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**NOTE**

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From: Presidency/General Secretariat of the Council  
To: Delegations

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Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF  
THE COUNCIL on the activities and supervision of institutions for  
occupational retirement provision (recast)

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Delegations will find below the fourth Presidency compromise on the abovementioned proposal. This note replaces document ST 1509/1/14 REV 1 issued earlier today.

With respect to previous compromise (doc. 15207/14), the new text is marked in **underlined bold** and deletions are indicated in ~~strike through~~.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the activities and supervision of institutions for occupational retirement provision

(recast)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53, Article 62 and Article 114(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee,

After consulting the European Data Protection Supervisor,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Directive 2003/41/EC of the European Parliament and of the Council<sup>1</sup> has been substantially amended several times<sup>2</sup>. Since further amendments are to be made, it should be recast in the interests of clarity.
- (2) The internal market should allow institutions to operate in other Member States and ensure a high level of protection for members and beneficiaries of occupational retirement schemes.

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<sup>1</sup> Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ L 235, 23.9.2003, p. 10).

<sup>2</sup> See Annex I, Part A.

- (2a) **However, this Directive is aimed at minimum harmonisation and therefore should not preclude Member States from maintaining or introducing more stringent provisions in order to protect members and beneficiaries, provided that such provisions are consistent with Member States' obligations under Union law. This Directive does not concern issues of national social and labour law, fiscal and contract legislation nor the adequacy of pension provisions in Member States.**
- (3) Directive 2003/41/EC represented a first legislative step on the way to an internal market for occupational retirement provision organised on a European scale. A genuine internal market for occupational retirement provision remains crucial for economic growth and job creation in the European Union and for tackling the challenge of an ageing European society. The Directive, dating from 2003, has not been substantially amended to introduce a modern risk-based governance system also for institutions for occupational retirement provision.
- (4) Action is needed to further develop complementary private retirement savings such as occupational pensions. This is important since social-security systems are coming under increasing pressure, which means that citizens will increasingly rely on occupational retirement pensions as a complement in the future. Occupational retirement pensions should be developed, without, however, calling into question the importance of social-security pension systems in terms of secure, durable and effective social protection, which should guarantee a decent standard of living in old age and should therefore be at the centre of the objective of strengthening the European social model.
- (5) This Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, notably, the right to protection of personal data, the right to conduct a business and the right to a high level of consumer protection, in particular by ensuring a higher level of transparency of retirement provisioning, informed personal financial and retirement planning as well as facilitating cross-border activity of institutions for occupational retirement provision and ~~businesses~~ **cross-border transfer of pension schemes**. This Directive must be implemented in accordance with these rights and principles.
- (5a) In particular, facilitating cross-border activity of institutions for occupational retirement provision **and** ~~or~~ the cross-transfer of pension schemes could have a positive impact on affiliated undertakings concerned and their employees, in whichever Member State they work, through the centralization of the management of the retirement services provided.
- (5b) The cross-border activity **and the cross-border transfer of pension schemes** should be without prejudice to the national social and labour law relevant to the field of occupational pension of a Member State, other than the home Member State of the institution involved, applied to the relationship between the sponsoring undertaking and members and beneficiaries.

(5c) Where the sponsoring undertaking and the institution are located in the same Member State, the mere fact that some members of a pension scheme have their residence in another Member State does not in itself constitute a cross-border activity.

**(5d) Member States will take into account the need for enhancing the protection of pension rights of workers temporarily sent to work in another Member State.**

- (6) Despite the entry into force of Directive 2003/41/EC important prudential barriers remain which make it more expensive for institutions to operate pension schemes across borders. In addition, the current minimum level of protection for members and beneficiaries needs to be improved. This is all the more important as the number of Europeans relying on schemes that shift longevity and market risks from the institution or the undertaking offering the occupational scheme ("sponsoring undertaking") to the individual has increased significantly. In addition, the current minimum level of information provision to members and beneficiaries needs to be increased. Those developments warrant an amendment of the Directive.
- (7) The prudential rules laid down in this Directive are intended both to guarantee a high degree of security for future pensioners through the imposition of stringent supervisory standards, and to clear the way for the efficient management of occupational pension schemes.
- (8) Institutions which are completely separated from any sponsoring undertaking and which operate on a funded basis for the sole purpose of providing retirement benefits should have freedom to provide services and freedom of investment, subject only to coordinated prudential requirements, regardless of whether these institutions are considered as legal entities.
- (9) In accordance with the principle of subsidiarity, Member States should retain full responsibility for the organisation of their pension systems as well as for the decision on the role of each of the three "pillars" of the retirement system in individual Member States. In the context of the second pillar, they should also retain full responsibility for the role and functions of the various institutions providing occupational retirement benefits, such as industry-wide pension funds, company pension funds and life-assurance companies. This Directive is not intended to call this prerogative into question.
- (10) National rules concerning the participation of self-employed persons in institutions for occupational retirement provision differ. In some Member States, institutions for occupational retirement provision can operate on the basis of agreements with trade or trade groups whose members act in a self-employed capacity or directly with self-employed and employed persons. In some Member States a self-employed person can also become a member of an institution when the self-employed person acts as employer or provides professional services to an undertaking. In some Member States self-employed persons cannot join an institution for occupational retirement provision unless certain requirements, including those imposed by social and labour law, are met.

- (11) Institutions managing social-security schemes, which are already coordinated at Union level, should be excluded from the scope of this Directive. Account should nevertheless be taken of the specificity of institutions which, in a single Member State, manage both social-security schemes and occupational pension schemes. Institutions operating on the principle of capital financing as part of mandatory social security schemes, such as the open pension funds in Poland, should be excluded from the scope of the Directive.
- (12) Financial institutions which already benefit from a Union legislative framework should in general be excluded from the scope of this Directive. However, as these institutions may also in some cases offer occupational pension services, it is important to ensure that this Directive does not lead to distortions of competition. Such distortions may be avoided by applying the prudential requirements of this Directive to the occupational pension business of life-assurance companies. The Commission should also carefully monitor the situation in the occupational pensions market and assess the possibility of extending the optional application of this Directive to other regulated financial institutions.
- (13) Since institutions for occupational pensions aim at ensuring financial security in retirement, the retirement benefits paid by institutions for occupational retirement provision should provide for the payment of a lifelong annuity, for payments for a temporary period or for a lump sum.
- (14) It is important to ensure that older and disabled people are not placed at risk of poverty and can enjoy a decent standard of living. Appropriate cover for biometrical risks in occupational pension arrangements is an important aspect of the fight against poverty and insecurity among elderly people. When setting up a pension scheme, employers and employees, or their respective representatives, should consider the possibility of the pension scheme including provisions for the coverage of the longevity risk and occupational disability risks as well as provision for surviving dependants.
- (15) Giving Member States the possibility to exclude from the scope of national implementing legislation institutions managing schemes which together have less than 100 members in total can facilitate supervision in some Member States, without undermining the proper functioning of the internal market in this field. However, this should not undermine the right of such institutions to appoint for the management of their investment portfolio and the custody of their assets investment managers and depositaries established in another Member State and duly authorised.
- (16) Institutions such as "Unterstützungskassen" in Germany, where the members have no legal rights to benefits of a certain amount and where their interests are protected by a compulsory statutory insolvency insurance, should be excluded from the scope of the Directive.
- (17) In order to protect members and beneficiaries, institutions for occupational retirement provision should limit their activities ~~to the activities~~, and those arising therefrom, **to those** referred to in this Directive.

- (18) In the event of the bankruptcy of a sponsoring undertaking, a member faces the risk of losing both his/her job and his/her acquired pension rights. This makes it necessary to ensure that there is a clear separation between that undertaking and the institution and that minimum prudential standards are laid down to protect members.
- (19) Institutions for occupational retirement provision operate and are supervised with significant differences in Member States. In some Member States, supervision can be exercised not only over the institution itself but also over the entities or companies which are authorised to manage these institutions. Member States should be able to take such specificity into account as long as all the requirements laid down in this Directive are effectively met. Member States should also be able to allow insurance entities and other financial entities to manage institutions for occupational retirement provision.
- (20) Institutions for occupational retirement provision are **pension institutions with a social purpose that provide** financial services. **They are responsible** ~~providers which bear a heavy responsibility~~ for the provision of occupational retirement benefits and therefore should meet certain minimum prudential standards with respect to their activities and conditions of operation. Their social function and the triangular relationship among the employee, the employer and the institution should be adequately acknowledged and supported as guiding principles of this Directive.
- (20a) Where, in accordance with national law, institutions for occupational retirement provision manage pension funds which consists of pension schemes of individual members, have no legal personality and whose assets are separated from the assets of the institutions, Member States may consider each pension fund as a single pension scheme within the meaning of this Directive.**
- (21) The huge number of institutions in certain Member States means a pragmatic solution is necessary as regards prior authorisation of institutions. However, if an institution wishes to manage a scheme in another Member State, a prior authorisation granted by the competent authority of the home Member State should be required.
- (22) Without prejudice to national social and labour legislation on the organisation of pension systems, including compulsory membership and the outcomes of collective bargaining agreements, institutions should have the possibility of providing their services in other Member States upon receipt of the authorisation from the competent authority of the institution's home Member State. Institutions should be allowed to accept sponsorship from undertakings located in any Member State and to operate pension schemes with members in more than one Member State. This would potentially lead to significant economies of scale for these institutions, improve the competitiveness of the Union industry and facilitate labour mobility.

- (23) The exercise of the right of an institution in one Member State to manage an occupational pension scheme contracted in another Member State should fully respect the provisions of the social and labour law in force in the host Member State insofar as it is relevant to occupational pensions, for example the definition and payment of retirement benefits and the conditions for transferability of pension rights. The scope of prudential rules should be clarified in order to ensure legal certainty for the cross-border activities of the institutions.
- (24) Institutions should be able to transfer pension schemes to other institutions across borders within the Union in order to facilitate the organisation of occupational retirement provision on a Union scale, subject to an authorisation from the competent authority in the home Member State of the transferring institution and under prior agreement of the home Member State of the receiving institution. Unless otherwise provided in national law, the transfer and its conditions should be subject to prior approval by the members and beneficiaries concerned or, where applicable, their representatives.
- (25) A prudent calculation of technical provisions is an essential condition to ensure that obligations to pay retirement benefits can be met. Technical provisions should be calculated on the basis of recognised actuarial methods and certified by qualified persons. The maximum interest rates should be chosen prudently according to any relevant national rules. The minimum amount of technical provisions should both be sufficient for benefits already in payment to beneficiaries to continue to be paid and reflect the commitments that arise out of members' accrued pension rights.
- (26) Risks covered by institutions vary significantly from one Member State to another. Home Member States should therefore have the possibility of making the calculation of technical provisions subject to additional and more detailed rules than those laid down in this Directive.
- (27) Sufficient and appropriate assets to cover the technical provisions protect the interests of members and beneficiaries of the pension scheme if the sponsoring undertaking becomes insolvent. In particular in cases of cross-border activity, the mutual recognition of supervisory principles applied in Member States requires that the technical provisions be fully funded at all times.
- (28) If the institution does not work on a cross-border basis, Member States should be able to permit underfunding provided that a proper plan is established to restore full funding and without prejudice to the requirements of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.<sup>3</sup>

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<sup>3</sup> OJ L 283, 28.10.1980, p. 23.

- (29) In many cases, it could be the sponsoring undertaking and not the institution itself that either covers any biometric risk or guarantees certain benefits or investment performance. However, in some cases, it is the institution itself which provides such cover or guarantees and the sponsor's obligations are generally exhausted by paying the necessary contributions. In these circumstances, the institutions concerned should hold own funds based on the value of technical provisions and risk capital.
- (30) Institutions are very long-term investors. Redemption of the assets held by these institutions cannot, in general, be made for any purpose other than providing retirement benefits. Furthermore, in order to protect adequately the rights of members and beneficiaries, institutions should be able to opt for an asset allocation that suits the precise nature and duration of their liabilities. These aspects call for efficient supervision and an approach towards investment rules allowing institutions sufficient flexibility to decide on the most secure and efficient investment policy and obliging them to act prudently. Compliance with the "prudent person" rule therefore requires an investment policy geared to the membership structure of the individual institution for occupational retirement provision.
- (31) By setting the "prudent person" rule as the underlying principle for capital investment and making it possible for institutions to operate across borders, the redirection of savings into the sector of occupational retirement provision is encouraged, thus contributing to economic and social progress.
- (32) Supervisory methods and practices vary among Member States. Therefore, Member States should be given some discretion on the precise investment rules that they wish to impose on the institutions located in their territories. However, these rules should not restrict the free movement of capital, unless justified on prudential grounds.
- (33) As very long-term investors with low liquidity risks, institutions for occupational retirement provision are in a position to invest in non-liquid assets such as shares and in other instruments that have a long-term economic profile and are not traded on regulated markets, multilateral trading facilities or organised trading facilities within prudent limits. They can also benefit from the advantages of international diversification. Investments in shares in currencies other than those of the liabilities and in other instruments that have a long-term economic profile and are not traded on regulated markets, multilateral trading facilities or organised trading facilities should therefore not be restricted except on prudential grounds.



- (34) The understanding of what constitutes instruments with a long-term economic profile is broad. These instruments are non-transferable securities and therefore do not have access to the liquidity of secondary markets. They often require fixed term commitments which restrict their marketability. These instruments should be understood to include participations, debt instruments in non-listed undertakings and loans provided to them. Non-listed undertakings include infrastructure projects, unlisted companies seeking growth, real estate or other assets that could be suitable for long term investment purposes. Low carbon and climate resilient infrastructure projects are often non-listed assets and rely on long term credits for project financing.
- (35) Institutions should be allowed to invest in other Member States in accordance with the rules of their home Member States in order to reduce the cost of cross-border activity. Therefore the host Member States should not be allowed to impose additional investment requirements on institutions located in other Member States.
- (36) Some risks cannot be reduced through quantitative requirements reflected in the technical provisions and funding requirements but can only be properly addressed through governance requirements. Ensuring an effective system of governance is therefore essential for the adequate management of risk. Those systems should be proportionate to the nature, scale and complexity of the activities of the institution.
- (37) Remuneration policies which encourage excessive risk-taking behaviour can undermine sound and effective risk management of institutions. Principles and disclosure requirements for remuneration policies applicable to other types of financial institutions in the Union should be made applicable also to institutions, bearing in mind, however, the particular governance structure of institutions in comparison to other financial institutions and the need to take account of the size, nature, scale and complexity of the activities of institutions.
- (38) Institutions should have sufficient capacity to have a risk-management function, an internal audit function, an internal control function and, where applicable, an actuarial function. The identification of the abovementioned key functions does not prevent the institution from freely deciding how to organise those key functions in practice save where otherwise specified in this Directive. This should not lead to unduly burdensome requirements because account should be taken of the nature, scale and complexity of the activities of the institution.
- (39) ~~All~~persons that effectively run the institution or perform key functions should be fit and proper.

- (40) Furthermore, with the exception of the internal audit function, it should be possible for a single person or organisational unit to carry out more than one key function. In addition, taking into account the size, nature, scale and complexity of the activities of the institutions, the person or unit performing a key function in the institution could also be the same performing a similar key function for the sponsoring undertaking, if the institution has put in place adequate measures in order to prevent and manage any conflicts of interests with the sponsoring undertaking.
- (41) It is essential that institutions improve their risk management so that potential vulnerabilities in relation to the sustainability of the pension scheme can be properly understood and discussed with the competent authorities. Institutions should, as part of their risk management system, produce a risk evaluation for their activities relating to pensions. That risk evaluation should also be made available to the competent authorities.
- (42) Each Member State should require that every institution located in its territory draw up annual accounts and annual reports taking into account each pension scheme operated by the institution and, where applicable, annual accounts and annual reports for each pension scheme. The annual accounts and annual reports, reflecting a true and fair view of the institution's assets, liabilities and financial position, taking into account each pension scheme operated by an institution, and duly approved by an authorised person, are an essential source of information for members and beneficiaries of a scheme and the competent authorities. In particular, they enable the competent authorities to monitor the financial soundness of an institution and assess whether the institution is able to meet all its contractual obligations.
- (43) The investment policy of an institution is a decisive factor for both security and affordability of occupational pensions. The institutions should therefore draw up and, at least every three years, review a statement of investment principles. It should be made available to the competent authorities and on request also to members and beneficiaries of each pension scheme.
- (44) Institutions should be allowed to entrust their management, in whole or in part, to other entities operating on their behalf. Institutions should remain fully responsible for discharging all of their obligations under this Directive when they outsource key functions or any other activities.
- (45) The safe-keeping and oversight duties related to the assets of institutions should be strengthened by clarifying the depositary's roles and duties. Only institutions operating schemes where members and beneficiaries bear all the risks should be required to appoint a depositary.

**(45a) Member States, taking into account their safe-keeping and oversight mechanisms - such as fiduciary obligations imposed on institutions - should be allowed to exempt institutions from the requirement to appoint a depositary provided that the level of protection afforded to members is not less favourable than those provided for in this Directive.**

- (46) Institutions should provide clear and adequate information to prospective members, members and beneficiaries to support their decision-making about their retirement and ensure a high level of transparency throughout the various phases of a scheme comprising pre-enrolment, membership (including pre-retirement) and post-retirement. In particular, information concerning accrued pension entitlements, projected levels of retirement benefits, risks and guarantees, and costs should be given. Where members bear an investment risk, additional information on the investment profile, any available options and past performance are also crucial.
- (47) Before joining a scheme, prospective members should be given all the necessary information to make an informed choice such as possibilities to opt out, contributions, costs and investment options, where applicable, with the exception of the case in which the member does not take an individual decision to join the pension scheme.
- (48) For the institution's members that have not yet retired, institutions should draw up a standardised pension benefit statement containing key personal and generic information about the pension scheme. The pension benefit statement should have a standard format in order to facilitate the understanding of pension entitlements over time and across schemes and serve labour mobility.
- (49) Institutions should inform members sufficiently in advance before retirement about their pay-out options. Where the retirement benefit is not paid out as a lifetime annuity, members that approach retirement should receive information about the benefit payment products available, in order to facilitate financial planning for retirement.
- (50) During the phase when retirement benefits are paid, beneficiaries should continue to receive information on their benefits and corresponding payment options. This is particularly important when a significant level of investment risk is borne by beneficiaries in the pay-out phase.
- (51) The competent authority should exercise its powers having as its prime objective the protection of **the rights of** members and beneficiaries **and the stability and soundness of the institutions.**

- (52) The scope of prudential supervision differs between Member States. This can cause problems where an institution needs to comply with the prudential regulation of its home Member State whilst simultaneously comply with the social and labour law of its host Member State. Clarifying which areas are considered to be part of prudential supervision for the purpose of this Directive reduces legal uncertainty and the associated transaction costs.
- (53) An internal market for institutions requires mutual recognition of prudential standards. The institution's adherence to those standards should be supervised by the competent authorities of the institution's home Member State. Member States should attribute to competent authorities the necessary powers to use preventive or corrective measures if institutions breach any of the requirements of this Directive.
- (54) In order to ensure effective supervision of outsourced activities, including all subsequent re-outsourcing activities, it is essential that the competent authorities have access to all relevant data held by the service providers to whom activities have been outsourced, regardless of whether the latter is a regulated or unregulated entity, and have the right to conduct on-site inspections. In order to take account of market developments and to ensure continuous compliance with the conditions for outsourcing, institutions should inform competent authorities of any outsourcing of key functions or other critical or important functions or activities.
- (55) Provision should be made for exchanges of information between the competent authorities, other authorities and bodies tasked with strengthening of financial stability and the termination of pension schemes. It is therefore necessary to specify the conditions under which those exchanges of information should be possible. Moreover, where information may be disclosed only with the express agreement of the competent authorities, those authorities should be able, where appropriate, to make their agreement subject to compliance with strict conditions.

- (56) Directive 95/46/EC of the European Parliament and of the Council<sup>4</sup> governs the processing of personal data carried out in the Member States in the context of this Directive and under the supervision of the competent authorities. Regulation (EC) No 45/2001 of the European Parliament and of the Council<sup>5</sup>, governs the processing of personal data carried out by the European Supervisory Authorities pursuant to this Directive and under the supervision of the European Data Protection Supervisor. Any processing of personal data carried out within the framework of this Directive, such as the exchange or transmission of personal data by the competent authorities should be in accordance with national rules which implement Directive 95/46/EC, and any exchange or transmission of information by the European Supervisory Authorities should be in accordance with Regulation (EC) No 45/2001.
- (57) In order to ensure the smooth functioning of the internal market for occupational retirement provision organised on a European scale, the Commission should, ~~after consulting EIOPA,~~ review and report on the application of this Directive and should submit that report to the European Parliament and to the Council 6 years after the entry into force of this Directive. This review should **focus on relevant issues, as identified by the Commission, and should** be produced ~~after consulting EIOPA,~~ **on its** ~~which will report on all the in-depth analyses~~ **analysis of** ~~done on~~ occupational pensions schemes.
- (58) In order to ensure fair competition between institutions, the transitional period allowing insurance undertakings subject to Directive 2009/138/EC of the European Parliament and of the Council<sup>6</sup> to operate their occupational-retirement-provision-business under the rules referred to in Article 4 of Directive 2009/138/EC should be extended until 31 December 2022. Directive 2009/138/EC should therefore be amended accordingly.
- (59) *deleted*
- (60) Since the objective of the proposed action, namely to create a Union legal framework covering institutions for occupational retirement provision, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved by the Union, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

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<sup>4</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p.31)

<sup>5</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies on the free movement of such data (OJ L 8, 12.01.2001, p. 1)

<sup>6</sup> Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

- (61) In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents<sup>7</sup>, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (62) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive amendment as compared with the earlier Directives. The obligation to transpose the provisions which are unchanged arises under the earlier Directives.
- (63) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and application of the Directives set out in Annex I, Part B,

HAVE ADOPTED THIS DIRECTIVE:

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<sup>7</sup> OJ C 369, 17.12.2011, p. 14.

## Title I

### GENERAL PROVISIONS

#### *Article 1*

##### Subject matter

This Directive lays down rules for the taking-up and pursuit of activities carried out by institutions for occupational retirement provision.

#### *Article 2*

##### Scope

1. This Directive shall apply to institutions for occupational retirement provision. Where, in accordance with national law, institutions for occupational retirement provision do not have legal personality, Member States shall apply this Directive either to those institutions or, subject to paragraph 2, to those authorised entities responsible for managing them and acting on their behalf.
2. This Directive shall not apply to:
  - (a) institutions managing social-security schemes which are covered by Regulations (EC) No 883/2004<sup>8</sup> and (EC) No 987/2009 of the European Parliament and of the Council<sup>9</sup>;

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<sup>8</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1).

<sup>9</sup> Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ L 284, 30.10.2009, p. 1).

- (b) institutions which are covered by Directives 2004/39/EC<sup>10</sup>, 2009/65/EC<sup>11</sup>, 2009/138/EC, 2011/61/EU<sup>12</sup> and 2013/36/EU<sup>13</sup>;
- (c) institutions which operate on a pay-as-you-go basis;
- (d) institutions where employees of the sponsoring undertakings have no legal rights to benefits and where the sponsoring undertaking can redeem the assets at any time and not necessarily meet its obligations for payment of retirement benefits;
- (e) companies using book-reserve schemes with a view to paying out retirement benefits to their employees.

### *Article 3*

#### Application to institutions operating social-security schemes

Institutions for occupational retirement provision which also operate compulsory employment-related pension schemes which are considered to be social-security schemes covered by Regulations (EC) No 883/2004 and (EC) No 987/2009 shall be covered by this Directive in respect of their non-compulsory occupational retirement provision business. In that case, the liabilities and the corresponding assets shall be ring-fenced and it shall not be possible to transfer them to the compulsory pension schemes which are considered as social-security schemes or vice versa.

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<sup>10</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

<sup>11</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

<sup>12</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

<sup>13</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).



## *Article 4*

### Optional application to institutions covered by Directive 2009/138/EC

Home Member States may choose to apply the provisions of Articles 9 to 15, Articles 20 to 24(2), Articles 25 to 29, Articles 31 to 53 and Articles 55 to 71 of this Directive to the occupational retirement provision business of life insurance undertakings which are covered by Directive 2009/138/EC. In that case, all assets and liabilities corresponding to the said business shall be ring-fenced, managed and organised separately from the other activities of the life insurance undertakings, without any possibility of transfer.

In such case, and only as far as their occupational retirement provision business is concerned, life insurance undertakings shall not be subject to Articles 76 to 86, Article 132, Article 134(2), Article 173, Article 185(5), Article 185(7) and (8) and Article 209 of Directive 2009/138/EC.

The home Member State shall ensure that either the competent authorities, or the authorities responsible for supervision of life insurance undertakings covered by Directive 2009/138/EC, as part of their supervisory work, verify the strict separation of the relevant occupational retirement provision business.

## *Article 5*

### Small pension institutions and statutory schemes

With the exception of Articles 34 and 35(3), Member States may choose not to apply this Directive, in whole or in part, to any institution registered or authorised in their territories which operates pension schemes which together have less than 100 members in total. Subject to Article 2(2), such institutions shall nevertheless be given the right to apply this Directive on a voluntary basis. Article 12 may be applied only if all the other provisions of this Directive apply.

Member States may choose to apply any of Articles 1 to 8, Article 12, Article 20 and Articles 34 to 37 to institutions where occupational retirement provision is made under statute, pursuant to legislation, and is guaranteed by a public authority. Article 12 may be applied only if all the other provisions of this Directive apply.

## Article 6

### Definitions

For the purposes of this Directive:

- (a) ‘institution for occupational retirement provision’, or ‘institution’, means an institution, irrespective of its legal form, operating on a funded basis, established separately from any sponsoring undertaking or trade for the purpose of providing retirement benefits in the context of an occupational activity on the basis of an agreement or a contract agreed:
- individually or collectively between the employer(s) and the employee(s) or their respective representatives, or
  - with self-employed persons or their association(s), in compliance with the legislation of the home and host Member States,
- and which carries out activities directly arising therefrom;
- (b) ‘pension scheme’ means a contract, an agreement, a trust deed or rules stipulating which retirement benefits are granted and under which conditions;
- (c) ‘sponsoring undertaking’ means any undertaking or other body, regardless of whether it includes or consists of one or more legal or natural persons, which acts as an employer or in a self-employed capacity or any combination thereof and which under national legislation is legally obliged or voluntarily commits to offering or paying contributions to a pension scheme;
- (d) ‘retirement benefits’ means benefits paid by reference to reaching, or the expectation of reaching, retirement or, where they are supplementary to those benefits and provided on an ancillary basis, in the form of payments on death, disability, or cessation of employment or in the form of support payments or services in case of sickness, indigence or death. In order to facilitate financial security in retirement, these benefits may take the form of payments for life, of payments made for a temporary period or of a lump sum, **or any combination thereof**;
- (e) ‘member’ means a person, other than a beneficiary or a prospective member, whose current or past occupational activities entitle or will entitle him/her to retirement benefits in accordance with the provisions of a pension scheme;
- (f) ‘beneficiary’ means a person receiving retirement benefits;
- (fa) ‘prospective member’ means a person who is eligible to join **the** a pension scheme;

- (g) ‘competent authorities’ means the national authorities designated to carry out the duties provided for in this Directive;
- (h) ‘biometrical risks’ mean risks linked to death, disability and longevity;
- (i) ‘home Member State’ means the Member State in which the institution has been registered or authorised in accordance with Article 9(1);
- (j) ‘host Member State’ means the Member State whose social and labour law relevant to the field of occupational pension schemes is applicable to the relationship between the sponsoring undertaking and members or beneficiaries in the case of cross-border activity as referred to in Article 12;
- (k) ‘transferring institution’ means an institution transferring all or a part of a pension scheme to an institution in another Member State;
- (l) ‘receiving institution’ means an institution receiving all or a part of a pension scheme from an institution in another Member State;
- (m) ‘regulated market’ means a multilateral system in the Union within the meaning of Article 4(1)(21) of Directive 2014/65/EU;
- (n) ‘multilateral trading facility’ means a multilateral system in the Union within the meaning of Article 4(1)(22) of Directive 2014/65/EU;
- (o) ‘organised trading facility’ means a system or facility in the Union referred to in Article 4(1)(23) of Directive 2014/65/EU;
- (p) ‘durable medium’ means an instrument which enables a member or a beneficiary to store information addressed personally to that member or beneficiary in a way that is accessible for future reference for a period of time adequate for the purposes of the information, and which allows the unchanged reproduction of the information stored.
- (q) *deleted*

### *Article 7*

#### Activities of an institution

Member States shall require institutions registered or authorised within their territories to limit their activities to retirement-benefit related operations and activities arising therefrom.

When, in accordance with Article 4, a life insurance undertaking manages its occupational retirement provision business by ring-fencing its assets and liabilities, the ring-fenced assets and liabilities shall be restricted to retirement-benefit related operations and activities directly arising therefrom.

## *Article 8*

### Legal separation between sponsoring undertakings and institutions for occupational retirement provision

Member States shall, in respect of every institution registered or authorised in their territories, ensure that there is a legal separation between a sponsoring undertaking and an institution for occupational retirement provision in order that the assets of the institution are safeguarded in the interests of members and beneficiaries in the event of bankruptcy of the sponsoring undertaking.

## *Article 9*

### Registration or authorisation

Member States shall, in respect of every institution, the main administration of which is located in their territories, ensure that the institution is registered in a national register by the competent authority. The location of the main administration refers to either the place where the decision making body of the institution is situated or, if different, the place where the main strategic decisions of the institution are made. Member States may decide that institutions shall also be authorised by the competent authority.

In the case of cross-border activities referred to in Article 12, the institution shall be authorised to operate cross-border as provided for in Article 12 (2) and the register shall also indicate the Member States in which the institution is operating.

That information from the register shall be communicated to the European Insurance and Occupational Pensions Authority (hereinafter 'EIOPA'), established by Regulation (EU) No 1094/2010 which shall publish it on its website.

## *Article 10*

### Pension scheme rules

Member States shall, in respect of every institution registered or authorised in their territories, ensure that properly constituted rules regarding the functioning of any pension scheme operated by the institution have been implemented.

## *Article 11*

### Commitment of regular financing and additional benefits

1. Member States shall, in respect of every institution registered or authorised in their territories, ensure that where the sponsoring undertaking guarantees the payment of the retirement benefits, it is committed to regular financing.

2. In accordance with the principle of subsidiarity and taking due account of the scale of pension benefits offered by the social-security regimes, Member States may provide that the option of longevity and disability cover, provision for surviving dependants and a guarantee of repayment of contributions as additional benefits be offered to members if employers and employees, or their respective representatives, so agree.

## *Article 12*

### Cross-border activities and procedures

1. Without prejudice to national social and labour law on the organisation of pension systems, including compulsory membership and the outcomes of collective bargaining agreements, Member States shall allow an institution registered or authorised in their territories to accept to ~~operate~~ **carry out a cross-border activity** for a sponsoring undertaking whose relationship with the members or beneficiaries concerned is governed by social and labour law relevant to the field of occupational pension schemes of a Member State other than the home Member State of the institution. **Consequently, when this situation occurs, This implies that Member States** ~~They shall also allow undertakings located within their territories to offering or paying contributions to a pension scheme operated by an institution registered or authorised in another Member State which proposes to or carries out cross-border activity. The procedure to activate such cross-border activity is set out in paragraphs 2 to 9 of this Article.~~
2. An institution proposing to carry out cross-border activity shall be subject to a prior authorisation by the competent authorities of its home Member State. In addition, it shall notify its intention to carry out cross-border activity to the competent authorities of the home Member State.
3. Member States shall require institutions ~~authorised in their territories and proposing to carry out cross-border activity~~ to provide the following information when effecting a notification under paragraph 2:
  - (a) the host Member State(s), **accompanied by a reasoned declaration of the sponsoring undertaking about the Member State whose social and labour law relevant to the field of occupational pension schemes will be applicable to the relationship with the employees concerned;**
  - (b) the name and the location of the administration of the sponsoring undertaking;
  - (c) the main characteristics of the pension scheme to be operated for the sponsoring undertaking;
  - (d) ~~a reasoned declaration of the sponsoring undertaking regarding the Member State whose social and labour law relevant to the field of occupational pension schemes and relationship with the employees concerned will be applicable.~~

4. Where a competent authority~~ies~~ of the home Member State is **are** notified under paragraph 2, and unless **they have**~~it has~~ issued a reasoned decision that the administrative structure or the financial situation of the institution or the good repute or professional qualifications or experience of the persons running the institution are not compatible with the proposed cross-border activity, ~~it~~ **those competent authorities** shall within three months of receiving all the information referred to in paragraph 3 communicate that information to the competent authorities of the host Member State and inform the institution accordingly.

The reasoned decision as referred to in the first subparagraph shall be issued within three months of receiving all the information referred to in paragraph 3. That reasoned decision or a failure to act shall be subject to a right of appeal **by the institution** in the courts in the home Member State **in accordance with Article 62(7)**.

5. Before the institution starts to carry out a cross-border activity, the competent authorities of the host Member State shall, within two months of receiving the information referred to in paragraph 3, inform the competent authorities of the home Member State, ~~of~~ **on** the requirements of social and labour law relevant to the field of occupational pensions under which the pension scheme must be operated and ~~provide~~ **on** the national rules regarding the way these requirements shall be disclosed to the prospective members and members. The competent authorities of the home Member State shall communicate this information to the institution.
6. On receiving the communication referred to in paragraph 5, or if no communication is received from the competent authorities of the home Member State on expiry of the period provided for in paragraph 5, the institution may start to carry out a cross-border activity in accordance with the host Member State's requirements of social and labour law relevant to the field of occupational pensions.
7. The competent authorities of the host Member State shall inform the competent authorities of the home Member State of any significant change in the host Member State's requirements of social and labour law relevant to the field of occupational pension schemes which may affect the characteristics of the pension scheme insofar as it concerns the cross-border activity. The competent authorities of the home Member State shall communicate this information to the institution.

8. The institution shall be subject to on-going supervision by the competent authorities of the host Member State as to the compliance of its activities with the host Member State's requirements of social and labour law relevant to the field of occupational pension schemes and the rules regarding the way these requirements shall be disclosed to the prospective members and members as referred to in paragraph 5. Should this supervision bring irregularities to light, the competent authorities of the host Member State shall inform the competent authorities of the home Member State immediately. The competent authorities of the home Member State shall, in coordination with the competent authorities of the host Member State, take the necessary measures to ensure that the institution puts a stop to the detected breach.
9. If, despite the measures taken by the competent authorities of the home Member State or because appropriate measures are lacking in the home Member State, the institution persists in breaching the applicable provisions of the host Member State's requirements of social and labour law relevant to the field of occupational pension schemes, the competent authorities of the host Member State may, after informing the competent authorities of the home Member State, take appropriate measures to prevent or penalise further irregularities, including, insofar as is strictly necessary, preventing the institution from operating in the host Member State for the sponsoring undertaking.
- 9a. ~~Member States shall in particular facilitate cross-border activities in relation to employees that are employed in affiliated undertakings.~~
- 9b. ~~Where a member of a pension scheme is temporarily sent to work in another Member State by his employer, Member States shall allow the person to remain, with the consent of the institution and the employer, a member of the scheme; no specific authorisation by the competent authority shall be required.~~
- 9c. ~~The institution shall be allowed to voluntarily activate the cross-border procedure, according to the paragraphs 1 to 9. Where the case described in paragraph 9b concerns a relevant number of members the activation of the cross-border procedure shall be mandatory.~~
10. *deleted*

### *Article 13*

#### Cross-border transfers **and procedures** of pension schemes

1. Without prejudice to national social and labour law, Member States shall allow institutions registered or authorised in their territories to transfer a pension scheme's liabilities or technical provisions, as well as other obligations and rights and corresponding assets, or cash equivalent thereof, to a receiving institution registered or authorised in another Member State.

- 1a. Member States may also allow the institutions registered or authorised in their territories to transfer part of the pension scheme's liabilities or technical provisions, as well as other obligations and rights and corresponding assets, or of the cash equivalent thereof, to a pension scheme operated by them to a receiving institution authorised in another Member State ~~whilst taking note of~~ **verifying** the viability of both the transferred and the remaining part of the pension scheme.
- 1b. The transfer and its conditions shall be subject to approval by the following:
- a) the members and beneficiaries concerned of the transferring institution or, where applicable, their representatives, unless otherwise provided in national law. In any event, information on the transfer and its conditions, ~~including the relevant changes in prudential oversight as a result of the transfer,~~ shall be made available to the members and beneficiaries concerned in a timely manner by the transferring institution;
  - b) the sponsoring undertaking in case it is partly or fully liable to ensure the pension benefits.
- 1c. The transferring institution shall ask the competent authorities of its home Member State to authorise the transfer. The application for the authorisation of transfer shall contain the following information:
- (a) the written agreement between the transferring and the receiving institutions setting out the conditions of the transfer;
  - (b) the main characteristics of the pension scheme;
  - (c) the description of the transferred assets and, ~~where applicable,~~ the corresponding liabilities, **technical provisions, or other obligations and rights, or of cash equivalent thereof;**
  - d) the names and the locations of the transferring and the receiving institutions **and**, ~~together with the indication~~ **confirmation** of the Member State in which each institution is registered or authorised;
  - e) the name and the location of the administration of the sponsoring undertaking;
  - f) *deleted*
  - g) a reasoned declaration of the sponsoring undertaking regarding the Member State whose social and labour law relevant to the **field of occupational pension schemes will be applicable to the** relationship with the employees concerned ~~will be applicable.~~



The **transferring** institution shall submit to the competent authorities of its home Member State:

- a) the approval of the sponsoring undertaking in case it is partly or fully liable to ensure the pension benefits;
  - b) the approval by the members and beneficiaries of the transferring institution or, where applicable, their representatives, unless otherwise provided in national law.
2. After receiving the documents referred to in paragraph 1c ~~the~~ the competent authorities of the home Member State of the transferring institution shall authorise the transfer of all or part of the pension scheme, according to paragraphs 1 or 1a, after obtaining the **agreement prior consent** of the competent authorities of the home Member State of the receiving institution, **by providing the information referred to in paragraph 1c**.
3. *deleted*
4. *deleted*
5. The authorisation by the competent authorities of the home Member State of the transferring institution shall be given, duly taking into account the relevant aspects of national social and labour law **relevant to the field of occupational pension schemes**, and under condition that all information referred to in paragraph 1c has been provided by the transferring institution and if the competent authorities ~~have~~ **have** no reason to doubt that the interests of the members and beneficiaries concerned are adequately protected ~~according to the rules provided in this Directive~~ during and after the transfer, within three months of receiving the consent by the competent authorities of the home Member State of the receiving institution.

Where the authorisation referred in the first subparagraph is not given, the competent authorities of the home Member State of the transferring institution shall provide the reasoning for such refusal within the three month period referred to in the first subparagraph. That refusal, or a failure to act by the competent authorities of the home Member State of the transferring institution shall be subject to **the a right of the transferring institution** to apply to the courts in the home Member State of the transferring institution **in accordance with Article 62(7)**.

- 5a. The competent authorities of the home Member State of the receiving institution shall give its consent to the competent authorities of the home Member State of the transferring institution within three months of receiving a request for ~~consultation~~ **its consent** from it. The consent shall not be given if the competent authorities of the home Member State of the receiving institution **have** reasons to doubt that the administrative structure or the financial situation of the institution or the good repute or professional qualifications or experience of the persons running the institution are ~~not~~ compatible with the proposed transfer operation **or that the interests of the members and beneficiaries concerned are adequately protected during and after the transfer.**

Where the consent referred in the first subparagraph is not given, that refusal shall be reasoned. Refusal of consent or failure to act by the competent authorities of the home Member State of the receiving institution shall be subject to ~~at the~~ right **of the receiving institution to apply of appeal before to** the courts of the home Member State of the receiving institution **in accordance with Article 62(7).**

**The competent authorities of the home Member State of the transferring institution shall promptly inform the transferring institution of the consent or the refusal thereof.**

6. The competent authorities of the home Member State of the transferring institution shall within one month inform the competent authorities of the home Member State of the receiving institution of the decision taken under paragraph 5 and of the requirements of social and labour law relevant to the field of occupational pensions of the home Member State of the transferring institution under which the pension scheme must be operated. The competent authorities of the home Member State of the receiving institution shall communicate this information to the receiving institution.
7. Upon receiving the communication referred to in paragraph 6, or, if no communication is received from the competent authorities of the home Member State of the receiving institution upon expiry of the period of four months after the competent authorities of the home Member State of the transferring institution **have** received the consent referred to in paragraph 5a, the receiving institution may start to operate the pension scheme in accordance with the requirements of **the applicable** social and labour law relevant to the field of occupational pensions **schemes** of the ~~home~~ Member State **of the transferring institution.**
8. **After the transfer is completed, the receiving institution shall be subject to the rules of the Member State in which it is registered or authorised.** Where the receiving institution carries out a cross-border activity according to Article 12(1), Article 12(7), (8) and (9) shall apply.

- 8a. ~~Member States shall in particular facilitate, through cross-border transfer of pension schemes, the integration of pension schemes that are related to employees employed in affiliated undertakings.~~

## Title II

### QUANTITATIVE REQUIREMENTS

#### *Article 14*

##### Technical provisions

1. The home Member State shall ensure that institutions operating occupational pension schemes establish at all times in respect of the total range of their pension schemes an adequate amount of liabilities corresponding to the financial commitments which arise out of their portfolio of existing pension contracts.
2. The home Member State shall ensure that institutions operating occupational pension schemes, where they provide cover against biometric risks or guarantee either an investment performance or a given level of benefits, establish sufficient technical provisions in respect of the total range of these schemes.
3. The calculation of technical provisions shall take place every year. However, the home Member State may allow a calculation once every three years if the institution provides members or the competent authorities with a certification or a report of adjustments for the intervening years. The certification or the report shall reflect the adjusted development of the technical provisions and changes in risks covered.
4. The calculation of the technical provisions shall be executed and certified by an actuary or by another specialist in this field, including an auditor, according to national legislation, on the basis of actuarial methods recognised by the competent authorities of the home Member State, according to the following principles:
  - (a) the minimum amount of the technical provisions shall be calculated by a sufficiently prudent actuarial valuation, taking account of all commitments for benefits and for contributions in accordance with the pension arrangements of the institution. It must be sufficient both for pensions and benefits already in payment to beneficiaries to continue to be paid, and to reflect the commitments which arise out of members' accrued pension rights. The economic and actuarial assumptions chosen for the valuation of the liabilities shall also be chosen prudently taking account, if applicable, of an appropriate margin for adverse deviation;
  - (b) the maximum rates of interest used shall be chosen prudently and determined in accordance with any relevant rules of the home Member State. These prudent rates of interest shall be determined by taking into account:
    - (i) the yield on the corresponding assets held by the institution and the future investment returns and/or

- (ii) the market yields of high-quality or government bonds;
  - (c) the biometric tables used for the calculation of technical provisions shall be based on prudent principles, having regard to the main characteristics of the group of members and the pension schemes, in particular the expected changes in the relevant risks;
  - (d) the method and basis of calculation of technical provisions shall in general remain constant from one financial year to another. However, discontinuities may be justified by a change of legal, demographic or economic circumstances underlying the assumptions.
5. The home Member State may make the calculation of technical provisions subject to additional and more detailed requirements, with a view to ensuring that the interests of members and beneficiaries are adequately protected.

### *Article 15*

#### Funding of technical provisions

1. The home Member State shall require every institution to have at all times sufficient and appropriate assets to cover the technical provisions in respect of the total range of pension schemes operated.
2. The home Member State may allow an institution, for a limited period of time, to have insufficient assets to cover the technical provisions. In this case the competent authorities shall require the institution to adopt a concrete and realisable recovery plan in order to ensure that the requirements of paragraph 1 are met again. The plan shall be subject to the following conditions:
  - (a) the institution shall set up a concrete and realisable plan to re-establish the required amount of assets to cover fully the technical provisions in due time. The plan shall be made available to members or, where applicable, to their representatives and/or shall be subject to approval by the competent authorities of the home Member State;
  - (b) in drawing up the plan, account shall be taken of the specific situation of the institution, in particular the asset/liability structure, risk profile, liquidity plan, the age profile of the members entitled to receive retirement benefits, start-up schemes and schemes changing from non-funding or partial funding to full funding;

- (c) in the event of termination of a pension scheme during the period referred to in the first sentence of this paragraph, the institution shall inform the competent authorities of the home Member State. The institution shall establish a procedure in order to transfer the assets and the corresponding liabilities to another financial institution or a similar body. This procedure shall be disclosed to the competent authorities of the home Member State and a general outline of the procedure shall be made available to members or, where applicable, to their representatives in accordance with the principle of confidentiality.
3. In the event of cross-border activity as referred to in Article 12, the technical provisions shall at all times be fully funded in respect of the total range of pension scheme operated. If these conditions are not met, the competent authorities of the home Member State shall intervene in accordance with Article 62(4). To comply with this requirement the home Member State may require ring-fencing of the assets and liabilities.

### *Article 16*

#### Regulatory own funds

1. The home Member States shall ensure that institutions operating pension schemes, where the institution itself, and not the sponsoring undertaking, underwrites the liability to cover against biometric risk, or guarantees a given investment performance or a given level of benefits, hold on a permanent basis additional assets above the technical provisions to serve as a buffer. The amount thereof shall reflect the type of risk and asset base in respect of the total range of schemes operated. These assets shall be free of all foreseeable liabilities and serve as a safety capital to absorb discrepancies between the anticipated and the actual expenses and profits.
2. For the purposes of calculating the minimum amount of additional assets, the rules laid down in Articles 17, 18 and 19 shall apply.
3. Paragraph 1 shall, however, not prevent Member States from requiring institutions located in their territory to hold regulatory own funds or from laying down more detailed rules provided that they are prudentially justified.

### *Article 17*

#### Available solvency margin

1. Member States shall require of every institution referred to in Article 16(1) which are located in their territories an adequate available solvency margin in respect of its entire business at all times which is at least equal to the requirements in this Directive.

2. The available solvency margin shall consist of the assets of the institution free of any foreseeable liabilities, less any intangible items, including:
- (a) the paid-up share capital or, in the case of an institution taking the form of a mutual undertaking, the effective initial fund plus any accounts of the members of the mutual undertaking which fulfil the following criteria:
    - (i) the memorandum and articles of association must stipulate that payments may be made from those accounts to members of the mutual undertaking only in so far as this does not cause the available solvency margin to fall below the required level or, after the dissolution of the undertaking, where all the undertaking's other debts have been settled;
    - (ii) the memorandum and articles of association must stipulate, with respect to any payments referred to in point (i) for reasons other than the individual termination of membership in the mutual undertaking, that the competent authorities must be notified at least one month in advance and can prohibit the payment within that period; and
    - (iii) the relevant provisions of the memorandum and articles of association may be amended only after the competent authorities have declared that they have no objection to the amendment, without prejudice to the criteria stated in points (i) and (ii);
  - (b) reserves (statutory and free) not corresponding to underwriting liabilities;
  - (c) the profit or loss brought forward after deduction of dividends to be paid; and
  - (d) in so far as authorised under national law, profit reserves appearing in the balance sheet where they may be used to cover any losses which may arise and where they have not been made available for distribution to members and beneficiaries.

The available solvency margin shall be reduced by the amount of own shares directly held by the institution.

3. Member States may provide that the available solvency margin may also comprise:
- (a) cumulative preferential share capital and subordinated loan capital up to 50% of the lesser of the available solvency margin and the required solvency margin, no more than 25% of which shall consist of subordinated loans with a fixed maturity, or fixed-term cumulative preferential share capital, provided that binding agreements exist under which, in the event of the bankruptcy or liquidation of the institution, the subordinated loan capital or preferential share capital ranks after the claims of all other creditors and is not to be repaid until all other debts outstanding at the time have been settled;

- (b) securities with no specified maturity date and other instruments, including cumulative preferential shares other than those referred to in point (a), to a maximum of 50 % of the available solvency margin, or the required solvency margin, whichever the lesser, for the total of such securities, and the subordinated loan capital referred to in point (a) provided they fulfil the following conditions:
- (i) they must not be repaid on the initiative of the bearer or without the prior consent of the competent authority;
  - (ii) the contract of issue must enable the institution to defer the payment of interest on the loan;
  - (iii) the lender's claims on the institution must rank entirely after those of all non-subordinated creditors;
  - (iv) the documents governing the issue of the securities must provide for the loss-absorption capacity of the debt and unpaid interest, while enabling the institution to continue its business; and
  - (v) only fully paid-up amounts must be taken into account.

For the purposes of point (a), subordinated loan capital shall also fulfil the following conditions:

- (i) only fully paid-up funds shall be taken into account;
- (ii) for loans with a fixed maturity, the original maturity shall be at least five years. No later than one year before the repayment date, the institution shall submit to the competent authorities for their approval a plan showing how the available solvency margin will be kept at or brought to the required level at maturity, unless the extent to which the loan may rank as a component of the available solvency margin is gradually reduced during at least the five years before the repayment date. The competent authorities may authorise the early repayment of such loans provided application is made by the issuing institution and its available solvency margin will not fall below the required level;
- (iii) loans the maturity of which is not fixed shall be repayable only subject to five years' notice unless the loans are no longer considered as a component of the available solvency margin or unless the prior consent of the competent authorities is specifically required for early repayment. In the latter event the institution shall notify the competent authorities at least six months before the date of the proposed repayment, specifying the available solvency margin and the required solvency margin both before and after that repayment. The competent authorities shall authorise repayment only where the institution's available solvency margin will not fall below the required level;



- (iv) the loan agreement shall not include any clause providing that in specified circumstances, other than the winding-up of the institution, the debt will become repayable before the agreed repayment dates; and
- (v) the loan agreement may be amended only after the competent authorities have declared that they have no objection to the amendment.

4. Upon application, with supporting evidence, by the institution to the competent authority of the home Member State and with the agreement of that competent authority, the available solvency margin may also comprise:
- (a) where Zillmerising is not practised or where, if practised, it is less than the loading for acquisition costs included in the premium, the difference between a non-Zillmerised or partially Zillmerised mathematical provision and a mathematical provision Zillmerised at a rate equal to the loading for acquisition costs included in the premium;
  - (b) any hidden net reserves arising out of the valuation of assets, in so far as such hidden net reserves are not of an exceptional nature;
  - (c) one half of the unpaid share capital or initial fund, once the paid-up part amounts to 25 % of that share capital or fund, up to 50 % of the available or required solvency margin, whichever is the lesser.

The figure referred to in point (a) shall not exceed 3,5 % of the sum of the differences between the relevant capital sums of life assurance and occupational retirement provision activities and the mathematical provisions for all policies for which Zillmerising is possible. The difference shall be reduced by the amount of any undepreciated acquisition costs entered as an asset.

#### *Article 18*

##### Required solvency margin

1. The required solvency margin shall be determined as laid down in paragraphs 2 to 6 according to the liabilities underwritten.

2. The required solvency margin shall be equal to the sum of the following results:
  - (a) the first result:

a 4% fraction of the mathematical provisions relating to direct business and reinsurance acceptances gross of reinsurance cessions shall be multiplied by the ratio, which shall not be less than 85%, for the previous financial year, of the mathematical provisions net of reinsurance cessions to the gross total mathematical provisions;
  - (b) the second result:

for policies on which the capital at risk is not a negative figure, a 0,3% fraction of such capital underwritten by the institution shall be multiplied by the ratio, which shall not be less than 50%, for the previous financial year, of the total capital at risk retained as the institution's liability after reinsurance cessions and retrocessions to the total capital at risk gross of reinsurance.

For temporary assurances on death of a maximum term of three years, that fraction shall be 0,1%. For such assurance of a term of more than three years but not more than five years, that fraction shall be 0,15 %.
3. For supplementary insurances referred to in Article 2(3)(a)(iii) of Directive 2009/138/EC the required solvency margin shall be equal to the required solvency margin for institutions as laid down in Article 19.
4. For capital redemption operations referred to in Article 2(3)(b)(ii) of Directive 2009/138/EC, the required solvency margin shall be equal to a 4% fraction of the mathematical provisions calculated in compliance with paragraph 2(a).
5. For operations referred to in Article 2(3)(b)(i) of Directive 2009/138/EC, the required solvency margin shall be equal to 1% of their assets.
6. For assurances covered by Article 2(3)(a)(i) and (ii) of Directive 2009/138/EC linked to investment funds and for the operations referred to in Article 2(3)(b)(iii), (iv) and (v) of Directive 2009/138/EC, the required solvency margin shall be equal to the sum of the following:
  - (a) in so far as the institution bears an investment risk, a 4 % fraction of the technical provisions, calculated in compliance with paragraph 2(a);
  - (b) in so far as the institution bears no investment risk but the allocation to cover management expenses is fixed for a period exceeding five years, a 1% fraction of the technical provisions, calculated in compliance with paragraph 2(a);

- (c) in so far as the institution bears no investment risk and the allocation to cover management expenses is not fixed for a period exceeding five years, an amount equivalent to 25 % of the net administrative expenses of the previous financial year pertaining to such business;
- (d) in so far as the institution covers a death risk, a 0,3 % fraction of the capital at risk calculated in compliance with paragraph 2(b).

*Article 19*

Required solvency margin for the purpose of Article 18(3)

1. The required solvency margin shall be determined on the basis either of the annual amount of premiums or contributions, or of the average burden of claims for the past three financial years.
2. The amount of the required solvency margin shall be equal to the higher of the two results as set out in paragraphs 3 and 4.
3. The premium basis shall be calculated using the higher of gross written premiums or contributions as calculated below, and gross earned premiums or contributions.

The premiums or contributions (inclusive of charges ancillary to premiums or contributions) due in respect of direct business in the previous financial year shall be aggregated.

To that sum there shall be added the amount of premiums accepted for all reinsurance in the previous financial year.

From that sum there shall then be deducted the total amount of premiums or contributions cancelled in the previous financial year, as well as the total amount of taxes and levies pertaining to the premiums or contributions entering into the aggregate.

The amount so obtained shall be divided into two portions, the first extending up to EUR 50 million, the second comprising the excess; 18% of the first portion and 16% of the second shall be added together.

The sum so obtained shall be multiplied by the ratio existing in respect of the sum of the previous three financial years between the amount of claims remaining to be borne by the institution after deduction of amounts recoverable under reinsurance and the gross amount of claims. That ratio shall be no less than 50 %.

4. The claims basis shall be calculated, as follows:

The amounts of claims paid in respect of direct business (without any deduction of claims borne by reinsurers and retrocessionaires) in the periods specified in paragraph 1 shall be aggregated.

To that sum there shall be added the amount of claims paid in respect of reinsurances or retrocessions accepted during the same periods and the amount of provisions for claims outstanding established at the end of the previous financial year both for direct business and for reinsurance acceptances.

From that sum there shall be deducted the amount of recoveries effected during the periods specified in paragraph 1.

From the sum then remaining, there shall be deducted the amount of provisions for claims outstanding established at the commencement of the second financial year preceding the last financial year for which there are accounts, both for direct business and for reinsurance acceptances.

One third of the amount so obtained shall be divided into two portions, the first extending up to EUR 35 million and the second comprising the excess; 26% of the first portion and 23% of the second, shall be added together.

The sum so obtained shall be multiplied by the ratio existing in respect of the sum of the previous three financial years between the amount of claims remaining to be borne by the institution after deduction of amounts recoverable under reinsurance and the gross amount of claims. That ratio shall be no less than 50%.

5. Where the required solvency margin as calculated in paragraphs 2 to 4 is lower than the required solvency margin of the preceding year, the required solvency margin shall be at least equal to the required solvency margin of the preceding year, multiplied by the ratio of the amount of the technical provisions for claims outstanding at the end of the previous financial year and the amount of the technical provisions for claims outstanding at the beginning of the previous financial year. In those calculations technical provisions shall be calculated net of reinsurance but the ratio may be no higher than 1.

#### *Article 20*

#### Investment rules

1. Member States shall require institutions located in their territories to invest in accordance with the 'prudent person' rule and in particular in accordance with the following rules:

- (a) the assets shall be invested in the best interests of members and beneficiaries. In the case of a potential conflict of interest, the institution, or the entity which manages its portfolio, shall ensure that the investment is made in the sole interest of members and beneficiaries;
- (b) the assets shall be invested in such a manner as to ensure the security, quality, liquidity and profitability of the portfolio as a whole.

Assets held to cover the technical provisions shall also be invested in a manner appropriate to the nature and duration of the expected future retirement benefits;

- (c) the assets shall be predominantly invested on regulated markets. Investment in assets which are not admitted to trading on a regulated financial market must in any event be kept to prudent levels;
- (d) investment in derivative instruments shall be possible insofar as they contribute to a reduction of investment risks or facilitate efficient portfolio management. They must be valued on a prudent basis, taking into account the underlying asset, and included in the valuation of the institution's assets. The institution shall also avoid excessive risk exposure to a single counterparty and to other derivative operations;
- (e) the assets shall be properly diversified in such a way as to avoid excessive reliance on any particular asset, issuer or group of undertakings and accumulations of risk in the portfolio as a whole.

Investments in assets issued by the same issuer or by issuers belonging to the same group shall not expose the institution to excessive risk concentration;

- (f) investment in the sponsoring undertaking shall be no more than 5% of the portfolio as a whole and, when the sponsoring undertaking belongs to a group, investment in the undertakings belonging to the same group as the sponsoring undertaking shall not be more than 10% of the portfolio.

When the institution is sponsored by a number of undertakings, investment in these sponsoring undertakings shall be made prudently, taking into account the need for proper diversification.

Member States may decide not to apply the requirements referred to in points (e) and (f) to investment in government bonds.

2. Taking into account the nature, scale and complexity of the activities of the institutions supervised, Member States shall ensure that the competent authorities monitor the adequacy of the institutions' credit assessment processes, assess the use of references to credit ratings issued by credit rating agencies as defined in Article 3(1)(b) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council<sup>14</sup>, in their investment policies and, where appropriate, encourage mitigation of the impact of such references, with a view to reducing sole and mechanistic reliance on such credit ratings.
3. The home Member State shall prohibit the institution from borrowing or acting as a guarantor on behalf of third parties. However, Member States may authorise institutions to carry out some borrowing only for liquidity purposes and on a temporary basis.
4. Member States shall not require institutions registered or authorised in their territory to invest in particular categories of assets.
5. Without prejudice to Article 32, Member States shall not subject the investment decisions of an institution registered or authorised in their territory or its investment manager to any kind of prior approval or systematic notification requirements.
6. In accordance with the provisions of paragraphs 1 to 5, Member States may, for the institutions registered or authorised in their territories, lay down more detailed rules, including quantitative rules, provided they are prudentially justified, to reflect the total range of pension schemes operated by these institutions.

However, Member States shall not prevent institutions from:

- (a) investing up to 70 % of the assets covering the technical provisions or of the whole portfolio for schemes in which the members bear the investment risks in shares, negotiable securities treated as shares and corporate bonds admitted to trading on regulated markets, or through multilateral trading facilities or organised trading facilities, and deciding on the relative weight of these securities in their investment portfolio; **However, provided that it is prudentially justified, Member States may apply a lower limit to institutions which provide retirement products with a long-term interest rate guarantee, bear the investment risk and themselves provide for the guarantee;**
- (b) investing up to 30 % of the assets covering technical provisions in assets denominated in currencies other than those in which the liabilities are expressed;
- (c) investing in instruments that have a long-term economic profile and are not traded on regulated markets, multilateral trading facilities or organised trading facilities.

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<sup>14</sup> Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies (OJ L 302, 17.11.2009, p. 1.)

7. Paragraph 6 shall not preclude the right for Member States to require the application to institutions registered or authorised in their territory of more stringent investment rules also on an individual basis provided they are prudentially justified, in particular in the light of the liabilities entered into by the institution. In any case, where the institution provides retirement benefits with a long-term interest rate guarantee, bears the investment risk and itself provides for the guarantee, the corresponding assets shall be of good quality.
8. The competent authorities of the host Member State of an institution carrying out cross-border activity as referred to in Article 12 shall not lay down investment rules in addition to those set out in paragraphs 1 to 6 for the part of the assets which cover technical provisions for cross-border activity.

### Title III

## CONDITIONS GOVERNING ACTIVITIES

### CHAPTER 1

#### System of governance

#### Section 1

#### General provisions

#### *Article 21*

#### Responsibility of the administrative, management or supervisory body

1. Member States shall ensure that the administrative, management or supervisory body of the institution has the ultimate responsibility under national law for the compliance, by the institution concerned, with the laws, regulations and administrative provisions adopted pursuant to this Directive.
2. This Directive is without prejudice to the role of social partners in the management of the institutions.

## Article 22

### General governance requirements

1. Member States shall require all institutions to have in place an effective system of governance which provides for sound and prudent management of their activities. That system shall include an adequate transparent organisational structure with a clear allocation and appropriate segregation of responsibilities and an effective system for ensuring the transmission of information. The system of governance shall be subject to regular internal review.
2. The system of governance referred to in paragraph 1 shall be proportionate to the nature, scale and complexity of the activities of the institution.
3. Member States shall ensure that the institutions adopt written policies in relation to risk management, internal control, internal audit and, where relevant, actuarial activities and outsourced activities, and that these institutions ensure that those policies are implemented. Those written policies shall be subject to prior approval by the administrative, management or supervisory body of the institution and shall be reviewed at least every three years and shall be adapted in view of any significant change in the system or area concerned.
4. *deleted*
5. *deleted*
6. Member States shall require institutions to have at least two persons who effectively run the institution. Member States may allow that only one person effectively runs the institution, on the basis of a reasoned assessment conducted by the competent authorities. The assessment shall take into account the role of social partners in the overall management of the institutions, as well as size, nature, scale and complexity of the activities of the institutions.

## Article 23

### Requirements for fit and proper management

1. Member States shall require institutions to ensure that ~~persons the governing body~~ persons who ~~which~~ who effectively runs the institution, or those that or persons who have key functions and or, where applicable, those persons or entities employed to carry out key functions in accordance with Article 33; fulfil the following requirements when carrying out their tasks:
  - (a) their ~~professional~~ qualifications, knowledge and experience are collectively adequate in relation to the activities performed for the institution, (requirement to be fit);



(b) they are of good repute and integrity (requirement to be proper).

2. Member States shall ensure that there are effective procedures and controls in place to enable the competent authorities to assess whether the persons who effectively run the institution or have key functions fulfil the requirements laid down in paragraph 1.
3. Where a Member State requires of its own nationals proof of good repute, proof of no previous bankruptcy, or both, that Member State shall accept as sufficient evidence in respect of nationals of other Member States the production of an extract from the judicial record of the other Member State or, in the absence of a judicial record in the other Member State, of an equivalent document issued by a competent judicial or administrative authority in the home Member State or the Member State whose national the concerned person is showing that those requirements have been met.
4. Where the home Member State or the Member State whose national the concerned person is does not issue an equivalent document as referred to in paragraph 3, the national of the other Member State shall be allowed to produce in its place a declaration on oath.

However, in Member States where there is no provision for declarations on oath the national of the other Member State concerned shall be allowed to produce a solemn declaration made by him or her before a competent judicial or administrative authority in their home Member State or the Member State from which they come or before a notary in one of those Member States.

Such authority or notary shall issue a certificate attesting the authenticity of the declaration on oath or solemn declaration.

5. The proof in respect of no previous bankruptcy referred to in paragraph 3 may be provided in the form of a declaration made by the nationals of the other Member State concerned before a competent judicial, professional or trade body in that other Member State concerned.
6. The documents and certificates referred to in paragraphs 3, 4 and 5 shall not be presented more than three months after their date of issue.
7. Member States shall designate the authorities and bodies competent to issue the documents referred to in paragraphs 3, 4 and 5 and shall forthwith inform the other Member States and the Commission thereof.

Member States shall also inform the other Member States and the Commission of the authorities or bodies to which the documents referred to in paragraphs 3 to 5 are to be submitted in support of an application to pursue the activities referred to in Article 12 in the territory of that Member State.

## Article 24

### Remuneration policy

1. Member States shall require institutions to establish and apply a sound remuneration policy for all those persons who effectively run the institution, perform key functions and other categories of staff whose professional activities have a material impact on the risk profile of the institution and of the pension schemes operated by it in a manner that is appropriate to their size and internal organisation, as well as to the nature, scale and complexity of their activities.
2. Institutions shall disclose, at least to members and beneficiaries on request, relevant information regarding the remuneration policy.
3. When establishing and applying the remuneration policies referred to in paragraph 1, institutions shall comply with the following principles:
  - (a) *deleted*
    - the remuneration policy is established, implemented and maintained in line with the activities, risk management strategy, risk profile, objectives, risk management practices and the long-term interests and performance of the institution as a whole and of the pension schemes operated by it;
    - the remuneration policy includes measures aimed at avoiding conflicts of interest;
    - the remuneration policy is consistent with sound and effective risk management and does not encourage risk-taking which is inconsistent with the risk profiles and rules of the institution as a whole and of the pension schemes operated by it;
    - *deleted*
    - *deleted*
    - the institution establishes the general principles of the remuneration policy that shall be reviewed and updated at least every three years, and it is responsible for the control of its implementation;
    - where remuneration is performance-related, the total amount of remuneration is based on a combination of the performance of the individual and of the overall results of the institution, and when assessing individual performance, financial as well as non-financial criteria are taken into account;

- the assessment of performance is set in a multi-year framework, not exceeding five years, in order to ensure that the assessment process is based on long-term performance and that the actual payment of performance-based components of remuneration is spread over the same period.

(b) *deleted*

4. *deleted*

## Section 2

### Functions

#### *Article 25*

##### General provisions

1. Member States shall require institutions to have in place the following key functions: a risk-management function, an internal audit function, an internal control function and, where applicable, an actuarial function.
2. Other than in the case provided for in Article 27(2), institutions may allow a single person or organisational unit to carry out more than one key function.
3. Member States may, taking into account the nature, scale and complexity of the activities of the institution, allow the institution and the sponsoring undertaking to conduct key functions through the same individual or organisational unit, provided that, in the risk evaluation for pensions as referred to in Article 29, the institution explains how it prevents conflicts of interests with the sponsoring undertaking. The competent authority may take appropriate measures where necessary.
4. *deleted*
5. Any material findings and recommendations of the key functions shall be reported to the administrative, management or supervisory body of the institution which shall determine what actions are to be taken.
6. *deleted*
7. *deleted*

## Article 26

### Risk management

1. Member States shall require institutions, in a manner that is appropriate to their size and internal organisation, as well as to the nature, scale and complexity of their activities, to have in place an effective risk-management function. According to this function, institutions shall adopt strategies, processes and reporting procedures necessary to identify, measure, monitor, manage and report to the administrative, managing or supervisory body of the institution on a continuous basis the risks, at an individual and at an aggregated level, to which the institution and the pension schemes are or could be exposed, and their interdependencies.  
  
That risk-management system shall be well-integrated into the organisational structure and in the decision-making processes of the institution.
2. The risk-management system shall cover risks which can occur in the institutions or in undertakings to which tasks or activities have been outsourced at least in the following areas, where applicable:
  - (a) underwriting and reserving;
  - (b) asset–liability management;
  - (c) investment, in particular derivatives and similar commitments;
  - (d) liquidity and concentration risk management;
  - (e) operational risk management;
  - (f) insurance and other risk-mitigation techniques.
3. Where, in accordance with the conditions of the pension scheme, members and beneficiaries bear risks, the risk management system shall also consider those risks from the perspective of members and beneficiaries.
4. *deleted*

## Article 26a

### Internal control function

1. Member States shall require institutions, in a manner that is appropriate to their size and internal organisation, as well as to the nature, scale and complexity of their activities, to provide for an effective internal control function.

- 1a. The internal control function shall at least ensure that it implements a system that includes administrative and accounting procedures, an internal control framework and appropriate reporting arrangements at all levels of the institution.
2. The internal control function shall advise the administrative, management or supervisory body on compliance by the institution with the laws, regulations and administrative provisions. It shall also assess the possible impact of any changes in the legal environment on the operations of the institution concerned and identify and assess compliance risks.

### *Article 27*

#### Internal audit function

1. Member States shall require institutions, in a manner that is appropriate to their size and internal organisation, as well as to the nature, scale and complexity of their activities, to provide for an effective internal audit function. The internal audit function shall include an evaluation of the adequacy and effectiveness of the internal control function and other elements of the system of governance ~~laid down in Articles 21 to 24~~, including outsourced activities.
2. The internal audit function shall be objective and independent from other functions.
3. *deleted*

### *Article 28*

#### Actuarial function

1. Where the institution itself provides cover against biometric risks or guarantees either an investment performance or a given level of benefits Member States shall require that institutions provide for an effective actuarial function to:
  - (a) co-ordinate and oversee the calculation of technical provisions;
  - (b) assess the appropriateness of the methodologies and underlying models used in the calculation of technical provisions and the assumptions made for this purposes;
  - (c) assess the sufficiency and quality of the data used in the calculation of technical provisions;
  - (d) compare the assumptions underlying the technical provisions' calculation with the experience;
  - (e) inform the administrative, management or supervisory body of the institution of the reliability and adequacy of the calculation of technical provisions;

- (f) express an opinion on the overall underwriting policy in the event of the institution having such a policy;
  - (g) express an opinion on the adequacy of insurance arrangements in the event of the institution having such arrangements; and
  - (h) contribute to the effective implementation of the risk management system.
2. Member States shall require institutions to designate at least one person, inside or outside the institution, who is responsible for the actuarial function.

### Section 3

#### Documents concerning governance

#### Article 29

##### Risk evaluation for pensions

1. Member States shall require institutions, in a manner that is appropriate to their size and internal organisation, as well as to the nature, scale and complexity of their activities, to carry out a risk assessment and to produce a risk evaluation for pensions in order to document that assessment.

The risk evaluation for pensions shall be performed at least every three years or without delay following any significant change in the risk profile of the institution or of the pension scheme operated by the institution. Where there is a significant change in the risk profile of a pension scheme the risk evaluation for pensions may be performed only with regard to the risks and activities that are related to that pension scheme.

- 1a. Member States shall require that the competent authority, having regard to the size and internal organisation of the institution as well as to the nature, scale and complexity of the activities of the institutions concerned, shall lay down detailed rules specifying the structure, and information to be included in the risk evaluation for pensions.
2. Where applicable **and in accordance with paragraph 1a**, the risk evaluation for pensions shall include the following **information** evaluations:
- (a-1) a description of how the own risk assessment is integrated into the management process and into the decision-making process of the institution;
  - (a) an assessment of the effectiveness of the risk management function of the institution including in particular:

- (i) the institution's risk management strategies, objectives, processes and reporting procedures for each category of risk;
  - (ii) *deleted*
  - (iii) how the institution fulfils its obligation to invest its assets in accordance with the applicable provisions;
- (aa) ~~an assessment of the effectiveness of the activities undertaken by the internal control function in each of its areas of responsibility during the reporting period;~~
- (i) *deleted*
  - (ii) *deleted*
  - (iii) *deleted*
- (ab) ~~an assessment of the effectiveness of the activities undertaken by the internal audit function of the institution in each of its areas of responsibility during the reporting period;~~
- (i) *deleted*
  - (ii) *deleted*
  - (iii) *deleted*
- (ac) ~~an assessment of the effectiveness of the activities undertaken by~~ **functioning of** ~~the actuarial function in each of its areas of responsibility during the reporting period;~~
- (ad) how the institution prevents conflicts of interests with the sponsoring undertaking, in case the institution outsources key functions to the sponsoring undertaking according to Article 25(3);
- (ae) an assessment of the effectiveness of the activity undertaken by the depositary during the reporting period;
- (af) an assessment of the effectiveness of the payments of benefits;
- (b) an assessment of the overall solvency needs of the institution in accordance with national law, including a description of the recovery plan where applicable;
- (c) *deleted*

- (d) where a margin for adverse deviation is calculated in accordance with Article 14(4), a description of this margin for adverse deviation;
  - (e) a description of pension benefits reflecting the financial commitments referred to in Article 14(1) or the technical provisions referred to in Article 14(2), including, as applicable:
    - (i) the indexation mechanism;
    - (ii) the benefit reduction mechanisms, including the extent to which accrued pension benefits can be reduced, under which conditions and by whom;
    - (iii) the relevant assumptions about future management actions;
    - (iv) the relevant assumptions about sponsoring undertaking and member behaviour; and
    - (v) how the nature and the duration of the pension benefits influence the risk management methods, investment policy and funding policy of the institution;
  - (f) a qualitative assessment of the mechanisms protecting accrued individual entitlements, including, as applicable:
    - (i) guarantees, covenants or any other type of financial support by the sponsoring undertaking in favour of the institution or the members and beneficiaries; and
    - (ii) insurance by an insurance undertaking covered by Directive 2009/138/EC or coverage by a pension protection scheme.
  - (g) *deleted*
  - (h) *deleted*
3. For the purposes of paragraph 2, the institutions shall have in place methods to identify and evaluate the risks they are or could be exposed to in the short and in the long term and that may have an impact on the institution's ability to meet its obligations. Those methods shall be proportionate to the nature, scale and complexity of the risks inherent in its activities and considering the risk sharing mechanism among the institution, the sponsoring undertaking and members. The methods shall be described in the evaluation ~~and they~~ **which** shall include, where applicable:
- (a) the risk profile of the institution and of the pension schemes separately for the following categories of risk:



- (i) biometrical risk;
  - (ii) market risk;
  - (iii) credit risk;
  - (iv) liquidity risk;
  - (v) operational risk;
  - (vi) other material risks, including new or emerging risks;
- (b) the risk exposure of the institution, with reference to situations where the institution bears specific risks related to the provision of guarantees;
  - (c) the risk concentrations;
  - (d) the techniques currently used to mitigate risks;
  - (e) any other material information regarding their risk profile.

For the purposes of point (a)(v) of the first subparagraph, operational risk means the risk of loss arising from inadequate or failed internal processes, personnel or systems, or from external events. The assessment of operational risk shall describe how operational risks are identified, the most significant categories of operational risk in terms of impact or frequency, whether the operational risk is borne by the institution, the sponsoring undertaking or the members and beneficiaries, and the methods used by the institution to mitigate the risks.

- 4. The risk evaluation for pensions shall be taken into account in the strategic decisions of the institution.

### *Article 30*

Delegated act for the risk evaluation for pensions

*deleted*

## *Article 31*

### Annual accounts and annual reports

Member States shall require every institution registered or authorised in their territories to draw up annual accounts and annual reports taking into account each pension scheme operated by the institution and, where applicable, annual accounts and annual reports for each pension scheme. The annual accounts and the annual reports shall give a true and fair view of the institution's assets, liabilities and financial position. The annual accounts and information in the reports shall be consistent, comprehensive, fairly presented and duly approved by authorised persons, in accordance with national law.

## *Article 32*

### Statement of investment policy principles

Member States shall ensure that every institution registered or authorised in their territories prepares and, at least every three years, reviews a written statement of investment-policy principles. That statement is to be revised without delay after any significant change in the investment policy. Member States shall provide for this statement to contain, at least, such matters as the investment risk measurement methods, the risk-management processes implemented and the strategic asset allocation with respect to the nature and duration of pension liabilities.

## **CHAPTER 2**

### Outsourcing and investment management

## *Article 33*

### Outsourcing

1. Member States may permit or require institutions registered or authorised in their territories to entrust key functions or any other activities of those institutions, in whole or in part, to other entities operating on behalf of those institutions.
2. Member States shall ensure that institutions remain fully responsible for compliance with their obligations under this Directive when they outsource key functions or any other activities.
3. Outsourcing of key functions or any other activities shall not be undertaken in such a way as to lead to any of the following:

- (a) impairing the quality of the system of governance of the institution concerned;
  - (b) unduly increasing the operational risk;
  - (c) impairing the ability of the competent authorities to monitor the compliance of the institution with its obligations under this Directive;
  - (d) undermining continuous and satisfactory service to members and beneficiaries.
4. The institution shall ensure the proper functioning of the outsourced activities through the process of selecting the service provider and the on-going monitoring of the activities of the service provider.
5. Member States shall ensure that institutions outsourcing key functions or other critical or important functions or activities enter into at least a written agreement with the service provider. The agreement shall be legally enforceable and shall clearly define the rights and obligations of the institution and the service provider.
6. Member States shall ensure that institutions notify, in a timely manner, competent authorities of any outsourcing of key functions or other critical or important functions or activities as well as of any subsequent important developments with respect to these functions and activities.
7. Member States shall ensure that competent authorities have the powers necessary to perform their duties under this Directive, including to request information from institutions and from service providers about outsourced key functions or any other activities at any time.

#### *Article 34*

#### Investment management

Member States shall not restrict institutions from appointing, for the management of the investment portfolio, investment managers established in another Member State and duly authorised for this activity, in accordance with Directive 2004/39/EC and Directives, 2009/65/EC, 2009/138/EC, 2011/61/EU and 2013/36/EU, as well as those referred to in Article 2(1) of this Directive.

## CHAPTER 3

### Depository

#### *Article 35*

##### Appointment of a depository

1. For an occupational pension scheme in which members and beneficiaries fully bear the investment risk or biometrical risks individually the home Member State shall require the institution to appoint one or more depositaries for safe-keeping of assets and oversight duties in accordance with Articles 36 and 37. Without prejudice to Article 36(5), **Member States may decide** ~~this requirement will not to be applicable~~ **apply this requirement to an institution which has outsourced all of its investment management activities to one or more entities which** **when the institution has invested all pension scheme assets in the financial products** ~~have appointed a depository for safekeeping of assets and oversight duties of the pension scheme in accordance with~~ **covered by** Directive 2011/61/EU or 2014/91/EU **2009/65/EU**; **and when a depository has been appointed in accordance with these Directives.**
  - 1a. ~~**Taking into account the nature, scale and complexity of the activities of the institution,**~~ **Member States may allow the competent authority to exempt the institution from the requirement set out in paragraph 1 provided that levels of protection not less favourable than equivalent to those provided for in Articles 36 and 37 are in place.**

**Such exemption shall not be applicable to institutions which carry out cross-border activity or cross-border transfers in accordance with Article 12(4) and Article 13 respectively.**
2. For occupational pension schemes in which the members and beneficiaries do not fully bear the investment risk, the home Member State may require the institution to appoint one or more depositaries for safe-keeping of assets or for safe-keeping of assets and oversight duties in accordance with Articles 36 and 37.
3. Member States shall not restrict institutions from appointing, for the custody of their assets, depositaries established in another Member State and duly authorised in accordance with Directive 2004/39/EC or Directive 2013/36/EU, or accepted as a depository for the purposes of Directive 2009/65/EC.
4. Member States shall take the necessary steps to enable competent authorities under their national law to prohibit, in accordance with Article 62, the free disposal of assets held by a depository or custodian located within their territory at the request of the authority of the institution's home Member State.

5. The depositary shall be appointed by means of at least a written contract. The contract shall stipulate the transmission of the information necessary for the depositary to perform its duties for the pension scheme for which it has been appointed as depositary, as set out in this Directive and in other relevant laws, regulations or administrative provisions.
6. When carrying out the tasks laid down in Articles 36 and 37, the institution and the depositary shall act honestly, fairly, professionally, independently and in the interest of the scheme's members and beneficiaries.
7. A depositary shall not carry out activities with regard to the institution which may create conflicts of interest between the institution, the scheme's members and beneficiaries and itself, unless the depositary has functionally and hierarchically separated the performance of its depositary tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the scheme's members and beneficiaries and to the administrative, management or supervisory body of the institution.
8. Where no depositary is appointed, institutions shall make arrangements to prevent and resolve any conflict of interest in the course of tasks otherwise performed by a depositary and an asset manager.

### *Article 36*

#### Safekeeping of assets and depositary liability

1. Where the assets of a pension scheme consisting of financial instruments which can be held in custody are entrusted to a depositary for safekeeping, the depositary shall hold in custody all financial instruments which can be registered in a financial instruments account opened in the depositary's books and all financial instruments which can be physically delivered to the depositary.

For those purposes, the depositary shall ensure that the financial instruments which can be registered in a financial instruments account opened in the depositary's books are registered in the depositary's books within segregated accounts in accordance with the rules laid down in Directive 2004/39/EC, opened in the name of the institution, so that they can be clearly identified as belonging to the institution or the pension scheme's members and beneficiaries at all times.

2. Where the assets of a pension scheme consist of other assets than those referred to in paragraph 1, the depositary shall verify that the institution or the members and beneficiaries are the owners of the assets and shall maintain a record of their assets. The verification shall be carried out on the basis of information or documents provided by the institution and, where available, on external evidence. The depositary shall keep its record up-to-date.

3. Member States shall ensure that a depositary is liable to the institution or the members and beneficiaries for any loss suffered by them as a result of its unjustifiable failure to perform its obligations or its improper performance of them.
4. Member States shall ensure that a depositary's liability, as referred to in paragraph 3, shall not be affected by the fact that it has entrusted to a third party all or some of the assets in its safe-keeping.
5. Where no depositary is appointed for the safe-keeping of assets, institutions shall, at least be required to:
  - (a) ensure that financial instruments are subject to due care and protection;
  - (b) keep records that enable the institution to identify all assets at all times and without delay;
  - (c) take the necessary measures to avoid conflicts of interest or incompatibility;
  - (d) inform the competent authority, upon request, about the manner in which assets are kept.

### *Article 37*

#### Oversight duties

1. The depositary shall carry out the tasks referred to in paragraphs 1 and 2 of Article 36 in addition to the following:
  - (a) carry out instructions of the institution, unless they conflict with national law or the institution's rules;
  - (b) ensure that in transactions involving the assets of an institution or of a pension scheme any consideration is remitted to the institution within the usual time limits;
  - (c) ensure that income produced by assets is applied in accordance with the institution's rules.
2. Notwithstanding paragraph 1, the home Member State of the institution may establish other oversight duties to be performed by the depositary.
3. Where no depositary is appointed for oversight duties, the institution shall implement procedures which ensure that the tasks, otherwise subject to oversight by depositaries, are being duly performed within the institution.

## Title IV

### INFORMATION TO BE GIVEN TO PROSPECTIVE MEMBERS, MEMBERS AND BENEFICIARIES

#### CHAPTER 1

##### General provisions

###### *Article 38*

##### Principles

1. Depending on the nature of the pension scheme established, Member States shall ensure that every institution registered or authorised in their territories provides to prospective members at least the information set out in Article 55, to members at least the information set out in Articles 39 to 53, ~~56~~ and 58 and to beneficiaries at least the information set out in Articles 57 and 58. The information shall fulfil all the following requirements:
  - (a) it shall be regularly updated;
  - (b) it shall be written in a clear manner, using clear, succinct and comprehensible language, avoiding the use of jargon and avoiding technical terms where everyday words can be used instead;
  - (c) it shall not be misleading and consistency shall be ensured in the vocabulary and content;
  - (d) it shall be presented in a way that is easy to read;
  - (e) it shall be available in ~~the~~an official languages of the Member State whose social and labour law relevant to the field of the occupational pension scheme is applicable to the relationship between the sponsoring undertaking or the institution, and the members or the beneficiaries.
- 2a. Member States may adopt or maintain further provisions on information to be given to prospective members, members and beneficiaries.
- 2b. Member States may allow that the information referred to in paragraph 1 is provided by third parties other than institutions.

Conditions of the pension scheme

1. Member States shall, in respect of every institution registered or authorised in their territories, ensure that members are sufficiently informed about the functioning of the respective pension scheme operated by the institution, in particular about:
  - (a) the rights and obligations of the parties involved in the pension scheme;
  - (b) the nature of financial risks borne by the members and beneficiaries;
  - (ba) ~~the conditions regarding guarantees of a given investment performance or of a given level of benefits, if any;~~ **the conditions regarding guarantees of a given investment performance or of a given level of benefits, if any;**
  - (bb) the mechanisms protecting accrued entitlements or the benefits reduction mechanisms, if any;
  - (bc) the historical series of investment returns obtained at least during the last five years, for those schemes that have been operating for at least five years, where members bear investment risk or can take investment decisions;
  - (bd) the structure of costs borne by members and beneficiaries, for schemes ~~where~~ **which do not provide for a given level of benefits** ~~members bear the investment risk;~~
  - (be) the options available to members in receiving their retirement income;
  - (c) the persons who are eligible to join the pension scheme.

With reference to point (bc), a statement that historical data are not predictive of the future value of the investment returns.

2. Member States shall, in respect of every institution registered or authorised in their territories, ensure that, for schemes in which members bear an investment risk and which provide for more than one option with different investment profiles, the members are informed of the conditions regarding the range of investment options available, and, where applicable, the default investment option and, the pension scheme's rule to allocate a particular member to an investment option, in addition to the information listed in paragraph 1.
3. Members and beneficiaries and/or, where applicable, their representatives shall receive, within a reasonable time, any relevant information regarding changes to the pension scheme rules.



4. Institutions shall make available ~~electronically or on a website~~ the conditions of the pension scheme set out in this Article.

## CHAPTER 2

### Pension Benefit Statement

#### *Article 40*

##### General provisions

1. Member States shall require institutions to draw up a document containing key information for each member. The title of the document shall contain the words 'Pension benefit statement'.
  - 1a. The pension benefit statement shall be written in a concise way.
2. Member States shall ensure that the information contained in the pension benefit statement is updated and provided to each member at least once every twelve months and free of charge.
3. Any material change to the information contained in the pension benefit statement compared to the previous year shall be clearly indicated.
  - 3a. The pension benefit statement shall be generally comprehensible without reference to other information than that referred to in Articles 51 and 53 or produced in accordance with Article 38(2a) and (2b).
  - 3b. Member States may allow institutions to provide the pension benefit statement in a durable medium, or by means of a website in case it can be downloaded and stored in a durable medium. A paper copy shall be delivered to the members ~~and beneficiaries~~ on request and free of charge in addition to any electronic means.

#### *Article 41*

##### Comprehensibility

*deleted*

*Article 42*

Length

*deleted*

*Article 43*

Medium

*deleted*

*Article 44*

Liability

*deleted*

*Article 45*

Title

*deleted*

*Article 46*

Personal details

*deleted*

*Article 47*

Purpose, date and identification details

1. A short statement explaining the purpose of the pension benefit statement shall appear directly underneath the title.
2. The exact date to which the information in the pension benefit statement refers shall be stated prominently.

3. The pension benefit statement shall identify the member, specifying the personal details of the member, and shall include a clear indication of the retirement age ~~retirement age~~ or the date when receiving retirement benefits for taking the accrued entitlements used as the basis for the projections referred to in Article 49.
4. The pension benefit statement shall identify the institution and the pension scheme of the member, indicating:
  - (1) the name of the institution and its address;
  - (2) the Member State in which the institution is registered or authorised and the name of the national competent authority;
  - (3) the identification of the pension scheme of the member;
  - (3b) ~~the website~~ where the conditions of that pension scheme are published as referred to in Article 39(4);
  - (3c) the cover and/or the guarantee of investment performance or of a given level of benefits and the nature of the risk coverage or guarantee, if any.

#### *Article 48*

#### Types of occupational pension scheme

*deleted*

#### *Article 49*

#### Balance, contributions and pension projections

1. With regard to balance, contributions and pension projections the pension benefit statement shall indicate the following amounts expressed in the currency relevant for the pension scheme, if ~~attributed~~ contributed to the individual accounts of the members:
  - (a) where the pension scheme does not provide for a given level of benefits, ~~the sum of the total~~ contributions paid by the sponsoring undertaking and the member into the pension scheme, ~~including a separate indication of the contribution~~ over the past twelve months, or, if the member has joined the scheme less than twelve months ago, the sum of the contributions since joining;
  - (b) *deleted*

- (c) *deleted*
- (d) the balance on the date of the pension benefit statement calculated in one of the two following ways depending on the nature of the pension scheme:
  - (i) for pension schemes that do not provide for a given level of benefits, the capital accumulated by the member, expressed also as an annuity, if applicable;
  - (ii) for pension schemes that provide for a given level of benefits, the accrued individual entitlements;
- (e) the amounts calculated under point (d) shall include other contributions relevant to the member such as transfer of accrued capital, and **shall be net of all** the costs deducted by the institution;
- (f) *deleted*

2. Where the pension scheme provides for a given level of benefits, the pension benefit statement shall indicate, where applicable, the amount of the given level of benefits at the estimated ~~retirement age~~ **retirement age or the estimated date when receiving retirement** benefits provided for in the pension scheme, ~~and for the following two years where it is possible to remain a member of the pension scheme after the estimated retirement age~~ under best estimate assumptions, expressed in the currency relevant for the pension scheme, **or shall indicate where these projections are provided.**

3. *deleted*

4. Where the pension scheme does not provide for a given level of benefits, the pension benefit statement shall indicate, where applicable, the expected amount of the capital accumulated by the member at the estimated ~~retirement age~~ **retirement age or the estimated date when receiving retirement benefits**, ~~and for the following two years where it is possible to remain a member of the pension scheme after the estimated retirement age~~ under best estimate assumptions relevant for the scheme, expressed in the currency relevant for the pension scheme, **or shall indicate where these projections are provided.** The amount shall also be expressed as an annuity, if applicable.

5. Member States shall provide rules to determine the assumptions referred to in paragraphs 1, 2 and 4. These rules shall be taken into account in order to determine the following factors, if relevant:

- (a) the annual rate of nominal investment returns;
- (b) the annual rate of inflation;
- (c) trend of future wages.

6. *deleted*

- 6a. The pension benefit statement shall contain a warning in order to clarify that amounts indicated in the pensions projections are estimates based on assumptions and might differ from the final value of the benefits accrued.

#### *Article 49a*

##### Costs

Where the pension scheme does not provide for a given level of benefits, the pension benefit statement shall indicate the total amount of the costs **borne by members** ~~deducted from the gross contributions paid by the member, from the investment return, and from the accumulated capital over the past twelve months-~~ **or, if** ~~If~~ the member has joined the scheme less than twelve months ago, the sum of the aforementioned costs that have been deducted since joining ~~shall be indicated.~~

#### *Article 50*

##### Pension projections

*deleted*

#### *Article 51*

##### Investment profile

1. For pension schemes where members bear investment risk and where they have a choice ~~between~~ **among** different investment options, the pension benefit statement shall indicate the investment profiles. The pension benefit statement shall indicate ~~the documents or the website~~ where a list of the investment options available and a short description of each option are provided. The member's current investment option shall be marked prominently.
2. For pension schemes where members bear investment risk and where an investment option is imposed on the member by a specific rule specified in the pension scheme, the pension benefit statement shall indicate ~~the documents or the website~~ where the following additional information shall be provided, where applicable:
  - (a) rules based on actual age;
  - (b) rules based on the member's targeted **retirement age** ~~retirement age~~ **or the targeted date when receiving retirement benefits**;
  - (c) other rules.

3. For pension schemes where members bear investment risk, the pension benefit statement shall contain information about the risk and return profile. The pension benefit statement shall indicate the documents or the website where the following additional information shall be provided:
  - (a) *deleted*
  - (b) an explanation of **investment** risks which are materially relevant;
  - (ba) a brief explanation **of the actual returns** ~~as to why the pension scheme or investment option is in a specific category;~~
  - (bc) a statement that the lowest ~~category~~ **risk profile** does not mean a risk-free investment.
4. *deleted*
5. *deleted*
6. The pension benefit statement shall indicate where the statement of investment principles is available.

*Article 52*

Past performance

*deleted*

*Article 53*

Supplementary information

The pension benefit statement shall specify where and how to obtain the following supplementary information:

- (a) further practical information about any member's options provided by the pension scheme other than those mentioned in Articles 51 ~~and 56~~;
- (aa) further information about cover or guarantees referred to in Article 47(4)(3c) in case these are provided by the scheme;
- (ab) further information about costs referred to in Article 49a, if any;
- (ac) information about rules based on actual age, if any, and/or about rules based on the member's targeted **retirement age** ~~retirement age~~ **or the targeted date when receiving retirement benefits**, if any, and/or other rules;

- (b) in case a member has the right to transfer pension rights, further information about the arrangements relating to the transfer of pension rights to another institution for occupational retirement provision in the event of termination of the employment relationship;
- (c) information about the assumptions used for amounts expressed in annuities, in particular with respect to the annuity rate, the type of provider and the duration of the annuity;
- (d) further information about the given level of the retirement benefits, if applicable, and the level of benefits in case of cessation of employment.

*Article 54*

Implementation of rules on Pension Benefit Statement

*deleted*

CHAPTER 3

Other information and documents to be provided

*Article 55*

Information to be given to prospective members

1. Member States shall ensure that institutions provide to prospective members **who have to take an individual decision**; before they join the scheme, a document that explains the relevant features of the institution, ~~its system of governance, the persons who are eligible to join the pension scheme,~~ according to its rules and objectives, the kind of benefits and the reference to documents and website where further information is available.
2. Where members bear investment risks and ~~which provide for~~ **where a choice among more different than one investment options with different investment profiles is available**, the prospective members shall be informed of the conditions regarding the range of investment options available, of the historical series of investment returns obtained at least during the last 5 years for those schemes that have been operating for at least 5 years, and, where applicable, the default investment option and the institution's rule to allocate a particular member to an investment option. In addition institution shall provide information on costs.

3. Where persons become members of a pension scheme without taking an individual decision to join it, institution shall promptly provide them, after the enrolment, with information about the following conditions regarding their membership:
  - a) their investment options, if any;
  - b) the system of governance of the institution, where members bear the investment risk.

*Article 56*

Information to be given to members during the pre-retirement phase

*deleted*

*Article 57*

Information to be given to beneficiaries during the pay-out phase

1. Member States shall ensure that institutions **periodically** provide beneficiaries with information about **major material changes in** the benefits due and the corresponding payment options.
2. When a significant level of investment risk is borne by beneficiaries in the pay-out phase, Member States shall ensure that beneficiaries receive appropriate information **regularly**.

*Article 58*

Additional information to be given on request to members and beneficiaries

1. On request of a member, a beneficiary or their representatives, the institution shall provide the following additional information:
  - (a) the annual accounts and the annual reports referred to in Article 31, or where an institution is responsible for more than one scheme, those accounts and reports relating to their particular pension scheme;
  - (b) the statement of investment policy principles, referred to in Article 32;
  - (c) further information about the assumptions used to generate the projections referred to Article 49, **if any**;
  - (d) further information about the assumed annuity rate, the type of provider and the duration of the annuity referred to in Article 53(c), **if any**.



2. On request from a member, the institution shall also provide detailed and substantial information on:
  - (a) the target level of the retirement benefits, if applicable;
  - (b) the level of benefits in case of cessation of employment.

## Title V

### PRUDENTIAL SUPERVISION

#### Chapter 1

##### General rules on prudential supervision

###### *Article 59*

###### Main objective of prudential supervision

1. The main objective of prudential supervision is to pursue the protection of the rights of members and beneficiaries and the stability and soundness of the institutions.
2. *deleted*

###### *Article 60*

###### Scope of prudential supervision

Member States shall ensure that institutions for occupational retirement provision are subject to prudential supervision including the supervision of the following, where applicable:

- (a) conditions of operations;
- (b) technical provisions;
- (c) funding of technical provisions;
- (d) regulatory own funds;
- (e) available solvency margin;
- (f) required solvency margin;
- (g) investment rules;

- (h) investment management; **and**
- (i) ~~conditions governing activities; and~~
- (j) information to be provided to competent authorities.

#### *Article 61*

##### General principles of prudential supervision

1. The competent authorities of the home Member State shall be responsible for the prudential supervision of institutions for occupational retirement provision.
2. Member States shall ensure that supervision is based on a forward-looking and risk-based approach.
3. Supervision of institutions shall comprise an appropriate combination of off-site activities and on-site inspections.
4. Supervisory powers shall be applied in a timely and proportionate manner.
5. Member States shall ensure that the competent authorities duly consider the potential impact of their actions on the stability of the financial systems in the European Union, in particular in emergency situations.

#### *Article 62*

##### Powers of intervention and duties of the competent authorities

1. The competent authorities shall require every institution registered or authorised in their territories to have sound administrative and accounting procedures and adequate internal control mechanisms.
2. Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted on the basis of this Directive and shall take all necessary measures to ensure that they are implemented. Those sanctions shall be effective, proportionate and dissuasive. Member States shall provide that the competent authority may disclose to the public any administrative or other sanction that will be imposed for infringement of the measures adopted in the transposition of this Directive, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.
3. Any decision to prohibit or restrict the activities of an institution shall contain detailed reasons and be notified to the institution in question. It shall also be notified to EIOPA.

4. Competent authorities may also restrict or prohibit the free disposal of the institution's assets when, in particular:
  - (a) the institution has failed to establish sufficient technical provisions in respect of the entire business or has insufficient assets to cover the technical provisions;
  - (b) the institution has failed to hold the regulatory own funds.
5. In order to safeguard the interests of members and beneficiaries, the competent authorities may transfer the powers which the persons running an institution registered or authorised in their territories hold in accordance with the law of the home Member State wholly or partly to a special representative who is fit to exercise these powers.
6. The competent authorities may prohibit or restrict the activities of an institution registered or authorised in their territories in particular if:
  - (a) the institution fails to protect adequately the interests of scheme members and beneficiaries;
  - (b) the institution no longer fulfils the conditions of operation;
  - (c) the institution fails seriously in its obligations under the rules to which it is subject;
  - (d) in the case of cross-border activity, the institution does not respect the requirements of social and labour law of the host Member State relevant to the field of occupational pensions.
7. Member States shall ensure that decisions taken in respect of an institution under laws, regulations and administrative provisions adopted in accordance with this Directive are subject to the right to apply to the courts.

### *Article 63*

#### Supervisory review process

1. Member States shall ensure that competent authorities have the necessary powers to review the strategies, processes and reporting procedures which are established by institutions to comply with the laws, regulations and administrative provisions adopted pursuant to this Directive.

When carrying on the review, competent authorities shall take into account the circumstances in which the institutions are operating, and, where relevant, the parties carrying out outsourced key functions or any other activities for them, and their review may comprise the following elements:

- (a) an assessment of the qualitative requirements relating to the system of governance;
  - (b) an assessment of the risks the institution faces;
  - (c) an assessment of the ability of the institution to assess and control those risks.
2. Member States shall ensure that competent authorities have monitoring tools, that enable them to identify deteriorating financial conditions in an institution and to monitor how a deterioration is remedied. For this purpose, competent authorities may put in place stress tests.
  3. The competent authorities shall have the necessary powers to require institutions to remedy weaknesses or deficiencies identified in the supervisory review process.
  4. The competent authorities shall establish the minimum frequency and the scope of the review laid down in paragraph 1 having regard to the nature, scale and complexity of the activities of the institutions concerned.

#### *Article 64*

##### Information to be provided to the competent authorities

1. Member States shall ensure that the competent authorities, in respect of any institution registered or authorised in their territories, have the necessary powers and means:
  - (a) to require, the administrative, management or supervisory body of the institution or the persons who effectively run the institution or have key functions, to supply at any time information about all business matters or forward all business documents;
  - (b) to supervise relationships between the institution and other companies or between institutions, when institutions transfer key functions or any other activities to those other companies or institutions (outsourcing and all subsequent re-outsourcing), influencing the financial situation of the institution or being in a material way relevant for effective supervision;
  - (c) to obtain at least on request the following documents: the risk evaluation for pensions, the statement of investment-policy principles, documents relating to the governance system, the annual accounts and the annual reports and all other documents necessary for the purposes of supervision.
  - (d) to lay down which documents are necessary for the purposes of supervision, including:
    - (i) internal interim reports;

- (ii) actuarial valuations and detailed assumptions;
  - (iii) asset-liability studies;
  - (iv) evidence of consistency with the investment-policy principles;
  - (v) evidence that contributions have been paid in as planned;
  - (vi) reports by the persons responsible for auditing the annual accounts referred to in Article 31;
- (e) to carry out on-site inspections at the institution's premises and, where appropriate, on outsourced and all subsequent re-outsourced activities to check if activities are carried out in accordance with the supervisory rules.
  - (f) to request information from institutions about outsourced and all subsequent re-outsourced activities at any time.
2. EIOPA may develop draft implementing technical standards on the forms and formats for the documents listed in paragraph 1(d)(i) to (vi).

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1094/2010.

### *Article 65*

#### Transparency and accountability

1. Member States shall ensure that the competent authorities conduct the tasks laid down in Articles 60, 61, 62, 63 and 64 in a transparent and accountable manner with due respect for the protection of confidential information.
2. Member States shall ensure that the following information is publicly disclosed:
  - (a) the texts of laws, regulations, administrative rules and general guidance in the field of occupational pensions regulation, and information about whether the Member State chooses to apply this Directive in accordance with Articles 4 and 5;
  - (b) information regarding the supervisory review process as set out in Article 63;
  - (c) aggregate statistical data on key aspects of the application of the prudential framework;

- (d) the main objective of prudential supervision and information on the main functions and activities of the supervision;
- (e) the rules on sanctions applicable to breaches of national provisions adopted pursuant to this Directive.

3. *deleted*

## Chapter 2

### Professional secrecy and exchange of information

#### *Article 66*

##### Professional secrecy

1. Member States shall lay down rules to ensure that all persons who are working or who have worked for the competent authorities, as well as auditors and experts acting on behalf of those authorities, are bound by the obligation of professional secrecy.

Without prejudice to cases covered by criminal law, those persons shall not divulge confidential information received by them in the course of their duties to any person or authority, except in summary or aggregate form not allowing for the identification of individual institutions.

2. *deleted*

#### *Article 67*

##### Use of confidential information

Member States shall ensure that competent authorities which receive confidential information under this Directive use it only in the course of their duties and for the following purposes:

- (a) to check that the conditions for occupational retirement provision are met by institutions before commencing their activities;
- (b) to facilitate the monitoring of the activities of institutions, including the monitoring of the technical provisions, the solvency, the system of governance, and the information provided to members and beneficiaries;
- (c) to impose corrective measures, including sanctions;

- (ca) to publish, if it is permitted by their national law, key performance indicators for all individual institutions, which may assist members and beneficiaries in taking financial decisions regarding their pension;
- (d) appeals against decisions of the competent authorities taken in accordance with the provisions transposing this Directive;
- (e) in court proceedings regarding the provisions transposing this Directive.

### *Article 68*

#### Exchange of information between authorities

1. Article 66 shall not preclude any of the following:
  - (a) the exchange of information between competent authorities in the same Member State in the discharge of their supervisory functions;
  - (b) the exchange of information between competent authorities in different Member States in the discharge of their supervisory functions;
  - (c) the exchange of information, in the discharge of their supervisory functions, between competent authorities and any of the following which are situated in the same Member State:
    - (i) authorities responsible for the supervision of financial sector entities and other financial organisations and the authorities responsible for the supervision of financial markets;
    - (ii) authorities or bodies charged with responsibility for maintaining the stability of the financial system in Member States through the use of macro-prudential rules;
    - (iii) bodies involved in the termination of a pension scheme and in other similar procedures;
    - (iv) reorganisation bodies or authorities aiming at protecting the stability of the financial system;
    - (v) persons responsible for carrying out statutory audits of the accounts of institutions, insurance undertakings and other financial institutions;
  - (d) the disclosure, to bodies which administer the termination of a pension scheme, of information necessary for the performance of their duties.

2. The information received by the authorities, bodies and persons referred to in paragraph 1 shall be subject to the rules on professional secrecy laid down in Article 66.
3. Article 66 shall not preclude Member States from authorising exchanges of information between the competent authorities and any of the following:
  - (a) the authorities responsible for overseeing the bodies involved in the termination of pension schemes and other similar procedures;
  - (b) the authorities responsible for overseeing the persons charged with carrying out statutory audits of the accounts of institutions, credit institutions, investment firms, insurance undertakings and other financial institutions;
  - (c) independent actuaries of institutions carrying out supervision of those institutions and the bodies responsible for overseeing such actuaries.

#### *Article 69*

#### Transmission of information to central banks, monetary authorities, European Supervisory Authorities and the European Systemic Risk Board

1. Article 66 shall not prevent a competent authority from transmitting information to the following entities for the purposes of the exercise of their respective tasks:
  - (a) central banks and other bodies with a similar function in their capacity as monetary authorities;
  - (b) where appropriate, other public authorities responsible for overseeing payment systems;
  - (c) the European Systemic Risk Board, EIOPA, the European Banking Authority and the European Securities and Markets Authority.
2. Articles 68 to 71 shall not prevent the authorities or bodies referred to in paragraph 1(a), (b) and (c) from communicating to the competent authorities such information as the competent authorities may need for the purposes of Article 67.
3. Information received in accordance with paragraphs 1 and 2 shall be subject to professional secrecy requirements at least equivalent to those as set out in this Directive.



Disclosure of information to government administrations responsible for financial legislation

1. Articles 66 (1), 67 and 71 (1) shall not preclude Member States from authorising the disclosure of confidential information between competent authorities and other departments of their central government administrations responsible for the enforcement of legislation on the supervision of institutions, credit institutions, financial institutions, investment services, insurance undertakings and to inspectors acting on behalf of those departments.

Such disclosure shall be made only where necessary for reasons of prudential control, and prevention and resolution of failing institutions. Without prejudice to paragraph 2 of this Article, persons having access to the information shall be subject to professional secrecy requirements at least equivalent to those set out in this Directive. Member States shall, however, provide that information received under Article 68, and information obtained by means of on-site verification may only be disclosed with the express consent of the competent authority from which the information originated or of the competent authority of the Member State in which the on-site verification was carried out.

2. Member States may authorise the disclosure of confidential information relating to the prudential supervision of institutions to parliamentary enquiry committees or courts of auditors in their Member State and other entities in charge of enquiries in their Member State, where all of the following conditions are fulfilled:
  - (a) the entities have the competence under national law to investigate or scrutinise the actions of authorities responsible for the supervision of institutions or for laws on such supervision;
  - (b) the information is strictly necessary for fulfilling the competence referred to in point (a);
  - (c) the persons with access to the information are subject to professional secrecy requirements under national law at least equivalent to those set out in this Directive;
  - (d) if the information originates from another Member State, this information is disclosed with the explicit agreement of the originating competent authorities and solely for the purposes for which those authorities gave their agreement.

Conditions for the exchange of information

1. For exchanges of information under Articles 68, transmission of information under Article 69 and disclosure of information under Article 70, Member States shall require that at least the following conditions are met:
  - (a) the information shall be exchanged, transmitted or disclosed for the purpose of carrying out the oversight or legal supervision;
  - (b) the information received shall be subject to the obligation of professional secrecy laid down in Article 66;
  - (c) where the information originates from another Member State, it shall not be disclosed without the express agreement of the competent authority from which it originates and, where appropriate, solely for the purposes for which that authority gave its agreement.
2. Article 67 shall not preclude Member States from authorising, with the aim of strengthening the stability, and integrity, of the financial system, the exchange of information between the competent authorities and the authorities or bodies responsible for the detection and investigation of breaches of company law applicable to sponsoring undertakings.

Member States which apply the first subparagraph shall require that at least the following conditions are met:

- (a) the information must be intended for the purpose of detection and investigation as referred to in Article 70(2)(a);
  - (b) information received must be subject to the obligation of professional secrecy laid down in Article 66;
  - (c) where the information originates from another Member State, it shall not be disclosed without the express agreement of the competent authority from which it originates and, where appropriate, solely for the purposes for which that authority gave its agreement.
3. Where, in a Member State, the authorities or bodies referred to in the first subparagraph of paragraph 2 perform their task of detection or investigation with the aid of persons appointed, in view of their specific competence, for that purpose and not employed in the public sector, the possibility of exchanging information provided for in Article 70(2) shall apply.

## *Article 72*

### National provisions of a prudential nature

1. Member States shall report to EIOPA their national provisions of prudential nature relevant to the field of occupational pension schemes, which are not covered by the reference to national social and labour law in Article 12(1).
2. Member States shall update that information on a regular basis and at least every two years and EIOPA shall make that information available on its website.

## Title VI

### FINAL PROVISIONS

## *Article 73*

### Cooperation between Member States, EIOPA and the Commission

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, 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 institutions for occupational retirement provision.
3. The competent authorities shall cooperate with EIOPA for the purposes of this Directive, in accordance with Regulation (EU) No 1094/2010.

The competent authorities 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.

*Article 74*

Processing of personal data

With regard to the processing of personal data within the framework of this Directive, institutions and competent authorities shall carry out their tasks for the purposes of this Directive in accordance with national law implementing Directive 95/46/EC. With regard to the processing of personal data by EIOPA within the framework of this Directive, EIOPA shall comply with the provisions of Regulation (EC) No 45/2001.

*Article 75*

Evaluation and review

~~Four~~ Six years after the entry into force of this Directive, the Commission shall review this Directive and report on its implementation and effectiveness to the European Parliament and the Council.

*Article 76*

Amendment of Directive 2009/138/EC

Directive 2009/138/EC is amended as follows:

1) Point 7 of Article 13 is replaced by the following:

‘reinsurance’ means either of the following:

(a) the activity consisting in accepting risks ceded by an insurance undertaking or third-country insurance undertaking, or by another reinsurance undertaking or third-country reinsurance undertaking; or

(b) in the case of the association of underwriters known as Lloyd’s, the activity consisting in accepting risks, ceded by any member of Lloyd’s, by an insurance or reinsurance undertaking other than the association of underwriters known as Lloyd’s; **or**

(c) the provision of cover by a reinsurance undertaking to an institution for occupational retirement provision falling under the scope of Directive ...../EU where the law of the institution’s home Member State permits such provision.

2) **point 15 of** ~~The following Article 308b6a is~~ **replaced by the following** inserted:

~~"Article 306a~~

**15.** Where, on the entry into force of this Directive, home Member States applied provisions referred to in Article 4 of Directive.../.../EU of the European Parliament and of the Council<sup>15</sup>, such home Member States may continue to apply the laws, regulations and administrative provisions that had been adopted by them with a view to complying with Articles 1 to 19, Articles 27 to 30, Articles 32 to 35 and Articles 37 to 67 of Directive 2002/83/EC as in force on 31 December 2015 for a transitional period expiring on 31 December 2022.

Where a home Member State continues to apply those laws, regulations and administrative provisions, insurance undertakings in that home Member State shall calculate their solvency capital requirement as the sum of the following:

- (a) a notional solvency capital requirement with respect to their insurance activity, calculated without the occupational retirement provision business under Article 4 of Directive .../.../EU,
- (b) the solvency margin with respect to the occupational retirement provision business, calculated in accordance with the laws, regulations and administrative provisions that have been adopted to comply with Article 28 of Directive 2002/83/EC;
- (c) *deleted*

By 31 December 2017, Commission shall submit a report to the European Parliament and to the Council, on whether the period referred to in the first paragraph should be extended."

#### *Article 77*

Exercise of the delegation

*deleted*

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<sup>15</sup> OJ

## Article 78

### Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Article 6(c), (i) to (p), Article 12(4) second and third subparagraph, Article 12(10), Article 13, Article 20(6) and (8), Articles 21 to 30, Article 33, Article 35(1) and (2), Article 35(4) to (7), Article 36 to 38, Articles 39(1) and (3), Articles 40 to 53, Articles 55 to 57, Article 58(1), Articles 59 to 61, Article 63, Article 64(1)(b) to (d) and (f), Articles 65 to ~~71~~**72** of this Directive **by 24 months after the entry into force of the Directive.**

Member States shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the directives repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

## Article 79

### Repeal

Directive 2003/41/EC, as amended by the Directives listed in Annex I, Part A, is repealed with effect ~~from~~ **on the day starting from 24 months after the entry into force of the Directive** [...] without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and application of the Directives set out in Annex I, Part B.

References to the repealed Directive 2003/41/EC shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

*Article 80*

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Articles 1 to 5, Article 6(a), (b), (d) to (h) and (j), Articles 7 to 11, Article 12(1) to (9c), Articles 14 to 19, Article 20(1) to (5) and (7), Articles 31 and 32, Article 34, Article 35(2) and (3), Article 39(1) and (3), Article 58(2), Article 62, Article 64(1)(a) and (e) and Article 64(2) shall apply from 24 months after the entry into force of the Directive.

~~Articles 23 shall apply from 36 months after the entry into force of the Directive.~~

*Article 81*

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

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