DIRECTIVES

DIRECTIVE (EU) 2016/2341 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (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 ([1]),

Acting in accordance with the ordinary legislative procedure ([2]),

Whereas:

(1) Directive 2003/41/EC of the European Parliament and of the Council ([3]) has been substantially amended several times ([4]). Since further amendments are to be made, that Directive should be recast in the interests of clarity.

(2) In the internal market, institutions for occupational retirement provision (IORPs) should have the possibility to operate in other Member States while ensuring a high level of protection and security for members and beneficiaries of occupational pension schemes.

(3) This Directive is aimed at minimum harmonisation and therefore should not preclude Member States from maintaining or introducing further provisions in order to protect members and beneficiaries of occupational pension schemes, provided that such provisions are consistent with Member States' obligations under Union law. This Directive does not concern issues of national social, labour, tax or contract law, or the adequacy of pension provision in Member States.

(4) In order to facilitate further the mobility of workers between Member States, this Directive aims to ensure good governance, the provision of information to scheme members and the transparency and safety of occupational retirement provision.

(5) The way in which IORPs are organised and regulated varies significantly between Member States. Both IORPs and life insurance undertakings manage occupational pension schemes. It is not appropriate, therefore, to adopt a 'one-size-fits-all' approach to IORPs. The Commission and the European Supervisory Authority (European

([1]) OJ C 451, 16.12.2014, p. 109.
([2]) Position of the European Parliament of 24 November 2016 (not yet published in the Official Journal) and decision of the Council of 8 December 2016.
([3]) 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).
([4]) See Annex I, Part A.

Insurance and Occupational Pensions Authority) (EIOPA) established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council ([1]) should have regard to the various traditions of Member States in their activities and should act without prejudice to national social and labour law in determining the organisation of IORPs.

(6) Directive 2003/41/EC represented a first legislative step on the way to an internal market for occupational retirement provision organised on a Union scale. A genuine internal market for occupational retirement provision remains crucial for economic growth and job creation in the Union and for tackling the challenge of an ageing society. That Directive, dating from 2003, has not been substantially amended to introduce a modern risk-based governance system for IORPs. Appropriate regulation and supervision at Union and national level remain important for the development of safe and secure occupational retirement provision across all Member States.

(7) As a general principle, IORPs should, where relevant, take into account the objective of ensuring the intergenerational balance of occupational pension schemes, by aiming to have an equitable spread of risks and benefits between generations in occupational retirement provision.

(8) Appropriate action is needed to further improve complementary private retirement savings such as occupational pension schemes. This is important since social security systems are coming under increasing pressure, which means that occupational retirement pensions are increasingly relied on to complement other retirement provisions. IORPs play an important role in the long-term financing of the Union's economy and in the provision of secure retirement benefits. They are a vital part of the Union economy, holding assets worth EUR 2,5 trillion on behalf of around 75 million members and beneficiaries. Occupational retirement pensions should be improved, without, however, calling into question the major 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 models.

(9) In light of demographic developments in the Union and the situation regarding national budgets, occupational retirement provision is a valuable addition to social security pension systems. A resilient pension system includes a diverse product range, a diversity of institutions as well as effective and efficient supervisory practices.

(10) Member States should protect workers from old-age poverty and promote supplementary pension schemes linked to employment contracts as additional coverage to public pensions.

(11) This Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular the right to the protection of personal data, the freedom to conduct a business, the right to property, the right of collective bargaining and action 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 the cross-border activity of IORPs and the cross-border transfer of pension schemes. This Directive is to be implemented in accordance with those rights and principles.

(12) In particular, facilitating the cross-border activity of IORPs and the cross-border transfer of pension schemes by clarifying the relevant procedures and removing unnecessary obstacles could have a positive impact on the undertakings concerned and their employees, in whichever Member State they work, through the centralisation of the management of the retirement services provided.

(13) The cross-border activity of IORPs should be without prejudice to national social and labour law, relevant to the field of occupational pension schemes of the host Member State, applicable to the relationship between the undertaking offering the pension scheme ('sponsoring undertaking') and members and beneficiaries. Cross-border activity and the cross-border transfer of pension schemes are distinct and should be governed by different provisions. If a cross-border transfer of a pension scheme leads to cross-border activity, the provisions on cross-border activity should then apply.

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

([1]) Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).

(15) Member States should take into account the need to protect the pension rights of workers temporarily sent to work in another Member State.

(16) Despite the entry into force of Directive 2003/41/EC, cross-border activity has been limited due to the differences in national social and labour law. Furthermore, important prudential barriers remain which make it more expensive for IORPs 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 longevity and market risks are increasingly borne by members and beneficiaries rather than the IORP or the sponsoring undertaking. In addition, the current minimum level of information provision to members and beneficiaries needs to be increased.

(17) The prudential rules laid down in this Directive are intended both to guarantee a high degree of security for all future pensioners through the imposition of stringent supervisory standards, and to clear the way for the sound, prudent and efficient management of occupational pension schemes.

(18) IORPs should be completely separated from any sponsoring undertaking and operate on a funded basis for the purpose of providing retirement benefits. IORPs which operate for that sole purpose should have the freedom to provide services and freedom of investment, subject only to coordinated prudential requirements, regardless of whether such IORPs are considered to be legal entities.

(19) 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 insurance undertakings. This Directive is not intended to call this prerogative of Member States into question, but rather encourage them to build up adequate, safe and sustainable occupational retirement provision and facilitate cross-border activity.

(20) Taking into account the need to further improve occupational retirement provision, the Commission should provide significant added value at Union level by undertaking further steps in supporting Member States' cooperation with social partners in the improvement of second pillar pension schemes and by establishing a high level group of experts to enhance second pillar retirement savings in Member States, including the promotion of the exchange of best practices between Member States, in particular with regard to cross-border activity.

(21) National rules concerning the participation of self-employed persons in IORPs differ. In some Member States, IORPs can operate on the basis of agreements with 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 IORP where the self-employed person acts as employer or provides professional services to an undertaking. In some Member States, self-employed persons cannot join an IORP unless certain requirements, including those imposed by social and labour law, are met.

(22) Institutions operating 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 IORPs which, in a single Member State, operate both social security schemes and occupational pension schemes.

(23) Institutions operating on the principle of capital financing as part of mandatory social security schemes are not covered by this Directive.

(24) Financial institutions which already benefit from a Union legislative framework should in general be excluded from the scope of this Directive. However, as such 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 can be avoided by applying the prudential requirements of this Directive to the occupational pension business of life insurance undertakings in accordance with point (a)(i) to (iii) of Article 2(3) and point (b)(ii) to (iv) of Article 2(3) of Directive 2009/138/EC of the European Parliament and of the Council ([1]). 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.

([1]) 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).

(25) Since IORPs aim to ensure financial security in retirement, the retirement benefits paid by them should generally take the form of payments for life, payments to be made for a temporary period, lump sum payments, or any combination thereof.

(26) 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 biometric 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.

(27) Giving Member States the possibility to exclude from the scope of national implementing law IORPs which operate pension schemes which together have less than 100 members in total can facilitate supervision in those Member States, without undermining the proper functioning of the internal market in this field. However, this should not undermine the right of such IORPs to appoint investment managers established and duly authorised in another Member State for the management of their investment portfolio, and custodians or depositaries established and duly authorised in another Member State for the custody of their assets. In any event, Member States should apply certain provisions concerning investment rules and the system of governance to IORPs which operate pension schemes which together have more than 15 members in total.

(28) 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.

(29) In order to protect members and beneficiaries, IORPs should limit their activities to those referred to in this Directive and to those arising therefrom.

(30) In the event of the bankruptcy of a sponsoring undertaking, members face the risk of losing both their jobs and their acquired pension rights. This makes it necessary to ensure that there is a clear separation between the sponsoring undertaking and the IORP and that minimum prudential standards are laid down to protect members. Access of IORPs to pension protection schemes or similar mechanisms which protect the accrued individual entitlements of members and beneficiaries against the risk of default of the sponsoring undertaking should be taken into account when such standards are laid down.

(31) The operation and supervision of IORPs differ significantly between Member States. In some Member States, supervision can be exercised not only over the IORP itself but also over the entities or companies which are authorised to manage such IORPs. 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 IORPs.

(32) IORPs are pension institutions with a social purpose that provide financial services. They are responsible for the provision of occupational retirement benefits and should therefore meet certain minimum prudential standards with respect to their activities and conditions of operation, taking into account national rules and traditions. However, such institutions should not be treated as purely financial service providers. Their social function and the triangular relationship between the employee, the employer and the IORP should be adequately acknowledged and supported as guiding principles of this Directive.

(33) Where, in accordance with national law, IORPs manage pension funds that have no legal personality and consist of pension schemes of individual members whose assets are separated from the assets of the IORPs, it should be possible for Member States to consider each pension fund as a single pension scheme within the meaning of this Directive.

(34) The huge number of IORPs in certain Member States means a pragmatic solution is necessary as regards prior authorisation of IORPs. However, if an IORP 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.

(35) Without prejudice to national social and labour law on the organisation of pension systems, including compulsory membership and the outcomes of collective bargaining agreements, IORPs should have the

possibility of providing their services in other Member States upon receipt of the authorisation from the competent authority of the IORP's home Member State. IORPs 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 such IORPs, improve the competitiveness of Union industry and facilitate labour mobility.

(36) The exercise of the right of an IORP established 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 pension schemes, 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 IORPs.

(37) IORPs should be able to transfer pension schemes to other IORPs across borders within the Union in order to facilitate the organisation of occupational retirement provision on a Union scale. Transfers should be subject to authorisation by the competent authority in the home Member State of the receiving IORP after that competent authority has received the consent of the competent authority of the home Member State of the IORP transferring the pension scheme. The transfer and its conditions should be subject to prior approval by a majority of the members and a majority of the beneficiaries concerned or where applicable, by a majority of their representatives, such as the trustees of a trust-based scheme.

(38) In the case of a transfer of part of a pension scheme, the viability of both the transferred part and the remaining part of the pension scheme should be ensured and the rights of all members and beneficiaries should be adequately protected after the transfer, by requiring both the transferring and the receiving IORPs to have sufficient and appropriate assets to cover the technical provisions for the transferred part and the remaining part of the scheme.

(39) In order to facilitate the coordination of supervisory practices, EIOPA can request information from the competent authorities in accordance with the powers conferred on it by Regulation (EU) No 1094/2010. Furthermore, in the event of a whole or partial cross-border transfer of a pension scheme, where there is a disagreement between the competent authorities concerned, it should be possible for EIOPA to carry out mediation.

(40) A prudent calculation of technical provisions is an essential condition to ensure that obligations to pay retirement benefits can be met both in the short and the long term. Technical provisions should be calculated on the basis of recognised actuarial methods and certified by an actuary or by another specialist in that field. 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. The actuarial function should be carried out by persons who have knowledge of actuarial and financial mathematics commensurate with the size, nature, scale and complexity of the risks inherent in the activities of the IORP, and who are able to demonstrate their relevant experience with applicable professional qualifications or other standards.

(41) Risks covered by IORPs 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.

(42) Sufficient and appropriate assets to cover the technical provisions should be required to protect the interests of members and beneficiaries of the pension scheme if the sponsoring undertaking becomes insolvent.

(43) In order to promote a level playing field between domestic and cross-border IORPs, Member States should take into consideration the funding requirements for both domestic and cross-border IORPs.

(44) In many cases, it could be the sponsoring undertaking and not the IORP itself that either covers any biometric risk or guarantees certain benefits or investment performance. However, in some cases, it is the IORP itself which provides such cover or guarantees and the sponsor's obligations are generally exhausted by paying the necessary contributions. In those circumstances, the IORP concerned should hold own funds based on the value of technical provisions and risk capital.

(45) IORPs are very long-term investors. Redemption of the assets held by IORPs 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, IORPs should be able to opt for an asset allocation that suits the precise nature and duration of their liabilities. Therefore, efficient supervision is required as well as an approach to investment rules that allows IORPs sufficient flexibility to decide on the most secure and efficient investment policy and obliges them to act prudently. Compliance with the prudent person rule therefore requires an investment policy geared to the membership structure of the individual IORP.

(46) By setting the prudent person rule as the underlying principle for capital investment and making it possible for IORPs to operate across borders, the redirection of savings into the sector of occupational retirement provision is encouraged, thereby contributing to economic and social progress.

(47) 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 IORPs located in their territories. However, those rules should not restrict the free movement of capital, unless justified on prudential grounds.

(48) This Directive should ensure an appropriate level of investment freedom for IORPs. As very long-term investors with low liquidity risks, IORPs 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 (MTFs) or organised trading facilities (OTFs) 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, MTFs or OTFs should therefore not be restricted, in line with the prudent person rule so as to protect the interest of members and beneficiaries, except on prudential grounds.

(49) The understanding of what constitutes instruments with a long-term economic profile is broad. Such 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 and should be understood to include participation and debt instruments in, and loans provided to, non-listed undertakings. 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.

(50) IORPs 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 IORPs located in other Member States.

(51) Individuals need to have a clear overview of their accrued pension rights stemming from statutory and occupational pension schemes, in particular where such rights are accrued in more than one Member State. That overview could be achieved through the establishment of pension tracking services across the Union, similar to those that have already been set up in some Member States following the Commission's White Paper of 16 February 2012 entitled 'An Agenda for Adequate, Safe and Sustainable Pensions', which promotes the development of such services.

(52) 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 and the protection of members and beneficiaries. Such systems should be proportionate to the size, nature, scale and complexity of the activities of the IORP.

(53) Remuneration policies which encourage excessive risk-taking behaviour can undermine the sound and effective risk management of IORPs. Principles and disclosure requirements for remuneration policies applicable to other financial institutions in the Union should also be made applicable to IORPs, bearing in mind, however, the particular governance structure of IORPs in comparison to other financial institutions and the need to take account of the size, nature, scale and complexity of the activities of IORPs.

(54) A key function is a capacity to undertake particular governance tasks. IORPs should have sufficient capacity to have a risk-management function, an internal audit function and, where applicable, an actuarial function. Unless otherwise specified in this Directive, the identification of a particular key function should not prevent an IORP from freely deciding how to organise that key function in practice. This should not lead to unduly burdensome requirements because account should be taken of the size, nature, scale and complexity of the activities of the IORP.

(55) Persons who effectively run an IORP should collectively be fit and proper and persons who carry out key functions should have adequate knowledge and experience and, where applicable, adequate professional qualifications. However, only holders of the key functions should be subject to notification requirements to the competent authority.

(56) 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. However, the person or organisational unit performing a key function should be different from the one performing a similar key function in the sponsoring undertaking. Member States should be able to allow the IORP to carry out key functions through the same single person or organisational unit as the sponsoring undertaking, provided that the IORP explains how it prevents or manages any conflict of interest with the sponsoring undertaking.

(57) It is essential that IORPs improve their risk management while taking into account the aim of having an equitable spread of risks and benefits between generations in occupational retirement provision, so that potential vulnerabilities in relation to the sustainability of pension schemes can be properly understood and discussed with the relevant competent authorities. IORPs should, as part of their risk management system, produce a risk assessment for their activities relating to pensions. That risk assessment should also be made available to the competent authorities and should, where relevant, include, inter alia, risks related to climate change, use of resources, the environment, social risks, and risks related to the depreciation of assets due to regulatory change ('stranded assets').

(58) Environmental, social and governance factors, as referred to in the United Nations-supported Principles for Responsible Investment, are important for the investment policy and risk management systems of IORPs. Member States should require IORPs to explicitly disclose where such factors are considered in investment decisions and how they form part of their risk management system. The relevance and materiality of environmental, social and governance factors to a scheme's investments and how such factors are taken into account should be part of the information provided by an IORP under this Directive. This does not preclude an IORP from satisfying the requirement by stating in such information that environmental, social and governance factors are not considered in its investment policy or that the costs of a system to monitor the relevance and materiality of such factors and how they are taken into account are disproportionate to the size, nature, scale and complexity of its activities.

(59) Each Member State should require that every IORP located in its territory draw up annual accounts and annual reports taking into account each pension scheme operated by the IORP 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 IORP's assets, liabilities and financial position, taking into account each pension scheme operated by an IORP, 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 IORP and assess whether the IORP is able to meet all its contractual obligations. Annual accounts and annual reports should be publicly disclosed on a website, where possible, or by other means such as making copies available upon request.

(60) The investment policy of an IORP is a decisive factor for both the security and the long-term economic sustainability of occupational pension schemes. IORPs should therefore draw up and, at least every three years, review a statement of investment principles. Such statement should be made available to the competent authorities and, on request, also to members and beneficiaries of each pension scheme.

(61) IORPs should be allowed to entrust any activity, including key functions, in whole or in part, to service providers operating on their behalf. IORPs should remain fully responsible for discharging all of their obligations under this Directive when they outsource key functions or any other activities. IORPs should enter into a written agreement

with the service provider when outsourcing any activity. For the purposes of this Directive, this does not include agreements for operational type services for example, for security or maintenance personnel.

(62) It should be possible for Member States to require the appointment of a depositary in relation to the safe-keeping of the assets of IORPs.

(63) Taking into account the nature of the pension scheme established and the administrative burden involved, IORPs 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 projected levels of retirement benefits are based on economic scenarios, that information should also include an unfavourable scenario, which should be extreme but plausible. Where members bear an investment risk, additional information on the investment profile, any available options and past performance are also crucial. Information should be adequate to the needs of the user and should take into account the United Nations Convention on the Rights of Persons with Disabilities, in particular as regards accessibility and access to information, as provided for in Articles 3 and 21 thereof respectively. Member States can choose to further specify by whom the information to be given to prospective members, members and beneficiaries can be provided including through pension tracking services.

(64) Given the specificities of schemes providing a given level of benefits, such benefits are, except under extreme circumstances, not affected by past performance nor by cost structure. Information thereon should therefore be provided only with respect to schemes where members bear investment risk or can take investment decisions.

(65) Before joining a scheme, prospective members should be given all the necessary information to make an informed choice. Where prospective members do not have a choice and are automatically enrolled in a pension scheme, the IORP should provide them with the key relevant information about their membership promptly after enrolment.

(66) For members, IORPs should draw up a Pension Benefit Statement containing key personal and generic information about the pension scheme. The Pension Benefit Statement should be clear and comprehensive and should contain relevant and appropriate information to facilitate the understanding of pension entitlements over time and across schemes and serve labour mobility.

(67) IORPs 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 approaching retirement should receive information about the benefit payment products available, in order to facilitate financial planning for retirement.

(68) During the phase when retirement benefits are paid, beneficiaries should continue to receive information on their benefits and corresponding pay-out options. This is particularly important when a significant level of investment risk is borne by beneficiaries in the pay-out phase. Beneficiaries should also be informed of any reduction in the level of benefits due, prior to the application of any such reduction, after a decision which will result in a reduction has been taken. As a matter of best practice, IORPs are recommended to consult beneficiaries in advance of any such decision.

(69) The competent authority should exercise its powers having as its prime objectives the protection of the rights of members and beneficiaries and the stability and soundness of IORPs.

(70) The scope of prudential supervision differs between Member States. This can cause problems where an IORP needs to comply with the prudential regulation of its home Member State whilst simultaneously complying 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.

(71) An internal market for IORPs requires mutual recognition of prudential standards. An IORP's adherence to those standards should be supervised by the competent authorities of the IORP's home Member State. Member States should assign to competent authorities the necessary powers to use preventive or corrective measures if an IORP breaches any of the requirements of this Directive.

(72) 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, competent authorities should have the necessary powers to request information from IORPs and service providers about any outsourced activities.

(73) 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.

(74) Any processing of personal data carried out pursuant to this Directive, such as the exchange or transmission of personal data by the competent authorities, should be in accordance with Regulation (EU) 2016/679 of the European Parliament and of the Council ([1]), and any exchange or transmission of information by the European Supervisory Authorities pursuant to this Directive should be in accordance with Regulation (EC) No 45/2001 of the European Parliament and of the Council ([2]).

(75) In order to ensure the smooth functioning of the internal market for occupational retirement provision organised on a Union 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 by 13 January 2023.

(76) In order to ensure fair competition between institutions, the transitional period allowing insurance undertakings falling within the scope of Directive 2009/138/EC to operate their occupational retirement provision business under the rules referred to in Article 4 of this Directive should be extended until 31 December 2022. Directive 2009/138/EC should therefore be amended accordingly.

(77) The further development at Union level of solvency models, such as the holistic balance sheet (HBS), is not realistic in practical terms and not effective in terms of costs and benefits, particularly given the diversity of IORPs within and across Member States. No quantitative capital requirements, such as Solvency II or HBS models derived therefrom, should therefore be developed at the Union level with regard to IORPs, as they could potentially decrease the willingness of employers to provide occupational pension schemes.

(78) Since the objective of this Directive, namely to create a Union legal framework covering IORPs, cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the action, be better achieved at Union level, 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.

(79) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents, 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.

(80) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive amendment as compared to the earlier Directives. The obligation to transpose the provisions which are unchanged arises under the earlier Directives.

(81) 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,

([1]) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

([2]) 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, 12.1.2001, p. 1).

HAVE ADOPTED THIS DIRECTIVE:

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 (IORPs).

Article 2

Scope

1. This Directive shall apply to IORPs. Where, in accordance with national law, IORPs do not have legal personality, Member States shall apply this Directive either to those IORPs or, subject to paragraph 2, to those authorised entities responsible for operating them and acting on their behalf.

2. This Directive shall not apply to:

(a) institutions operating social security schemes which are covered by Regulations (EC) No 883/2004 ([1]) and (EC) No 987/2009 ([2]) of the European Parliament and of the Council;

(b) institutions which are covered by Directives 2009/65/EC ([3]), 2009/138/EC, 2011/61/EU ([4]), 2013/36/EU ([5]) and 2014/65/EU ([6]) of the European Parliament and of the Council;

(c) institutions which operate on a pay-as-you-go basis;

(d) institutions where employees of the sponsoring undertaking 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 IORPs operating social security schemes

IORPs 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 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.

([1]) 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).

([2]) 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).

([3]) 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).

([4]) 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).

([5]) Directive 2013/36/EU of 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).

([6]) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

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 14, Articles 19 to 22, Article 23(1) and (2), and Articles 24 to 58 of this Directive to the occupational retirement provision business of life insurance undertakings in accordance with points (a)(i) to (iii) of Article 2(3) and points (b)(ii) to (iv) of Article 2(3) of Directive 2009/138/EC. In that case, all assets and liabilities corresponding to the occupational retirement provision business shall be ring-fenced, managed and organised separately from the other activities of the life insurance undertakings, without any possibility of transfer.

In the case referred to in the first paragraph of this Article, and only insofar 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 IORPs and statutory schemes

With the exception of Articles 32 to 35, Member States may choose not to apply this Directive, in whole or in part, to any IORP 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 IORPs shall nevertheless be given the right to apply this Directive on a voluntary basis. Article 11 may be applied only if all the other provisions of this Directive apply. Member States shall apply Article 19(1) and Article 21(1) and (2) to any IORP registered or authorised in their territories which operates pension schemes which together have more than 15 members in total.

Member States may choose to apply any of Articles 1 to 8, Article 19 and Articles 32 to 35 to institutions where occupational retirement provision is made under statute, pursuant to national law, and is guaranteed by a public authority.

Article 6

Definitions

For the purposes of this Directive:

(1) 'institution for occupational retirement provision', or 'IORP', 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:

   (a) individually or collectively between the employer(s) and the employee(s) or their respective representatives, or

   (b) with self-employed persons, individually or collectively, in compliance with the law of the home and host Member States,

   and which carries out activities directly arising therefrom;

(2) 'pension scheme' means a contract, an agreement, a trust deed or rules stipulating which retirement benefits are granted and under which conditions;

(3) '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 offers a pension scheme or pays contributions to an IORP;

(4) '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, payments made for a temporary period, a lump sum, or any combination thereof;

(5) 'member' means a person, other than a beneficiary or a prospective member, whose past or current occupational activities entitle or will entitle him/her to retirement benefits in accordance with the provisions of a pension scheme;

(6) 'beneficiary' means a person receiving retirement benefits;

(7) 'prospective member' means a person who is eligible to join a pension scheme;

(8) 'competent authority' means a national authority designated to carry out the duties provided for in this Directive;

(9) 'biometric risks' mean risks linked to death, disability and longevity;

(10) 'home Member State' means the Member State in which the IORP has been registered or authorised and in which its main administration is located in accordance with Article 9;

(11) '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;

(12) 'transferring IORP' means an IORP transferring all or a part of a pension scheme's liabilities, technical provisions, and other obligations and rights, as well as corresponding assets or cash equivalent thereof, to an IORP registered or authorised in another Member State;

(13) 'receiving IORP' means an IORP receiving all or a part of a pension scheme's liabilities, technical provisions, and other obligations and rights, as well as corresponding assets or cash equivalent thereof, from an IORP registered or authorised in another Member State;

(14) 'regulated market' means a regulated market as defined in point (21) of Article 4(1) of Directive 2014/65/EU;

(15) 'multilateral trading facility' or 'MTF' means a multilateral trading facility or MTF as defined in point (22) of Article 4(1) of Directive 2014/65/EU;

(16) 'organised trading facility' or 'OTF' means an organised trading facility or OTF as defined in point (23) of Article 4(1) of Directive 2014/65/EU;

(17) '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 and for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

(18) 'key function', within a system of governance, means a capacity to undertake practical tasks comprising the risk management function, the internal audit function, and the actuarial function;

(19) 'cross-border activity' means operating a pension scheme where the relationship between the sponsoring undertaking, and the members and beneficiaries concerned, is governed by the social and labour law relevant to the field of occupational pension schemes of a Member State other than the home Member State.

Article 7

Activities of an IORP

Member States shall require IORPs 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.

As a general principle, IORPs shall, where relevant, have regard to the aim of having an equitable spread of risks and benefits between generations in their activities.

Article 8

Legal separation between sponsoring undertakings and IORPs

Member States shall ensure that there is a legal separation between a sponsoring undertaking and an IORP registered or authorised in their territories in order that the assets of the IORP are safeguarded in the interests of members and beneficiaries in the event of bankruptcy of the sponsoring undertaking.

Article 9

Registration or authorisation

1. Member States shall, in respect of every IORP, the main administration of which is located in their territories, ensure that the IORP is registered in a national register, or authorised, by the competent authority.

The location of the main administration refers to the place where the main strategic decisions of an IORP are made.

2. In the case of cross-border activities undertaken in accordance with Article 11, the register shall also indicate the Member States in which the IORP is operating.

3. The information from the register shall be communicated to EIOPA which shall publish it on its website.

Article 10

Operating requirements

1. Member States shall, in respect of every IORP registered or authorised in their territories, ensure that:

(a) the IORP has implemented properly constituted rules regarding the operation of any pension scheme;

(b) 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 additional benefits such as the option of longevity and disability cover, provision for surviving dependants and a guarantee of repayment of contributions are offered to members with the agreement of the employers and the employees or their respective representatives.

Article 11

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 IORP registered or authorised in their territories to carry out cross-border activity. Member States shall also allow undertakings located in their territories to sponsor IORPs which propose to or carry out cross-border activity.

2. An IORP proposing to carry out cross-border activity and to accept sponsorship from a sponsoring undertaking shall be subject to prior authorisation by the relevant competent authority of its home Member State.

3. An IORP shall notify its intention to carry out cross-border activity to the competent authority of the home Member State. Member States shall require IORPs to provide the following information when effecting the notification:

(a) the name of the host Member State(s), which shall, where applicable, be identified by the sponsoring undertaking;

(b) the name and the location of the main administration of the sponsoring undertaking;

(c) the main characteristics of the pension scheme to be operated for the sponsoring undertaking.

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

The reasoned decision referred to in the first subparagraph shall be issued within three months of receiving all the information referred to in paragraph 3.

5. Where the competent authority of the home Member State does not communicate the information referred to in paragraph 3 to the competent authority of the host Member State, it shall give the reasons for this to the IORP concerned within three months of receiving all that information. That non-communication of information shall be subject to a right of appeal to the courts in the home Member State.

6. IORPs carrying out cross-border activity shall be subject to the information requirements referred to in Title IV imposed by the host Member State in respect of the prospective members, members and beneficiaries which that cross-border activity concerns.

7. Before the IORP starts to carry out a cross-border activity, the competent authority of the host Member State shall, within six weeks of receiving the information referred to in paragraph 3, inform the competent authority of the home Member State, of the requirements of social and labour law relevant to the field of occupational pension schemes under which the pension scheme sponsored by an undertaking in the host Member State must be operated and of the information requirements of the host Member State referred to in Title IV which shall apply to the cross-border activity. The competent authority of the home Member State shall communicate this information to the IORP.

8. On receiving the communication referred to in paragraph 7, or if no communication is received from the competent authority of the home Member State on expiry of the period provided for in paragraph 7, the IORP 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 pension schemes and with the host Member State's information requirements as referred to in paragraph 7.

9. The competent authority of the host Member State shall inform the competent authority 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, and any significant change in the host Member State's information requirements as referred to in paragraph 7. The competent authority of the home Member State shall communicate that information to the IORP.

10. The IORP shall be subject to on-going supervision by the competent authority 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 of the host Member State's information requirements as referred to in paragraph 7. Should this supervision bring irregularities to light, the competent authority of the host Member State shall inform the competent authority of the home Member State immediately. The competent authority of the home Member State shall, in coordination with the competent authority of the host Member State, take the necessary measures to ensure that the IORP puts a stop to the detected breach.

11. If, despite the measures taken by the competent authority of the home Member State or because appropriate measures are lacking in the home Member State, the IORP 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 or the host Member State's information requirements as referred to in paragraph 7, the competent authority of the host Member State may, after informing the competent authority of the home Member State, take appropriate measures to prevent or penalise further irregularities, including, insofar as is strictly necessary, preventing the IORP from operating in the host Member State for the sponsoring undertaking.

Article 12

Cross-border transfers

1. Member States shall allow IORPs registered or authorised in their territories to transfer all or a part of a pension scheme's liabilities, technical provisions, and other obligations and rights, as well as corresponding assets or cash equivalent thereof, to a receiving IORP.

2. Member States shall ensure that the costs of the transfer are not incurred by the remaining members and beneficiaries of the transferring IORP or by the incumbent members and beneficiaries of the receiving IORP.

3. The transfer shall be subject to prior approval by:

(a) a majority of members and a majority of the beneficiaries concerned or, where applicable, by a majority of their representatives. The majority shall be defined in accordance with national law. The information on the conditions of the transfer shall be made available to the members and beneficiaries concerned and, where applicable, to their representatives, in a timely manner by the transferring IORP before the application referred to in paragraph 4 is submitted; and

(b) the sponsoring undertaking, where applicable.

4. The transfer of all or a part of a pension scheme's liabilities, technical provisions, and other obligations and rights, as well as corresponding assets or cash equivalent thereof, between transferring and receiving IORPs shall be subject to authorisation by the competent authority of the home Member State of the receiving IORP after obtaining the prior consent of the competent authority of the home Member State of the transferring IORP. The application for authorisation of the transfer shall be submitted by the receiving IORP. The competent authority of the home Member State of the receiving IORP shall grant or refuse the authorisation and communicate its decision to the receiving IORP within three months of receipt of the application.

5. The application for the authorisation of transfer referred to in paragraph 4 shall contain the following information:

(a) the written agreement between the transferring and the receiving IORPs setting out the conditions of the transfer;

(b) a description of the main characteristics of the pension scheme;

(c) a description of the liabilities or technical provisions to be transferred, and other obligations and rights, as well as corresponding assets or cash equivalent thereof;

(d) the names and the locations of the main administrations of the transferring and the receiving IORPs and the Member States in which each IORP is registered or authorised;

(e) the location of the main administration of the sponsoring undertaking and the name of the sponsoring undertaking;

(f) evidence of the prior approval in accordance with paragraph 3;

(g) where applicable, the names of the Member States whose social and labour law relevant to the field of occupational pension schemes is applicable to the pension scheme concerned.

6. The competent authority of the home Member State of the receiving IORP shall forward the application referred to in paragraph 4 to the competent authority of the transferring IORP, without delay following its receipt.

7. The competent authority of the home Member State of the receiving IORP shall only assess whether:

(a) all the information referred to in paragraph 5 has been provided by the receiving IORP;

(b) the administrative structure, the financial situation of the receiving IORP and the good repute or professional qualifications or experience of the persons running the receiving IORP are compatible with the proposed transfer;

(c) the long term interests of the members and beneficiaries of the receiving IORP and the transferred part of the scheme are adequately protected during and after the transfer;

(d) the technical provisions of the receiving IORP are fully funded at the date of the transfer, where the transfer results in a cross-border activity; and

(e) the assets to be transferred are sufficient and appropriate to cover the liabilities, technical provisions and other obligations and rights to be transferred, in accordance with applicable rules in the home Member State of the receiving IORP.

8. The competent authority of the home Member State of the transferring IORP shall only assess whether:

(a) in the case of a partial transfer of the pension scheme's liabilities, technical provisions, and other obligations and rights, as well as corresponding assets or cash equivalent thereof, the long term interests of the members and beneficiaries of the remaining part of the scheme are adequately protected;

(b) the individual entitlements of the members and beneficiaries are at least the same after the transfer;

(c) the assets corresponding to the pension scheme to be transferred are sufficient and appropriate to cover the liabilities, technical provisions and other obligations and rights to be transferred, in accordance with the applicable rules in the home Member State of the transferring IORP.

9. The competent authority of the home Member State of the transferring IORP shall communicate the results of the assessment referred to in paragraph 8 within eight weeks of receipt of the application referred to in paragraph 6 in order to allow the competent authority of the home Member State of the receiving IORP to take a decision in accordance with paragraph 4.

10. Where the authorisation is refused, the competent authority of the home Member State of the receiving IORP shall provide the reasoning for such refusal within the three month period referred to in paragraph 4. That refusal, or a failure to act by the competent authority of the home Member State of the receiving IORP shall be subject to a right of appeal to the courts in the home Member State of the receiving IORP.

11. The competent authority of the home Member State of the receiving IORP shall inform the competent authority of the home Member State of the transferring IORP of the decision referred to in paragraph 4, within two weeks of taking that decision.

Where the transfer results in a cross-border activity, the competent authority of the home Member State of the transferring IORP shall also inform the competent authority of the home Member State of the receiving IORP of the requirements of social and labour law relevant to the field of occupational pension schemes under which the pension scheme must be operated and of the information requirements of the host Member State referred to in Title IV which shall apply to the cross-border activity. This shall be communicated within a further four weeks.

The competent authority of the home Member State of the receiving IORP shall communicate this information to the receiving IORP within one week of its receipt.

12. Upon receipt of a decision to grant an authorisation as referred to in paragraph 4, or if no information on the decision is received from the competent authority of the home Member State of the receiving IORP on expiry of the period referred to in the third subparagraph of paragraph 11, the receiving IORP may start to operate the pension scheme.

13. In the case of a disagreement about the procedure or content of an action or inaction of the competent authority of the home Member State of the transferring or receiving IORP, including a decision to authorise or refuse a cross-border transfer, EIOPA may carry out non-binding mediation in accordance with point (c) of the second paragraph of Article 31 of Regulation (EU) No 1094/2010 upon request of either of the competent authorities or on its own initiative.

14. Where the receiving IORP carries out a cross-border activity, Article 11(9), (10) and (11) shall apply.

TITLE II

QUANTITATIVE REQUIREMENTS

Article 13

Technical provisions

1. The home Member State shall ensure that IORPs 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 IORPs 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 such 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 IORP 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 that field, including an auditor, where permitted by national law, 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 IORP. 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. Those prudent rates of interest shall be determined by taking into account:

   (i) the yield on the corresponding assets held by the IORP and the projected future investment returns;

   (ii) the market yields of high-quality bonds, government bonds, European Stability Mechanism bonds, European Investment Bank (EIB) bonds or European Financial Stability Facility bonds, or;

   (iii) a combination of points (i) and (ii);

(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 14

Funding of technical provisions

1. The home Member State shall require every IORP 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 IORP, for a limited period of time, to have insufficient assets to cover the technical provisions. In this case, the competent authorities shall require the IORP to adopt a concrete and realisable recovery plan with a timeline in order to ensure that the requirements of paragraph 1 are met again. The plan shall be subject to the following conditions:

(a) the IORP 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 IORP, 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 winding up of a pension scheme during the period referred to in the first sentence of this paragraph, the IORP shall inform the competent authorities of the home Member State. The IORP shall establish a procedure in order to transfer the assets and the corresponding liabilities of that scheme to another IORP, an insurance undertaking or other appropriate 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, the technical provisions shall at all times be fully funded in respect of the total range of pension schemes operated. If this condition is not met, the competent authority of the home Member State shall promptly intervene and require the IORP to immediately draw up appropriate measures and implement them without delay in a way that members and beneficiaries are adequately protected.

Article 15

Regulatory own funds

1. The home Member State shall ensure that IORPs operating pension schemes, where the IORP 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 the portfolio of assets in respect of the total range of schemes operated. Those 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 16, 17 and 18 shall apply.

3. Paragraph 1 shall, however, not prevent Member States from requiring IORPs located in their territory to hold regulatory own funds or from laying down more detailed rules provided that they are prudentially justified.

Article 16

Available solvency margin

1. Member States shall require of every IORP referred to in Article 15(1) which is registered or authorised 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 in order to ensure long-term sustainability of occupational retirement provision.

2. The available solvency margin shall consist of the assets of the IORP free of any foreseeable liabilities, less any intangible items, including:

(a) the paid-up share capital or, in the case of an IORP 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 insofar 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 referred to 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) insofar 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 IORP.

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 IORP, 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 IORP to defer the payment of interest on the loan;

(iii) the lender's claims on the IORP 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 IORP 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 IORP 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 IORP 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 IORP 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 IORP'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 IORP, 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 IORP 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, insofar 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 insurance 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 17

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 IORP 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 IORP'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 point (a)(iii) of Article 2(3) of Directive 2009/138/EC, the required solvency margin shall be equal to the required solvency margin for IORPs as laid down in Article 18.

4. For capital redemption operations referred to in point (b)(ii) of Article 2(3) 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 point (b)(i) of Article 2(3) of Directive 2009/138/EC, the required solvency margin shall be equal to 1 % of their assets.

6. For assurances linked to investment funds and covered by points (a)(i) and (ii) of Article 2(3) of Directive 2009/138/EC and for the operations referred to in points (b)(iii) to (v) of Article 2(3) of Directive 2009/138/EC, the required solvency margin shall be equal to the sum of the following:

(a) insofar as the IORP bears an investment risk, a 4 % fraction of the technical provisions, calculated in compliance with paragraph 2(a);

(b) insofar as the IORP 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) insofar as the IORP 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 assurances and operations;

(d) insofar as the IORP covers a death risk, a 0,3 % fraction of the capital at risk calculated in compliance with paragraph 2(b).

Article 18

Required solvency margin for the purpose of Article 17(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 50 000 000, 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 IORP 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 35 000 000 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 IORP 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 19

Investment rules

1. Member States shall require IORPs registered or authorised 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 long-term interests of members and beneficiaries as a whole. In the case of a potential conflict of interest, an IORP, or the entity which manages its portfolio, shall ensure that the investment is made in the sole interest of members and beneficiaries;

(b) within the prudent person rule, Member States shall allow IORPs to take into account the potential long-term impact of investment decisions on environmental, social, and governance factors;

(c) the assets shall be invested in such a manner as to ensure the security, quality, liquidity and profitability of the portfolio as a whole;

(d) 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;

(e) investment in derivative instruments shall be possible insofar as such instruments contribute to a reduction in 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 an IORP's assets. IORPs shall also avoid excessive risk exposure to a single counterparty and to other derivative operations;

(f) 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 an IORP to excessive risk concentration;

(g) 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.

Where an IORP is sponsored by a number of undertakings, investment in those 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 (f) and (g) to investment in government bonds.

2. Taking into account the size, nature, scale and complexity of the activities of the IORPs supervised, Member States shall ensure that the competent authorities monitor the adequacy of the IORPs' credit assessment processes, assess the use of references to credit ratings issued by credit rating agencies as defined in point (b) of Article 3(1) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council [1], 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 IORPs from borrowing or acting as a guarantor on behalf of third parties. However, Member States may authorise IORPs to carry out some borrowing only for liquidity purposes and on a temporary basis.

4. Member States shall not require IORPs registered or authorised in their territory to invest in particular categories of assets.

5. Without prejudice to Article 30, Member States shall not subject the investment decisions of an IORP 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 IORPs 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 those IORPs.

However, Member States shall not prevent IORPs 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 MTFs or OTFs, and deciding on the relative weight of those securities in their investment portfolio. However, provided that it is prudentially justified, Member States may apply a lower limit of no lower than 35 % to IORPs which operate pension schemes 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 investment horizon and are not traded on regulated markets, MTFs or OTFs;

(d) investing in instruments that are issued or guaranteed by the EIB provided in the framework of the European Fund for Strategic Investments, European Long-term Investment Funds, European Social Entrepreneurship Funds and European Venture Capital Funds.

7. Paragraph 6 shall not preclude the right for Member States to require the application to IORPs registered or authorised in their territory of more stringent investment rules also on an individual basis provided they are prudentially justified, in particular in light of the liabilities entered into by the IORP.

8. The competent authority of the host Member State of an IORP carrying out cross-border activity as referred to in Article 11 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.

[1] 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).

TITLE III

CONDITIONS GOVERNING ACTIVITIES

CHAPTER 1

System of governance

Section 1

General provisions

Article 20

Responsibility of the management or supervisory body

1. Member States shall ensure that the management or supervisory body of an IORP has ultimate responsibility under national law for the compliance, by the IORP 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 IORPs.

Article 21

General governance requirements

1. Member States shall require all IORPs 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 and 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 include consideration of environmental, social and governance factors related to investment assets in investment decisions, and shall be subject to regular internal review.

2. The system of governance referred to in paragraph 1 shall be proportionate to the size, nature, scale and complexity of the activities of the IORP.

3. Member States shall ensure that IORPs establish and apply written policies in relation to risk management, internal audit and, where relevant, actuarial and outsourced activities. Those written policies shall be subject to prior approval by the management or supervisory body of the IORP and shall be reviewed at least every three years and adapted in view of any significant change in the system or area concerned.

4. Member States shall ensure that IORPs have in place an effective internal control system. That system shall include administrative and accounting procedures, an internal control framework, and appropriate reporting arrangements at all levels of the IORP.

5. Member States shall ensure that IORPs take reasonable steps to ensure continuity and regularity in the performance of their activities, including the development of contingency plans. To that end, IORPs shall employ appropriate and proportionate systems, resources and procedures.

6. Member States shall require IORPs to have at least two persons who effectively run the IORP. Member States may allow that only one person effectively runs the IORP, on the basis of a reasoned assessment conducted by the competent authorities. That assessment shall take into account the role of social partners in the overall management of the IORP, as well as the size, nature, scale and complexity of the activities of the IORP.

Article 22

Requirements for fit and proper management

1. Member States shall require IORPs to ensure that persons who effectively run the IORP, persons who carry out key functions and, where applicable, persons or entities to which a key function has been outsourced in accordance with Article 31 fulfil the following requirements when carrying out their tasks:

(a) the requirement to be fit:

(i) for persons who effectively run the IORP, this means their qualifications, knowledge and experience are collectively adequate to enable them to ensure a sound and prudent management of the IORP;

(ii) for persons who carry out the actuarial or internal audit key functions this means their professional qualifications, knowledge and experience are adequate to properly carry out their key functions;

(iii) for persons who carry out other key functions this means their qualifications, knowledge and experience are adequate to properly carry out their key functions; and

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

2. Member States shall ensure that the competent authorities are able to assess whether the persons who effectively run the IORP or carry out key functions fulfil the requirements laid down in paragraph 1.

3. Where a home Member State requires proof of good repute, proof of no previous bankruptcy, or both, from the persons referred to in paragraph 1, 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, an equivalent document, showing that those requirements have been met, issued by a competent judicial or administrative authority either in the Member State of which the concerned person is a national or in the home Member State.

4. Where no competent judicial or administrative authority in either the Member State of which the concerned person is a national or in the home Member State issues an equivalent document as referred to in paragraph 3, that person shall be allowed to produce in its place a declaration on oath.

However, in home Member States where there is no provision for declarations on oath to be made the nationals of other Member States concerned shall be allowed to produce a solemn declaration made by him or her before a competent judicial or administrative authority in the home Member State or the Member State of which they are a national 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 also be provided in the form of a declaration made by the national of the other Member State concerned before a competent judicial, professional or trade body in that other Member State.

6. The documents referred to in paragraphs 3, 4 and 5 shall be presented within three months of 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 immediately 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, 4 and 5 are to be submitted in support of an application to pursue the activities referred to in Article 11 in the territory of that Member State.

Article 23

Remuneration policy

1. Member States shall require IORPs to establish and apply a sound remuneration policy for all those persons who effectively run the IORP, carry out key functions and other categories of staff whose professional activities have a material impact on the risk profile of the IORP in a manner that is proportionate to their size and internal organisation, as well as to the size, nature, scale and complexity of their activities.

2. Unless otherwise provided for in Regulation (EU) 2016/679, IORPs shall regularly disclose publicly relevant information regarding their remuneration policy.

3. When establishing and applying the remuneration policy referred to in paragraph 1, IORPs shall comply with the following principles:

(a) the remuneration policy shall be established, implemented and maintained in line with the activities, risk profile, objectives, and the long-term interest, financial stability and performance of the IORP as a whole, and shall support the sound, prudent and effective management of IORPs;

(b) the remuneration policy shall be in line with the long-term interests of members and beneficiaries of pension schemes operated by the IORP;

(c) the remuneration policy shall include measures aimed at avoiding conflicts of interest;

(d) the remuneration policy shall be consistent with sound and effective risk management and shall not encourage risk-taking which is inconsistent with the risk profiles and rules of the IORP;

(e) the remuneration policy shall apply to the IORP and to the service providers referred to in Article 31(1), unless those service providers are covered by the Directives referred to in point (b) of Article 2(2);

(f) the IORP shall establish the general principles of the remuneration policy, shall review and update it at least every three years, and shall be responsible for its implementation;

(g) there shall be clear, transparent and effective governance with regard to remuneration and its oversight.

Section 2

Key functions

Article 24

General provisions

1. Member States shall require IORPs to have in place the following key functions: a risk-management function, an internal audit function, and, where applicable, an actuarial function. IORPs shall enable the holders of key functions to undertake their duties effectively in an objective, fair and independent manner.

2. IORPs may allow a single person or organisational unit to carry out more than one key function, with the exception of the internal audit function referred to in Article 26, which shall be independent from the other key functions.

3. The single person or organisational unit carrying out the key function shall be different from the one carrying out a similar key function in the sponsoring undertaking. Member States may, taking into account the size, nature, scale and complexity of the activities of the IORP, allow the IORP to carry out key functions through the same single person or organisational unit as in the sponsoring undertaking, provided that the IORP explains how it prevents or manages any conflicts of interest with the sponsoring undertaking.

4. The holders of a key function shall report any material findings and recommendations in the area of their responsibility to the administrative, management or supervisory body of the IORP which shall determine what actions are to be taken.

5. Without prejudice to the privilege against self-incrimination, the holder of a key function shall inform the competent authority of the IORP if the administrative, management or supervisory body of the IORP does not take appropriate and timely remedial action in the following cases:

(a) where the person or organisational unit carrying out the key function has detected a substantial risk that the IORP will not comply with a materially significant statutory requirement and reported it to the administrative, management or supervisory body of the IORP and where this could have a significant impact on the interests of members and beneficiaries; or

(b) where the person or organisational unit carrying out the key function has observed a significant material breach of the laws, regulations or administrative provisions applicable to the IORP and its activities in the context of the key function of that person or organisational unit and reported it to the administrative, management or supervisory body of the IORP.

6. Member States shall ensure the legal protection of persons informing the competent authority in accordance with paragraph 5.

Article 25

Risk-management

1. Member States shall require IORPs, in a manner that is proportionate to their size and internal organisation, as well as to the size, nature, scale and complexity of their activities, to have in place an effective risk-management function. That function shall be structured in such a way as to facilitate the functioning of a risk-management system for which the IORPs shall adopt strategies, processes and reporting procedures necessary to identify, measure, monitor, manage and report to the administrative, management or supervisory body of the IORP regularly the risks, at an individual and at an aggregated level, to which the IORPs and the pension schemes operated by them are or could be exposed, and their interdependencies.

That risk-management system shall be effective and well-integrated into the organisational structure and in the decision-making processes of the IORP.

2. The risk-management system shall cover, in a manner that is proportionate to the size and internal organisation of IORPs, as well as to the size, nature, scale and complexity of their activities, risks which can occur in IORPs or in undertakings to which tasks or activities of an IORP have been outsourced, at least in the following areas, where applicable:

(a) underwriting and reserving;

(b) asset–liability management;

(c) investment, in particular derivatives, securitisations and similar commitments;

(d) liquidity and concentration risk management;

(e) operational risk management;

(f) insurance and other risk-mitigation techniques;

(g) environmental, social and governance risks relating to the investment portfolio and the management thereof.

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.

Article 26

Internal audit function

Member States shall require IORPs in a manner that is proportionate to their size and internal organisation, as well as to the size, 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 system and other elements of the system of governance, including, where applicable, outsourced activities.

Article 27

Actuarial function

1. Where an IORP itself provides cover against biometric risks or guarantees either an investment performance or a given level of benefits, Member States shall require that IORP to provide for an effective actuarial function to:

(a) coordinate 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 purpose;

(c) assess the sufficiency and quality of the data used in the calculation of technical provisions;

(d) compare the assumptions underlying the calculation of the technical provisions with the experience;

(e) inform the administrative, management or supervisory body of the IORP 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 IORP having such a policy;

(g) express an opinion on the adequacy of insurance arrangements in the event of the IORP having such arrangements; and

(h) contribute to the effective implementation of the risk management system.

2. Member States shall require IORPs to designate at least one independent person, inside or outside the IORP, who is responsible for the actuarial function.

Section 3

Documents concerning governance

Article 28

Own-risk assessment

1. Member States shall require IORPs, in a manner that is proportionate to their size and internal organisation, as well as to the size, nature, scale and complexity of their activities, to carry out and document their own-risk assessment.

That risk assessment shall be performed at least every three years or without delay following any significant change in the risk profile of the IORP or of the pension schemes operated by the IORP. Where there is a significant change in the risk profile of a specific pension scheme, the risk assessment may be limited to that pension scheme.

2. Member States shall ensure that the risk assessment referred to in paragraph 1, having regard to the size and internal organisation of the IORP, as well as to the size, nature, scale and complexity of the IORP's activities, includes the following:

(a) a description of how own-risk assessment is integrated into the management process and into the decision-making processes of the IORP;

(b) an assessment of the effectiveness of the risk-management system;

(c) a description of how the IORP prevents conflicts of interest with the sponsoring undertaking, where the IORP outsources key functions to the sponsoring undertaking in accordance with Article 24(3);

(d) an assessment of the overall funding needs of the IORP, including a description of the recovery plan where applicable;

(e) an assessment of the risks to members and beneficiaries relating to the paying out of their retirement benefits and the effectiveness of any remedial action taking into account, where applicable:

  (i) indexation mechanisms;

  (ii) benefit reduction mechanisms, including the extent to which accrued pension benefits can be reduced, under which conditions and by whom;

(f) a qualitative assessment of the mechanisms protecting retirement benefits, including, as applicable, guarantees, covenants or any other type of financial support by the sponsoring undertaking, insurance or reinsurance by an undertaking covered by Directive 2009/138/EC or coverage by a pension protection scheme, in favour of the IORP or the members and beneficiaries;

(g) a qualitative assessment of the operational risks;

(h) where environmental, social and governance factors are considered in investment decisions, an assessment of new or emerging risks, including risks related to climate change, use of resources and the environment, social risks and risks related to the depreciation of assets due to regulatory change.

3. For the purposes of paragraph 2, IORPs shall have in place methods to identify and assess 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 IORP's ability to meet its obligations. Those methods shall be proportionate to the size, nature, scale and complexity of the risks inherent in its activities. The methods shall be described in the own-risk assessment.

4. The own-risk assessment shall be taken into account in the strategic decisions of the IORP.

Article 29

Annual accounts and annual reports

Member States shall require every IORP registered or authorised in their territories to draw up and publicly disclose annual accounts and annual reports taking into account each pension scheme operated by the IORP 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 IORP's assets, liabilities and financial position and include disclosure of significant investment holdings. 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 30

Statement of investment policy principles

Member States shall ensure that every IORP 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 and how the investment policy takes environmental, social and governance factors into account. The statement shall be made publicly available.

CHAPTER 2

Outsourcing and investment management

Article 31

Outsourcing

1. Member States may permit or require IORPs registered or authorised in their territories to entrust any activities including key functions and the management of those IORPs, in whole or in part, to service providers operating on behalf of those IORPs.

2. Member States shall ensure that IORPs 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 IORP concerned;

(b) unduly increasing the operational risk;

(c) impairing the ability of the competent authorities to monitor the compliance of the IORP with its obligations;

(d) undermining continuous and satisfactory service to members and beneficiaries.

4. IORPs shall ensure the proper functioning of the outsourced activities through the process of selecting a service provider and the ongoing monitoring of the activities of that service provider.

5. Member States shall ensure that IORPs outsourcing key functions, the management of those IORPs, or other activities covered by this Directive enter into a written agreement with the service provider. Such agreement shall be legally enforceable and shall clearly define the rights and obligations of the IORP and the service provider.

6. Member States shall ensure that IORPs notify competent authorities in a timely manner of any outsourcing of the activities covered by this Directive. Where the outsourcing relates to the key functions or management of IORPs, this shall be notified to competent authorities before the agreement in respect of any such outsourcing enters into force. Member States shall also ensure that IORPs notify competent authorities of any subsequent important developments with respect to any outsourced activities.

7. Member States shall ensure that competent authorities have the power to request information from IORPs and from service providers about outsourced key functions or any other activities at any time.

Article 32

Investment management

Member States shall not restrict IORPs 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 Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2013/36/EU and 2014/65/EU, as well as the authorised entities referred to in Article 2(1) of this Directive.

CHAPTER 3

Depositary

Article 33

Appointment of a depositary

1. In the case of an occupational pension scheme where members and beneficiaries fully bear the investment risk, the home Member State may require the IORP to appoint one or more depositaries for the safe-keeping of assets and oversight duties in accordance with Articles 34 and 35. The host Member State may require such IORPs to appoint one or more depositaries for the safe-keeping of assets and oversight duties in accordance with Articles 34 and 35 when carrying out cross-border activity in accordance with Article 11, provided that the appointment of a depositary is required under its national law.

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 IORP to appoint one or more depositaries for safe-keeping of assets or for safe-keeping of assets and oversight duties in accordance with Articles 34 and 35.

3. Member States shall not restrict IORPs from appointing depositaries established in another Member State and duly authorised in accordance with Directive 2013/36/EU or Directive 2014/65/EU, or accepted as a depositary for the purposes of Directive 2009/65/EC or Directive 2011/61/EU.

4. Member States shall take the necessary steps to enable competent authorities under their national law to prohibit, in accordance with Article 48, the free disposal of assets held by a depositary or custodian located within their territory at the request of the competent authority of the IORP's home Member State.

5. The depositary shall be appointed by means of a written contract. The contract shall stipulate the transmission of the information necessary for the depositary to perform its duties 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 34 and 35, the IORP 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 IORP which may create conflicts of interest between the IORP, 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 IORP.

8. Where no depositary is appointed, IORPs 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 34

Safekeeping of assets and depositary liability

1. Where the assets of an IORP relating to 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 2014/65/EU, opened in the name of the IORP, so that they can be clearly identified as belonging to the IORP or the pension scheme's members and beneficiaries at all times.

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

3. Member States shall ensure that a depositary is liable to the IORP and 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, IORPs shall, at least be required to:

(a) ensure that financial instruments are subject to due care and protection;

(b) keep records that enable the IORP to identify all assets at all times and without delay;

(c) take the necessary measures to avoid conflicts of interest in relation to the safe-keeping of assets;

(d) inform the competent authorities, upon request, about the manner in which assets are kept.

Article 35

Oversight duties

1. In addition to the tasks referred to in Article 34(1) and (2), the depositary appointed for oversight duties shall:

(a) carry out instructions of the IORP, unless they conflict with national law or the IORP's rules;

(b) ensure that in transactions involving the assets of an IORP relating to a pension scheme any consideration is remitted to the IORP within the usual time limits; and

(c) ensure that income produced by assets is applied in accordance with the rules of the IORP.

2. Notwithstanding paragraph 1, the home Member State of the IORP may establish other oversight duties to be performed by the depositary.

3. Where no depositary is appointed for oversight duties, the IORP shall implement procedures which ensure that the tasks, otherwise subject to oversight by depositaries, are being duly performed within the IORP.

TITLE IV

INFORMATION TO BE GIVEN TO PROSPECTIVE MEMBERS, MEMBERS AND BENEFICIARIES

CHAPTER 1

General provisions

Article 36

Principles

1. Taking into account the nature of the pension scheme established, Member States shall ensure that every IORP registered or authorised in their territories provides to:

(a) prospective members: at least the information set out in Article 41;

(b) members: at least the information set out in Articles 37 to 40, 42 and 44; and

(c) beneficiaries: at least the information set out in Articles 37, 43 and 44.

2. The information referred to in paragraph 1 shall be:

(a) regularly updated;

(b) 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) not misleading, and consistency shall be ensured in the vocabulary and content;

(d) presented in a way that is easy to read;

(e) available in an official language of the Member State whose social and labour law relevant to the field of occupational pension schemes is applicable to the pension scheme concerned; and

(f) made available to prospective members, members and beneficiaries free of charge through electronic means, including on a durable medium or by means of a website, or on paper.

3. Member States may adopt or maintain further provisions on information to be given to prospective members, members and beneficiaries.

Article 37

General information on the pension scheme

1. Member States shall, in respect of every IORP registered or authorised in their territories, ensure that members and beneficiaries are sufficiently informed about the respective pension scheme operated by the IORP, in particular concerning:

(a) the name of the IORP, the Member State in which the IORP is registered or authorised and the name of its competent authority;

(b) the rights and obligations of the parties involved in the pension scheme;

(c) information on the investment profile;

(d) the nature of financial risks borne by the members and beneficiaries;

(e) the conditions regarding full or partial guarantees under the pension scheme or of a given level of benefits or, where no guarantee is provided under the pension scheme, a statement to that effect;

(f) the mechanisms protecting accrued entitlements or the benefit reduction mechanisms, if any;

(g) where members bear investment risk or can take investment decisions, information on the past performance of investments related to the pension scheme for a minimum of five years, or for all the years that the scheme has been operating where this is less than five years;

(h) the structure of costs borne by members and beneficiaries, for schemes which do not provide for a given level of benefits;

(i) the options available to members and beneficiaries in receiving their retirement benefits;

(j) in case a member has the right to transfer pension rights, further information about the arrangements relating to such a transfer.

2. For schemes in which members bear an investment risk and which provide for more than one option with different investment profiles, the members shall be 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.

3. Members and beneficiaries or their representatives shall receive within a reasonable time, any relevant information regarding changes to the pension scheme rules. In addition, IORPs shall make available to them an explanation of the impact on members and beneficiaries of significant changes to technical provisions.

4. IORPs shall make available the general information on the pension scheme set out in this Article.

CHAPTER 2

Pension Benefit Statement and supplementary information

Article 38

General provisions

1. Member States shall require IORPs to draw up a concise document containing key information for each member taking into consideration the specific nature of national pension systems and of relevant national social, labour and tax law ('Pension Benefit Statement'). The title of the document shall contain the words 'Pension Benefit Statement'.

2. The exact date to which the information in the Pension Benefit Statement refers to shall be stated prominently.

3. Members States shall require that the information contained in the Pension Benefit Statement is accurate, updated and made available to each member free of charge through electronic means, including on a durable medium or by means of a website, or on paper, at least annually. A paper copy shall be provided to members on request in addition to any information through electronic means.

4. Any material change to the information contained in the Pension Benefit Statement compared to the previous year shall be clearly indicated.

5. Member States shall set out rules to determine the assumptions of the projections referred to in point (d) of Article 39(1). Those rules shall be applied by IORPs to determine, where relevant, the annual rate of nominal investment returns, the annual rate of inflation and the trend of future wages.

Article 39

Pension Benefit Statement

1. The Pension Benefit Statement shall include, at least, the following key information for members:

(a) personal details of the member, including a clear indication of the statutory retirement age, the retirement age laid down in the pension scheme or estimated by the IORP, or the retirement age set by the member, as applicable;

(b) the name of the IORP and its contact address and identification of the pension scheme of the member;

(c) where applicable, information on full or partial guarantees under the pension scheme and if relevant, where further information can be found;

(d) information on pension benefit projections based on the retirement age as specified in point (a), and a disclaimer that those projections may differ from the final value of the benefits received. If the pension benefit projections are based on economic scenarios, that information shall also include a best estimate scenario and an unfavourable scenario, taking into consideration the specific nature of the pension scheme;

(e) information on the accrued entitlements or accumulated capital taking into consideration the specific nature of the pension scheme;

(f) information on the contributions paid by the sponsoring undertaking and the member into the pension scheme, at least over the last 12 months, taking into consideration the specific nature of the pension scheme;

(g) a breakdown of the costs deducted by the IORP at least over the last 12 months;

(h) information on the funding level of the pension scheme as a whole.

2. In accordance with Article 60, Member States shall exchange best practices with regard to the format and the content of the Pension Benefit Statement.

Article 40

Supplementary information

1. The Pension Benefit Statement shall specify where and how to obtain supplementary information including:

(a) further practical information about the member's options provided under the pension scheme;

(b) the information specified in Articles 29 and 30;

(c) where applicable, 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) information on the level of benefits, in case of cessation of employment.

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 where additional information is available.

CHAPTER 3

Other information and documents to be provided

Article 41

Information to be given to prospective members

1. Member States shall require IORPs to ensure that prospective members who are not automatically enrolled in a pension scheme are informed, before they join that pension scheme, about:

(a) any relevant options available to them including investment options;

(b) the relevant features of the pension scheme including the kind of benefits;

(c) information on whether and how environmental, climate, social and corporate governance factors are considered in the investment approach; and

(d) where further information is available.

2. Where members bear investment risk or can take investment decisions, prospective members shall be provided with information on the past performance of investments related to the pension scheme for a minimum of five years, or for all the years that the scheme has been operating where this is less than five years and information on the structure of costs borne by members and beneficiaries.

3. Member States shall require IORPs to ensure that prospective members who are automatically enrolled in a pension scheme are promptly after their enrolment, informed about:

(a) any relevant options available to them including investment options;

(b) the relevant features of the pension scheme including the kind of benefits;

(c) information on whether and how environmental, climate, social and corporate governance factors are considered in the investment approach; and

(d) where further information is available.

Article 42

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

In addition to the Pension Benefit Statement, IORPs shall provide each member, in due time before the retirement age as specified in point (a) of Article 39(1), or at the request of the member, with information about the benefit pay-out options available in taking their retirement benefits.

Article 43

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

1. Member States shall require IORPs to periodically provide beneficiaries with information about the benefits due and the corresponding pay-out options.

2. IORPs shall inform beneficiaries without delay after a final decision has been taken resulting in any reduction in the level of benefits due, and three months before that decision is implemented.

3. 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 44

Additional information to be given on request to members and beneficiaries

On request of a member, a beneficiary or their representatives, the IORP shall provide the following additional information:

(a) the annual accounts and the annual reports referred to in Article 29, or where an IORP 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 30;

(c) any further information about the assumptions used to generate the projections referred to in point (d) of Article 39(1).

TITLE V

PRUDENTIAL SUPERVISION

CHAPTER 1

General rules on prudential supervision

Article 45

Main objective of prudential supervision

1. The main objective of prudential supervision is to protect the rights of members and beneficiaries and to ensure the stability and soundness of the IORPs.

2. Member States shall ensure that the competent authorities are provided with the necessary means, and have the relevant expertise, capacity, and mandate to achieve the main objective of supervision referred to in paragraph 1.

Article 46

Scope of prudential supervision

Member States shall ensure that IORPs are subject to prudential supervision including the supervision of the following where applicable:

(a) conditions of operation;

(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;

(i) system of governance; and

(j) information to be provided to members and beneficiaries.

Article 47

General principles of prudential supervision

1. The competent authorities of the home Member State shall be responsible for the prudential supervision of IORPs.

2. Member States shall ensure that supervision is based on a forward-looking and risk-based approach.

3. Supervision of IORPs shall comprise an appropriate combination of off-site activities and on-site inspections.

4. Supervisory powers shall be applied in a manner which is timely and proportionate to the size, nature, scale and complexity of the activities of the IORP.

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 Union, in particular in emergency situations.

Article 48

Powers of intervention and duties of the competent authorities

1. The competent authorities shall require every IORP registered or authorised in their territories to have sound administrative and accounting procedures and adequate internal control mechanisms.

2. Without prejudice to the supervisory powers of competent authorities and the right of Member States to provide for and impose criminal sanctions, Member States shall ensure that their competent authorities may impose administrative sanctions and other measures applicable to all infringements of the national provisions implementing this Directive, and shall take all measures necessary to ensure that they are implemented. Member States shall ensure that their administrative sanctions and other measures are effective, proportionate and dissuasive.

3. Member States may decide not to lay down rules on administrative sanctions under this Directive for infringements which are subject to criminal sanctions under their national law. In that case, Member States shall communicate to the Commission the relevant criminal law provisions.

4. Member States shall ensure that the competent authorities publish any administrative sanction or other measure that has been imposed for breaches of the national provisions implementing this Directive and against which no appeal was lodged in time, without undue delay, including information on the type and nature of the breach and the identity of persons responsible for it. However, where the publication of the identity of the legal persons, or identity or personal data of natural persons, is considered by the competent authority to be disproportionate following a case-by-case assessment conducted on the proportionality of the publication of such data or where publication jeopardises the stability of financial markets or an ongoing investigation, the competent authority may decide to defer publication, not to publish, or to publish the sanctions on an anonymous basis.

5. Any decision to prohibit or restrict the activities of an IORP shall contain detailed reasons and be notified to the IORP in question. That decision shall also be notified to EIOPA which shall communicate it to all competent authorities in the case of cross-border activity as referred to in Article 11.

6. Competent authorities may also restrict or prohibit the free disposal of the IORP's assets when, in particular:

(a) the IORP has failed to establish sufficient technical provisions in respect of the entire business or has insufficient assets to cover the technical provisions;

(b) the IORP has failed to hold the regulatory own funds.

7. In order to safeguard the interests of members and beneficiaries, the competent authorities may transfer the powers which the persons running an IORP 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 those powers.

8. The competent authorities may prohibit or restrict the activities of an IORP registered or authorised in their territories in particular if:

(a) the IORP fails to protect adequately the interests of scheme members and beneficiaries;

(b) the IORP no longer fulfils the conditions of operation;

(c) the IORP fails seriously in its obligations under the rules to which it is subject;

(d) in the case of cross-border activity, the IORP does not respect the requirements of social and labour law of the host Member State relevant to the field of occupational pension schemes.

9. Member States shall ensure that decisions taken in respect of an IORP under laws, regulations and administrative provisions adopted in accordance with this Directive are subject to a right of appeal to the courts.

Article 49

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 IORPs to comply with the laws, regulations and administrative provisions adopted pursuant to this Directive, taking into account the size, nature, scale and complexity of the activities of the IORP.

That review shall take into account the circumstances in which the IORPs are operating, and, where relevant, the parties carrying out outsourced key functions or any other activities for them. The review shall comprise the following elements:

(a) an assessment of the qualitative requirements relating to the system of governance;

(b) an assessment of the risks the IORP faces;

(c) an assessment of the ability of the IORP to assess and manage those risks.

2. Member States shall ensure that competent authorities have monitoring tools, including stress-tests, that enable them to identify deteriorating financial conditions in an IORP and to monitor how a deterioration is remedied.

3. The competent authorities shall have the necessary powers to require IORPs 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 size, nature, scale and complexity of the activities of the IORP concerned.

Article 50

Information to be provided to the competent authorities

Member States shall ensure that the competent authorities, in respect of any IORP registered or authorised in their territories, have the necessary powers and means to:

(a) require the IORP, the administrative, management or supervisory body of the IORP or the persons who effectively run the IORP or carry out key functions to supply at any time information about all business matters or forward all business documents;

(b) supervise relationships between the IORP and other companies or between IORPs, when IORPs outsource key functions or any other activities to those other companies or IORPs and all subsequent re-outsourcing, influencing the financial situation of the IORP or being in a material way relevant for effective supervision;

(c) obtain the following documents: the own-risk assessment, the statement of investment-policy principles, the annual accounts and the annual reports, and all other documents necessary for the purposes of supervision;

(d) 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 29;

(e) carry out on-site inspections at the IORP'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) request information from IORPs about outsourced and all subsequent re-outsourced activities at any time.

Article 51

Transparency and accountability

1. Member States shall ensure that the competent authorities conduct the tasks laid down in this Directive in a transparent, independent 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 pension schemes, 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 49;

(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 competent authorities;

(e) the rules on administrative sanctions and other measures applicable to breaches of national provisions adopted pursuant to this Directive.

3. Member States shall ensure that they have in place and apply transparent procedures regarding the appointment and dismissal of the members of the governing and managing bodies of their competent authorities.

CHAPTER 2

Professional secrecy and exchange of information

Article 52

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 ensuring that individual IORPs cannot be identified.

2. By derogation from paragraph 1, where a pension scheme is being wound up, Member States may allow confidential information to be divulged in civil or commercial proceedings.

Article 53

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 taking up occupational retirement provision business are met by IORPs before commencing their activities;

(b) to facilitate the monitoring of the activities of IORPs, 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 administrative sanctions;

(d) where permitted by national law, to publish key performance indicators for all individual IORPs, which may assist members and beneficiaries in taking financial decisions regarding their pension;

(e) in appeals against decisions of the competent authorities taken in accordance with the provisions transposing this Directive;

(f) in court proceedings regarding the provisions transposing this Directive.

Article 54

European Parliament right of inquiry

Articles 52 and 53 shall be without prejudice to the right of inquiry conferred on the European Parliament by Article 226 of the Treaty on the Functioning of the European Union.

Article 55

Exchange of information between authorities

1. Articles 52 and 53 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 winding up 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 IORPs, insurance undertakings and other financial institutions;

(d) the disclosure, to bodies which administer the winding up 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 52.

3. Articles 52 and 53 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 winding up 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 IORPs, insurance undertakings and other financial institutions;

(c) independent actuaries of IORPs carrying out supervision of those IORPs and the bodies responsible for overseeing such actuaries.

Article 56

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

1. Articles 52 and 53 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) other public authorities responsible for overseeing payment systems, where appropriate;

(c) the European Systemic Risk Board, EIOPA, the European Supervisory Authority (European Banking Authority) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council ([1]) and the European Supervisory Authority (European Securities and Markets Authority) established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council ([2]).

2. Articles 55 to 58 shall not prevent the authorities or bodies referred to in points (a), (b) and (c) of paragraph 1 of this Article from communicating to the competent authorities such information as the competent authorities may need for the purposes of Article 53.

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.

Article 57

Disclosure of information to government administrations responsible for financial legislation

1. Articles 52(1), 53 and 58(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 IORPs, credit institutions, financial institutions, investment services and insurance undertakings, or inspectors acting on behalf of those departments.

That disclosure shall be made only where necessary for reasons of prudential control, and prevention and resolution of failing IORPs. 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 the information received under Article 55, 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.

([1]) Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

([2]) Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

2. Member States may authorise the disclosure of confidential information relating to the prudential supervision of IORPs 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 IORPs 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, that information is disclosed with the explicit agreement of the originating competent authorities and solely for the purposes for which those authorities gave their agreement.

Article 58

Conditions for the exchange of information

1. For exchanges of information under Articles 55, transmission of information under Article 56 and disclosure of information under Article 57, 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 oversight or supervision;

(b) the information received shall be subject to the obligation of professional secrecy laid down in Article 52;

(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 53 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 and scrutiny as referred to in point (a) of Article 57(2);

(b) information received must be subject to the obligation of professional secrecy laid down in Article 52;

(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 57(2) shall apply.

Article 59

National provisions of a prudential nature

1. Member States shall report to EIOPA their national provisions of a prudential nature relevant to the field of occupational pension schemes, which are not covered by national social and labour law on the organisation of pension systems as referred to in Article 11(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 60

Cooperation between Member States, the Commission and EIOPA

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 with the involvement of the social partners where applicable, 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 IORPs.

3. The competent authorities of the Member States shall cooperate with EIOPA for the purposes of this Directive, in accordance with Regulation (EU) No 1094/2010 and 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 61

Processing of personal data

With regard to the processing of personal data within the framework of this Directive, IORPs and competent authorities shall carry out their tasks for the purposes of this Directive in accordance with Regulation (EU) 2016/679. With regard to the processing of personal data by EIOPA within the framework of this Directive, EIOPA shall comply with Regulation (EC) No 45/2001.

Article 62

Evaluation and review

1. By 13 January 2023, the Commission shall review this Directive and report on its implementation and effectiveness to the European Parliament and to the Council.

2. The review referred to in paragraph 1 shall in particular consider:

(a) the adequacy of this Directive from a prudential and governance point of view;

(b) cross-border activity;

(c) the experience acquired in applying this Directive and its impact on the stability of IORPs;

(d) the Pension Benefit Statement.

Article 63

Amendment of Directive 2009/138/EC

Directive 2009/138/EC is amended as follows:

(1) in Article 13, point (7) is replaced by the following:

'(7) "reinsurance" means one 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;

(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 that falls within the scope of Directive (EU) 2016/2341 of the European Parliament and of the Council (*);

(*) Directive (EU) 2016/2341 of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (OJ L 354, 23.12.2016, p. 37)';

(2) in Article 308b, paragraph 15 is replaced by the following:

'15. Where, on the entry into force of this Directive, home Member States applied provisions referred to in Article 4 of Directive (EU) 2016/2341, those 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) 2016/2341;

(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.

By 31 December 2017, the Commission shall submit a report to the European Parliament and to the Council, on whether the period referred to in the first subparagraph should be extended, taking account of changes to Union or national law resulting from this Directive.'.

Article 64

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 13 January 2019. They shall immediately communicate the text of those measures to the Commission.

When Member States adopt those measures, 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 65

Repeal

Directive 2003/41/EC, as amended by the Directives listed in Annex I, Part A, is repealed with effect from 13 January 2019 without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and the dates of 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 66

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*.

Article 67

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 14 December 2016.

For the European Parliament	*For the Council*
The President	*The President*
M. SCHULZ	I. KORČOK

ANNEX I

PART A

Repealed Directive with list of its successive amendments

(referred to in Article 65)

Directive 2003/41/EC of the European Parliament and of the Council (OJ L 235, 23.9.2003, p. 10).	
Directive 2009/138/EC of the European Parliament and of the Council (OJ L 335, 17.12.2009, p. 1).	Article 303 only
Directive 2010/78/EU of the European Parliament and of the Council (OJ L 331, 15.12.2010, p. 120).	Article 4 only
Directive 2011/61/EU of the European Parliament and of the Council (OJ L 174, 1.7.2011, p. 1).	Article 62 only
Directive 2013/14/EU of the European Parliament and of the Council (OJ L 145, 31.5.2013, p. 1).	Article 1 only

PART B

List of time-limits for transposition into national law and application

(referred to in Article 65)

Directive	Time-limit for transposition	Date of application
2003/41/EC	23.9.2005	23.9.2005
2009/138/EC	31.3.2015	1.1.2016
2010/78/EU	31.12.2011	31.12.2011
2011/61/EU	22.7.2013	22.7.2013
2013/14/EU	21.12.2014	21.12.2014

ANNEX II

Correlation Table

Directive 2003/41/EC	This Directive
Article 1	Article 1
Article 2	Article 2
Article 3	Article 3
Article 4	Article 4
Article 5	Article 5
Article 6(a)	Article 6(1)
Article 6(b)	Article 6(2)
Article 6(c)	Article 6(3)
Article 6(d)	Article 6(4)
Article 6(e)	Article 6(5)
Article 6(f)	Article 6(6) Article 6(7)
Article 6(g)	Article 6(8)
Article 6(h)	Article 6(9)
Article 6(i)	Article 6(10)
Article 6(j)	Article 6(11) Article 6(12) to (19)
Article 7	Article 7
Article 8	Article 8
Article 9(1)(a)	Article 9
Article 9(1)(c)	Article 10(1)(a)
Article 9(1)(e)	Article 10(1)(b)
Article 9(2)	Article 10(2)
Articles 20, 9(5)	Article 11 Article 12
Article 15(1) to (5)	Article 13(1) to (5)
Article 15(6)	
Article 16	Article 14
Article 17	Article 15

Directive 2003/41/EC	This Directive
Article 17a(1) to (4)	Article 16(1) to (4)
Article 17a(5)	
Article 17b	Article 17
Article 17c	
Article 17d	Article 18
Article 18	Article 19
	Article 20
	Article 21
Article 9(1)(b)	Article 22(1)
	Article 22(2) to (7)
	Article 23
	Article 24
	Article 25
	Article 26
	Article 27
	Article 28
Article 10	Article 29
Article 12	Article 30
Article 9(4)	Article 31(1)
	Article 31(2) to (7)
Article 19(1)	Article 32
Article 19(2) second subparagraph	Article 33(1)
	Article 33(2)
Article 19(2) first subparagraph	Article 33(3)
Article 19(3)	Article 33(4)
	Article 33(5) to (8)
	Article 34
	Article 35
	Article 36
Article 9(1)(f)	Article 37(1)
Article 11(4)(c)	Article 37(2)
Article 11(2)(b)	Article 37(3)
	Article 37(4)
	Article 38
	Article 39
	Article 40(1)(a) to (c)

Directive 2003/41/EC	This Directive
Article 11(4)(b)	Article 40(1)(d)
	Article 40(2)
	Article 41
	Article 42
Article 11(5)	Article 43
Article 11(2)(a)	Article 44(a)
Article 11(3)	Article 44(b)
	Article 44(c)
	Article 45
	Article 46
	Article 47
Article 14(1)	Article 48(1)
Article 14(2) first subparagraph	Article 48(2)
	Article 48(3) to (5)
Article 14(2) second subparagraph	Article 48(6)
Article 14(3) to (5)	Article 48(7) to (9)
	Article 49
Article 13(1)	Article 50
Article 13(2)	
	Article 51
	Article 52
	Article 53
	Article 54
	Article 55
	Article 56
	Article 57
	Article 58
Article 20(11) first subparagraph	Article 59(1)
Article 20(11) second subparagraph	Article 59(2)
Article 20(11) third and fourth subparagraphs	
Article 21	Article 60
	Article 61
	Article 62
	Article 63
Article 22	Article 64
	Article 65
	Article 66
	Article 67