authorities of EU Member States in the supervision of cross-border schemes. In the Irish case, the competent authority for the purpose of the Protocol is The Pensions Authority.

1.6 The present Guidelines are based on the various frameworks referred to at 1.1 to 1.5. Website references to the relevant documents are given at the end of these Guidelines (i.e. the Directive, the national legislation and the Budapest Protocol). A briefing note on Irish Social and Labour Law can be found under the Updates section or under Related Articles below.

1.7 The purpose of the Guidelines is to assist interested parties (in particular, scheme trustees and their advisers, sponsoring employers and pension practitioners) in understanding the main features of the various frameworks for the regulation and supervision of the activity of cross-border occupational pension provision. It should be noted, however, that the Guidelines do not purport to give a comprehensive or exhaustive account of the statutory requirements regarding the conduct of cross-border activity including the statutory obligations of scheme trustees. The Guidelines rather are intended to highlight the main areas of the frameworks, in particular regarding the Authority's responsibilities, and to give guidance, where appropriate, as to how the Authority proposes to execute them in practice.

1.8 It might be noted in this Introduction that, in these Guidelines, the phrase "IORP" (Institution for Occupational Retirement Provision - the term used in the Directive) is used interchangeably with "scheme" (occupational pension scheme – as per Irish usage)

1.9 Sections 2 to 5 of the Guidelines deal with the Authority as a home Member State competent authority i.e. the supervisor of Irish-based schemes engaging in cross-border activity. Section 6 deals with the Authority as a host Member State competent authority i.e. its role in relation to IORPs, supervised primarily by their home Member State competent authority, conducting pension activity in Ireland.

1.10 The competent authorities of the other Member States will be listed in Appendices 5 and 6 of the Budapest Protocol.

2. Cross-border activity

2.1 The Directive requires Member States to allow undertakings in their territories to sponsor IORPs in other Member States and to allow IORPs in their territories to accept sponsorship from undertakings in other Member States, subject to certain authorisation and notification procedures. Such activity constitutes cross-border activity under the Directive.

2.2 In these Guidelines, an “IORP located in Ireland” will be referred to as an “Irish scheme” and an “undertaking” as an “employer”.

2.3 The following Sections (3 and 4) of the Guidelines deal, respectively, with the authorisation and notification procedures applicable to Irish schemes wishing to engage in cross-border activity and to accept sponsorship from an employer in another Member State. For purposes of authorisation and notification, acceptance of sponsorship is transposed in Irish legislation as acceptance of contributions.

2.4 The trustees of an Irish scheme may not accept contributions from an employer in another Member State unless they (the trustees) have received prior authorisation by the Pensions Authority and have notified and been approved by the Authority in relation to the specific sponsoring employer.

2.5 It might be noted that the authorisation (at 2.4(i)) is a general one authorising the scheme to conduct cross-border activity and will usually (i.e. unless revoked and re-granted) be given only once. The notification/approval (at 2.4(ii)) will be required in relation to each specific employer in each specific Member State.

3. Authorisation

3.1 Trustees of a scheme wishing to apply for authorisation must make an application in writing to the Authority. The application should be signed by all of the trustees.

3.2 An application form (entitled “Authorisation Application Form”) has been prepared by the Authority. While not statutorily required to be used, the form may be used by applicants. Copies of these forms can be found under the ‘Forms’ section or under ‘Related Articles’ below. The information and declaration required in this application form are consistent with the statutory requirements for authorisation.

3.3 If the Authority’s application form is not used, trustees making an application must provide;

(a) a statement signed by them that they are in compliance, where applicable, with the requirements relating to

- (i) disclosure of information under Section 54 of the Pensions Act, 1990,
- (ii) trustees under Section 59A of the Act and Regulations made there under
- (iii) remittance of contributions under Section 58A of the Act
- (iv) funding requirements under Section 44 of the Act and Regulations made there under, were applicable.

(b) where applicable, an Actuarial Funding Certificate or the latest intervaluation statement and

(c) The Pensions Authority registration number.

3.4 In relation to the requirements at 3.3, and the corresponding requirements in the Authority’s application form, it might be noted that

“where applicable” at 3.3(a) is intended to allow for circumstances in which the requirement cannot apply as, for example, at (iii) in a case where no contributions have yet been received or at (iv) in the case of a defined contribution scheme.

- “where applicable” at 3.3(b) is intended to cover schemes to which 44 applies (as distinct for example from the generality of defined contribution schemes) but to allow for circumstances in which in the case of a new scheme 55(5) applies (i.e. the scheme’s annual report contains a negative or no actuarial intervaluation statement) the trustees must provide an Actuarial Funding Certificate with an effective date within the 12 months period prior to the date on which an application for authorization was made. (i.e. a scheme without any members) to which Section 44 applies an Actuarial Funding

Certificate does not arise. In the latter case, an Actuarial Funding Certificate must be provided within 2 years of the date of approval following the notification which Section procedure.

- under the requirements at 3.3(b), in the case of a scheme to which Section

3.5 It should be noted that in the case of a “small scheme”, i.e. a scheme with less than 100 active and deferred members, the trustees must, as a condition of authorization, in conjunction with those referred to at 3.3 above, comply with Sections 44(Funding Standard), 55(Annual Report), 56(Audited Accounts and Actuarial Valuations), and 59(1B) (Statement of Investment Policy Principles).

3.6 The Authority’s response to the application for authorization will be in writing to the trustees.

3.7 The Authority may revoke an authorization:

- (a) on being satisfied that the conditions of authorisation have not been complied with, or
- (b) where the trustees make a written request for revocation and give reasons for the request.

3.8 With effect from the date of receipt of notification of revocation from the Authority, the trustees of an authorized scheme must cease accepting contributions.

3.9 Revocation is governed by a due process (detailed in Section 150 of the Act) which includes provision for appeal to the High Court.

4. Notification

4.1 Before contributions may be accepted from an employer in another Member State, an Irish scheme must, as well as being authorised (“authorisation” as at 3 above), notify and be approved by the Authority in relation to the specific employer in a specific Member State (“notification”).

4.2 The trustees may:

- (i) engage in the notification procedure (in relation to one or more employers in one or more Member States) at the same time as applying for authorisation, or
- (ii) having been initially authorised, engage in subsequent notification or notifications in relation to an employer or employers in another Member State or States.

4.3 A notification to the Authority must be in writing and signed by all the trustees. While not statutorily required to be used, the Authority has proposed a form (entitled “Approval to accept contributions: Application Form”) which may be used for notification purposes. A copy of this form can be found under the ‘Forms’ section or under ‘Related Articles’ below. This form encompasses the statutory requirements for notification as well as the information required to comply with the Budapest Protocol.

4.4 If the Authority’s form is not used, a notification must be made in writing by the trustees to the Authority and contain:

- (i) the name and location of the employer from whom the trustees propose to accept contributions,
- (ii) the name of any host Member State, and
- (iii) the information listed in the Schedule to the Cross-border Regulations (which can be found under References at the end of this document).

4.5 The notification must be provided to the Authority in English or Irish and the language of the host Member State.

4.6 It should be noted that, on receipt of a notification, the Authority may request further information from the trustees.

4.7 A separate notification must be made in relation to each new employer, and host Member State(s) from which the trustees propose to accept contributions.

4.8 Unless the Authority has reason to doubt the compatibility of the proposed arrangement between employers and employees on the one hand and the scheme on the other, it shall, within 3 months of the initial notification, or on receipt of further information sought, notify in writing the competent authority of the host Member State of the relevant information and the trustees that the approval has been granted in relation to the employer specified in the notification.

4.9 Consistent with the Directive and the Protocol, in reaching its decision at 4.8, the Authority will have regard to:

- the administrative structure of the scheme;
- the financial situation of the scheme;
- the good repute and professional qualifications or experience of the trustees of the scheme (or their advisors),

doubt regarding any one of which may determine the Authority's view.

4.10 While under the legislation, where no notification is received from the Authority by the trustees within the period referred to at 4.8, approval will be deemed to have been granted, the Authority will, as a general rule, communicate its decision to the parties at 4.8.

4.11 If approval is not granted, the Authority will, consistent with the Protocol, inform the trustees accordingly and where it considers appropriate, the proposed host Member State's competent authority.

4.12 Following approval, if granted, the Authority will provide to the trustees information (received from the host Member State's competent authority) regarding:

- the social and labour law relating to occupational pensions under which the scheme must operate in the host Member State,
- any special rules concerning investment that are to apply to the scheme's assets attributable to activities to be carried out in the host Member State, and
- any additional information requirements to be met by the scheme in relation to disclosure of information to members (active and deferred) and beneficiaries.

4.13 Consistent with the Budapest Protocol, the Authority will endeavour to provide the information at 4.12 to the trustees within 2 months from the date on which the Authority has notified the trustees that approval has been granted under 4.8 above.



4.14 Where approval has been granted (or deemed to have been granted), the trustees may begin to accept contributions from the employer on the earlier of:

- (i) 2 months from the date on which Authority approval is granted (or deemed to have been granted) and
- (ii) the date on which the information at 4.12 is passed to it by the Authority

4.15 It should be noted that, irrespective of the timing of the exchange of the information at 4.12, it remains the responsibility of the trustees to ensure compliance with the provisions at 4.12.

4.16 Finally, in relation to the notification process, it might be noted that the Authority may either at its own discretion, or at the request of the host Member State's competent authority, pass information additional to that at 4.12 to the host Member State's competent authority. This is provided for under the Budapest Protocol.

5. Ongoing Compliance (including Funding)

5.1 Following authorisation of an Irish scheme, to conduct cross-border activity and approval of its trustees to accept contributions from a specific employer in another Member State, the Authority will continue to monitor compliance with the statutory requirements in particular:

- the conditions of authorisation at 3.3 and
- the requirements of the host Member State at 4.12

5.2 As indicated at 3.7, the Authority may, subject to a due process, revoke an authorisation on being satisfied that the conditions of authorisation have not been complied with by the scheme. If the Authority becomes aware that the scheme is not complying with the requirements of the host Member State, it may, subject to due process, direct the trustees in writing to act in accordance with the Directive or to cease accepting contributions from the employer.

5.3 As home Member State competent authority, the Authority, as stated in the Budapest Protocol (Section 3.1 entitled ongoing supervision), will be 'responsible for the supervision of the scheme as a whole'.....in accordance with its normal supervisory practices.

5.4 As part of its ongoing monitoring and enforcement of compliance the Authority will, as agreed in the Protocol, engage in dialogue as necessary with the competent authorities of host Member States. (The various circumstances which may give rise to such dialogue are detailed in Part 3 of the Budapest Protocol).

5.5 In relation to funding of an Irish scheme engaging in cross-border activity, the remainder of this section outlines the Authority's approach in light of the Directive, national statutory requirements, and the EU Commission's clarifications of the Directive.

5.6 Article 16 requires an IORP which is engaged in cross-border activity to be fully funded at all times and, in the event of it becoming under-funded, the competent authority of the home Member State is required to intervene in accordance with Article 14.

5.7 In its "Main Conclusions of Meetings on 22 October 2004 and 19 April 2005 on the transposition of the IORP Directive" (MARKT/2520/05-EN on the Commission's website), the Commission has indicated that in the event of an IORP engaged in cross-border activity becoming under-funded at some time after authorisation, the competent

authorities' intervention (under Article 14) does not exclude intervention under Article 16 i.e. a requirement on the IORP to set up a plan to re-establish full funding in due time.

5.8 Irish schemes seeking authorisation to engage in cross-border activity will be required (as at 3 above) to demonstrate compliance with the Funding Standard under Part IV of the Pensions Act.

5.9 Following authorisation, Irish schemes engaging in cross-border activity will be subject to the same funding requirements as (Irish) schemes conducting only domestic business, i.e. rules covering provision of Actuarial Funding Certificates and annual Certification of Compliance with the Funding Standard.

5.10 If an Irish scheme engaging in cross-border activity fails to meet the funding standard, the Authority may, under legislation, withdraw its cross-border authorisation. Were this to occur, the scheme would not be permitted to accept contributions in respect of its member in the other Member State(s) would in effect be forced to wind-up.

5.11 However, in the first instance, where a scheme engaged in cross-border activity becomes under-funded, the Authority will seek a funding proposal. This funding proposal will require Authority approval in all cases including where its term is three years or less.

5.12 In assessing the proposal, the Authority will require evidence that the scheme was being funded on a basis that was expected to maintain funding in accordance with the Funding Standard until the next valuation date. The Authority would not expect to grant approval for a funding proposal if the funding of the scheme had not met this standard.

5.13 The funding test at 5.11 is intended to implement the requirement in Article 16 of the Directive that cross-border schemes be fully funded at all times.

6. The Authority as host competent authority

6.1 The Directive permits a scheme located (i.e. which has its registered office and main administration) in another EU Member State or a non EU Member State which is party to the EEA agreement, to carry out cross-border activities. Effectively the overseas scheme can accept contributions from employers based in Member States other than the state where the scheme is located.

6.2 Where an Irish employer contributes to an overseas scheme in respect of his employees the Authority is the designated host competent authority in respect of those Irish members.

6.3 The primary function of the Authority acting as host competent authority is to ensure that Irish social and labour law and disclosure of information requirements are complied with in respect of the Irish members of the overseas scheme.

6.4 Where an overseas scheme wishes to accept contributions from an Irish employer it will notify its home Member State (state where it is located) of its intention to do so. Unless the home Member State competent authority decides to reject the application, it has three months to notify the Authority of the main characteristics of the scheme, the home Member State of the scheme and the name of the Irish employer who is proposing to contribute to it.

6.5 The Authority as host Member State competent authority has a further two months to inform the home Member State competent authority of Irish social and labour law requirements with which the scheme must comply in respect of its Irish members and of Irish disclosure of information requirements.

6.6 Current Irish social and labour law and Disclosure requirements with which the scheme must comply where it is accepting contributions from an Irish employer in respect of Irish members are:

- Part III of the Pensions Act 1990 as amended, (“the Act”) – preservation of benefits
- Part V of the Act – Disclosure of Information in relation to the scheme and
- Remittance of contributions by employers
- Section 59B of the Act– prohibition on reduction of benefits in payment
- Section 59C of the Act- increases in relation to pensions in payment

Irish Social and Labour Law and Disclosure of Information provisions are set out in more detail in a briefing note which can be found under the Updates section.

6.7 The Pensions Authority will advise the home Member State competent authority in writing of significant changes to Irish social and labour law or disclosure requirements, which it has previously supplied to that home Member State, as soon as is reasonably practical.

6.8 It should be noted that, irrespective of the timing of the exchange of the information at 6.6 and 6.7, it remains the responsibility of the overseas scheme to comply with current Irish social and labour law and disclosure requirements in respect of its Irish members at all times.

6.9 The Authority as host competent authority will monitor compliance by the overseas scheme with Irish social and labour law and disclosure requirements to ensure the overseas scheme complies with these in respect of Irish members. If the Authority becomes aware of any contravention the Authority will report the breach to the home Member State competent authority of the scheme, in the first instance.

6.10 The Authority may give a direction in writing to an employer subscribing to the scheme if it is satisfied that the breach/contravention is continuing even after it has informed the home Member State's competent authority (as outlined in 6.9):

- To take or refrain from taking the steps outlined in the direction, or
- To cease making contributions to the scheme

6.11 Any direction given by the Authority is governed by due process detailed in Section 152 of the Act which includes provision for appeal to the High Court by the employer against the direction.

7. Miscellaneous Matters

7.1 An Irish scheme must be authorised (see Chapter 3) and each specified employer in a specific Member State (see Chapter 4) must be notified and approved by the Authority. It is the responsibility of the trustees of an Irish scheme to ensure that the scheme is complying with the social and labour laws and any additional information requirements and investment rules of the Host Member State.

7.2 The Authority may give a direction in writing to the trustees subscribing to the scheme if it is satisfied that the trustees are not operating the scheme consistent with or compatible to, the social and labour law of the host Member State to refrain from taking the steps outlined in the direction, or to cease making contributions to the scheme.

7.3 Any direction given by the Authority is governed by due process detailed in Section 152 of the Act, which includes provision for appeal to the High Court by the employer against the direction.

References:

1. Section 37 of the Social Welfare Law Reform and Pensions Act, 2006
2. Occupational Pension Schemes (Cross-Border) Regulations, 2006 (S.I. No. 292 of 2006)
3. Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision (IORPs Directive)
4. CEIOPS Budapest Protocol

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