

Newsletter



European Federation
for Retirement Provision

A TIMETABLE FOR IORP DIRECTIVE MID-2006 TO 2008 - COMMISSION / CEIOPS

2006	<p>28.06.2006: Commission launched infringement proceedings UK and Slovenia referred to European Court of Justice for non-notification</p> <p>12.10.2006: Commission launches infringement proceedings</p> <ul style="list-style-type: none"> - Czech Republic, Hungary, Poland were sent Formal Notice for failure to implement - Italy referred to European Court of Justice for non-notification <p>Commission to</p> <ul style="list-style-type: none"> - begin assessing real implementation by Member States begins - will write to each Member State - request correlation table - issue updated interpretative guidelines (i.e. revision of the 'Main Conclusions' document) - consider further infringement proceedings (mid-December 2006) - possibly refer Belgium, Cyprus, France to European Court of Justice for non-notification (mid-December 2006) <p>CEIOPS to discuss on 14-15.12.2006</p> <ul style="list-style-type: none"> - asset pooling - definitions of "full funding" and "ring-fencing" - role of custodians / depositaries - investment rules - insolvency protection
2007	<p>Commission to</p> <ul style="list-style-type: none"> - begin drafting national implementation reports for discussion with Member States - possible further infringement proceedings against individual Member States <p>CEIOPS to</p> <ul style="list-style-type: none"> - finalise reports on "full funding" and "ring-fencing" - role of custodians / depositaries - insolvency protection - report on Member State implementation - consider extending optional application of Dir to other regulated financial services institutions – ongoing
2008	<p>Commission review of effectiveness of Directive begins including</p> <ul style="list-style-type: none"> - solvency review specifically for IORPs - assessment of desirability of extending optional application of the IORP Directive to other financial services providers - must cover following aspects at least <ul style="list-style-type: none"> o calculation of technical provisions – any need for harmonisation o cross-border operation o operation of investment rules o adaptation of national supervisory systems o use and role of depositaries <p><i>then decide if IORP Directive needs amending...</i></p>

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PORTABILITY

IS IT THE EU LOGJAM THAT IS ABOUT TO BREAK?

If the European Commission had hoped that its draft portability directive – launched over a year ago on October 2005 - would have been well on the way to final adoption by now, it must be concerned that the first stage of the legislative procedure is only likely to be completed in spring 2007. Positive progress on the draft portability directive is currently hard to discern.

Both Council and the European Parliament must agree to the proposal for it to become law under the EU's 'codecision' process. The current lack of consensus is beginning to resemble a 'Catch 22' situation where the European Parliament (EP) will not work on the file until the Council position is clearer and Council cannot finalise its view until the EP has delivered its opinion. Only when Council formally reacts to an EP proposal will the procedural clock begin to tick.

Despite **Council** opacity, it is clear that it has put a lot of hard work into the draft law. From autumn 2005 to summer 2006, it conducted a detailed but ultimately inconclusive article by article review of the Commission's text. The Finnish Council presidency, building on the work of its UK and Austrian predecessors, has now shifted to drafting what could be a **completely new version** of the directive. This could involve **dropping the transferability element**. If this were to happen, it would leave a '**rump directive**' based on **acquisition and preservation**.

Due to Council secrecy on this issue, it is not possible to attribute particular positions to individual Member States on the basis of the censored documentation released. But we understand that some Member States are concerned that the Commission text would effectively **consign to the dustbin of history the role of employers and employees** – "social partners" – in organizing supplementary pensions in those Member States.

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- **IORP Directive**
- **Comment: Portability Directive**

These Member State seem to be considering all sorts of opt-out for "social partners". Some Member States prefer a more transfer based portability directive, seeking elimination or downgrading of acquisition and preservation provisions. Other Member States take the opposite approach, they want the transfer element put on the side line because they think their national systems would already sufficiently comply with an acquisition and preservation based directive.

The need for Council unanimity on this measure means that the EP must gauge carefully any proposed changes it puts to Council. But the absence of emergent consensus within Council makes this difficult. In addition, the same national concerns voiced behind closed doors in Council are echoed within the EP, threatening to cut across political groupings. Scandinavian MEPs want arrangements by social partners to be above any portability law. German MEPs want non-externally funded arrangements out of the scope, Dutch MEPs want them in.

By summer the three EP committees working on the draft directive had generated around 300 proposed amendments between them. Apart from those of the Women's and Equal Opportunities Committee, work by the Economic and Monetary Affairs Committee and by the Employment and Social Affairs Committee – which has the lead in this matter – **no real discussion of the proposals** has occurred.

If Council really does push for a radical redraft of the Commission proposal, the 300 proposed amendments tabled to date could well become obsolete and the EP may need to begin its work afresh.

The practical effect of this uncertainty is that the EP is unlikely to complete its first reading of the draft directive before February 2007.

EFRP

GENERAL ASSEMBLY OF THE MEMBERS

On 27 October the EFRP held its six-monthly General Assembly of the Members. Organised by EFRP French Member Associations (AFG, AFPEN and CTIP) this successful event focussed on how the EFRP should evolve in the face of new challenges such as EU-enlargement and new forms of supplementary pension provision.

There was only one change in the current **Board of Directors** as Director **Nora FINN** (IE - IAPF) decided not to renew her candidature after 4 years of highly valued service. In her place the Members elected **Patrick BURKE** (IE). He is Head of Investment Development at Irish Life Investment Managers and Vice-Chairman of the Irish Association of Pension Funds (IAPF).



Nora FINN



Patrick BURKE

As of 27 October 2006, the EFRP Board of Directors is as follows:

- **Jaap MAASSEN**, Chairman (Netherlands)
- **Angel MARTINEZ-ALDAMA**, 1st Vice-Chairman (Spain)
- **Peter LINDBLAD**, 2nd Vice-Chairman (Sweden)
- **Wil BECKERS** (Netherlands)
- **Christian BÖHM** (Austria)
- **Patrick BURKE** (Ireland)
- **Robin ELLISON** (UK)
- **Anne SEIERSEN** (Denmark)
- **Klaus STIEFERMANN** (Germany)
- **Vincent VANDIER** (France)

IORP DIRECTIVE

ACTIVITY AT EU LEVEL BEGINS TO INTENSIFY

The **European Commission** has now moved up a gear in its infringement proceedings against **Member States on implementation** of the IORP Directive. Until recently, its **focus** was on getting all Member States **to notify their laws** to it – regardless of quality (Court actions have been launched against **Italy** and the **UK** – an action against **Slovenia** appears to have been dropped).

It has **now** switched to assessing the **quality of implementation**. It has sent letters of formal notice to the **Czech Republic, Hungary** and **Poland** for failure to implement the substance of the directive. The Commission has said that these countries appear to take the view that given the fact that there are currently no pension institutions in their

IORP DIRECTIVE - IMPLEMENTATION AND INFRINGEMENT – WHERE ARE WE?

Member State	"fully notified"	Non-Notification			Failure to implement			Comment
		Stage 1 Formal Notice	Stage 2 Reason. Opin	Stage 3 Referral ECJ	Stage 1 Formal Notice	Stage 2 Reason. Opin	Stage 3 Referral ECJ	
Austria	yes	-						
Belgium	nothing	05.12.2005	04.04.2006					Possible referral to ECJ mid-December 2006?
Cyprus	nothing	05.12.2005	04.04.2006					Possible referral to ECJ mid-December 2006?
Czech Republic	yes	05.12.2005	04.04.2006		12.10.2006			Commission says MS only implemented cross-border aspects
Denmark	yes	-						
Estonia	yes	no						
Finland	yes	05.12.2005	04.04.2006					Ended: 28.06.2006
France	partly	05.12.2005	04.04.2006					Possible referral to ECJ mid-December 2006?
Germany	yes	-						
Greece	yes	-						
Hungary	yes	-			12.10.2006			Commission says MS only implemented cross-border aspects
Ireland	yes	-						
Italy	nothing	05.12.2005	04.04.2006	12.10.2006				No case number as yet.
Latvia	yes							
Lithuania	yes	05.12.2005	04.04.2006					Ended?
Luxembourg	yes	-						
Malta	yes	05.12.2005						Ended?
Netherlands	yes	05.12.2005						Ended?
Poland	yes	-			12.10.2006			Commission says MS only implemented cross-border aspects
Portugal	yes	05.12.2005	04.04.2006					Ended?
Slovakia	yes	05.12.2005	04.04.2006					Ended: 28.06.2006
Slovenia	yes	05.12.2005	04.04.2006	28.06.2006				Proceedings reportedly withdrawn
Spain	yes	05.12.2005	04.04.2006					Ended: 28.06.2006
Sweden	yes	05.12.2005						Ended?
United Kingdom	partly	05.12.2005	04.04.2006	28.06.2006				registered as Case C-367/06 on 07.09.2006

Notes: Infringement procedure (see Article 226 EC Treaty):

- Starts with Formal Notice under which the Commission signals that it believes a Member State has infringed its obligations to the EU (Stage 1). Member State usually has 2 months to respond.
- Failure by a Member State to respond properly to the Formal Notice is likely to trigger issue of a Reasoned Opinion in which the Commission explains why it believes the Member State to be infringing (Stage 2). Member State usually has 2 months to respond.
- Failure by Member State to respond adequately to Reasoned Opinion is likely to trigger proceedings before the European Court of Justice (Stage 3).

Other points

- The information in the above table is based on collated European Commission information published in different locations:
 - http://ec.europa.eu/internal_market/finances/docs/actionplan/index/transposition_en.pdf
 - various Press Releases on infringement
 - Commission Secretariat General's table of infringement proceedings http://ec.europa.eu/community_law/eulaw/index_en.htm#infractions
- Infringement for non-notification is a relatively minor offence (and subsequent notification by a Member State Failure should be enough to result in withdrawal of proceedings). Failure to implement is the most onerous breach of Community law.
- The status "fully notified" involved in parts a 'self assessment' exercise by Member States themselves.

countries falling under the scope of the Directive, they are only obliged to transpose the Directive to the extent that pension institutions established in other Member States should be allowed to provide their services in their countries.

The Commission takes the opposite view: all Member States must transpose the Directive in its entirety. This means putting in place a legal framework to enable pension institutions to be set up even though they do not exist currently in those

Member States. The countries concerned have until mid-December to respond to the letter of formal notice before the Commission issues them with Reasoned Opinions – the final step before starting Court proceedings.

In order to further reduce the scope for misunderstanding, the Commission should now finally **issue updated guidelines** on what the IORP Directive requires (and does not require). These have been due since late 2005.

At long last, **CEIOPS**, the Level 3 Lamfalussy Committee in which Member State supervisors work together, has begun to fill in more detail in the Appendices to the Budapest Protocol. The Protocol not only contains rules for cross-border supervisory cooperation between national competent authorities required under the IORP Directive but the Appendices contain information on legal forms of IORPs across the EU and since early October.

In September CEIOPS' Occupational Pensions Committee also updated its work programme for IORPs.¹ This outlines what it has done over the last 12 months and lists actions for the near future. The

programme is part of CEIOPS "Regular Reporting" (See also table, p. 1.).

EIOPC is the Level 2 Lamfalussy Committee in which Member State regulators work together. On 5 April 2006, EIOPC decided not to include a solvency review for IORPs as part of the current Solvency II exercise for insurance companies. It was agreed that the question would be revisited in 2008. However, the minutes of that meeting were only recently published after the EIOPC meeting of 6 July 2006. The minutes show the extent of Member State disagreement about how IORPs should be dealt with.²

COMMENT: PORTABILITY - GENERAL UNHAPPINESS AND A DIFFICULT DILEMMA

*The situation in Brussels is highly fluid and a lot is going on behind closed doors. In Council, there appears to be almost universal discontent with the draft directive both from a policy and technical perspective. In mid-November Council should finalise a first draft of a counter-proposal to the Commission's text. But Member States seem to find themselves in a **dilemma**:*

- *Some appear to be pushing for a 'principle-based' directive in the hope that vaguer wording increases the scope for arguing compliance at a later date. But a principle-based law risks handing over the keys of national social and labour policy to the EU because it creates large discretionary spaces for the Commission and the European Court of Justice to revisit the directive at a later date.*
- *The alternative is a very precisely worded and detailed directive, but this threatens to become complex and too prescriptive – so invasiveness occurs in another way.*

*This **dilemma** applies regardless of whether Member States decide to push for a **more preservation** or a **more transfer based directive**. There are **two ways out of the dilemma**:*

- *One is to go for a '**narrow band directive**' setting clear-cut, EU-level rules on strictly defined **matters**. These contain no normative, discretionary or mysterious terminology – so all references to 'fair adjustment', 'fair treatment' or 'transfers of rights' should be deleted. Around these core rules, would be national options - each Member State remaining free to add on (or not) national rules, and relying exclusively on its own standards in the light of its own national systems and priorities.*
- *The other way out is one that Member States have been fighting shy of. Member State 'failure' to achieve consensus to date – like the 'failure' of the social partners in the run up to this draft directive to set their own EU-wide rules - should not be seen as demonstrating the need for EU intervention. Quite the contrary: **lack of consensus should be seen as practical proof of EU-wide rejection** of the need for any EU level rules.*

*The first approach may seem too modest, in our view it is realistic. If the second route is taken it must not be allowed to mean the end of the mobility project. The Commission must press forward, for example, by means of a **Communication**, setting out approaches on how different types of supplementary scheme might be linked up both within and between Member States. This could also provide guidance on by identifying examples of good practice already to found across the Member States.*

*Whichever route is taken, any EU mobility initiative **must reinforce the social and economic foundations of workplace pensions systems – not undermine them.***

¹<http://www.ceiops.org/media/files/workinggroups/RegReportingOPC.pdf>

² http://ec.europa.eu/internal_market/insurance/docs/2006-market-docs/2516-06-minutes_en.pdf