

Occupational pension schemes with cross-border transfers

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In a legislative mixed bag, the Government has approved a set of urgent measures incorporating into the Spanish legal system various European Union directives in the field of pension schemes and funds, amongst other. This analysis highlights the new developments affecting occupational pension schemes; that is, those schemes where the undertaking acts as sponsor and the workers act as members or beneficiaries, along with the cross-border transfers of this kind of pension schemes and of their appropriate pension funds.

1. Below follows an analysis highlighting changes affecting occupational pension schemes - those in which the undertaking acts as a sponsor and the workers as members or beneficiaries - introduced by 'Royal Decree-Law 3/2020, of 4 February, on urgent measures transposing into Spanish law various European Union directives in the fields of: public procurement in certain sectors; private insurance; pension schemes and funds; taxation and tax litigation'.

Specifically, Art. 212 (Book II, Title II) of the aforementioned Royal Decree-Law 3/2020 amends the Recast Version of the Pension Schemes and Funds (Regulation) Act (Royal Legislative Decree 1/2002 of 29 November, PFPP) to partially transpose 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. Its predecessor, Directive 2003/41, had established a minimum harmonisation in the cross-border activities of these schemes and funds, which represented a first step on the way to an internal market for occupational retirement provision organised on a European scale that is still considered fundamental in addressing the ageing

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of the European society. This other Directive 2016/2341, repealing the previous one, introduces significant changes regarding, among other aspects of interest, the procedure for the start of cross-border activity by institutions for occupational retirement provision (IORPs), cross-border transfers of occupational pension schemes and information to be given to prospective members, members and beneficiaries.

2. A first amendment concerns the nomenclature, since, by virtue of a new wording of Art. 37 of the Pension Schemes and Funds (Regulation) Act, any institution authorised or registered as such by a competent authority of a Member State under Directive 2016/2341 shall be considered an IORP. In the case of Spain, these IORPs will be the institutions regulated in Part IV of said Act, intended for the development of occupational pension schemes. Any undertaking or entity, natural or legal person, acting as an employer or self-employed worker or in any combination thereof, which offers a pension scheme or makes contributions to an occupational pension scheme, shall be considered a sponsoring undertaking. For this purpose, the host Member State is that whose 'social and labour law' relevant to the field of occupational pension schemes is applicable to the relationship between the sponsoring undertaking and the members or beneficiaries. And, lastly, operating a pension scheme is considered a cross-border activity when 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.

In view of the above, we should specify that reciprocity is permitted. Thus, IORPs authorised and registered in Spain may operate occupational pension schemes subject to the social and labour law of other Member States. However, IORPs authorised or registered in other Member States may also operate occupational pension schemes subject to Spanish social and labour law. Two initial clarifications have to be made in light of the new Art. 38 of the Pension Schemes and Funds (Regulation) Act: firstly, the rules on pension funds' investments laid down in the legislation of the pension fund's home Member State shall be deemed to apply and, secondly, IORPs carrying out cross-border activities, in respect of members and beneficiaries, shall be subject to the information requirements imposed by the authorities and the legislation of the host Member States on pension funds authorised in their territory.

3. *If a pension fund authorised and registered in Spain operates an occupational pension scheme sponsored by one or more undertakings subject to the social and labour law of another Member State, a series of requirements must be met, as established in the new Art. 40 of the Pension Schemes and Funds (Regulation) Act, namely - and among other things - that: a) the IORP notifies the Directorate-General for Insurance and Pension Funds (DGSFP) of the intention to operate the pension scheme. The information provided when effecting the notification must include the name of the host Member State(s), which shall, where applicable, be identified by the sponsoring undertaking, the name and the location of the main administration of the sponsoring undertaking and the main characteristics of the pension scheme to be operated for the sponsoring undertaking; b) the Directorate-General for Insurance and Pension Funds, within three months of receiving all the information referred to, communicates said information*

to the competent authority of the host Member State and informs the IORP accordingly; (c) the competent authority of the host Member State, within six weeks of receiving the information referred to, informs the competent authority of the home Member State, of the requirements of social and labour law relevant to the field of occupational pension schemes under which the pension scheme sponsored by an undertaking in the host Member State must be operated and of the information requirements of the host Member State which shall apply; and (d) on receiving the communication referred to, or if no communication is received from the Directorate-General for Insurance and Pension Funds on expiry of a six-week period, the fund may start to operate the pension scheme by virtue of express resolution of approval of the fund's 'control' committee or, failing that, by the IORP.

Where the employment relationships of a sponsoring undertaking or group of sponsoring undertakings are subject to *different national laws* insofar as they have employees in different Member States who may join the pension fund, as many pension schemes as there are host Member States shall be identified for the purposes of this regulation. However, a single scheme, comprising different sub-schemes, corresponding to the different host Member States, may be considered if the competent authorities of the host Member States do not object. In addition, for groups of workers in an undertaking, different pension schemes subject to the social and labour law of the same Member State and operated by a pension fund or by different pension funds may be identified.

Furthermore, if the *development of occupational pension schemes* subject to the social and labour law of other Member States is carried out by pension funds authorised and registered in Spain, Art. 41 provides specific rules. Without prejudice, where appropriate, to the existence of bodies or agencies for the representation or participation of undertakings and employees set up by an agreement or in accordance with the custom or legislation of the host Member State to monitor the operation of the scheme and relations with the IORP and, through it, with the competent Spanish authority, in such cases, a control committee need not be set up for the scheme.

The rules and limits on investments and management and deposit fees contained in the Pension Schemes and Funds (Regulation) Act and in its implementing regulations applicable to pension funds authorised and registered in Spain shall apply. It should be noted that the assets of the pension fund are not liable for the debts of the scheme sponsors. However, the pension scheme account may be moved to another IORP authorised in any Member State, for which purpose the procedure for cross-border transfers governed by Art. 50 of the Pension Schemes and Funds (Regulation) Act applies.

Lastly, Art. 43 of the aforementioned law regulates the implementation of pension *commitments subject to Spanish legislation through IORPs authorised in other Member States*. In this regard, in order to implement the pension commitments arising from an employment relationship subject to Spanish legislation, membership of an IORP authorised in other Member States will require the sponsorship and formalisation of an occupational pension

scheme from among those regulated by this piece of legislation, albeit with the nuances provided for in this provision.

4. Art. 44 regulates the *operation of occupational pension schemes subject to Spanish social and labour law within pension funds authorised in other Member States*. In this case, before the pension scheme is operated within the pension fund authorised in another Member State, the procedure for communication between the pension fund and the authorities of the fund's home Member State and Spain as host Member State must be completed. In order to initiate the procedure, the pension fund must notify its competent national authority of the intention to operate the scheme. This notification must include, at least, information identifying Spain as the host Member State, the sponsoring undertaking(s), the location of the main administration of the sponsoring undertaking(s) and the main characteristics of the pension scheme. The information must also include the identification of the pension fund representative in Spanish territory. Once the competent authority of the fund's home Member State has forwarded this information to the Directorate-General for Insurance and Pension Funds, that body shall, within six weeks of receiving the information, inform the competent authority of the pension fund of the provisions of Spanish social and labour law under which the pension scheme must operate and of the rules on information to members and beneficiaries of occupational pension schemes required from pension funds authorised and registered in Spain, *inter alia*.

Lastly, the pension scheme may be operated within the pension fund once the competent authority of the pension fund's home State forwards to the pension fund the above information issued by the Directorate-General for Insurance and Pension Funds, or the above-mentioned period of six weeks has elapsed without the pension fund having received any communication. In any event, an occupational pension scheme subject to Spanish law operated by a pension fund authorised in Spain may be moved to an IORP authorised in another Member State by transferring its account to that Member State, for which purpose the cross-border transfer procedure regulated in Art. 50 of the Pension Schemes and Funds (Regulation) Act shall apply.

In the case of the *development of occupational pension schemes* subject to Spanish social and labour law operated by IORPs authorised in other Member States, Art. 45 of the Pension Schemes and Funds (Regulation) Act stipulates that the rules on pension fund investments laid down in the legislation of the pension fund's home Member State shall apply. As regards the rights and obligations to provide information to members and beneficiaries of pension schemes subject to Spanish law operated by pension funds authorised in other Member States, the rules laid down by the aforementioned Act on information rights and obligations in occupational pension schemes shall apply. The scheme's control committee shall ensure that the pension fund managers comply with the reporting requirements. Lastly, it is provided that such type of schemes may be moved to another IORP authorised in any Member State, for which the cross-border transfer procedure will apply.

5. Lastly, and perhaps one of the most novel aspects, *cross-border transfers*, to whose regulation the Pension Schemes and Funds (Regulation) Act devotes a new chapter 4 in Part X.

As a general rule, and in accordance with Art. 49 of the above-mentioned Act, *an IORP authorised or registered in a Member State may transfer all or part of the obligations, technical provisions and other obligations and rights of a pension scheme operated by it, as well as the appropriate assets or their cash equivalent, to a receiving IORP authorised or registered in another Member State. A partial cross-border transfer of an occupational pension scheme subject to Spanish social and labour law may be carried out in accordance with the conditions laid down by law for the operation of an occupational pension scheme by several pension funds in joint sponsorship schemes on the occasion of the separation of the sponsoring institutions or when the scheme is split into two or more schemes as a result of capital transactions.*

To this end, it should be specified that: (a) the costs of the transfer shall not be borne by the remaining members and beneficiaries of the transferring IORP or by the members and beneficiaries of the receiving IORP; (b) the transfer shall be subject to prior approval of a majority of the members and a majority of the beneficiaries affected or, where applicable, of a majority of their representatives and, in addition, where applicable, shall require the approval of the sponsoring undertaking, in accordance with the applicable national legislation; (c) the transferring IORP shall make information on the conditions of the transfer available to the members and beneficiaries concerned and, where applicable, their representatives, in good time before applying for authorisation of the transfer by the competent authority of the receiving IORP's home Member State; and (d) such information shall include information on the transfer of personal data of the members and beneficiaries concerned and the new data controller.

In the case of an occupational pension plan subject to Spanish social and labour law, prior approval must be granted by resolution of the pension scheme's control committee with the majority stipulated in its specifications for changes of manager or depositary and for the movement of the scheme to another fund, and must include the favourable vote of at least half of the representatives of the members. For this purpose, the members of the pension scheme's control committee who jointly represent members and beneficiaries shall be counted as representatives of members.

In the case of *cross-border transfers from an IORP authorised and registered in Spain to an IORP authorised or registered in another Member State*, Art. 50 of the Pension Schemes and Funds (Regulation) Act, already cited, contains specific rules. Thus, such a transfer must be authorised in advance by the competent authority of the home Member State of the receiving IORP, after obtaining the authorisation of the Directorate-General for Insurance and Pension Funds. The application for authorisation of the transfer shall be submitted by the receiving IORP to the competent authority of its home Member State and shall contain, inter alia, the written agreement between the transferring and the receiving IORPs setting out the conditions of the transfer, a description of the main characteristics of the pension scheme, a description of the liabilities or technical provisions to be transferred, and other obligations and rights, as well as corresponding assets or cash equivalent thereof, an identification of the transferring and receiving pension funds, an identification of the undertaking sponsoring the scheme, evidence of the prior approval and, in short, where applicable, the name of the Member State

whose social and labour law relevant to the field of occupational pension schemes is applicable to the pension scheme concerned.

For its approval, the Directorate-General for Insurance and Pension Funds shall assess whether, in the case of a partial transfer of the pension scheme's liabilities, technical provisions, and other obligations and rights, as well as corresponding assets or cash equivalent thereof, the long term interests of the members and beneficiaries of the remaining part of the scheme are adequately protected; whether the individual entitlements of the members and beneficiaries are at least the same after the transfer, and whether the assets corresponding to the pension scheme to be transferred are sufficient and appropriate to cover the liabilities, technical provisions and other obligations and rights to be transferred, in accordance with the applicable rules in Spain. That Directorate-General has eight weeks - from receipt of the application forwarded by the competent authority of the receiving IORP's home Member State - to communicate the results of the assessment and the consequent granting or refusal of its authorisation of the requested transfer. Once the transfer has been made, the manager of the transferring pension fund must notify the Directorate-General within one month of the transfer becoming effective. In the case of a transfer of a pension scheme subject to Spanish social and labour law between IORPs authorised or registered in one or more other Member States, once the transfer has been made, the pension scheme's control committee and the representative in Spain of the receiving IORP must notify the Directorate-General within one month of the transfer becoming effective.

In accordance with Art. 51, *a cross-border transfer of an occupational pension scheme from a transferring IORP authorised or registered in another Member State to a receiving IORP authorised and registered in Spain* must be authorised in advance by the Directorate-General for Insurance and Pension Funds, after obtaining the authorisation of the competent authority of the transferring IORP's home Member State. To this end, the application for authorisation of the transfer must be submitted by the receiving IORP to the said Directorate-General, which shall grant or refuse the authorisation and communicate its decision to the receiving IORP within three months of receipt of the application, subject to very similar conditions as described above.

In this case the Directorate-General for Insurance and Pension Funds shall assess whether: all the required information has been provided by the receiving IORP; the administrative structure, the financial situation of the receiving IORP and the good repute or professional qualifications or experience of the persons running the receiving IORP are compatible with the proposed transfer; the long term interests of the members and beneficiaries of the receiving IORP and the transferred part of the scheme are adequately protected during and after the transfer; the technical provisions of the receiving IORP are fully funded at the date of the transfer, where the transfer results in a cross-border activity; and the assets to be transferred are sufficient and appropriate to cover the liabilities, technical provisions and other obligations and rights to be transferred, in accordance with applicable rules in Spain. The Directorate-General shall decide on the application for authorisation of the transfer and notify its decision to the receiving fund within three months. Once the transfer has been made, the manager of the receiving pension fund must notify the Directorate-General within one month of the transfer becoming effective.

6. This consolidates the European trend towards facilitating the movement of pension funds and schemes, in this case linked to labour activity such as occupational ones, by speeding up the cross-border transfer of these through the clarification of transfer procedures and the appropriate removal of administrative and financial obstacles. However, it should be stressed that these cross-border activities - mainly by pension funds - must generally comply with the national social and labour law on occupational pension schemes applicable to the relationship between the company offering the pension scheme - the sponsoring company - and its employees - members or beneficiaries - under the terms set out above.