

Newsletter



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The very best
Season's Greetings
from the EFRP!

We wish you a
harmonious 2007!

PORTABILITY

COUNCIL SEES PENSION PORTABILITY WITHOUT TRANSFERS

On 1 December, the **Finnish Presidency** of the European Union concluded its treatment of the draft portability directive with a public, **Council** debate on whether the draft directive should be primarily about preservation and vesting, and whether the transfer elements should go. The outcome of this debate suggested that the transfer element should be ditched.

Although not unexpected, the implications of the debate are important. It will send a strong political signal both to the European Parliament (EP) and the European Commission and influence their next steps. The much delayed EP opinion due in spring 2007 (see below) will have to take into account that Council is unlikely to welcome any proposal involving transfer. The Commission too has scope to revise or withdraw its proposal until Council acts formally responding to the EP opinion.

So signals that the Commission would be willing to accept loss of the transfer element mean that its expected redraft may well pre-empt Council's formal position. Much will also depend on the EP's readiness to go the same route. The EP has showed little appetite for dealing with this directive and, on the basis of the number of amendments generated, has also shown relatively little interest in transfers, so there would seem to be a good chance that Article 6 of the draft directive will disappear or be reduced to a symbolic option.

However, Council still has much work to do before it can finalise a draft position. The incoming German Presidency, beginning on 1 January 2007, is likely to use the same question-and-answer approach as adopted by the Finnish.

One issue that we think will come to the fore is how the directive should be phased in. The current favourite, that it should apply to "**new claims**" only, seems to enjoy

wide support partly because everyone seems to interpret "new claims" differently. Council seems to have conclusively given the thumbs down to the Commission's concept of "**fair adjustment**", preferring "**fair treatment**" instead. Member States seem to think that this will kill off any risk that it could imply compulsory indexation. But whereas the Commission "fair adjustment" proposal was at least limited to ensuring that the treatment of one group of people would be linked to the treatment of another, the emerging fair treatment approach is much more open.

The EP has yet again **postponed treatment** of the draft directive. Partly, this reflects the need to synchronise its procedural treatment with that of Council. But it also reflects the difficulty in creating an EP majority on this matter as a surprising mix of views has emerged, cutting across party lines.

It now seems unlikely that the EP will adopt an opinion before March or April 2007. In the light of the likely Council attitude towards transfers, the Rapporteur will have to sound out MEPs to see if they are happy to go the same way. It is unclear as to how passionate MEPs are about transfers. As the total number of transfer related amendments tabled amount to around 10% of all EP proposals tables.

To watch is a recent initiative by a small group of MEPs calling upon the Commission to withdraw the draft directive entirely and replace it with a recommendation.

EFRP

NEW BOARD MEMBER

On 13 December, the EFRP Board of Directors underwent a further change (see Newsletter 4th edition) as Vincent VANDIER (AFPEN - FR) stood down in favour of his compatriot Pierre BOLLON (AFG - FR) who was co-opted by the Board. As of 13 December 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)
- **Pierre BOLLON** (France)
- **Patrick BURKE** (Ireland)
- **Robin ELLISON** (UK)
- **Anne SEIERSEN** (Denmark)
- **Klaus STIEFERMANN** (Germany)



Vincent VANDIER



Pierre BOLLON

WHITE PAPER ON INVESTMENT FUNDS

REFORM APPROACH UNVEILED

On 15 November, the European Commission issued its "**White Paper on enhancing the Single Market Framework for Investment Funds**".¹

The Paper refers to the "front line" challenge of transforming savings into predictable and secure income for investors in retirement, i.e. pensions. It notes that the "race to develop those products is on."

Although a fundamental overhaul of the UCITS Directive will not occur the process of review will continue and only targeted amendments are envisaged. These will, for example, streamline cross-border aspects (e.g. as to marketing and management arrangements).

Given the general silence of IORP Directive on how fund assets are to be held, the suggestions in a preparatory document preceding this Paper was that reform of the UCITS Directive to enable asset pooling should also be applied to the IORP Directive were somewhat premature² as the IORP Directive is silent on such issues. Nevertheless, discussion of fund structuring arrangements and

¹ COM(2006)686, downloadable at:

http://ec.europa.eu/internal_market/securities/docs/ucits/whitepaper/whitepaper_en.pdf

² See in particular the call to CEIOPS to act regarding IORPs in the "Expert Group on Investment Fund Market Efficiency: Report to the Commission"

(http://ec.europa.eu/internal_market/securities/docs/ucits/reports/efficiency_en.pdf) and the "Appendices to the report on Investment Fund Market Efficiency"

(http://ec.europa.eu/internal_market/securities/docs/ucits/reports/annex_efficiency_en.pdf) of July 2006.

their tax implications is of interest to pension funds – particularly as CEIOPS seems to have taken an interest in the asset pooling issue.

GREEN PAPER ON LABOUR LAW MODERNISATION

WILL FORTHCOMING FLEXICURITY DEBATE REOPEN PORTABILITY ISSUES?

On 22 November, the European Commission issued its Green Paper "**Modernising labour law to meet the challenges of the 21st century**".³

This Green Paper considers whether there is need to provide more EU-harmonised concepts in the field of labour law such as that a worker and being self-employed and whether there is need for a universal concept of worker that could be used for a universal set of basic rights.

Currently the approach to these concepts is 'subjective' with each Member State defining in its own terms what a worker is. These definitions are intended to underpin a possible new legal framework for workers' rights protecting acquired rights across job transitions – both domestic and cross-border.

This labour law Green Paper will be followed in **June 2007** by a **Green Paper on flexicurity**. Its aim will be to **flesh out an EU concept of flexicurity**.

Broadly, the idea of flexicurity is to provide a framework that would reduce a worker's protection in relation to a particular employer whilst at the same time putting in place measures which ensure that the individual can find a new job quickly and that certain rights (e.g. pension rights) can be taken across jobs. The idea is not just that employers can dismiss workers more easily, but that they will also be more ready to employ workers. Job change should be built into the fabric of social protection so that an individual will feel secure that even in the face of major career changes – including breaks – his or her acquired social rights will not disappear with each move.

There has been some low profile discussion in Council during the Austrian Presidency on this issue. Member States whose systems will receive

particular attention are **Austria, Denmark, the Netherlands and Sweden**, which already said to embody elements of flexicurity.

Potentially, the **flexicurity debate has major implications for work-linked pension systems**. It may mean revisiting the transfer aspects of portability as well as addressing issues avoided in the discussion of the portability directive – the technical treatment of cross-border job moves and switches between employed and self-employed statuses. It **may even further fudge distinctions between Second and Third Pillars**. However, as the portability debate shows, in policy areas such as this where each Member State has a national veto progress can be slow to imperceptible.

The consultation is open until 31 March 2007.

IORP DIRECTIVE

IMPLEMENTATION

The biggest development is that **Belgium and Cyprus** have fully notified their implementing laws to the Commission.

We also understand that Member State supervisors are currently dealing with around **30 notifications of cross-border activity**. Although most are essentially clarificatory - seeking to establish whether a particular arrangement is cross-border activity or not - a good core of around 6 reportedly involve true cross-border pension provision arrangements.

The two parallel sets of **infringement proceedings** continue. The Court proceedings launched by the Commission against the UK and Italy for not fully notifying national implementing law remain in place (see Newsletter 4th Edition). However, the Italian case still does not have a registration number (which could signify that matters are about to be resolved).

The Commission's DG Markt is still finalising its **interpretive guidelines** on the IORP Directive. The revised text is now expected to be published early in 2007. These guidelines will then replace the 'Main Conclusions' document of August 2005. We understand that, inter alia, the Guidelines will clarify the application of the Directive to various cross-border scenarios - including job-moves within multinational groups.

³ COM(2006) 708, downloadable at:

http://ec.europa.eu/employment_social/labour_law/docs/2006/green_paper_en.pdf

EURO FINANCE WEEK

EUROPEAN PENSIONS FUNDS CONGRESS

On 15 November 2007, as part of the **9th Euro Finance Week** in Frankfurt, the **Maleki Group**, in partnership with EFRP, organised the very first **European Pension Funds Congress**. This followed on from the **CEIOPS 2006 conference** the day before (see below).

The Congress covered the following topics

- **private pensions in the EU-10** – this outlined similarities and differences within the new Member States, progress made and challenges faced. It also identified similarities and differences between the 'old' and the 'new' Member States
- **pensions and financial innovation** – this considered issues such as the need for cross-sectoral consistency between different types of financial services provider,
- **risk-sharing in workplace pensions** – this examined the role of financial education and default rules within 401k plans, went beyond a simplistic DB-v-DB model to consider a variety of risk sharing arrangements including e.g. collective risk sharing and 'super trusts'.
- towards **pan-European pension vehicles** – this session considered the progress made to date under the IORP Directive in cross-border pension provision

Many presentations are downloadable from the EFRP website⁴ (all should be available shortly).

This was a **well-attended, lively conference**. The EFRP intends to repeat the exercise and continue its partnership with the Maleki Group in **2007**.

On 14 November 2006, as part of its open dialogue policy, **CEIOPS** held its **2006 conference** at which industry experts were invited to give their views. The main topics covered were:

- impact of **Solvency II** on the industry from a strategic viewpoint
- challenges for undertakings and supervisors in reducing **operational risk**
- life after the **IORP Directive**: the future of pensions on a European level
- how to enhance **cross-sector consumer protection** in the fields of savings products

Many of the presentations are downloadable from the CEIOPS website.⁵ All presentations should be available shortly.

WITHHOLDING TAX ON DIVIDENDS

ECJ JUDGEMENTS

There have been a number European Court of Justice (ECJ) judgements on cross-border taxation recently. They include the two following cases.

On 14 December 2006, the ECJ handed down a promising judgement in *Denkavit*⁶ on the tax treatment of dividend payments. The case concerned French withholding tax on dividends due to a Dutch parent company from its French subsidiaries. The ECJ found the French rules, which did not impose a similar withholding tax requirement on similar payment from a French subsidiary to a French parent company, infringed Treaty rules on freedom of establishment (Arts 43 and 48 EC Treaty).

If the ECJ's logic can also be extended to withholding tax on dividends paid cross-border to institutional investors, then this would be benefit pension funds. However, it remains to be seen whether the Court will apply the same reasoning to an issue concerning free movement of capital (Art 56 EC Treaty) from one relating to parent-subsidiary cases.

Somewhat less promising was the ECJ's judgement of 14 November 2006 in *Kerckhaert and Morres*⁷ which did concern free movement of capital and which effectively recognised that there could be losses which were not due to discriminatory treatment by an individual Member State but arose from the exercise in parallel by two Member States of their fiscal sovereignty.

⁵ <http://www.ceiops.org/content/view/27/31>

⁶ Case C-170/05, *Denkavit Internationaal BV and Denkavit France SARL v Ministre de l'Économie, des Finances et de l'Industrie*, judgment downloadable at <http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79938785C19050170&doc=T&ouvert=T&seance=ARRET>

See also the ECJ press release at

<http://www.curia.europa.eu/en/actu/communiqués/cp06/aff/cp060102en.pdf>

⁷ Case C-513/04, *Kerckhaert and Morres v Belgium*

downloadable at [http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0513:EN:HTML)

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0513:EN:HTML>

See also the ECJ press release at

<http://curia.europa.eu/en/actu/communiqués/cp06/aff/cp060092en.pdf>

⁴ <http://www.efrp.org/extranet01/extra.asp>