



Brussels, 27.3.2014
COM(2014) 167 final

2014/0091 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the activities and supervision of institutions for occupational retirement provision

(recast)

(Text with EEA relevance)

{SWD(2014) 102 final}

{SWD(2014) 103 final}

{SWD(2014) 104 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

European society is ageing. Pension systems across the European Union (EU) have to adapt in order to ensure adequate, safe and sustainable pensions. This is not a simple matter. Effectively addressing these challenges requires closely coordinated action by Member States. The proposed revision of Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision (IORPs)¹ will make those institutions better governed, more transparent and increasing their cross-border activity, thereby strengthening the internal market.

In a number of respects the Directive's review is long overdue.

First, higher governance standards reflecting best practices at national level following the economic and financial crisis are needed to protect scheme members and beneficiaries, and facilitate safe cross-border provisioning. Some IORPs are large financial institutions, and their failure could impact on financial stability and have significant social consequences. This is particularly relevant as more and more occupational pensions are defined-contribution (DC) schemes. The pensions of the members of these schemes are at risk in case of possible insufficient risk governance or mismanagement.²

Second, regulatory divergences, overlapping requirements, and excessively burdensome cross-border procedures must be reduced. Commission's consultations have shown that these are one of the obstacles to develop cross-border occupational pensions markets, and reducing those obstacles would help companies, including SMEs and multinationals, to organise their pension provision on a European scale more efficiently.³ Cross-border IORPs, such as the pan-European pension fund for mobile researchers⁴ or a planned cross-border scheme for Austrian employers⁵ are limited today. But the increasing pressure on the occupational pensions sector is likely to grow significantly in view of increasingly limited public pensions systems, and cross-border IORPs have the potential to represent an increasing share in occupational pension provision. In

¹ OJ L 235, 23.9.2003, p.10.

² Schemes where the level of contributions, not the final benefit is pre-defined. Individual members bear the investment and longevity risks and often make decisions about how to mitigate these risks.

³ See e.g. responses to question 5 of the Commission's Green Paper on pensions (<http://ec.europa.eu/social/main.jsp?catId=700&langId=en&consultId=3&visib=0&furtherConsult=yes>); Hewitt Associates (2010), "Feasibility Study for Creating an EU Pension Fund for Researchers Prepared for the European Commission Research Directorate-General"; Centre for European Economic Research, Expert Survey on the future of DC pension plans in Europe, 2009, pg. 128.

⁴ Since 2010 the Commission has been working together with representatives of researchers' employers towards the establishment of a multi-country and multi-employer IORP. The purpose of the Pan-European pension fund for researchers is to ensure adequate and sustainable occupational pensions for mobile and non-mobile researchers in the EEA.

⁵ See, for example, the question from the European Parliament to the Commission (E-002485-13) of 4 March 2013 concerning the project to establish a cross-border IORP in the NL for members and beneficiaries in AT.

fact, new legislation has been introduced in several Member States aimed at positioning them as locations of choice for cross-border IORPs.⁶

Third, there is evidence of significant gaps in the level of information provided to scheme members and beneficiaries across the EU. Many scheme members are not aware that their pension rights are not guaranteed or even if accrued that they could be cut by IORPs, contrary to other financial contracts.⁷ They are also often not aware that charges have a significant impact on pension rights.

This proposal builds on a number of initiatives launched in recent years such as the White Paper on pensions⁸ and the Green Paper on long-term financing of the European economy.⁹ Following on from this last Paper, the revision of the Directive also aims to strengthen the capacity of IORPs to invest in assets with a long-term economic profile and support the financing of sustainable growth in the real economy.

The IORP sector is being developed in many Member States where occupational pensions so far play a limited role, including by setting up regulatory frameworks. Failing to provide an up-to-date EU regulatory framework now entails the risk that Member States continue to develop diverging solutions, thereby exacerbating regulatory fragmentation. Furthermore, improvements to the performance of occupational pensions require long periods of time to materialise. Failing to act now would lead to lost opportunities in terms of cost savings and investment returns, and inadequate financial planning by millions of Europeans. It would also increase the burden disproportionately for younger generations and undermine inter-generational solidarity.

This proposal does not consider the introduction of new solvency rules, which are in any event not relevant for DC schemes. Moreover, a quantitative impact study¹⁰ conducted by the European Insurance and Occupational Pensions Authority (EIOPA) in 2013 indicated that more complete data on solvency aspects are necessary before a decision can be taken on those aspects.

1.1. Objectives of the proposal

The general objective of this proposal is to facilitate the development of occupational retirement savings. Safer, more efficient occupational pensions will contribute to pension adequacy and sustainability by enhancing the contribution of complementary retirement savings to retirement incomes. It will also reinforce IORPs' role as institutional investors in the EU's real economy and enhance the capacity of the European economy to channel long-term savings to growth-enhancing investment.

⁶ Examples include Luxembourg's SEPCAV (Société d'épargne-pension à capital variable) and ASSEP (Association d'épargne-pension), Belgium's OFP (Organization for Financing Pensions), or the Netherlands' PPI (Premium Pension Institutions).

⁷ For example, the Dutch central bank reported that since the outbreak of the crisis 68 IORPs were compelled to curtail accrued pension rights in April 2013; this affected 300,000 individuals (DNB, 2013, Five years in the pensions sector: curtailment and indexation in perspective). In the UK, IORPs that fail can be taken over by the Pension Protection Fund but in that case the pension rights are cut by 10%.

⁸ COM (2012) 55 final, 16.2.2012.

⁹ COM (2013) 150 final, 25.3.2013.

¹⁰ EIOPA, "Report on QIS on IORPs", 4.7.2013

This proposal has four specific objectives: (1) removing remaining prudential barriers for cross-border IORPs, notably by requiring that the rules on investment and disclosure of information to members and beneficiaries are those of the home Member State, as well as by clarifying procedures for cross-border activities and clearly defining the scope of action of home and host Member State; (2) ensuring good governance and risk management; (3) providing clear and relevant information to members and beneficiaries; and (4) ensuring that supervisors have the necessary tools to effectively supervise IORPs.

1.2. Consistency with other policies and objectives of the Union

The objectives of this proposal are consistent with the policies and objectives pursued by the Union. The Treaty on the Functioning of the European Union (TFEU) provides for action to ensure the establishment and functioning of the internal market with a high level of consumer protection, as well as the freedom to provide services.

This proposal is in line with the White Paper on pensions. At the same time it is consistent with the Europe 2020 strategy, which calls for fiscal consolidation and long-term financial sustainability to go hand in hand with structural reform of pension systems in Member States.¹¹ Finally, this proposal is consistent with other initiatives in the field of financial services, such as Solvency II¹², AIFMD¹³ and MiFID II¹⁴. As such it falls well within the scope of the Commission's agenda towards a stronger financial sector to support growth.¹⁵

The proposal promotes human rights by protecting retirement provision. It is in line with Article 25 of the Charter of Fundamental Rights of the EU which calls for recognition and respect for the rights of the elderly to lead a life of dignity and independence. The proposed actions would have a positive impact on consumer protection under Article 38 and freedom to conduct business under Article 16, in particular by ensuring a higher level of transparency of retirement provisioning, informed personal financial and retirement planning as well as facilitating cross-border business of IORPs and their sponsors. The general objective justifies certain limitations on the freedom to conduct a business (Article 16) as the proposal aims at ensuring the market integrity and stability.

2. RESULTS OF CONSULTATION WITH INTERESTED PARTIES AND IMPACT ASSESSMENT

This proposal builds on multiple public consultations regarding requirements on quantitative aspects, governance and information disclosures. Given the specific nature of the IORP activities, the consultations consistently included the social partners (employers and trade unions). In July 2010, the Commission consulted on its Green Paper on pensions in which it outlined a number of its ideas regarding this review.¹⁶ The consultation drew almost 1700 responses from across the EU,

¹¹ COM(2010) 2020 final, 3.3.2010.

¹² OJ L 335, 17.12.2009, p. 1.

¹³ Alternative Investment Fund Managers Directive (OJ L 174, 1.7.2011, p. 1).

¹⁴ Markets in Financial Instruments Directive.

¹⁵ COM(2010) 301 final, 2.6.2010.

¹⁶ COM (2010) 365 final, 7.7.2010.

including 350 from Member States, national parliaments, business and trade union organisations, civil society and industry representatives.¹⁷

Taking into account the feedback on the Green Paper on pensions, the Commission Services asked EIOPA in April 2011 to provide technical advice on how to change the Directive. EIOPA recommended that - taking into account the principle of proportionality - the governance framework set out in the Solvency II Directive should apply to IORPs. The publication of the draft advice¹⁸ was followed by an extensive consultation.¹⁹ EIOPA delivered its final advice in February 2012, on the basis of which Directorate-General for Internal Market and Services organised an exchange of views amongst stakeholders during a public hearing on 1 March 2012. Subsequently, the Commission Services conducted a Quantitative Impact Study on the quantitative requirements, as well as a study on administrative burden for aspects relating to governance and information disclosures. Both studies built on the contributions from the industry and social partners.

This proposal is accompanied by an impact assessment report that considers a range of policy options and sub-options. The report was first submitted to the Impact Assessment Board on 4 September 2013. The Board asked for resubmission with additional information on the views of the different stakeholder groups, problem definition, subsidiarity and proportionality aspects, options and expected impacts. The report was revised accordingly and the main changes were: (i) a more comprehensive description of the views of the Member States and different stakeholder categories; (ii) a more detailed explanation of the problems being addressed by the proposed action; (iii) as regards subsidiarity, a more detailed description of the case for EU action; (iv) a clarification that further harmonisation of supervisory reporting is not being proposed; (v) a new section on the impact of the initiative on small and medium-sized enterprises; and (vi) a more detailed description of the assumptions used in the calculation of the expected benefits and costs of the various options. The impact assessment was resubmitted on 16 October 2013. On 6 November the Board stated it could not issue a positive opinion and requested some further amendments.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. Legal basis

This proposal recasts Directive 2003/41/EC. It simultaneously codifies its unchanged provisions and amends it. The legal bases of Directive 2003/41/EC are ex-Articles 47(2), 55 and 95 EC (currently Articles 53, 62 and 114(1) TFEU).

The proposal maintains the legal bases of the Directive. It seeks both to establish the internal market by means of freedom to provide services and freedom of establishment when regulating the taking-up and pursuit of activities as self-employed persons and when establishing a high level of protection for consumers.

Directive 2003/41/EC regulates areas such as the conditions of operations of IORPs, including a common approach to registration or authorisation, rules and

¹⁷ Consultation summary at: <http://ec.europa.eu/social/main.jsp?catId=333&langId=en>.

¹⁸ EIOPA-CP-11/001, 08.07.2011.

¹⁹ Responses to the consultations of EIOPA's advice can be found via <https://eiopa.europa.eu/consultations/consultation-papers/2011-closed-consultations>.

procedures to be followed when IORPs wish to offer their services in other Member States, quantitative solvency rules, investment rules based on the prudent person principle, requirements on the effective management, including fit and proper requirements, the use of internal audit and actuarial services, risk management requirements, the use of depositories, information to be disclosed to members and beneficiaries and supervisory powers and reporting obligations.

This proposal further builds on these elements. As to the information to be disclosed by the IORP it, for example, introduces an EU-wide pension benefit statement. With regard to effective management of IORPs it lays down more detailed rules on fit and proper and key functions including risk management. The proposal also aims to facilitate cross-border activity.

The two objectives of Directive 2003/41/EC are retained. Neither of the objectives is secondary or indirect in relation to the other. For example, the professionalization of IORP management by defining the tasks and responsibilities of key management staff and the introduction of a forward-looking self-risk assessment strengthens consumer protection. Conversely, better information through the pension benefit statement empowers members and beneficiaries to hold IORP management more accountable. A higher level of harmonisation of those requirements facilitates cross-border activity by reducing transaction costs and stimulating market innovation.

3.2. Subsidiarity and proportionality

EU level action in this field adds value because action by Member States alone will not: (i) remove obstacles to cross-border activities of IORPs; (ii) ensure a higher EU-wide minimum level of consumer protection; (iii) lead to scale economies, risk diversification and innovation inherent to cross-border activity; (iv) avoid regulatory arbitrage between financial services sectors; (v) avoid regulatory arbitrage between Member States; and (vi) take into account the interests of cross-border workers.

Under the proposed action, Member States retain full responsibility for the organisation of their pension systems. The revision does not call this prerogative into question. Neither does the revision cover issues of national social and labour, fiscal or contract legislation.

The proposal complies with the principle of proportionality, as enshrined in Article 5(4) of the Treaty on European Union (TEU). The selected policy options seek to strike a balance between public interest, the protection of members and beneficiaries, as well as the costs for institutions, sponsors and supervisors. The options have been carefully considered, crafted as minimum standards and tailored taken into account different business models. This is why, overall, the proposal will stimulate occupational retirement provision.

3.3. References to other directives

This proposal is a recast exercise and refers to Directives 2003/41/EC, 2009/138/EC, 2010/78/EU²⁰, 2011/61/EU and 2013/14/EU²¹. Directive 2003/41/EC will be repealed by this Directive.

²⁰ OJ L 331, 15.12.2010, p. 120.

²¹ OJ L 145, 31.5.2013, p. 1.

3.4. Detailed explanation of the proposal

As this is a recast of Directive 2003/41/EC, the detailed explanation below focusses solely on new provisions or provisions that are to be amended.

Title I – GENERAL PROVISIONS

Article 6 now includes new and/or clarified definitions of "sponsoring undertaking", "home Member State", "host Member State", "transferring" and "receiving" institutions, "regulated market", "multilateral trading facility", "organised trading facility", "durable medium" and "key functions".

Article 9, in conjunction with *Article 10*, no longer list the conditions of operation separately but give responsibility to Member States to ensure that every institution is registered or authorised and that they have properly constituted rules for the pension scheme.

Article 12 is amended in three ways. First, it specifies that an institution carries out cross-border activity when it operates a pension scheme that is subject to the social and labour law of another Member State, including in situations where the institution and the sponsoring undertaking are located in the same Member State.²² Second, paragraph 4 requires a reasoned decision by a competent authority of the home Member State, should the authority ban cross-border activity. Moreover, where a competent authority of the home Member State does not notify a competent authority of the host Member State, it shall give reasons for its refusal. Third, the host Member State may no longer impose additional information requirements on institutions carrying out cross-border activities. This is because the proposal introduces a standardised pension benefit statement (see Articles 40 to 54).

Article 13 lays down new rules for the cross-border transfer of pension schemes which must be subject to prior authorisation by a competent authority of the home Member State of the receiving institution. Unless national social and labour law on the organisation of pension systems provides otherwise, the transfer and its conditions shall be subject to prior approval by members and beneficiaries concerned or, where applicable, their representatives. *Article 13* also includes rules on exchange of information concerning the applicable social and labour law under which the pension scheme must be operated. Should, following the transfer, the receiving institution carry out a cross-border activity, *Article 12(8)* and (9) apply. The institution will operate the pension scheme in accordance with the social and labour law of the host Member State²³, thereby not changing the level of protection of the members and beneficiaries concerned by the transfer.

Title II – QUANTITATIVE REQUIREMENTS

Article 20 on investment rules is modified in three ways. First, the host Member State may no longer impose additional investment rules on institutions carrying out cross-border activities. This facilitates the organisation of investment management, in particular for defined contribution schemes. This does not undermine the protection of members and beneficiaries because it is matched by

²² For example, the institution and the sponsoring undertaking are located in Member State A and the social and labour law applicable to the pension scheme is that of Member State B.

²³ The home Member State before the transfer becomes the host Member State after the transfer.

strengthened governance and supervisory rules. Second, Article 20(6)(a) has been updated to reflect the terminology used in Regulation (EU) No .../... [MiFIR]. Third, it replaces the ambiguous term 'risk capital markets' (*Article 20(6) (c)*) with a terminology that better reflects the original meaning of this provision, namely that Member States cannot restrict institutions from investing in long-term instruments that are not traded on regulated markets. Moreover, investment rules should not restrict investment in non-listed assets that finance low carbon and climate resilient infrastructure projects.

A further harmonisation of rules relating to the financial solvency situation of the institution is not being proposed.

Title III – CONDITIONS GOVERNING ACTIVITIES

For small IORPs, the proposal maintains the possibility for Member States to exclude institutions managing schemes which together have less than 100 members in total. For other IORPs, specific measures, for instance on the key functions and risk evaluation, ensure that governance requirements are proportionate.

CHAPTER 1 – System of governance

Except for *Articles 31 and 32* (ex *Articles 10 and 12*), this Title is new to the Directive and lays down new detailed governance requirements for IORPs.

Article 21 sets out that the administrative, management or supervisory body of the IORP is ultimately responsible for the IORP's compliance with the laws, regulations and administrative provisions adopted pursuant to this Directive. The rules on governance of IORPs are without prejudice to the role of social partners in their management.

Article 22 establishes that institutions need to have in place an effective system of governance which provides for sound and prudent management of their activities. This system shall be proportionate to the nature, scale and complexity of the activities of the IORPs so as to ensure that the governance requirements will not be too burdensome for example for small institutions.

Article 23 requires IORPs to ensure that all persons who effectively run the IORP or have key functions have professional qualifications, knowledge and experience which are adequate to enable sound and prudent management of the IORP or to properly perform their key functions (*fit*) and that they are of good repute and integrity (*proper*).

Article 24 sets out that institutions must have a sound remuneration policy and that this policy is disclosed publicly. The article also proposes to empower the Commission to adopt a delegated act.

Article 25 sets out the general principles on key functions. IORPs may allow a single person or organisational unit to carry out more than one key function, but shall at all times allocate the risk management function to a different person or organisational unit than the internal audit function.

Article 26 states that IORPs need to have in place an effective risk-management system which is necessary to identify, monitor, manage and report on a continuous basis all risks, including those related to outsourced or subsequently re-outsourced activities, to which they are or could be exposed, and their interdependencies. The risk management should be proportionate to the size,

internal organisation and the nature, scope and complexity of the institution's activities.

Article 27 provides for an effective internal audit function which evaluates the adequacy and effectiveness of the internal control system and other elements of its system of governance, including outsourced or subsequently re-outsourced activities. The internal audit function is to be assumed by at least one independent person, inside or outside of the institution.

Article 28 requires an effective actuarial function to co-ordinate and oversee the calculation of technical provisions as well as to assess the appropriateness of the methodologies and underlying models, where members and beneficiaries do not bear all the risks.

Article 29 sets out that institutions need to produce a risk evaluation for pensions regularly and without delay following any significant change in the institution's risk profile. The evaluation needs to demonstrate the compatibility of a number of elements in line with national requirements. The evaluation should include new or emerging risks relating to climate change, use of resources and the environment. The risk evaluation for pensions should be proportionate to the size, internal organisation and the nature, scope and complexity of the institution's activities.

Article 30 proposes to empower the Commission to adopt a delegated act with regard to the risk evaluation for pensions.

CHAPTER 2 – Outsourcing and investment management

Article 33 lays down the rules for contracting to third parties (outsourcing), including re-outsourced activities.

CHAPTER 3 – Depositary

Articles 35 to 37 set out that IORPs need to appoint a single depositary for safe-keeping of assets and oversight duties if members and beneficiaries fully bear the investment risk.

Title IV – INFORMATION TO BE GIVEN TO THE PROSPECTIVE MEMBERS, MEMBERS AND BENEFICIARIES

CHAPTER 1 – General provisions

This Chapter lays down the details of the information to be provided to members, prospective members, and after retirement, beneficiaries and building on former Article 11.

Article 38 sets out the general principle for information disclosures.

Article 39 lays down the type of information that members (and beneficiaries) need to receive, such as the rights and obligations of the parties, the risks and investment options and whether these are default or not. The conditions of the particular pension scheme must be published on a website by the institution concerned.

Article 40 places an obligation on IORPs to provide, every twelve months, a pension benefit statement ('PBS') for the individual in the clearest possible way, also as a basis to feed information into a potential pension tracking service as

described in the White Paper on pensions.²⁴ Where Member States already provide for comprehensive information to individuals covering one or more pension pillars, they will maintain the flexibility to design their pension information systems, as long as they comply with the requirements of this proposal.

CHAPTER 2 – Pension Benefit Statement

Articles 40 to 44 lay down general provisions for the PBS - which is intended for active members of the pension scheme. The idea of the PBS is based on EIOPA's Advice to the European Commission on the review of the IORP Directive, draws on national best practices in several Member States and international work developed by the OECD²⁵. The PBS ensures comparability with information required by legislation in other financial sectors such as the key investor document for open investment funds (UCITS), while taking into account the specificities of the occupational pensions sector. Moreover, the PBS leaves sufficient leeway for Member States to introduce more specific requirements and integrated systems allowing for comparability between different pillars of the pension system.

The standardisation of the PBS should enable automatisisation of the regular production of the PBS and its potential outsourcing, thereby keeping costs low in particular for smaller institutions.

Articles 46 to 53 lay down the components of the PBS which shall be read together with Article 45. The components are as follows:

- personal details of the member;
- identification of the institution;
- guarantees;
- balance, contributions and costs;
- pension projections;
- investment profile;
- past performance; and
- supplementary information.

Article 54 proposes to empower the Commission to adopt a delegated act with regard to the PBS.

CHAPTER 3 – Other information and documents to be provided

This Chapter relates to information that should be provided by IORPs to members and beneficiaries in different pension stages such as just before enrolment, just before retirement or during the pay-out phase.

²⁴ Initiative 17 states that "[t]he Commission will promote the development of pension tracking services allowing people to keep track of their pension entitlements acquired in different jobs. It will consider, in the context of the revision of the IORP directive and the proposal for a portability directive, how the provision of the required information for pensions tracking can be ensured, and it will support a pilot project on cross-border tracking."

²⁵ OECD Roadmap for the good design of defined contribution pension plans, June 2012.

Article 55 lays down specific rules for IORP to provide information to prospective members prior to joining the IORP 's pension scheme.

Article 56 lays down the information to be given to members before retirement. This should be provided in addition to the PBS, at least two years before retirement, whether that is predefined or not.

Article 57 details the information to be given to beneficiaries during the pay-out phase. This information to beneficiaries should replace the PBS.

Article 58 lays down information to be given on request by members and beneficiaries.

Title V - PRUDENTIAL SUPERVISION

CHAPTER 1 – General rules on prudential supervision

Article 59 designates the protection of scheme members and beneficiaries as the main objective of prudential supervision.

Article 60 defines which areas are to be understood as belonging to prudential supervision in the context of this Directive. This Article takes away the legal uncertainty for IORPs caused by differences in scope of Member States' prudential regulation.

Article 61 sets out the general principles of prudential supervision. It, for example, lays down that the competent authority of the home Member State has the sole responsibility for the prudential supervision of all IORPs authorised or registered in its jurisdiction. The article furthermore establishes the principle that supervision of IORPs needs to be prospective and risk-based, as well as timely and proportionate.

Article 63 introduces the supervisory review process which aims to identify IORPs with financial, organisational or other features susceptible to producing a higher risk profile.

Article 64 ensures that all the new requirements introduced by this proposal are reflected in the power attributed to competent authorities with regard to the provision of information.

Article 65 sets out that competent authorities need to conduct their tasks in a transparent and accountable manner.

CHAPTER 2 – Professional secrecy and exchange of information

Articles 66 to 71 make provisions and lay down the conditions for the exchanges of information between competent authorities and authorities and bodies which help to strengthen the stability of the financial system.

Title VI – FINAL PROVISIONS

Articles 73 to 81 lay down cooperation and reporting obligations, conditions for the processing of the personal data. They include evaluation and review of the Directive, amendment of the Solvency II Directive 2009/138/EC, the implementation deadline of the Directive, repeals and addressees.

4. BUDGETARY IMPLICATIONS

Specific budgetary implications are assessed in the legislative financial statement and relate to tasks allocated to EIOPA.

↓ 2003/41/EC

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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN
UNION,

Having regard to the Treaty ~~establishing the European Community~~ on the
Functioning of the European Union, and in particular Article ~~53~~⁴⁷⁽²⁾, Article
~~62~~⁵⁵ and Article ~~114(1)~~⁹⁵⁽¹⁾ thereof,

Having regard to the proposal from the European Commission,

↓ new

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

↓ 2003/41/EC

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

↓ new

After consulting the European Data Protection Supervisor,

↓ 2003/41/EC

Acting in accordance with the ordinary legislative procedure ~~laid down in Article~~
~~251 of the Treaty(3)~~,

Whereas:

↓ new

(1) Directive 2003/41/EC of the European Parliament and of the Council²⁶ has been substantially amended several times²⁷. Since further amendments are to be made, it should be recast in the interests of clarity.

↓ 2003/41/EC recital
1

~~A genuine internal market for financial services is crucial for economic growth and job creation in the Community.~~

↓ 2003/41/EC recital
2 (adapted)
⇒ new

~~(2) Major achievements have already been made in the establishment of The this internal market, allowing ⇒ should allow ⇐ financial institutions to operate in other Member States and ensure ensuring a high level of protection for ⇐ members and beneficiaries of occupational retirement schemes ⇐ the consumers of financial services.~~

↓ 2003/41/EC recital
3 (adapted)

~~The communication from the Commission "Implementing the framework for financial markets: action plan" identifies a series of actions that are needed in order to complete the internal market for financial services, and the European Council, at its meeting in Lisbon on 23 and 24 March 2000, called for the implementation of this action plan by 2005.~~

↓ 2003/41/EC recital
4 (adapted)

~~The action plan for financial services stresses as an urgent priority the need to draw up a directive on the prudential supervision of institutions for occupational retirement provision, as these institutions are major financial institutions which have a key role to play in ensuring the integration, efficiency and liquidity of the financial markets, but they are not subject to a coherent Community legislative framework allowing them to benefit fully from the advantages of the internal market.~~

²⁶ 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).

²⁷ See Annex I, Part A.

↓ new

- (3) Directive 2003/41/EC represented a first legislative step on the way to an internal market for occupational retirement provision organised on a European scale. A genuine internal market for occupational retirement provision remains crucial for economic growth and job creation in the European Union and for tackling the challenge of an ageing European society. The Directive, dating from 2003, has not been substantially amended to introduce a modern risk-based governance system also for institutions for occupational retirement provision.
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↓ 2003/41/EC recital
5 (adapted)
⇒ new

- (4) ⇒ Action is needed to further develop complementary private retirement savings such as occupational pensions. This is important since social-security systems are coming under increasing pressure, which means that citizens will increasingly rely on occupational retirement pensions as a complement in the future. ~~↪ Since social security systems are coming under increasing pressure, occupational retirement pensions will increasingly be relied on as a complement in future.~~ Occupational retirement pensions should ~~therefore~~ be developed, without, however, calling into question the importance of social-security pension systems in terms of secure, durable and effective social protection, which should guarantee a decent standard of living in old age and should therefore be at the centre of the objective of strengthening the European social model.
-

↓ new

- (5) This Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, notably, the right to protection of personal data, the right to conduct a business and the right to a high level of consumer protection, in particular by ensuring a higher level of transparency of retirement provisioning, informed personal financial and retirement planning as well as facilitating cross-border business of institutions for occupational retirement provision and businesses. This Directive must be implemented in accordance with these rights and principles.
- (6) Despite the entry into force of Directive 2003/41/EC important prudential barriers remain which make it more expensive for institutions to operate pension schemes across borders. Moreover, the current minimum level of protection for members and beneficiaries needs to be increased. This is all the more important as the number of Europeans relying on schemes that shift longevity and market risks from the institution or the undertaking offering the occupational scheme ("sponsoring undertaking") to the individual has increased significantly. In addition, the current minimum level of information provision to members and beneficiaries needs to be increased. Those developments warrant an amendment of the Directive.

↓ 2003/41/EC recital 7

- (7) The prudential rules laid down in this Directive are intended both to guarantee a high degree of security for future pensioners through the imposition of stringent supervisory standards, and to clear the way for the efficient management of occupational pension schemes.
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↓ 2003/41/EC recital 8

- (8) Institutions which are completely separated from any sponsoring undertaking and which operate on a funded basis for the sole purpose of providing retirement benefits should have freedom to provide services and freedom of investment, subject only to coordinated prudential requirements, regardless of whether these institutions are considered as legal entities.
-

↓ 2003/41/EC recital 9

- (9) In accordance with the principle of subsidiarity, Member States should retain full responsibility for the organisation of their pension systems as well as for the decision on the role of each of the three "pillars" of the retirement system in individual Member States. In the context of the second pillar, they should also retain full responsibility for the role and functions of the various institutions providing occupational retirement benefits, such as industry-wide pension funds, company pension funds and life-assurance companies. This Directive is not intended to call this prerogative into question.
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↓ 2003/41/EC recital 10

- (10) National rules concerning the participation of self-employed persons in institutions for occupational retirement provision differ. In some Member States, institutions for occupational retirement provision can operate on the basis of agreements with trade or trade groups whose members act in a self-employed capacity or directly with self-employed and employed persons. In some Member States a self-employed person can also become a member of an institution when the self-employed person acts as employer or provides ~~his~~ professional services to an undertaking. In some Member States self-employed persons cannot join an institution for occupational retirement provision unless certain requirements, including those imposed by social and labour law, are met.

↓ 2003/41/EC recital
11

- (11) Institutions managing social-security schemes, which are already coordinated at Community Union level, should be excluded from the scope of this Directive. Account should nevertheless be taken of the specificity of institutions which, in a single Member State, manage both social-security schemes and occupational pension schemes.
-

↓ 2003/41/EC recital
12

- (12) Financial institutions which already benefit from a Community Union legislative framework should in general be excluded from the scope of this Directive. However, as these institutions may also in some cases offer occupational pension services, it is important to ensure that this Directive does not lead to distortions of competition. Such distortions may be avoided by applying the prudential requirements of this Directive to the occupational pension business of life-assurance companies. The Commission should also carefully monitor the situation in the occupational pensions market and assess the possibility of extending the optional application of this Directive to other regulated financial institutions.
-

↓ 2003/41/EC recital
13

- (13) When aiming at ensuring financial security in retirement, the benefits paid by institutions for occupational retirement provision should generally provide for the payment of a lifelong pension. Payments for a temporary period or a lump sum should also be possible.
-

↓ 2003/41/EC recital
14

- (14) It is important to ensure that older and disabled people are not placed at risk of poverty and can enjoy a decent standard of living. Appropriate cover for biometrical risks in occupational pension arrangements is an important aspect of the fight against poverty and insecurity among elderly people. When setting up a pension scheme, employers and employees, or their respective representatives, should consider the possibility of the pension scheme including provisions for the coverage of the longevity risk and occupational disability risks as well as provision for surviving dependants.
-

↓ 2003/41/EC recital
15

- (15) Giving Member States the possibility to exclude from the scope of national implementing legislation institutions managing schemes which together

have less than 100 members in total can facilitate supervision in some Member States, without undermining the proper functioning of the internal market in this field. However, this should not undermine the right of such institutions to appoint for the management of their investment portfolio and the custody of their assets investment managers and custodians established in another Member State and duly authorised.

↓ 2003/41/EC recital
16

- (16) Institutions such as "Unterstützungskassen" in Germany, where the members have no legal rights to benefits of a certain amount and where their interests are protected by a compulsory statutory insolvency insurance, should be excluded from the scope of the Directive.
-

↓ 2003/41/EC recital
17

- (17) In order to protect members and beneficiaries, institutions for occupational retirement provision should limit their activities to the activities, and those arising therefrom, referred to in this Directive.
-

↓ 2003/41/EC recital
18

- (18) In the event of the bankruptcy of a sponsoring undertaking, a member faces the risk of losing both his/her job and his/her acquired pension rights. This makes it necessary to ensure that there is a clear separation between that undertaking and the institution and that minimum prudential standards are laid down to protect members.
-

↓ 2003/41/EC recital
19

- (19) Institutions for occupational retirement provision operate and are supervised with significant differences in Member States. In some Member States, supervision can be exercised not only over the institution itself but also over the entities or companies which are authorised to manage these institutions. Member States should be able to take such specificity into account as long as all the requirements laid down in this Directive are effectively met. Member States should also be able to allow insurance entities and other financial entities to manage institutions for occupational retirement provision.
-

↓ 2003/41/EC recital
20

- (20) Institutions for occupational retirement provision are financial service providers which bear a heavy responsibility for the provision of occupational retirement benefits and therefore should meet certain

minimum prudential standards with respect to their activities and conditions of operation.

↓ 2003/41/EC recital
21

- (21) The huge number of institutions in certain Member States means a pragmatic solution is necessary as regards prior authorisation of institutions. However, if an institution wishes to manage a scheme in another Member State, a prior authorisation granted by the competent authority of the home Member State should be required.
-

↓ 2003/41/EC recital
36 (adapted)
⇒ new

- (22) Without prejudice to national social and labour legislation on the organisation of pension systems, including compulsory membership and the outcomes of collective bargaining agreements, institutions should have the possibility of providing their services in other Member States ⇒ upon receipt of the authorisation from the competent authority of the institution's home Member State ⇐. ~~Institutions~~ They should be allowed to accept sponsorship from undertakings located in ⇒ any ⇐ ~~other~~ Member States and to operate pension schemes with members in more than one Member State. This would potentially lead to significant economies of scale for these institutions, improve the competitiveness of the UnionCommunity industry and facilitate labour mobility. ~~This requires mutual recognition of prudential standards. Proper enforcement of these prudential standards should be supervised by the competent authorities of the home Member State, unless specified otherwise.~~
-

↓ 2003/41/EC recital
37
⇒ new

- (23) The exercise of the right of an institution in one Member State to manage an occupational pension scheme contracted in another Member State should fully respect the provisions of the social and labour law in force in the host Member State insofar as it is relevant to occupational pensions, for example the definition and payment of retirement benefits and the conditions for transferability of pension rights. ⇒ The scope of prudential rules should be clarified in order to ensure legal certainty for the cross-border activities of the institutions. ⇐
-

↓ new

- (24) Institutions should be able to transfer pension schemes to other institutions across borders within the Union in order to facilitate the organisation of occupational retirement provision on a Union scale, subject only to authorisation from the competent authority in the home Member State of

the institution receiving the pension scheme (the "receiving institution"). Unless national social and labour law on pension systems provides otherwise, the transfer and its conditions should be subject to prior approval by members and beneficiaries concerned or, where applicable, their representatives.

↓ 2003/41/EC recital
26

- (25) A prudent calculation of technical provisions is an essential condition to ensure that obligations to pay retirement benefits can be met. Technical provisions should be calculated on the basis of recognised actuarial methods and certified by qualified persons. The maximum interest rates should be chosen prudently according to any relevant national rules. The minimum amount of technical provisions should both be sufficient for benefits already in payment to beneficiaries to continue to be paid and reflect the commitments that arise out of members' accrued pension rights.
-

↓ 2003/41/EC recital
27

- (26) Risks covered by institutions vary significantly from one Member State to another. Home Member States should therefore have the possibility of making the calculation of technical provisions subject to additional and more detailed rules than those laid down in this Directive.
-

↓ 2003/41/EC recital
28

- (27) Sufficient and appropriate assets to cover the technical provisions protect the interests of members and beneficiaries of the pension scheme if the sponsoring undertaking becomes insolvent. In particular in cases of cross-border activity, the mutual recognition of supervisory principles applied in Member States requires that the technical provisions be fully funded at all times.
-

↓ 2003/41/EC recital
29

- (28) If the institution does not work on a cross-border basis, Member States should be able to permit underfunding provided that a proper plan is established to restore full funding and without prejudice to the requirements of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.²⁸

²⁸ OJ L 283, 28.10.1980, p. 23.

↓ 2003/41/EC recital
30

- (29) In many cases, it could be the sponsoring undertaking and not the institution itself that either covers any biometric risk or guarantees certain benefits or investment performance. However, in some cases, it is the institution itself which provides such cover or guarantees and the sponsor's obligations are generally exhausted by paying the necessary contributions. In these circumstances, the products offered are similar to those of life-assurance companies and the institutions concerned should hold at least the same additional own funds as life-assurance companies.
-

↓ 2003/41/EC recital
31

- (30) Institutions are very long-term investors. Redemption of the assets held by these institutions cannot, in general, be made for any purpose other than providing retirement benefits. Furthermore, in order to protect adequately the rights of members and beneficiaries, institutions should be able to opt for an asset allocation that suits the precise nature and duration of their liabilities. These aspects call for efficient supervision and an approach towards investment rules allowing institutions sufficient flexibility to decide on the most secure and efficient investment policy and obliging them to act prudently. Compliance with the "prudent person" rule therefore requires an investment policy geared to the membership structure of the individual institution for occupational retirement provision.
-

↓ 2003/41/EC recital
6 (adapted)

- (31) ~~This Directive thus represents a first step on the way to an internal market for occupational retirement provision organised on a European scale.~~ By setting the "prudent person" rule as the underlying principle for capital investment and making it possible for institutions to operate across borders, the redirection of savings into the sector of occupational retirement provision is encouraged, thus contributing to economic and social progress.
-

↓ 2003/41/EC recital
32 (adapted)

- (32) Supervisory methods and practices vary among Member States. Therefore, Member States should be given some discretion on the precise investment rules that they wish to impose on the institutions located in their territories. However, these rules ~~must~~ ☒ should ☒ not restrict the free movement of capital, unless justified on prudential grounds.

↓ 2003/41/EC recital
33 (adapted)
⇒ new

- (33) As very long-term investors with low liquidity risks, institutions for occupational retirement provision are in a position to invest in non-liquid assets such as shares as well as in ⇒ instruments that have a long-term economic profile and are not traded on regulated markets, multilateral trading facilities or organised trading facilities ⇐ ~~risk capital markets~~ within prudent limits. They can also benefit from the advantages of international diversification. Investments in shares, ~~risk capital markets~~ and ☒ in ☒ currencies other than those of the liabilities ⇒ and in instruments that have a long-term economic profile and are not traded on regulated markets, multilateral trading facilities or organised trading facilities ⇐ should therefore not be restricted except on prudential grounds.

↓ new

- (34) The understanding of what constitutes instruments with a long-term economic profile is broad. These instruments are non-transferable securities and therefore do not have access to the liquidity of secondary markets. They often require fixed term commitments which restrict their marketability. These instruments should be understood to include participations, debt instruments in non-listed undertakings and loans provided to them. Non-listed undertakings include infrastructure projects, unlisted companies seeking growth, real estate or other assets that could be suitable for long term investment purposes. Low carbon and climate resilient infrastructure projects are often non-listed assets and rely on long term credits for project financing.

↓ 2003/41/EC recital
34 (adapted)

~~However, if the institution works on a cross-border basis, it may be asked by the competent authorities of the host Member State to apply limits for investment in shares and similar assets not admitted to trading on a regulated market, in shares and other instruments issued by the same undertaking or in assets denominated in non-matching currencies provided such rules also apply to institutions located in the host Member State.~~

↓ 2003/41/EC recital
35 (adapted)

~~Restrictions regarding the free choice by institutions of approved asset managers and custodians limit competition in the internal market and should therefore be eliminated.~~

- (35) Institutions should be allowed to invest in other Member States in accordance with the rules of their home Member States in order to reduce the cost of cross-border activity. Therefore the host Member States should not be allowed to impose additional investment requirements on institutions located in other Member States.
- (36) Some risks cannot be reduced through quantitative requirements reflected in the technical provisions and funding requirements but can only be properly addressed through governance requirements. Ensuring an effective system of governance is therefore essential for the adequate management of risk. Those systems should be proportionate to the nature, scale and complexity of the activities.
- (37) Remuneration policies which encourage excessive risk-taking behaviour can undermine sound and effective risk management of institutions. Principles and disclosure requirements for remuneration policies applicable to other types of financial institutions in the Union should be made applicable also to institutions, bearing in mind, however, the particular governance structure of institutions in comparison to other types of financial institutions and the need to take account of the size, nature, scope and complexity of the activities of institutions.
- (38) A key function is an internal capacity to undertake particular governance tasks. Institutions should have sufficient capacity to have a risk-management function, an internal audit function and, where applicable, an actuarial function. The identification of a particular key function does not prevent the institution from freely deciding how to organise that key function in practice save where otherwise specified in this Directive. This should not lead to unduly burdensome requirements because account should be taken of the nature, scale and complexity of the activities of the institution.
- (39) All persons that perform key functions should be fit and proper. However, only the key function holders should be subject to notification requirements to the competent authority.
- (40) Furthermore, with the exception of the internal audit function, in smaller and less complex institutions it should be possible for a single person or organisational unit to carry out more than one key function. However, the person or unit performing a key function should be different from the one performing a similar key function in the sponsoring undertaking; although the competent authority should be authorised to grant an exemption taking into account the size, nature, scope and complexity of the activities of institutions.
- (41) It is essential that institutions improve their risk management so that potential vulnerabilities in relation to the sustainability of the pension scheme can be properly understood and discussed with the competent authorities. Institutions should, as part of their risk management system, produce a risk evaluation for their activities relating to pensions. That risk evaluation should also be made available to the competent authorities. In

that evaluation institutions should provide among others a qualitative description of key elements determining their funding position in accordance with national law, the effectiveness of their risk-management system and the ability to comply with the requirements regarding technical provisions. This risk evaluation should include new or emerging risks, such as risks related to climate change, resource use or the environment.

↓ 2003/41/EC recital
22

- (42) Each Member State should require that every institution located in its territory draw up annual accounts and annual reports taking into account each pension scheme operated by the institution and, where applicable, annual accounts and annual reports for each pension scheme. The annual accounts and annual reports, reflecting a true and fair view of the institution's assets, liabilities and financial position, taking into account each pension scheme operated by an institution, and duly approved by an authorised person, are an essential source of information for members and beneficiaries of a scheme and the competent authorities. In particular, they enable the competent authorities to monitor the financial soundness of an institution and assess whether the institution is able to meet all its contractual obligations.
-

↓ 2003/41/EC recital
24

- (43) The investment policy of an institution is a decisive factor for both security and affordability of occupational pensions. The institutions should therefore draw up and, at least every three years, review a statement of investment principles. It should be made available to the competent authorities and on request also to members and beneficiaries of each pension scheme.
-

↓ new

- (44) Institutions should be allowed to entrust their management, in whole or in part, to other entities operating on their behalf. Institutions should remain fully responsible for discharging all of their obligations under this Directive when they outsource key functions or any other activities.
- (45) The safe-keeping and oversight duties related to the assets of institutions should be strengthened by clarifying the depositary's roles and duties. Only institutions operating schemes where members and beneficiaries bear all the risks should be required to appoint a depositary.
-

↓ 2003/41/EC recital
23 (adapted)

~~Proper information for members and beneficiaries of a pension scheme is crucial. This is of particular relevance for requests for information concerning the~~

~~financial soundness of the institution, the contractual rules, the benefits and the actual financing of accrued pension entitlements, the investment policy and the management of risks and costs.~~

↓ new

- (46) Institutions should provide clear and adequate information to prospective members, members and beneficiaries to support their decision-making about their retirement and ensure a high level of transparency throughout the various phases of a scheme comprising pre-enrolment, membership (including pre-retirement) and post-retirement. In particular, information concerning accrued pension entitlements, projected levels of retirement benefits, risks and guarantees, and costs should be given. Where members bear an investment risk, additional information on the investment profile, any available options and past performance are also crucial.
- (47) Before joining a scheme, prospective members should be given all the necessary information to make an informed choice such as possibilities to opt out, contributions, costs and investment options, where applicable.
- (48) For the institution's members that have not yet retired, institutions should draw up a standardised pension benefit statement containing key personal and generic information about the pension scheme. The pension benefit statement should have a standard format in order to facilitate the understanding of pension entitlements over time and across schemes and serve labour mobility.
- (49) Institutions should inform members sufficiently in advance before retirement about their pay-out options. Where the retirement benefit is not paid out as a lifetime annuity, members that approach retirement should receive information about the benefit payment products available, in order to facilitate financial planning for retirement.
- (50) During the phase when retirement benefits are paid, beneficiaries should continue to receive information on their benefits and corresponding payment options. This is particularly important when a significant level of investment risk is borne by beneficiaries in the pay-out phase.
- (51) The competent authority should exercise its powers having as its prime objective the protection of members and beneficiaries.
- (52) The scope of prudential supervision differs between Member States. This can cause problems where an institution needs to comply with the prudential regulation of its home Member State whilst simultaneously comply with the social and labour law of its host Member State. Clarifying which areas are considered to be part of prudential supervision for the purpose of this Directive reduces legal uncertainty and the associated transaction costs.
- (53) An internal market for institutions requires mutual recognition of prudential standards. The institution's adherence to those standards should be supervised by the competent authorities of the institution's home Member State. Member States should attribute to competent authorities the

necessary powers to use preventive or corrective measures if institutions breach any of the requirements of this Directive.

↓ 2003/41/EC recital
25 (adapted)

~~To fulfil their statutory function, the competent authorities should be provided with adequate rights to information and powers of intervention with respect to institutions and the persons who effectively run them. Where an institution for occupational retirement provision has transferred functions of material importance such as investment management, information technology or accounting to other companies (outsourcing), it should be possible for the rights to information and powers of intervention to be enlarged so as to cover these outsourced functions in order to check whether those activities are carried out in accordance with the supervisory rules.~~

↓ new

- (54) In order to ensure effective supervision of outsourced activities, including all subsequent re-outsourcing activities, it is essential that the competent authorities have access to all relevant data held by the service providers to whom activities have been outsourced, regardless of whether the latter is a regulated or unregulated entity, and have the right to conduct on-site inspections. In order to take account of market developments and to ensure continuous compliance with the conditions for outsourcing, institutions should inform competent authorities prior to the outsourcing of critical or important activities.
- (55) Provision should be made for exchanges of information between the competent authorities, other authorities and bodies tasked with strengthening of financial stability and the termination of pension schemes. It is therefore necessary to specify the conditions under which those exchanges of information should be possible. Moreover, where information may be disclosed only with the express agreement of the competent authorities, those authorities should be able, where appropriate, to make their agreement subject to compliance with strict conditions.
- (56) Directive 95/46/EC of the European Parliament and of the Council²⁹ governs the processing of personal data carried out in the Member States in the context of this Directive and under the supervision of the competent authorities. Regulation (EC) No 45/2001 of the European Parliament and of the Council³⁰, governs the processing of personal data carried out by the European Supervisory Authorities pursuant to this Directive and under the supervision of the European Data Protection Supervisor. Any processing

²⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p.31)

³⁰ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies on the free movement of such data (OJ L 8, 12.01.2001, p. 1)

of personal data carried out within the framework of this Directive, such as the exchange or transmission of personal data by the competent authorities should be in accordance with national rules which implement Directive 95/46/EC, and any exchange or transmission of information by the European Supervisory Authorities should be in accordance with Regulation (EC) No 45/2001.

- (57) In order to ensure the smooth functioning of the internal market for occupational retirement provision organised on a European scale, the Commission should, after consulting EIOPA, review and report on the application of this Directive and should submit that report to the European Parliament and to the Council four years after the entry into force of this Directive. That review should assess in particular the application of the rules regarding the calculation of the technical provisions, the funding of technical provisions, regulatory own funds, solvency margins, investment rules and any other aspect relating to the financial solvency situation of the institution.
- (58) In order to ensure fair competition between institutions, the transitional period allowing insurance undertakings subject to Directive 2009/138/EC of the European Parliament and of the Council³¹ to operate their occupational-retirement-provision-business under the rules referred to in Article 4 of Directive 2009/138/EC should be extended until 31 December 2022. Directive 2009/138/EC should therefore be amended accordingly.
- (59) In order to specify the requirements set out in this Directive, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of clarifying the remuneration policy, the risk evaluation for pensions and the pension benefit statement. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

↓ 2003/41/EC recital
38 (adapted)

~~When a scheme is ring-fenced, the provisions of this Directive apply individually to that scheme.~~

↓ 2003/41/EC recital
39 (adapted)

~~It is important to make provision for cooperation between the competent authorities of the Member States for supervisory purposes and between those authorities and the Commission for other purposes. For the purposes of carrying out their duties and of contributing to the consistent and timely implementation of~~

³¹ 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).

~~this Directive, competent authorities should provide each other with the information necessary to apply the provisions of the Directive. The Commission has indicated its intention to set up a committee of supervisors in order to encourage cooperation, coordination and exchanges of views between national competent authorities, and to promote the consistent implementation of this Directive.~~

↓ 2003/41/EC recital
40

- (60) Since the objective of the proposed action, namely to create a UnionCommunity legal framework covering institutions for occupational retirement provision, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved by the UnionCommunity, the UnionCommunity 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.
-

↓ new

- (61) In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents³², Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (62) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive amendment as compared with the earlier Directives. The obligation to transpose the provisions which are unchanged arises under the earlier Directives.
- (63) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and application of the Directives set out in Annex I, Part B,
-

↓ 2003/41/EC

HAVE ADOPTED THIS DIRECTIVE:

↓ new

Title I

GENERAL PROVISIONS

³² OJ C 369, 17.12.2011, p. 14.

↓ 2003/41/EC
(adapted)

Article 1

Subject ☒ Subject matter ☒

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

Article 2

Scope

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

2. This Directive shall not apply to:

↓ 2003/41/EC
(adapted)

(a) institutions managing social-security schemes which are covered by Regulations (EEC) No ~~1408/71~~³³ 883/2004³⁴ and ~~Regulation (EEC) No 574/72~~³⁵ 987/2009 ☒ of the European Parliament and of the Council ☒³⁶,

↓ 2011/61/EU Art.
62.1

(b) institutions which are covered by Directives ~~73/239/EEG~~³⁷, ~~Directive 85/611/EEG~~³⁸, ~~Directive 93/22/EEG~~³⁹, ~~Directive 2000/12/EC~~⁴⁰ and

³³ ~~Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ L 149, 5.7.1971, p. 2). Regulation as last amended by Regulation (EC) No 1386/2001 of the European Parliament and of the Council (OJ L 187, 10.7.2001, p. 1).~~

³⁴ ~~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).~~

³⁵ ~~Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ L 74, 27.3.1972, p. 1). Regulation as last amended by Commission Regulation (EC) No 410/2002 (OJ L 62, 5.3.2002, p. 17).~~

³⁶ ~~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).~~

³⁷ ~~First Council Directive 73/239/EEG of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance (OJ L 228, 16.8.1973, p. 3). Directive as last amended by Directive 2002/13/EC of the European Parliament and of the Council (OJ L 77, 20.3.2002, p. 17).~~

~~Directive 2002/83/EC⁴¹ 2004/39/EC⁴², 2009/65/EC⁴³, 2009/138/EC, 2011/61/EU⁴⁴ and 2013/36/EU⁴⁵;~~

↓ 2003/41/EC

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

(d) institutions where employees of the sponsoring undertakings have no legal rights to benefits and where the sponsoring undertaking can redeem the assets at any time and not necessarily meet its obligations for payment of retirement benefits;

(e) companies using book-reserve schemes with a view to paying out retirement benefits to their employees.

Article 3

Application to institutions operating social-security schemes

Institutions for occupational retirement provision which also operate compulsory employment-related pension schemes which are considered to be social-security schemes covered by Regulations (EEC) No ~~1408/71~~ 883/2004 and (EEC) No ~~574/72~~ 987/2009 shall be covered by this Directive in respect of their non-compulsory occupational retirement provision business. In that case, the liabilities and the corresponding assets shall be ring-fenced and it shall not be possible to transfer them to the compulsory pension schemes which are considered as social-security schemes or vice versa.

³⁸ ~~Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 375, 31.12.1985, p. 3). Directive as last amended by Directive 2001/108/EC of the European Parliament and of the Council (OJ L 41, 13.2.2002, p. 35).~~

³⁹ ~~Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ L 141, 11.6.1993, p. 27). Directive as last amended by Directive 2000/64/EC of the European Parliament and of the Council (OJ L 290, 17.11.2000, p. 27).~~

⁴⁰ ~~Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ L 126, 26.5.2000, p. 1). Directive as amended by Directive 2000/28/EC (OJ L 275, 27.10.2000, p. 27).~~

⁴¹ ~~Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ L 345, 19.12.2002, p. 1).~~

⁴² ~~Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).~~

⁴³ ~~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).~~

⁴⁴ ~~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).~~

⁴⁵ ~~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).~~

Article 4

Optional application to institutions covered by Directive 2002/83/EC 2009/138/EC

↓ 2003/41/EC
(adapted)

Home Member States may choose to apply the provisions of Articles ~~9 to 16 and Articles 18 to 20~~ ☒ 9 to 15, Articles 20 to 24(2), Articles 25 to 29, Articles 31 to 53 and Articles 55 to 71 ☒ of this Directive to the occupational retirement provision business of ☒ life ☒ insurance undertakings which are covered by Directive 2002/83/EC 2009/138/EC. In that case, all assets and liabilities corresponding to the said business shall be ring-fenced, managed and organised separately from the other activities of the ☒ life ☒ insurance undertakings, without any possibility of transfer.

In such case, and only as far as their occupational retirement provision business is concerned, ☒ life ☒ insurance undertakings shall not be subject to Articles ~~20 to 26, 31 and 36~~ ☒ 76 to 86, Article 132, Article 134(2), Article 173, Article 185(5), Article 185(7) and (8) and Article 209 ☒ of Directive 2002/83/EC 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 2002/83/EC 2009/138/EC, as part of their supervisory work, verify the strict separation of the relevant occupational retirement provision business.

Article 5

Small pension institutions and statutory schemes

With the exception of ~~Article 19~~ ☒ Articles 34 to 37 ☒, Member States may choose not to apply this Directive, in whole or in part, to any institution located in their territories which operates pension schemes which together have less than 100 members in total. Subject to Article 2(2), such institutions ~~should~~ ☒ shall ☒ nevertheless be given the right to apply this Directive on a voluntary basis. Article ~~20~~ 12 may be applied only if all the other provisions of this Directive apply.

Member States may choose ~~not~~ to apply Articles ~~9 to 17~~ ☒ 1 to 8, Article 12, Article 20 and Articles 34 to 37 ☒ to institutions where occupational retirement provision is made under statute, pursuant to legislation, and is guaranteed by a public authority. Article ~~20~~ 12 may be applied only if all the other provisions of this Directive apply.

↓ 2003/41/EC

Article 6

Definitions

For the purposes of this Directive:

- (a) 'institution for occupational retirement provision', or 'institution', means an institution, irrespective of its legal form, operating on a funded

basis, established separately from any sponsoring undertaking or trade for the purpose of providing retirement benefits in the context of an occupational activity on the basis of an agreement or a contract agreed:

- individually or collectively between the employer(s) and the employee(s) or their respective representatives, or
- with self-employed persons, in compliance with the legislation of the home and host Member States,

and which carries out activities directly arising therefrom;

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

↓ 2003/41/EC
(adapted)
⇒ new

(c) ‘sponsoring undertaking’ means any undertaking or other body, regardless of whether it includes or consists of one or more legal or natural persons, ~~acts as an employer or in a self-employed capacity or any combination thereof and which pays contributions into an institution for occupational retirement provision~~ ⇒ which under national legislation is legally obliged or voluntarily commits to offering a pension scheme; ⇐

↓ 2003/41/EC

(d) ‘retirement benefits’ means benefits paid by reference to reaching, or the expectation of reaching, retirement or, where they are supplementary to those benefits and provided on an ancillary basis, in the form of payments on death, disability, or cessation of employment or in the form of support payments or services in case of sickness, indigence or death. In order to facilitate financial security in retirement, these benefits usually take the form of payments for life. They may, however, also be payments made for a temporary period or as a lump sum.

(e) ‘member’ means a person whose occupational activities entitle or will entitle him/her to retirement benefits in accordance with the provisions of a pension scheme;

(f) ‘beneficiary’ means a person receiving retirement benefits;

(g) ‘competent authorities’ means the national authorities designated to carry out the duties provided for in this Directive;

(h) ‘biometrical risks’ mean risks linked to death, disability and longevity;

↓ 2003/41/EC (adapted) ⇒ new

(i) 'home Member State' means the Member State ⇒ in which the institution has been authorised or registered and in which its main administration is located. The place of main administration refers to a place where the main strategic decisions of the institution's decision making body are made; ⇐ ~~in which the institution has its registered office and its main administration or, if it does not have a registered office, its main administration;~~

↓ 2003/41/EC (adapted) ⇒ new

(j) 'host Member State' means the Member State whose social and labour law relevant to the field of occupational pension schemes is applicable to the relationship between the sponsoring undertaking and members ⇒ or beneficiaries ⇐;

⇓ new

(k) 'transferring institution' means an institution transferring all or a part of a pension scheme to an institution in another Member State;

(l) 'receiving institution' means an institution receiving all or a part of a pension scheme from an institution in another Member State;

(m) 'regulated market' means a multilateral system in the Union within the meaning of Article 2(1)(5) of Regulation (EU) No .../... [MiFIR];

(n) 'multilateral trading facility' means a multilateral system in the Union within the meaning of Article 2(1)(6) of Regulation (EU) No .../... [MiFIR];

(o) 'organised trading facility' means a system or facility in the Union referred to in Article 2(1)(7) of Regulation (EU) No .../... [MiFIR];

(p) 'durable medium' means an instrument which enables a member or a beneficiary to store information addressed personally to that member or beneficiary in a way that is accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

(q) 'key function', within a system of governance, means an internal capacity to undertake practical tasks; a system of governance includes the risk management function, the internal audit function, and where the institution enters into financial commitments or establishes technical provisions, also the actuarial function.

↓ 2003/41/EC
(adapted)
⇒ new

Article 7

Activities of an institution

~~Each~~ Member States shall require institutions located within ~~its territory~~ their territories to limit their activities to retirement-benefit related operations and activities arising therefrom.

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

Article 8

Legal separation between sponsoring undertakings and institutions for occupational retirement provision

~~Each~~ Member States shall ensure that there is a legal separation between a sponsoring undertaking and an institution for occupational retirement provision in order that the assets of the institution are safeguarded in the interests of members and beneficiaries in the event of bankruptcy of the sponsoring undertaking.

Article 9

~~Conditions of operation~~ ⇒ Registration or authorisation ⇐

~~1. Each~~ Member States shall, in respect of every institution located in ~~its territory~~ their territories, ensure that:

↓ 2010/78/EU Art.
4.1(a) (adapted)

~~(a)~~ the institution is registered in a national register by the competent authority or authorised ☒ by it ☒ ; in the case of cross-border activities referred to in Article ~~1220~~, the register shall also indicate the Member States in which the institution is operating; that information shall be communicated to the ~~European Supervisory Authority~~ (European Insurance and Occupational Pensions Authority (hereinafter 'EIOPA'), established by Regulation (EU) No 1094/2010 ~~of the European Parliament and of the Council~~ ⁴⁶ which shall publish it on its website.

↓ 2003/41/EC
(adapted)

~~(b) the institution is effectively run by persons of good repute who must themselves have appropriate professional qualifications and experience or employ advisers with appropriate professional qualifications and experience;~~

⁴⁶ OJ L 331, 15.12.2010, p. 48.

↓ new

Article 10

Pension scheme rules

↓ 2003/41/EC

~~(c) Member States shall, in respect of every institution located in their territories, ensure that properly constituted rules regarding the functioning of any pension scheme operated by the institution have been implemented and members have been adequately informed of these rules.~~

↓ 2003/41/EC
(adapted)

~~(d) all technical provisions are computed and certified by an actuary or, if not by an actuary, by another specialist in this field, including an auditor, according to national legislation, on the basis of actuarial methods recognised by the competent authorities of the home Member State;~~

↓ new

Article 11

Commitment of regular financing and additional benefits

↓ 2003/41/EC

~~(e)1. Member States shall, in respect of every institution located in their territories, ensure that where the sponsoring undertaking guarantees the payment of the retirement benefits, it is committed to regular financing.~~

↓ 2003/41/EC
(adapted)

~~(f) the members are sufficiently informed of the conditions of the pension scheme, in particular concerning:~~

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

~~(ii) the financial, technical and other risks associated with the pension scheme;~~

~~(iii) the nature and distribution of those risks.~~

↓ 2003/41/EC

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

↓ 2003/41/EC
(adapted)

~~3. Member States may make the conditions of operation of institutions located subject to other requirements, with a view to ensuring that the interests of members and beneficiaries are adequately protected.~~

↓ 2010/78/EU Art.
4.1(a) (adapted)

~~5. In the case of cross-border activity as referred to in Article 20, the conditions of operation of the institution shall be subject to a prior authorisation by the competent authorities of the home Member State. When giving such authorisation, Member States shall immediately inform EIOPA.~~

↓ 2003/41/EC
(adapted)
⇒ new

Article ~~20~~12

Cross-border activities ⇒ and procedures ⇐

1. Without prejudice to national social and labour law on the organisation of pension systems, including compulsory membership and the outcomes of collective bargaining agreements, Member States shall allow undertakings located within their territories to sponsor institutions ⇒ which propose to or carry out cross-border activity ⇐ ~~for occupational retirement provision authorised in other Member States.~~ They shall also allow institutions ☒ authorised in their territories ☒ ~~for occupational retirement provision authorised in their territories~~ ⇒ to carry out cross-border activity ⇐ ~~to accept~~ ☒ by accepting ☒ sponsorship by undertakings located within the territories of ~~other~~ ⇒ any ⇐ Member States.

2. An institution ☒ proposing ☒ ~~wishing~~ ⇒ to carry out cross-border activity and ⇐ to accept sponsorship from a sponsoring undertaking ~~located within the territory of another Member State~~ shall be subject to a prior authorisation by the competent authorities of its home Member State, ~~as referred to in Article 9(5).~~ It shall notify its intention to accept sponsorship from a sponsoring undertaking ~~located within the territory of another Member State~~ to the competent authorities of the home Member State ~~where it is authorised.~~

3. Member States shall require institutions ~~located within~~ ☐ authorised or registered in ☐ their territories and proposing to ~~be sponsored~~ ☒ receive sponsorship ☒ ~~by an undertaking located in the territory of another Member State~~ to provide the following information when effecting a notification under paragraph 2:

- (a) the host Member State(s);
- (b) the name ☐ and the location of the administration ☐ of the sponsoring undertaking;
- (c) the main characteristics of the pension scheme to be operated for the sponsoring undertaking.

↓ 2003/41/EC
(adapted)
☐ new

4. Where a competent authority of the home Member State is notified under paragraph 2, and unless ~~it has reason to doubt~~ ☐ it has issued a decision ☐ that the administrative structure or the financial situation of the institution or the good repute or professional qualifications or experience of the persons running the institution are ☐ not ☐ compatible with the ☒ proposed ☒ operations ~~proposed in the host Member State~~, it shall within three months of receiving all the information referred to in paragraph 3 communicate that information to the competent authorities of the host Member State and inform the institution accordingly.

↓ new

The decision referred to in the first subparagraph shall be reasoned.

Where the competent authority of the home Member State refuses to communicate the information referred in the first subparagraph to the competent authorities of the host Member State, it shall give the reasons for its refusal to the institution concerned within three months of receiving all the information referred to in paragraph 3. That refusal or a failure to act shall be subject to a right to apply to the courts in the home Member State.

↓ 2003/41/EC
(adapted)
☐ new

5. Before the institution starts to ~~operate~~ ☒ carry out a cross-border activity ☒ ~~a pension scheme for a sponsoring undertaking in another Member State~~, the competent authorities of the host Member State shall, within ~~two~~ ☐ one ☐ months of receiving the information referred to in paragraph 3, inform the competent authorities of the home Member State, ~~if appropriate~~, of the requirements of social and labour law relevant to the field of occupational pensions under which the pension scheme sponsored by an undertaking in the host Member State must be operated ~~and any rules that are to be applied in accordance~~

~~with Article 18(7) and with paragraph 7 of this Article.~~ The competent authorities of the home Member State shall communicate this information to the institution.

6. On receiving the communication referred to in paragraph 5, or if no communication is received from the competent authorities of the home Member State on expiry of the period provided for in paragraph 5, the institution may start to ☒ carry out a cross-border activity ☒ ~~operate the pension scheme sponsored by an undertaking in the host Member State~~ in accordance with the host Member State's requirements of social and labour law relevant to the field of occupational pensions, and any rules that are to be applied in accordance with Article 18(7) and with paragraph 7 of this Article.

↓ 2003/41/EC
(adapted)

~~7. In particular, an institution sponsored by an undertaking located in another Member State shall also be subject, in respect of the corresponding members, to any information requirements imposed by the competent authorities of the host Member State on institutions located in that Member State, in accordance with Article 11.~~

↓ 2003/41/EC
⇒ new

~~87. The competent authorities of the host Member State shall inform the competent authorities of the home Member State of any significant change in the host Member State's requirements of social and labour law relevant to the field of occupational pension schemes which may affect the characteristics of the pension scheme insofar as it concerns the ☒ cross-border activity ☒ ~~operation of the pension scheme sponsored by an undertaking in the host Member State and in any rules that have to be applied in accordance with Article 18(7) and with paragraph 7 of this Article.~~~~

~~98. The institution shall be subject to on-going supervision by the competent authorities of the host Member State as to the compliance of its activities with the host Member State's requirements of labour and social law relevant to the field of occupational pension schemes referred to in paragraph 5. and with the information requirements referred to in paragraph 7~~ Should this supervision bring irregularities to light, the competent authorities of the host Member State shall inform the competent authorities of the home Member State immediately. The competent authorities of the home Member State shall, in coordination with the competent authorities of the host Member State, take the necessary measures to ensure that the institution puts a stop to the detected breach of social and labour law.

↓ 2003/41/EC

~~109. If, despite the measures taken by the competent authorities of the home Member State or because appropriate measures are lacking in the home Member State, the institution persists in breaching the applicable provisions of the host Member State's requirements of social and labour law relevant to the field of~~

occupational pension schemes, the competent authorities of the host Member State may, after informing the competent authorities of the home Member State, take appropriate measures to prevent or penalise further irregularities, including, insofar as is strictly necessary, preventing the institution from operating in the host Member State for the sponsoring undertaking.

↓ new

10. Member States shall ensure that an institution carrying out cross-border activity shall not be subject to any requirements concerning information to members and beneficiaries imposed by the competent authorities of the host Member State in respect of the members which that cross-border activity concerns.

Article 13

Cross-border transfers of pension schemes

1. Member States shall allow institutions authorised or registered in their territories to transfer all or a part of their pension schemes to receiving institutions authorised or registered in other Member States.

2. The transfer of all or part of a pension scheme between transferring and receiving institutions authorised or registered in different Member States shall be subject to prior authorisation by the competent authority of the home Member State of the receiving institution. The application for authorisation of the transfer shall be submitted by the receiving institution.

3. Unless national social and labour law on the organisation of pension systems provides otherwise, the transfer and its conditions shall be made subject to prior approval by the members and beneficiaries concerned or, where applicable, their representatives. In any event, information on the conditions of the transfer shall be made available to the members and beneficiaries concerned or, where applicable, their representatives at least four months before the application referred to in paragraph 2 is submitted.

4. The application referred to in paragraph 2 shall contain the following information:

- a) the written agreement between the transferring and the receiving institutions setting out the conditions of the transfer, including the main characteristics of the pension scheme and the description of the transferred assets and, where applicable, the corresponding liabilities;
- b) the name and the seat of the transferring institution;
- c) the location of the administration of the sponsoring undertaking and the name of the sponsoring undertaking;
- d) the host Member State or the host Member States, if there are more than one.

5. Where a competent authority of the home Member State of the receiving institution receives the application referred to in paragraph 2, and it has not issued a decision stating that the administrative structure or the financial situation of the receiving institution, or the good repute or the professional qualifications or experience of the persons running the receiving institution are not compatible

with the operations proposed in the home Member State of the receiving institution, it shall within three months of receiving all the information referred to in paragraph 4 communicate its decision authorising the transfer to the receiving institution and to the competent authority of the home Member State of the transferring institution. The competent authority of the home Member State of the transferring institution shall inform the transferring institution of that decision.

The decisions referred to in the first subparagraph shall be reasoned. Where the competent authority of the home Member State of the receiving institution refuses to communicate the information referred to in the first subparagraph to the competent authorities of the home Member State of the transferring institution, it shall give reasons for its refusal to the institution concerned within three months of receiving all the information referred to in paragraph 4. That refusal or a failure to act shall be subject to a right of the receiving institution to apply to the courts in the home Member State of the receiving institution.

6. The competent authority of the home Member State of the transferring institution shall, within one month of receiving the information referred to in paragraph 5, inform the competent authority of the home Member State of the receiving institution of the requirements of social and labour law relevant to the field of occupational pensions of the host Member State under which the pension scheme must be operated. The competent authority of the home Member State of the receiving institution shall communicate this information to the receiving institution.

7. Upon receiving the communication referred to in paragraph 6, or if no communication is received from the competent authority of the home Member State of the receiving institution on expiry of the period laid down in paragraph 6, the receiving institution may start to operate the pension scheme in accordance with the requirements of social and labour law relevant to the field of occupational pensions of the host Member State.

8. Where the receiving institution carries out a cross-border activity, Article 12(8) and (9) shall apply.

Title II

QUANTITATIVE REQUIREMENTS

↓ 2003/41/EC

Article ~~15~~ 14

Technical provisions

1. The home Member State shall ensure that institutions operating occupational pension schemes establish at all times in respect of the total range of their pension schemes an adequate amount of liabilities corresponding to the financial commitments which arise out of their portfolio of existing pension contracts.

2. The home Member State shall ensure that institutions operating occupational pension schemes, where they provide cover against biometric risks ~~and/or~~ guarantee either an investment performance or a given level of benefits, establish sufficient technical provisions in respect of the total range of these schemes.

3. The calculation of technical provisions shall take place every year. However, the home Member State may allow a calculation once every three years if the institution provides members ~~and/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, ~~if not by an actuary,~~ by another specialist in this field, including an auditor, according to national legislation, on the basis of actuarial methods recognised by the competent authorities of the home Member State, according to the following principles:

(a) the minimum amount of the technical provisions shall be calculated by a sufficiently prudent actuarial valuation, taking account of all commitments for benefits and for contributions in accordance with the pension arrangements of the institution. It must be sufficient both for pensions and benefits already in payment to beneficiaries to continue to be paid, and to reflect the commitments which arise out of members' accrued pension rights. The economic and actuarial assumptions chosen for the valuation of the liabilities shall also be chosen prudently taking account, if applicable, of an appropriate margin for adverse deviation;

(b) the maximum rates of interest used shall be chosen prudently and determined in accordance with any relevant rules of the home Member State. These prudent rates of interest shall be determined by taking into account:

(i) the yield on the corresponding assets held by the institution and the future investment returns and/or

(ii) the market yields of high-quality or government bonds;

(c) the biometric tables used for the calculation of technical provisions shall be based on prudent principles, having regard to the main characteristics of the group of members and the pension schemes, in particular the expected changes in the relevant risks;

(d) the method and basis of calculation of technical provisions shall in general remain constant from one financial year to another. However, discontinuities may be justified by a change of legal, demographic or economic circumstances underlying the assumptions.

5. The home Member State may make the calculation of technical provisions subject to additional and more detailed requirements, with a view to ensuring that the interests of members and beneficiaries are adequately protected.

2010/78/EU Art. 4.4

~~6. With a view to further harmonisation of the rules regarding the calculation of technical provisions which may be justified — in particular the interest rates and other assumptions influencing the level of technical provisions — the Commission, drawing on advice from EIOPA, shall, every 2 years or at the request of a~~

~~Member State, issue a report on the situation concerning the development in cross-border activities.~~

↓ 2003/41/EC

~~The Commission shall propose any necessary measures to prevent possible distortions caused by different levels of interest rates and to protect the interest of beneficiaries and members of any scheme.~~

↓ 2003/41/EC
(adapted)

Article ~~16~~ 15

Funding of technical provisions

1. The home Member State shall require every institution to have at all times sufficient and appropriate assets to cover the technical provisions in respect of the total range of pension schemes operated.

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

(a) the institution shall set up a concrete and realisable plan to re-establish the required amount of assets to cover fully the technical provisions in due time. The plan shall be made available to members or, where applicable, to their representatives and/or shall be subject to approval by the competent authorities of the home Member State;

(b) in drawing up the plan, account shall be taken of the specific situation of the institution, in particular the asset/liability structure, risk profile, liquidity plan, the age profile of the members entitled to receive retirement benefits, start-up schemes and schemes changing from non-funding or partial funding to full funding;

(c) in the event of termination of a pension scheme during the period referred to ~~above in~~ ☒ in the first sentence of ☒ this paragraph, the institution shall inform the competent authorities of the home Member State. The institution shall establish a procedure in order to transfer the assets and the corresponding liabilities to another financial institution or a similar body. This procedure shall be disclosed to the competent authorities of the home Member State and a general outline of the procedure shall be made available to members or, where applicable, to their representatives in accordance with the principle of confidentiality.

3. In the event of cross-border activity as referred to in Article ~~1220~~, the technical provisions shall at all times be fully funded in respect of the total range of pension schemes operated. If these conditions are not met, the competent authorities of the home Member State shall intervene in accordance with Article ~~6244~~. To comply with this requirement the home Member State may require ring-fencing of the assets and liabilities.

Article ~~17~~ 16

Regulatory own funds

1. The home Member State shall ensure that institutions operating pension schemes, where the institution itself, and not the sponsoring undertaking, underwrites the liability to cover against biometric risk, or guarantees a given investment performance or a given level of benefits, hold on a permanent basis additional assets above the technical provisions to serve as a buffer. The amount thereof shall reflect the type of risk and asset base in respect of the total range of schemes operated. These assets shall be free of all foreseeable liabilities and serve as a safety capital to absorb discrepancies between the anticipated and the actual expenses and profits.

↓ 2009/138/EC Art.
303.1 (adapted)

2. For the purposes of calculating the minimum amount of additional assets, the rules laid down in Articles ~~17a to 17d~~ 17, 18 and 19 shall apply.

2003/41/EC

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

↓ 2009/138/EC Art.
303.2 (adapted)

Article ~~17a~~ 17

Available solvency margin

1. ~~Each~~ Member States shall require of every institution referred to in Article ~~17~~ 16(1) which ~~are is~~ located in ~~their territories its territory~~ an adequate available solvency margin in respect of its entire business at all times which is at least equal to the requirements in this Directive.

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

(a) the paid-up share capital or, in the case of an institution taking the form of a mutual undertaking, the effective initial fund plus any accounts of the members of the mutual undertaking which fulfil the following criteria:

(i) the memorandum and articles of association must stipulate that payments may be made from those accounts to members of the mutual undertaking only in so far as this does not cause the available solvency margin to fall below the required level or, after the dissolution of the undertaking, where all the undertaking's other debts have been settled;

(ii) the memorandum and articles of association must stipulate, with respect to any payments referred to in point (i) for reasons other than the individual termination of membership in the mutual undertaking, that the competent authorities must be notified at least one month in advance and can prohibit the payment within that period; and

(iii) the relevant provisions of the memorandum and articles of association may be amended only after the competent authorities have declared that they have no objection to the amendment, without prejudice to the criteria stated in points (i) and (ii);

(b) reserves (statutory and free) not corresponding to underwriting liabilities;

(c) the profit or loss brought forward after deduction of dividends to be paid; and

(d) in so far as authorised under national law, profit reserves appearing in the balance sheet where they may be used to cover any losses which may arise and where they have not been made available for distribution to members and beneficiaries.

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

3. Member States may provide that the available solvency margin may also comprise:

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

(b) securities with no specified maturity date and other instruments, including cumulative preferential shares other than those referred to in point (a), to a maximum of 50 % of the available solvency margin, or the required solvency margin, whichever the lesser, for the total of such securities, and the subordinated loan capital referred to in point (a) provided they fulfil the following conditions:

(i) they must not be repaid on the initiative of the bearer or without the prior consent of the competent authority;

(ii) the contract of issue must enable the institution to defer the payment of interest on the loan;

(iii) the lender's claims on the institution must rank entirely after those of all non-subordinated creditors;

(iv) the documents governing the issue of the securities must provide for the loss-absorption capacity of the debt and unpaid interest, while enabling the institution to continue its business; and

(v) only fully paid-up amounts must be taken into account.

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

(i) only fully paid-up funds shall be taken into account;

(ii) for loans with a fixed maturity, the original maturity shall be at least five years. No later than one year before the repayment date, the institution shall submit to the competent authorities for their approval a plan showing how the available solvency margin will be kept at or brought to the required level at maturity, unless the extent to which the loan may rank as a component of the available solvency margin is gradually reduced during at least the five years before the repayment date. The competent authorities may authorise the early repayment of such loans provided application is made by the issuing institution and its available solvency margin will not fall below the required level;

(iii) loans the maturity of which is not fixed shall be repayable only subject to five years' notice unless the loans are no longer considered as a component of the available solvency margin or unless the prior consent of the competent authorities is specifically required for early repayment. In the latter event the institution shall notify the competent authorities at least six months before the date of the proposed repayment, specifying the available solvency margin and the required solvency margin both before and after that repayment. The competent authorities shall authorise repayment only where the institution's available solvency margin will not fall below the required level;

(iv) the loan agreement shall not include any clause providing that in specified circumstances, other than the winding-up of the institution, the debt will become repayable before the agreed repayment dates; and

(v) the loan agreement may be amended only after the competent authorities have declared that they have no objection to the amendment.

4. Upon application, with supporting evidence, by the institution to the competent authority of the home Member State and with the agreement of that competent authority, the available solvency margin may also comprise:

(a) where Zillmerising is not practised or where, if practised, it is less than the loading for acquisition costs included in the premium, the difference between a non-Zillmerised or partially Zillmerised mathematical provision and a mathematical provision Zillmerised at a rate equal to the loading for acquisition costs included in the premium;

(b) any hidden net reserves arising out of the valuation of assets, in so far as such hidden net reserves are not of an exceptional nature;

(c) one half of the unpaid share capital or initial fund, once the paid-up part amounts to 25 % of that share capital or fund, up to 50 % of the available or required solvency margin, whichever is the lesser.

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

↓ 2003/41/EC
(adapted)

~~5. The Commission may adopt implementing measures relating to paragraphs 2 to 4 in order to take account of developments that justify a technical adjustment of the elements eligible for the available solvency margin.~~

~~Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 21b.~~

↓ 2009/138/EC Art.
303.2 (adapted)

Article ~~17b~~ 18

Required solvency margin

1. ~~Subject to Article 17c,~~ The required solvency margin shall be determined as laid down in paragraphs 2 to 6 according to the liabilities underwritten.

2. The required solvency margin shall be equal to the sum of the following results:

(a) the first result:

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

(b) the second result:

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

For temporary assurances on death of a maximum term of three years, that fraction shall be 0,1 %. For such assurance of a term of more than three years but not more than five years, that fraction shall be 0,15 %.

3. For supplementary insurances referred to in Article 2(3)(a)(iii) of Directive 2009/138/EC ~~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)~~ the required solvency margin shall be equal to the required solvency margin for institutions as laid down in Article ~~17d~~ 19.

4. For capital redemption operations referred to in Article 2(3)(b)(ii) of Directive 2009/138/EC, the required solvency margin shall be equal to a 4 % fraction of the mathematical provisions calculated in compliance with paragraph 2(a).

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

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

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

(b) in so far as the institution bears no investment risk but the allocation to cover management expenses is fixed for a period exceeding five years, a 1 % fraction of the technical provisions, calculated in compliance with paragraph 2(a);

(c) in so far as the institution bears no investment risk and the allocation to cover management expenses is not fixed for a period exceeding five years, an amount equivalent to 25 % of the net administrative expenses of the previous financial year pertaining to such business;

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

2009/138/EC Art. 303.2

~~Article 17e~~

Guarantee fund

~~1. Member States may provide that one third of the required solvency margin as specified in Article 17b shall constitute the guarantee fund. That fund shall comprise the items listed in Article 17a(2) and (3) and, subject to the agreement of the competent authority of the home Member State, in Article 17a(4)(b).~~

~~2. The guarantee fund shall not be less than EUR 3 million. Any Member State may provide for a 25 % reduction of the minimum guarantee fund in the case of mutual and mutual-type undertakings.~~

Article ~~17d~~ 19

Required solvency margin for the purpose of Article ~~17b~~18(3)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2003/41/EC

Article ~~18~~ 20

Investment rules

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

(a) the assets shall be invested in the best interests of members and beneficiaries. In the case of a potential conflict of interest, the institution, or the entity which manages its portfolio, shall ensure that the investment is made in the sole interest of members and beneficiaries;

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

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

(c) the assets shall be predominantly invested on regulated markets. Investment in assets which are not admitted to trading on a regulated financial market must in any event be kept to prudent levels;

(d) investment in derivative instruments shall be possible insofar as they contribute to a reduction of investment risks or facilitate efficient portfolio management. They must be valued on a prudent basis, taking into account the underlying asset, and included in the valuation of the institution's assets. The institution shall also avoid excessive risk exposure to a single counterparty and to other derivative operations;

(e) the assets shall be properly diversified in such a way as to avoid excessive reliance on any particular asset, issuer or group of undertakings and accumulations of risk in the portfolio as a whole.

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

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

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

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

↓ 2013/14/EU Art. 1

~~1a2.~~ Taking into account the nature, scale and complexity of the activities of the institutions supervised, Member States shall ensure that the competent authorities monitor the adequacy of the institutions' credit assessment processes, assess the use of references to credit ratings issued by credit rating agencies as defined in Article 3(1)(b) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council ~~of 16 September 2009 on credit rating agencies~~⁴⁷, 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.

2003/41/EC (adapted)

~~23.~~ The home Member State shall prohibit the institution from borrowing or acting as a guarantor on behalf of third parties. However, Member States may authorise institutions to carry out some borrowing only for liquidity purposes and on a temporary basis.

~~34.~~ Member States shall not require institutions located in their territory to invest in particular categories of assets.

~~45.~~ Without prejudice to Article ~~42~~ 32, Member States shall not subject the investment decisions of an institution located in their territory or its investment manager to any kind of prior approval or systematic notification requirements.

↓ 2003/41/EC
(adapted)
⇒ new

~~56.~~ In accordance with the provisions of paragraphs 1 to ~~45~~, Member States may, for the institutions located in their territories, lay down more detailed rules,

⁴⁷ 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.)

including quantitative rules, provided they are prudentially justified, to reflect the total range of pension schemes operated by these institutions.

~~In particular, Member States may apply investment provisions similar to those of Directive 2002/83/EC.~~

However, Member States shall not prevent institutions from:

(a) investing up to 70 % of the assets covering the technical provisions or of the whole portfolio for schemes in which the members bear the investment risks in shares, negotiable securities treated as shares and corporate bonds admitted to trading on regulated markets, $\Rightarrow$ or through multilateral trading facilities or organised trading facilities, $\Leftarrow$ and deciding on the relative weight of these securities in their investment portfolio. ~~Provided it is prudentially justified, Member States may, however, apply a lower limit to institutions which provide retirement products with a long term interest rate guarantee, bear the investment risk and themselves provide for the guarantee;~~

(b) investing up to 30 % of the assets covering technical provisions in assets denominated in currencies other than those in which the liabilities are expressed;

(c) investing in ~~risk capital markets~~ $\Rightarrow$ instruments that have a long-term economic profile and are not traded on regulated markets, multilateral trading facilities or organised trading facilities $\Leftarrow$.

~~67. Paragraph 56 shall not preclude the right for Member States to require the application to institutions located $\Rightarrow$ authorised or registered $\Leftarrow$ in their territory of more stringent investment rules also on an individual basis provided they are prudentially justified, in particular in the light of the liabilities entered into by the institution.~~

$\Downarrow$ 2003/41/EC
(adapted)

~~7. In the event of cross border activity as referred in Article 20, the competent authorities of each host Member State may require that the rules set out in the second subparagraph apply to the institution in the home Member State. In such case, these rules shall apply only to the part of the assets of the institution that corresponds to the activities carried out in the particular host Member State. Furthermore, they shall only be applied if the same or stricter rules also apply to institutions located in the host Member State.~~

~~The rules referred to in the first subparagraph are as follows:~~

~~(a) the institution shall not invest more than 30 % of these assets in shares, other securities treated as shares and debt securities which are not admitted to trading on a regulated market, or the institution shall invest at least 70 % of these assets in shares, other securities treated as shares, and debt securities which are admitted to trading on a regulated market;~~

~~(b) the institution shall invest no more than 5 % of these assets in shares and other securities treated as shares, bonds, debt securities and other money and capital market instruments issued by the same undertaking and no more than~~

~~10 % of these assets in shares and other securities treated as shares, bonds, debt securities and other money and capital market instruments issued by undertakings belonging to a single group;~~

~~(c) the institution shall not invest more than 30 % of these assets in assets denominated in currencies other than those in which the liabilities are expressed.~~

~~To comply with these requirements, the home Member State may require ring-fencing of the assets.~~

↓ new

8. The competent authorities of the host Member State of an institution carrying out cross-border activity as referred to in Article 12 shall not lay down investment rules in addition to those set out in paragraphs 1 to 6 for the part of the assets which cover technical provisions for cross-border activity.

Title III

CONDITIONS GOVERNING ACTIVITIES

CHAPTER 1

System of governance

Section 1

General provisions

Article 21

Responsibility of the administrative, management or supervisory body

1. Member States shall ensure that the administrative, management or supervisory body of the institution has the ultimate responsibility under national law for the compliance, by the institution concerned, with the laws, regulations and administrative provisions adopted pursuant to this Directive.

2. This Directive is without prejudice to the role of social partners in the management of the institutions.

Article 22

General governance requirements

1. Member States shall require all institutions to have in place an effective system of governance which provides for sound and prudent management of their activities. That system shall include an adequate transparent organisational structure with a clear allocation and appropriate segregation of responsibilities and an effective system for ensuring the transmission of information. The system of governance shall be subject to regular internal review.

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

3. Member States shall ensure that the administrative, management or supervisory body of the institution shall adopt written policies in relation to risk management, internal audit and, where relevant, actuaries and outsourcing, and this body ensures that those policies are implemented. The policies shall be reviewed annually and shall be adapted in view of any significant change in the system or area concerned.

4. Member States shall ensure that institutions shall 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 institution.

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

6. Member States shall require institutions to have at least two persons who effectively run the institution.

Article 23

Requirements for fit and proper management

1. Member States shall require institutions to ensure that all persons who effectively run the institution or have other key functions fulfil the following requirements when carrying out their tasks:

(a) their professional qualifications, knowledge and experience are adequate to enable them to ensure a sound and prudent management of the institution and to properly carry out their key functions (requirement to be fit); and

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

2. Member States shall ensure that there are effective procedures and regular controls in place to enable the competent authorities to assess whether the persons who effectively run the institution or have other key functions fulfil the requirements laid down in paragraph 1.

3. Where a Member State requires of its own nationals proof of good reputation, proof of no previous bankruptcy, or both, that Member State shall accept as sufficient evidence in respect of nationals of other Member States the production of an extract from the judicial record of the other Member State or, in the absence of a judicial record in the other Member State, of an equivalent document issued by a competent judicial or administrative authority in the home Member State or the Member State whose national the concerned person is showing that those requirements have been met.

4. Where the home Member State or the Member State whose national the concerned person is does not issue an equivalent document as referred to in paragraph 3, the national of the other Member State shall be allowed to produce in its place a declaration on oath.

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

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

5. The proof in respect of no previous bankruptcy referred to in paragraph 3 may be provided in the form of a declaration made by the nationals of the other Member State concerned before a competent judicial, professional or trade body in that other Member State concerned.

6. The documents and certificates referred to in paragraphs 3, 4 and 5 shall not be presented more than three months after their date of issue.

7. Member States shall designate the authorities and bodies competent to issue the documents referred to in paragraphs 3, 4 and 5 and shall forthwith inform the other Member States and the Commission thereof.

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

Article 24

Remuneration policy

1. Member States shall require institutions to have a sound remuneration policy for those persons who effectively run the institution in a manner that is appropriate to their size and internal organisation, as well as to the nature, scope and complexity of their activities.

2. Institutions shall regularly disclose publicly relevant information regarding the remuneration policy unless otherwise provided in the laws, regulations and administrative provisions transposing Directive 95/46/EC of the European Parliament and of the Council.⁴⁸

3. The Commission shall be empowered to adopt a delegated act in accordance with Article 77 specifying:

- (a) the required elements of remuneration policies to be applied by institutions on the basis of the following principles:
 - the remuneration policy shall be established, implemented and maintained in line with the institution's activities and risk management strategy, its risk profile, objectives, risk management practices and the long-term interests and performance of the institution as a whole;
 - the remuneration policy shall incorporate proportionate measures aimed at avoiding conflicts of interest;

⁴⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

- the remuneration policy shall promote sound and effective risk management and shall not encourage risk-taking that exceeds the risk tolerance limits of the institution;
 - the remuneration policy shall apply to the institution and to the parties performing the institution's key functions or any other activities, including outsourced and subsequently re-outsourced key functions or any other activities;
 - the remuneration policy shall contain provisions that are specific to the tasks and performance of the administrative, management and supervisory body of the institution, persons who effectively run the institution, holders of key functions and other categories of staff whose professional activities have a material impact on the institution's risk profile;
 - the administrative, management or supervisory body of the institution shall establish the general principles of the remuneration policy for those categories of staff whose professional activities have an impact on the institution's risk profile and shall be responsible for the control of its implementation;
 - the administrative, management or supervisory body of the institution shall be responsible for the implementation of the remuneration policy which support sound, prudent and effective management of institutions;
 - there shall be clear, transparent and effective governance with regard to remuneration and its oversight.
- (b) the appropriate frequency, the specific modalities and content of the public disclosure of the remuneration policy.

Section 2

Functions

Article 25

General provisions

1. Member States shall require institutions to incorporate a risk-management function, an internal audit function, and, where applicable, an actuarial function. The reporting lines associated with each key function shall ensure the key function's ability to undertake its duties effectively in an objective, fair and independent manner.
2. Institutions may allow a single person or organisational unit to carry out more than one key function. However, the risk management function shall be allocated to a different person or organisational unit from the one carrying out the internal audit function.
3. Without prejudice to the role of social partners in the overall management of institutions, the 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. On the basis of a reasoned request from the institution, the

competent authority may grant an exemption from this restriction taking into account the size, nature, scope and complexity of the activities of the institution.

4. The person performing a key function shall promptly report any major problem in the area of responsibility of that person to the administrative, management or supervisory body of the institution.

5. Any findings and recommendations of the risk management, internal audit and, where applicable, actuarial functions shall be reported to the administrative, management or supervisory body of the institution which shall determine what actions are to be taken.

6. The risk management, internal audit and, where applicable, actuarial functions shall inform the competent authority of the institution if the administrative, management or supervisory body of the institution does not take appropriate and timely remedial action:

- (a) when the person or organisational unit carrying out the key function has detected a risk that the institution is unlikely to comply with a materially significant statutory requirement and reported it to the administrative, management or supervisory body of the institution;
- (b) when the person or organisational unit carrying out the key function has observed a materially significant breach of the legislation or regulations applicable to the institution 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 institution.

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

Article 26

Risk management system and function

1. Member States shall require institutions to have in place an effective risk-management system comprising strategies, processes and reporting procedures necessary to identify, measure, monitor, manage and report on a continuous basis the risks, at an individual and at an aggregated level, to which they are or could be exposed, and their interdependencies.

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

2. The risk-management system shall cover appropriately to their size, internal organisation and the nature, scope and complexity of their activities risks which can occur in the institutions or in undertakings to which tasks or activities have been outsourced at least in the following areas:

- (a) underwriting and reserving;
- (b) asset–liability management;
- (c) investment, in particular derivatives and similar commitments;
- (d) liquidity and concentration risk management;
- (e) operational risk management;

(f) insurance and other risk-mitigation techniques.

3. Where, in accordance with the conditions of the pension scheme, members and beneficiaries bear risks, the risk management system shall also consider those risks from the perspective of members and beneficiaries.

4. Institutions shall provide for a risk-management function structured in such a way as to facilitate the implementation of the risk-management system.

Article 27

Internal audit function

1. Member States shall require institutions to provide for an effective internal audit function. The internal audit function shall evaluate the adequacy and effectiveness of the internal control system and other elements of the system of governance laid down in Articles 21 to 24, including outsourced activities.

2. Member States shall require institutions to designate at least one independent person, inside or outside of the institution, who is responsible for the internal audit function. Except for the execution and certification referred to in Article 14(4), that person shall not assume responsibility for key functions other than those laid down in this Article.

3. Findings and recommendations of the internal audit function shall be reported to the administrative, management or supervisory body of the institution. The administrative, management or supervisory body of the institution shall determine what actions are to be taken with respect to each of those findings and recommendations and shall ensure that those actions are carried out.

Article 28

Actuarial function

1. Member States shall require that institutions where members and beneficiaries do not bear all the risks provide for an effective actuarial function to:

- (a) co-ordinate and oversee the calculation of technical provisions;
- (b) assess the appropriateness of the methodologies and underlying models used in the calculation of technical provisions and the assumptions made for this purposes;
- (c) assess the sufficiency and quality of the data used in the calculation of technical provisions;
- (d) compare best estimates with the experience;
- (e) inform the administrative, management or supervisory body of the institution of the reliability and adequacy of the calculation of technical provisions;
- (f) express an opinion on the overall underwriting policy in the event of the institution having such a policy;
- (g) express an opinion on the adequacy of insurance arrangements in the event of the institution having such arrangements; and

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

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

Section 3

Documents concerning governance

Article 29

Risk evaluation for pensions

1. Member States shall require, appropriately to their size, internal organisation and the nature, scope and complexity of their activities, institutions, as part of their risk-management system, to carry out their own risk assessment and to produce a risk evaluation for pensions in order to document that assessment.

The risk evaluation for pensions shall be performed regularly and without delay following any significant change in the risk profile of the institution or of the pension scheme.

2. The risk evaluation for pensions referred to in paragraph 1 shall cover:

- (a) the effectiveness of the risk-management system;
- (b) the overall funding needs of the institution;
- (c) the ability to comply with the requirements regarding technical provisions laid down in Article 14;
- (d) a qualitative assessment of the margin for adverse deviation as part of the calculation of the technical provisions in accordance with national law;
- (e) a description of pension benefits or capital accumulation;
- (f) a qualitative assessment of the sponsor support accessible to the institution;
- (g) a qualitative assessment of the operational risks for all schemes of the institution;
- (h) a qualitative assessment of new or emerging risks relating to climate change, use of resources and the environment.

3. For the purposes of paragraph 2, the institutions shall have in place methods to identify and evaluate the risks they are or could be exposed to in the short and in the long term. Those methods shall be proportionate to the nature, scale and complexity of the risks inherent in its activities. The methods shall be described in the evaluation.

4. The risk evaluation for pensions shall be an integral part of the operational strategy and shall be taken into account in the strategic decisions of the institution.

Article 30

Delegated act for the risk evaluation for pensions

The Commission shall be empowered to adopt a delegated act in accordance with Article 77 specifying:

- (a) the elements to be covered by paragraph 2 of Article 29;
- (b) the methods referred to in paragraph (3) of Article 29 taking into account the identification and the evaluation of the risks they are or could be exposed to in the short and in the long term; and
- (c) the frequency of the risk evaluation for pensions taking into account the requirements in paragraph 1 of Article 29.

The delegated act shall not impose additional funding requirements beyond those foreseen in this Directive.

↓ 2003/41/EC

Article ~~10~~ 31

Annual accounts and annual reports

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

Article ~~12~~ 32

Statement of investment policy principles

~~Each~~ Member States shall ensure that every institution located in ~~its territory~~ their territories prepares and, at least every three years, reviews a written statement of investment-policy principles. ~~This~~ That statement is to be revised without delay after any significant change in the investment policy. Member States shall provide ~~that~~ 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.

↓ new

CHAPTER 2

Outsourcing and investment management

Article 33

Outsourcing

↓ 2003/41/EC Art. 9
(4)

1. ~~A~~ Member States may permit or require institutions located in its territory to entrust management of ~~those~~ institutions, in whole or in part, to other entities operating on behalf of those institutions.

↓ new

2. Member States shall ensure that institutions remain responsible for compliance with their obligations under this Directive when they outsource key functions or any other activities.

3. Outsourcing of key functions or any other activities shall not be undertaken in such a way as to lead to any of the following:

- (a) impairing the quality of the system of governance of the institution concerned;
- (b) unduly increasing the operational risk;
- (c) impairing the ability of the competent authorities to monitor the compliance of the institution with its obligations;
- (d) undermining continuous and satisfactory service to members and beneficiaries.

4. The institution shall ensure the proper functioning of the outsourced activities through the process of selecting the service provider and the on-going monitoring of the activities.

5. Member States shall ensure that institutions outsourcing key functions or any other activities enter into at least a written agreement with the service provider. The agreement shall be legally enforceable and shall clearly define the rights and obligations of the institution and the service provider.

6. Member States shall ensure that institutions notify, in a timely manner, competent authorities in advance of any outsourcing of key functions or any other activities as well as of any subsequent important developments with respect to the key functions or any other activities.

7. Member States shall ensure that competent authorities have the necessary powers to request information from institutions about outsourced key functions or any other activities at any time.

2003/41/EC (adapted)

Article ~~19~~34

⊗ Investment ⊗ ~~M~~management and custody

↓ 2011/61/EU Art.
62.2 (adapted)

~~1.~~ Member States shall not restrict institutions from appointing, for the management of the investment portfolio, investment managers established in another Member State and duly authorised for this activity, in accordance with Directive ~~85/611/EEG~~ 2004/39/EC, ~~☒~~ and Directives ~~☒~~, 2009/65/EC, ~~93/22/EEG~~ 2000/12/EC 2009/138/EC, ~~2002/83/EC~~ 2011/61/EU and 2013/36/EU, as well as those referred to in Article 2(1) of this Directive.

↓ new

CHAPTER 3

Depository

Article 35

Appointment of a depository

1. For each occupational pension scheme in which members and beneficiaries fully bear the investment risk, the home Member State shall require the institution to appoint a single depository for safe-keeping of assets and oversight duties in accordance with Article 36 and 37.

2. For occupational pension schemes in which the members and beneficiaries do not fully bear the investment risk, the home Member State may require the institution to appoint a depository for safe-keeping of assets or for safe-keeping of assets and oversight duties in accordance with Articles 36 and 37.

↓ 2003/41/EC
(adapted)
⇒ new

3. Member States shall not restrict institutions from appointing, for the custody of their assets, ~~custodians~~ ⇒ depositaries ⇐ established in another Member State and duly authorised in accordance with Directive ~~93/22/EEG~~ 2004/39/EC or Directive ~~2000/12/EC~~ 2013/36/EU, or accepted as a depository for the purposes of Directive ~~85/611/EEG~~ 2009/65/EC.

~~The provision referred to in this paragraph shall not prevent the home Member State from making the appointment of a depository or a custodian compulsory.~~

4. ~~Each~~ Member States shall take the necessary steps to enable ~~it~~ ☒ competent authorities ☒ under ~~its~~ their national law to prohibit, in accordance with Article ~~1462~~, the free disposal of assets held by a depository or custodian located within ~~their~~ its territory at the request of the institution's home Member State.

↓ new

5. The depository shall be appointed by means of at least a written contract. The contract shall stipulate the transmission of the information necessary for the

depository to perform its duties for the pension scheme for which it has been appointed as depository, as set out in this Directive and in other relevant laws, regulations or administrative provisions.

6. When carrying out the tasks laid down in Articles 36 and 37, the institution and the depository shall act honestly, fairly, professionally, independently and in the interest of the scheme's members and beneficiaries.

7. A depository shall not carry out activities with regard to the institution which may create conflicts of interest between the institution, the scheme's members and beneficiaries and itself, unless the depository has functionally and hierarchically separated the performance of its depository 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.

8. Where no depository is appointed, institutions shall make arrangements to prevent and resolve any conflict of interest in the course of tasks otherwise performed by a depository and an asset manager.

Article 36

Safekeeping of assets and depository liability

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

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

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

3. Member States shall ensure that a depository is liable to the institution or the members and beneficiaries for any loss suffered by them as a result of its unjustifiable failure to perform its obligations or its improper performance of them.

4. Member States shall ensure that a depository'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 depository is appointed for the safe-keeping of assets, institutions shall, at least be required to:

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

- (b) keep records that enable the institution to identify all assets at all times and without delay;
- (c) take the necessary measures to avoid conflicts of interest or incompatibility;
- (d) inform the competent authority, upon request, about the manner in which assets are kept.

Article 37

Oversight duties

1. The depositary appointed for oversight duties shall carry out the tasks referred to in paragraphs 1 and 2 of Article 36 in addition to the following:

- (a) carry out instructions of the institution, unless they conflict with national law or the institution's rules;
- (b) ensure that in transactions involving the assets of an institution or of a pension scheme any consideration is remitted to the institution within the usual time limits;
- (c) ensure that income produced by assets is applied in accordance with the institution's rules.

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

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

Title IV

INFORMATION TO BE GIVEN TO PROSPECTIVE MEMBERS, MEMBERS AND BENEFICIARIES

CHAPTER 1

General provisions

2003/41/EC (adapted)

Article 11

~~Information to be given to the members and beneficiaries~~

↓ new

Article 38

Principles

↓ 2003/41/EC
(adapted)

1. Depending on the nature of the pension scheme established, ~~each~~ Member States shall ensure that every institution located in ~~their territories~~~~its territory~~ provides ☒ prospective members, members and beneficiaries ☒ at least the information set out in ~~this Article~~ ☒ Articles 39 to 53 and Articles 55 to 58. ☒

↓ new

2. The information shall fulfil all the following requirements:

- (a) it shall be regularly updated;
- (b) it shall be written in a clear manner, using clear, succinct and comprehensible language, avoiding the use of jargon and avoiding technical terms where everyday words can be used instead;
- (c) it shall not be misleading and consistency shall be ensured in the vocabulary and content;
- (d) it shall be presented in a way that is easy to read, using characters of readable size.

Colours shall not be used where they may diminish the comprehensibility of the information if the pension benefit statement is printed or photocopied in black and white.

Article 39

Conditions of the pension scheme

↓ 2003/41/EC Article
9 (f) (adapted)

1. ~~Each~~ Member States shall, in respect of every institution located in ~~their territories~~~~its territory~~, ensure that: ~~(f) the~~ members are sufficiently informed of the conditions of the pension scheme, in particular concerning:

- ~~(i)(a)~~ (a) the rights and obligations of the parties involved in the pension scheme;
 - ~~(ii)(b)~~ (b) the financial, technical and other risks associated with the pension scheme;
 - ~~(iii)(c)~~ (c) the nature and distribution of those risks.
-

↓ new

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, the default investment option and, where applicable, the pension scheme's rule to

allocate a particular member to an investment option, in addition to the information listed in points (a), (b) and (c) of the first paragraph.

2003/41/EC Article 11
(2)

3. Members and beneficiaries and/or, where applicable, their representatives shall receive:

~~(a) on request, the annual accounts and the annual reports referred to in Article 10, and, where an institution is responsible for more than one scheme, those relating to their particular pension scheme;~~

~~(b)~~ within a reasonable time, any relevant information regarding changes to the pension scheme rules.

↓ new

4. Institutions shall publish the conditions of the pension scheme on a website of their choice.

CHAPTER 2

Pension Benefit Statement

Article 40

Frequency and changes

- (1) Member States shall require institutions to draw up a document containing key information for each member (the 'pension benefit statement').
- (2) Member States shall ensure that the information contained in the pension benefit statement is updated and sent to each member at least once every twelve months and free of charge.
- (3) Any material change to the information contained in the pension benefit statement compared to the previous year shall be clearly explained in an accompanying letter.

Article 41

Comprehensibility and language

1. The information provided in the pension benefit statement shall be comprehensible without reference to other documents.
2. Member States shall ensure that the pension benefit statement is 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

relationship between the sponsoring undertaking or the institution on the one hand and the members or the beneficiaries on the other.

Article 42

Length

The pension benefit statement shall use characters of easily readable size and shall not be longer than two pages of A4-sized paper when printed.

Article 43

Medium

Member States may allow institutions to provide the pension benefit statement in a durable medium or by means of a website. A paper copy shall be delivered to the members and beneficiaries on request and free of charge, in addition to any electronic means.

Article 44

Liability

1. Member States shall ensure that institutions do not incur civil liability solely on the basis of the pension benefit statement, or a translation of the pension benefit statement, unless it is misleading, inaccurate or inconsistent with the relevant part of the pension scheme.
2. The pension benefit statement shall contain a clear warning in this respect.

Article 45

Title

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

Article 46

Personal details

The pension benefit statement shall specify the personal details of the member, including the legal retirement age, where applicable.

Article 47

Identification of the institution

The pension benefit statement shall identify the institution and provide information about:

- (1) the name of the institution and its address;
- (2) the Member States in which the institution is authorised or registered and the name of the competent authority;
- (3) the name of the sponsoring undertaking.

Article 48

Guarantees

1. The pension benefit statement shall contain one of the following indications regarding guarantees under the pension scheme:

- (a) a full guarantee where the institution or the sponsoring undertaking guarantees a given level of benefits;
- (b) no guarantee where the member fully bears the risk;
- (c) a partial guarantee in all other cases.

2. Where a guarantee is provided, the following shall be briefly explained:

- (a) the nature of the guarantee;
- (b) the current level of financing of the member's accrued individual entitlements;
- (c) mechanisms protecting accrued individual entitlements;
- (d) benefit reduction mechanisms, where those laid down in national legislation.

Article 49

Balance, contributions and costs

1. With regard to balance, contributions and costs, the pension benefit statement shall indicate the following amounts expressed in the currency relevant for the pension scheme:

- (a) the sum of the costs deducted from the gross contributions paid by the sponsoring undertaking, where applicable, or by the member over the past twelve months, or, if the member has joined the scheme less than twelve months ago, the sum of the costs deducted from their contributions since joining;
- (b) the sum of the contributions paid by the member over the past twelve months, or, if the member has joined the scheme less than twelve months ago, the sum of their contributions since joining;
- (c) the sum of the contributions paid by the sponsoring undertaking over the past twelve months, or, if the member has joined the scheme less than twelve months ago, the sum of the contributions paid by the sponsoring undertaking since the member joined;
- (d) the balance on the date of the pension benefit statement calculated in one of the two following ways depending on the nature of the pension scheme:

- (i) for pension schemes that do not provide for a target level of benefits, the total sum of the capital accumulated by the member, expressed also as an annuity per month,
 - (ii) for pension schemes that provide for a target level of benefits, the accrued individual entitlements per month.
- (e) other contributions or costs relevant to the member such as transfer of accrued capital;
- (f) the costs referred to in point (a) broken down into the following separate amounts expressed in the currency relevant for the pension scheme:
- (i) costs of administration of the institution;
 - (ii) costs of safekeeping of assets;
 - (iii) costs related to portfolio transactions;
 - (iv) other costs.

2. The 'other costs' referred to in paragraph 1 (f)(iv) shall be briefly explained where they account for 20% or more of the total charges.

Article 50

Pension projections

1. Where the pension scheme provides for a target level of benefits, the pension benefit statement shall indicate the following three amounts concerning pension projections expressed in the currency relevant for the pension scheme:
- (a) the target level of benefits per month at the retirement age under best estimate assumptions;
 - (b) the target level of benefits per month two years before the retirement age under best estimate assumptions;
 - (c) the target level of benefits per month two years after the retirement age under best estimate assumptions.
2. The assumptions referred to in paragraph 1 shall take into account future wages.
3. Where the pension scheme does not provide for a target level of benefits, the pension benefit statement shall indicate the following amounts concerning pension projections expressed in the currency relevant for the pension scheme:
- (a) the expected amount of capital accumulated until two years before the retirement age under best estimate assumptions relevant for the scheme;
 - (b) the expected amount of capital accumulated until the retirement age under best estimate assumptions relevant for the scheme;
 - (c) the expected amount of capital accumulated until two years after the retirement age under best estimate assumptions relevant for the scheme;
 - (d) the amounts referred to in points (a) to (c) expressed as a benefit per month.

4. The assumptions referred to in paragraph 3 shall take into account the following factors:

(a) the annual rate of nominal investment returns;

(b) the annual rate of inflation;

(c) future wages.

5. For the purposes of calculating the projections referred to in paragraphs 1 and 3, the contribution rates shall be assumed to remain constant.

Article 51

Investment profile

1. For pension schemes where members bear investment risk and where they have a choice between different investment options, the pension benefit statement shall indicate the investment profiles providing a list of the investment options available and a short description of each option. The member's current investment option shall be marked prominently.

When the number of different investment options with different investment objectives exceeds five, the institution shall restrict the short description of each option to five representative options including the most risky and the least risky options.

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 following additional information shall be provided:

(a) rules based on actual age;

(b) rules based on the member's targeted retirement age;

(c) other rules.

3. For pension schemes where members bear investment risk, the pension benefit statement shall contain information about the risk and return profile showing a synthetic graphical indicator of the risk and return profile of the pension scheme or, where applicable, of each investment option accompanied by the following:

(a) an explanation of the indicator and of its main limitations;

(b) an explanation of risks which are materially relevant and which are not adequately captured by the synthetic graphical indicator.

The computation of the synthetic indicator shall be adequately documented and institutions shall make that documentation available to members on request.

4. The explanation referred to in paragraph 3(a) shall include the following:

(a) a brief explanation as to why the pension scheme or investment option is in a specific category;

(b) a statement that historical data, such as is used in calculating the synthetic graphical indicator, is not a reliable indication of the future risk profile of the pension scheme or of the investment option;

(c) a statement that the risk and return category shown is not guaranteed to remain unchanged and that the categorisation of the pension scheme or the investment option may shift over time;

(d) a statement that the lowest category does not mean a risk-free investment.

5. The synthetic graphical indicator and the explanations referred to in paragraph 3 shall be drawn up in accordance with the internal process for identifying, measuring and monitoring risks adopted by the institution as laid down in this Directive, as well as with the investment objectives and investment policy described in the statement of investment principles.

Article 52

Past performance

1. The pension benefit statement shall contain the following information about past performance:

(a) information about the past performance of the pension scheme as a whole, or where relevant, of the member's investment option presented in a chart covering that performance for any years available and up to the last ten years;

(b) the chart layout supplemented by statements which appear prominently and which:

(i) warn about its limited value as a guide to future performance;

(ii) indicate which costs have been included or excluded from the calculation of past performance;

(iii) indicate the currency in which past performance has been calculated.

2. Where a material change occurs to a pension scheme's objective and investment policy during the period displayed in the chart referred to in paragraph 1, the pension scheme's past performance prior to that material change shall be shown. The period prior to the material change shall be indicated on the chart and labelled with a clear warning that the performance was achieved under circumstances that no longer apply.

3. Where a member changes investment option, the past performance of that investment option shall be shown.

Article 53

Supplementary information

The pension benefit statement shall specify the following supplementary information:

(a) where and how to obtain further information about the institution or the pension scheme, including from websites and relevant legal acts of a general nature;

- (b) where and how to obtain further information about the arrangements relating to the transfer of pension rights to another institution for occupational retirement provision in the event of termination of the employment relationship;
- (c) information about the assumptions used for amounts expressed in annuities, in particular with respect to the annuity rate, the type of provider and the duration of the annuity, where the member requests that information;
- (d) where and how to obtain access to additional information about the member's individual situation including the target level of the retirement benefits, if applicable, and the level of benefits in case of cessation of employment.

Article 54

Delegated act on the pension benefit statement

The Commission shall be empowered to adopt a delegated act in accordance with Article 77 specifying:

- (a) the content of the pension benefit statement, comprising of:
 - (i) the way of explaining material changes as referred to in Article 40(3);
 - (ii) the size of the characters as referred to in Article 42;
 - (iii) the wording of the liability warning as referred to in Article 44;
 - (iv) the wording of the statement as referred to in Article 45(2);
 - (v) the personal details to be specified as referred to in Article 46;
 - (vi) the method to explain the elements contained in Article 48(2) points (a), (b), (c) and (d);
 - (vii) the method of calculating the amounts as referred to in Article 49(1) points (a), (b), (c), (d), (e) and (f);
 - (viii) the method of calculating the amounts as referred to in Article 50(1) and Article 50(3) taking into account the condition as set out in Article 50(5);
 - (ix) the assumptions to be used as referred to in Article 50(2) and Article 50(4);
 - (x) the number of investment options to be displayed and the method to choose those options where the number of options exceeds five, the method of describing the options displayed, the way of marking the member's current investment option as referred to in Article 51(1);
 - (xi) the method of describing the additional information as referred to in Article 51(2);

- (xii) the method of generating and displaying the synthetic graphical indicators and the explanations as referred to in Article 51(3) taking into account the conditions as set out in Article 51(4);
 - (xiii) the method of generating the information about the past performance as referred to in Article 52(1)(a) and the methods of producing the statement and chart layout as referred to in Article 52(1)(b);
 - (xiv) the method for comparing different investment options in pension schemes as referred to in Article 52(1)(a);
 - (xv) the method of showing the material change as referred to in Article 52(2);
 - (xvi) the method of specifying the supplementary information as referred to in Article 53.
- (b) the format, layout, structure and sequencing of the pension benefit statement, comprising the information referred to in Articles 44(2) to 53, whilst taking into account the conditions in Articles 41(1) and Article 42.

CHAPTER 3

Other information and documents to be provided

Article 55

Information to be given to prospective members

The institution shall ensure that prospective members are informed about all the features of the scheme and any investment options including information on how environmental, climate, social and corporate governance issues are considered in the investment approach.

Article 56

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

In addition to the pension benefit statement, institutions shall provide each member, at least two years before the retirement age provided for in the scheme, or at the request of the member, with the following information:

- (a) information about the options available to members in taking their retirement income, including information about the advantages and disadvantages of those options, in a way which supports them in choosing the option most appropriate to their circumstances;
- (b) where the pension scheme is not paid out as a lifetime annuity, information about the benefit payment products available, including their advantages and disadvantages, and the key considerations members should consider when making the decision to buy a benefit payment product.

Article 57

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

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

Article 58

Additional information to be given on request to members and beneficiaries

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

(a) the annual accounts and the annual reports referred to in Article 31, or where an institution is responsible for more than one scheme, those accounts and reports relating to their particular pension scheme;

↓ 2003/41/EC
(adapted)

~~3(b) the statement of investment policy principles, referred to in Article 12 32, shall be made available to members and beneficiaries and/or, where applicable, to their representatives on request.~~

↓ new

(c) information about the assumptions used to generate the projections referred to Article 50;

(d) information about the assumed annuity rate, the type of provider and the duration of the annuity referred to in Article 53 (c).

↓ 2003/41/EC
⇒ new

- ~~4 2.~~ ⇒ On request from a ~~↔~~ ~~Each~~ member, ⇒ the institution ~~↔~~ shall also ⇒ provide ~~↔~~ ~~receive, on request,~~ detailed and substantial information on:

(a) the target level of the retirement benefits, if applicable;

(b) the level of benefits in case of cessation of employment;~~±~~

~~(c) where the member bears the investment risk, the range of investment options, if applicable, and the actual investment portfolio as well as information on risk exposure and costs related to the investments;~~

~~(d) the arrangements relating to the transfer of pension rights to another institution for occupational retirement provision in the event of termination of the employment relationship.~~

~~Members shall receive every year brief particulars of the situation of the institution as well as the current level of financing of their accrued individual entitlements.~~

~~5. Each beneficiary shall receive, on retirement or when other benefits become due, the appropriate information on the benefits which are due and the corresponding payment options.~~

↓ new

Title V

PRUDENTIAL SUPERVISION

Chapter 1

General rules on prudential supervision

Article 59

Main objective of prudential supervision

1. The main objective of prudential supervision is the protection of members and beneficiaries.

2. Without prejudice to the main objective of prudential supervision as set out in paragraph 1, Member States shall ensure that, in the exercise of their general duties, the competent authorities shall duly consider the potential impact of their decisions on the stability of the financial systems concerned in the Union, in particular in emergency situations, taking into account the information available at the relevant time.

Article 60

Scope of prudential supervision

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

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

(j) information to be provided to competent authorities.

Article 61

General principles of prudential supervision

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

↓ 2003/41/EC

Article ~~44~~ 62

Powers of intervention and duties of the competent authorities

1. The competent authorities shall require every institution located in their territories to have sound administrative and accounting procedures and adequate internal control mechanisms.
 2. The competent authorities shall have the power to take any measures including, where appropriate, those of an administrative or financial nature, either with regard to any institution located in their territories or against the persons running the institution, which are appropriate and necessary to prevent or remedy any irregularities prejudicial to the interests of the members and beneficiaries.
-

↓ 2010/78/EU Art. 4.3
⇒ new

3. Any decision to prohibit ⇒ or restrict ⇐ the activities of an institution shall contain detailed reasons and be notified to the institution in question. It shall also be notified to EIOPA.
-

↓ 2003/41/EC
(adapted)

~~They~~ ⊗ 4. Competent authorities ⊗ may also restrict or prohibit the free disposal of the institution's assets when, in particular:

- (a) the institution has failed to establish sufficient technical provisions in respect of the entire business or has insufficient assets to cover the technical provisions;
- (b) the institution has failed to hold the regulatory own funds.

5. In order to safeguard the interests of members and beneficiaries, the competent authorities may transfer the powers which the persons running an institution located in their territories hold in accordance with the law of the home Member State wholly or partly to a special representative who is fit to exercise these powers.

~~64.~~ The competent authorities may prohibit or restrict the activities of an institution located in their territories in particular if:

- (a) the institution fails to protect adequately the interests of ~~the~~ scheme ~~and~~ members and beneficiaries;
- (b) the institution no longer fulfils the conditions of operation;
- (c) the institution fails seriously in its obligations under the rules to which it is subject;
- (d) in the case of cross-border activity, the institution does not respect the requirements of social and labour law of the host Member State relevant to the field of occupational pensions.

~~75.~~ Member States shall ensure that decisions taken in respect of an institution under laws, regulations and administrative provisions adopted in accordance with this Directive are subject to the right to apply to the courts.

↓ new

Article 63

Supervisory review process

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

That review shall take into account the circumstances in which the institutions are operating, and, where relevant, the parties carrying out outsourced key functions or any other activities for them. 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 institution faces;
- (c) an assessment of the ability of the institution to assess 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 institution and to monitor how a deterioration is remedied.

3. The competent authorities shall have the necessary powers to require institutions to remedy weaknesses or deficiencies identified in the supervisory review process.

4. The competent authorities shall establish the minimum frequency and the scope of the review laid down in paragraph 1 having regard to the nature, scale and complexity of the activities of the institutions concerned.

↓ 2003/41/EC

Article ~~13~~ 64

Information to be provided to the competent authorities

1. ~~Each~~ Member States shall ensure that the competent authorities, in respect of any institution located in ~~their territories~~ its territory, have the necessary powers and means:

(a) to require the institution, the members of its board of directors and other managers or directors or persons controlling the institution to supply information about all business matters or forward all business documents;

↓ 2003/41/EC
(adapted)

⇒ new

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

(c) to obtain regularly the ⇒ following documents: the risk evaluation for pensions ⇐, ~~the~~ ~~statement of investment-policy principles~~ ⇒ documents relating to the governance system ⇐, the annual accounts and the annual reports, ⇒ information documents as provided to members and beneficiaries, ⇐ and all ~~other~~ ~~documents necessary for the purposes of supervision.~~ ~~These may include documents such as:~~

↓ new

(d) to lay down which documents are necessary for the purposes of supervision, including:

↓ 2003/41/EC
(adapted)
⇒ new

- (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 1031;

~~(d)~~(e) to carry out on-site inspections at the institution's premises and, where appropriate, on outsourced ~~⇒~~ and all subsequent re-outsourced activities ~~⇐ functions~~ to check if activities are carried out in accordance with the supervisory rules.

↓ new

(f) to request information from institutions about outsourced and all subsequent re-outsourced activities at any time.

↓ 2010/78/EU Art.
4.2(b)

2. EIOPA may develop draft implementing technical standards on the forms and formats for the documents listed in paragraph 1 ~~(e)~~(d) (i) to (vi).

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

↓ new

Article 65

Transparency and accountability

1. Member States shall ensure that the competent authorities conduct the tasks laid down in Articles 60, 61, 62, 63 and 64 in a transparent and accountable manner with due respect for the protection of confidential information.

2. Member States shall ensure that the following information is publicly disclosed:

- (a) the texts of laws, regulations, administrative rules and general guidance in the field of occupational pensions regulation, and information about whether the Member State chooses to apply this Directive in accordance with Articles 4 and 5;
- (b) information regarding the supervisory review process as set out in Article 63;
- (c) aggregate statistical data on key aspects of the application of the prudential framework;
- (d) a statement that the main objective of prudential supervision is the protection of members and beneficiaries and information on the main functions and activities of the supervision;
- (e) the rules on administrative sanctions 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 66

Professional secrecy

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

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

2. By derogation from paragraph 1, where a pension scheme is transferred to another institution or another entity, confidential information which does not concern third parties involved in attempts to rescue that undertaking may be divulged in civil or commercial proceedings.

Article 67

Use of confidential information

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

- (a) to check that the conditions for occupational retirement provision are met by institutions before commencing their activities;
- (b) to facilitate the monitoring of the activities of institutions, including the monitoring of the technical provisions, the solvency, the system of governance, and the information provided to members and beneficiaries;
- (c) to impose corrective measures, including sanctions;
- (d) appeals against decisions of the competent authorities taken in accordance with the provisions transposing this Directive;
- (e) in court proceedings regarding the provisions transposing this Directive.

Article 68

Exchange of information between authorities

1. Article 66 shall not preclude any of the following:

- (a) the exchange of information between competent authorities in the same Member State in the discharge of their supervisory functions;

- (b) the exchange of information between competent authorities in different Member States in the discharge of their supervisory functions;
- (c) the exchange of information, in the discharge of their supervisory functions, between competent authorities and any of the following which are situated in the same Member State:
 - (i) authorities responsible for the supervision of financial sector entities and other financial organisations and the authorities responsible for the supervision of financial markets;
 - (ii) authorities or bodies charged with responsibility for maintaining the stability of the financial system in Member States through the use of macro-prudential rules;
 - (iii) bodies involved in the termination of a pension scheme and in other similar procedures;
 - (iv) reorganisation bodies or authorities aiming at protecting the stability of the financial system;
 - (v) persons responsible for carrying out statutory audits of the accounts of institutions, insurance undertakings and other financial institutions;
- (d) the disclosure, to bodies which administer the termination of a pension scheme, of information necessary for the performance of their duties.

2. The information received by the authorities, bodies and persons referred to in paragraph 1 shall be subject to the rules on professional secrecy laid down in Article 66.

3. Article 66 shall not preclude Member States from authorising exchanges of information between the competent authorities and any of the following:

- (a) the authorities responsible for overseeing the bodies involved in the termination of pension schemes and other similar procedures;
- (b) the authorities responsible for overseeing the persons charged with carrying out statutory audits of the accounts of institutions, credit institutions, investment firms, insurance undertakings and other financial institutions;
- (c) independent actuaries of institutions carrying out legal supervision of those institutions and the bodies responsible for overseeing such actuaries.

Article 69

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

1. Article 66 shall not prevent a competent authority from transmitting information to the following entities for the purposes of the exercise of their respective tasks:

- (a) central banks and other bodies with a similar function in their capacity as monetary authorities;

(b) where appropriate, other public authorities responsible for overseeing payment systems;

(c) the European Systemic Risk Board, EIOPA, the European Banking Authority and the European Securities and Markets Authority.

2. Articles 68 to 71 shall not prevent the authorities or bodies referred to in paragraph 1 (a), (b) and (c) from communicating to the competent authorities such information as the competent authorities may need for the purposes of Article 67.

3. Information received in accordance with paragraphs 1 and 2 shall be subject to professional secrecy requirements at least equivalent to those as set out in this Directive.

Article 70

Disclosure of information to government administrations responsible for financial legislation

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

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

2. Member States may authorise the disclosure of confidential information relating to the prudential supervision of institutions to parliamentary enquiry committees or courts of auditors in their Member State and other entities in charge of enquiries in their Member State, where all of the following conditions are fulfilled:

(a) the entities have the competence under national law to investigate or scrutinise the actions of authorities responsible for the supervision of institutions or for laws on such supervision;

(b) the information is strictly necessary for fulfilling the competence referred to in point (a);

(c) the persons with access to the information are subject to professional secrecy requirements under national law at least equivalent to those set out in this Directive;

(d) if the information originates from another Member State, this information is disclosed with the explicit agreement of the originating competent authorities and solely for the purposes for which those authorities gave their agreement.

Article 71

Conditions for the exchange of information

1. For exchanges of information under Articles 68, transmission of information under Article 69 and disclosure of information under Article 70, Member States shall require that at least the following conditions are met:

- (a) the information shall be exchanged, transmitted or disclosed for the purpose of carrying out the oversight or legal supervision;
- (b) the information received shall be subject to the obligation of professional secrecy laid down in Article 66;
- (c) where the information originates from another Member State, it shall not be disclosed without the express agreement of the competent authority from which it originates and, where appropriate, solely for the purposes for which that authority gave its agreement.

2. Article 67 shall not preclude Member States from authorising, with the aim of strengthening the stability, and integrity, of the financial system, the exchange of information between the competent authorities and the authorities or bodies responsible for the detection and investigation of breaches of company law applicable to sponsoring undertakings.

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

- (a) the information must be intended for the purpose of detection and investigation as referred to in Article 70(2)(a);
- (b) information received must be subject to the obligation of professional secrecy laid down in Article 66;
- (c) where the information originates from another Member State, it shall not be disclosed without the express agreement of the competent authority from which it originates and, where appropriate, solely for the purposes for which that authority gave its agreement.

3. Where, in a Member State, the authorities or bodies referred to in the first subparagraph of paragraph 2 perform their task of detection or investigation with the aid of persons appointed, in view of their specific competence, for that purpose and not employed in the public sector, the possibility of exchanging information provided for in Article 70(2) shall apply.

Article 72

National provisions of a prudential nature

↓ 2010/78/EU Art. 4.5
(adapted)

~~11~~ 1. Member States shall report to EIOPA their national provisions of prudential nature relevant to the field of occupational pension schemes, which are not covered by the reference to national social and labour law in ~~paragraph 1~~ Article 12(1).

2. Member States shall update that information on a regular basis and at least every two years and EIOPA shall make that information available on its website.

~~In order to ensure uniform conditions of application of this paragraph, EIOPA shall develop draft implementing technical standards on the procedures to be followed and formats and templates to be used by the competent authorities when transmitting and updating the relevant information to EIOPA. EIOPA shall submit those draft implementing technical standards to the Commission by 1 January 2014.~~

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

↓ 2003/41/EC
(adapted)

~~Article 21b~~

Committee procedure

~~1. The Commission shall be assisted by the European Insurance and Occupational Pensions Committee established by Commission Decision 2004/9/EC⁴⁹.~~

↓ new

Title VI

FINAL PROVISIONS

↓ 2003/41/EC

~~Article 2173~~

↓ 2010/78/EU Art.
4.6(a)

Cooperation between Member States, EIOPA and the Commission

↓ 2003/41/EC

1. Member States shall ensure, in an appropriate manner, the uniform application of this Directive through regular exchanges of information and experience with a view to developing best practices in this sphere and closer cooperation, and by so doing, preventing distortions of competition and creating the conditions required for unproblematic cross-border membership.

2. The Commission and the competent authorities of the Member States shall collaborate closely with a view to facilitating supervision of the operations of institutions for occupational retirement provision.

⁴⁹ OJ L 3, 7.1.2004, p. 34.

↓ 2010/78/EU Art.
4.6(b)

~~23.~~ 3. The competent authorities shall cooperate with EIOPA for the purposes of this Directive, in accordance with Regulation (EU) No 1094/2010.

The competent authorities shall without delay provide EIOPA with all information necessary to carry out its duties under this Directive and under Regulation (EU) No 1094/2010, in accordance with Article 35 of that Regulation.

↓ 2010/78/EU Art.
4.6(c)

~~24.~~ 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.

↓ new

Article 74

Processing of personal data

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

Article 75

Evaluation and review

↓ 2003/41/EC
(adapted)
⇒ new

~~4.~~ Four years after the entry into force of this Directive, the Commission shall ~~issue a~~ ⇒ review this Directive and ⇐ report reviewing ⇒ on its implementation and effectiveness to the European Parliament and the Council. ⇐

~~(a) the application of Article 18 and the progress achieved in the adaptation of national supervisory systems, and~~

~~(b) the application of the second subparagraph of Article 19(2), in particular the situation prevailing in Member States regarding the use of depositaries and the role played by them where appropriate.~~

~~5. The competent authorities of the host Member State may ask the competent authorities of the home Member State to decide on the ring-fencing of the institution's assets and liabilities, as provided for in Article 16(3) and Article 18(7).~~

↓ 2009/138/EC Art.
303.3 (adapted)

~~Article 21a~~

~~**Review of the amount of the guarantee fund**~~

~~1. The amount in euro as laid down in Article 17c(2) shall be reviewed annually starting on 31 October 2012, in order to take account of changes in the Harmonised Indices of Consumer Prices of all Member States as published by Eurostat.~~

~~That amount shall be adapted automatically, by increasing the base amount in euro by the percentage change in that index over the period between 31 December 2009 and the review date and rounded up to a multiple of EUR 100000.~~

~~If the percentage change since the last adaptation is less than 5 %, no adaptation shall take place.~~

~~2. The Commission shall inform the European Parliament and the Council annually of the review and the adapted amount referred to in paragraph 1.~~

↓ 2003/41/EC
(adapted)

~~Article 22~~

~~**Implementation**~~

~~1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 23 September 2005. They shall forthwith inform the Commission thereof.~~

~~When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.~~

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

~~3. Member States may postpone until 23 September 2010 the application of Article 17(1) and (2) to institutions located in their territory which at the date specified in paragraph 1 of this Article do not have the minimum level of regulatory own funds required pursuant to Article 17(1) and (2). However, institutions wishing to operate pension schemes on a cross-border basis, within the meaning of Article 20, may not do so until they comply with the rules of this Directive.~~

~~4. Member States may postpone until 23 September 2010 the application of Article 18(1)(f) to institutions located in their territory. However, institutions wishing to operate pension schemes on a cross-border basis, within the meaning of Article 20, may not do so until they comply with the rules of this Directive.~~

~~Article 23~~

~~Entry in force~~

~~This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.~~

↓ new

Article 76

Amendment of Directive 2009/138/EC

In Directive 2009/138/EC the following Article 306a is inserted:

"Article 306a

Where, on the entry into force of this Directive, home Member States applied provisions referred to in Article 4 of Directive/EU of the European Parliament and of the Council⁵⁰, such home Member States may continue to apply the laws, regulations and administrative provisions that had been adopted by them with a view to complying with Articles 1 to 19, Articles 27 to 30, Articles 32 to 35 and Articles 37 to 67 of Directive 2002/83/EC as in force on 31 December 2015 for a transitional period expiring on 31 December 2022.

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

(a) a notional solvency capital requirement with respect to their insurance activity, calculated without the occupational retirement provision business under Article 4 of Directive/EU,

(b) the solvency margin with respect to the occupational retirement provision business, calculated in accordance with the laws, regulations and administrative provisions that have been adopted to comply with Article 28 of Directive 2002/83/EC.

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

Article 77

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The delegation of powers referred to in Article 24(3), Article 30 and Article 54 may be revoked at any time by the European Parliament or by the Council. A

⁵⁰

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decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

3. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

4. A delegated act adopted pursuant to Article 24(3), Article 30 and Article 54 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or the Council.

Article 78

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Article 6(c), (i) to (p), Article 12(4) second and third subparagraph, Article 12(10), Article 13, Article 20(6) and (8), Articles 21 to 30, Article 33, Article 35(1) and (2), Article 35(4) to (7), Article 36 to 38, Articles 39(1) and (3), Articles 40 to 53, Articles 55 to 57, Article 58(1), Articles 59 to 61, Article 63, Article 64(1)(b) to (d) and (f), Articles 65 to 71 of this Directive by 31 December 2016. They shall forthwith communicate to the Commission the text of those provisions.

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

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

Article 79

Repeal

Directive 2003/41/EC, as amended by the Directives listed in Annex I, Part A, is repealed with effect from 1 January 2017 without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and application of the Directives set out in Annex I, Part B.

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

Article 80

Entry into force

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

Articles 1 to 5, Article 6(a), (b), (d) to (h) and (j), Articles 7 to 11, Article 12(1) to (9), Articles 14 to 19, Article 20(1) to (5) and (7), Articles 31 and 32, Article 34, Article 35(2) and (3), Article 39(1) and (3), Article 58(2), Article 62, Article 64(1)(a) and (e) and Article 64(2) shall apply from 1 January 2017.

↓ 2003/41/EC

Article ~~24~~81

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

LEGISLATIVE FINANCIAL STATEMENT

1. FRAMEWORK OF THE PROPOSAL/INITIATIVE

1.1. Title of the proposal/initiative

Directive of the European Parliament and of the Council on the activities and supervision of institutions for occupational retirement provision (IORP2) (recast).

1.2. Policy area(s) concerned in the ABM/ABB structure⁵¹

Financial Services and Capital Markets

1.3. Nature of the proposal/initiative

The proposal/initiative relates to **the extension of an existing action** (revision of Directive 2003/41/EC).

1.4. Objective(s)

1.4.1. The Commission's multiannual strategic objective(s) targeted by the proposal/initiative

To increase the safety and the efficiency of the financial markets; to boost the internal market for financial services.

1.4.2. Specific objective(s) and ABM/ABB activity(ies) concerned

Specific objective No

ABM/ABB activity(ies) concerned

Financial Services and Capital Markets

To improve the governance and transparency of institutions for occupational retirement provision; to facilitate cross-border activities of IORPs.

1.4.3. Expected result(s) and impact

The proposal, amending the 2003 Directive on IORPs, aims at: laying down detailed rules on the governance of IORPs, supervisory powers over IORPs, information to be provided by IORPs to supervisors, information to be provided by IORPs to members and beneficiaries, investment by IORPs, IORP depositaries, cross-border transfer of IORPs and cross-border activity of IORPs.

1.4.4. Indicators of results and impact

The indicators, as described in section 6 of the impact assessment report, include reduced costs for employers, greater geographic coverage of IORPs, greater cross-border activity of IORPs, fewer failures of IORPs.

⁵¹

ABM: activity-based management – ABB: activity-based budgeting.

1.5. Grounds for the proposal/initiative

1.5.1. Requirement(s) to be met in the short or long term

1.5.2. Added value of EU involvement

- 1) A regulatory patchwork can lead to increased administrative costs and regulatory arbitrage.
- 2) In the absence of action at EU level, cross-border activity of IORPs will probably remain at the current low level.
- 3) A robust regulatory framework for IORPs at EU level can foster the development of IORPs in Member States where they currently barely exist, thus improving retirement provision and providing a source of savings for long-term investment.
- 4) Improved provisions on governance and depositaries are anticipated to contribute to reducing the rate of failure of IORPs.
- 5) Improved and harmonised transparency provisions be beneficial for scheme members and beneficiaries and make IORPs more comparable across borders.

1.5.3. Lessons learned from similar experiences in the past

The 2003 Directive on IORPs, which has been in place for ten years, has significant gaps, which have allowed divergent supervisory practices to develop between Member States as regards governance and transparency of IORPs. These divergences discourage cross-border mobility of workers, hinder comparability of IORPs, and act as an obstacle to cross-border transfers and provision of services by IORPs.

1.5.4. Compatibility and possible synergy with other appropriate instruments

The review of the 2003 IORP Directive was announced in the White Paper of 16 February 2012 "An Agenda for Adequate, Safe and Sustainable Pensions" and forms a cohesive package with the other initiatives and actions outlined in that White Paper for improved pension provision in the EU.

1.6. Duration and financial impact

Proposal/initiative of **unlimited duration**

1.7. Management mode(s) planned⁵²

From the 2014 budget

- ☐ **Direct management** by the Commission
 - ☐ by its departments, including by its staff in the Union delegations;
 - ☐ by the executive agencies;
- ☐ **Shared management** with the Member States
- ☐ **Indirect management** by delegating implementation tasks to:
 - ☐ third countries or the bodies they have designated;

⁵²

Details of management modes and references to the Financial Regulation may be found on the BudgWeb site: http://www.cc.cec/budg/man/budgmanag/budgmanag_en.html

- ☐ international organisations and their agencies (to be specified);
- ☐ the EIB and the European Investment Fund;
- ✓ bodies referred to in Articles 208 and 209 of the Financial Regulation;
- ☐ public law bodies;
- ☐ bodies governed by private law with a public service mission to the extent that they provide adequate financial guarantees;
- ☐ bodies governed by the private law of a Member State that are entrusted with the implementation of a public-private partnership and that provide adequate financial guarantees;
- ☐ persons entrusted with the implementation of specific actions in the CFSP pursuant to Title V of the TEU, and identified in the relevant basic act.

Comments

EIOPA is a regulatory agency acting under the oversight of the Commission.

2. MANAGEMENT MEASURES

2.1. Monitoring and reporting rules

In line with already existing arrangements EIOPA prepares regularly reports on its activity (including internal reporting to Senior Management, Management Board reporting, six month activity reporting to the Board of Supervisors and the production of the annual report), and undergoes audits by the Court of Auditors and the Internal Audit Service on its use of its resources. Monitoring and reporting of the present proposed actions will comply with the same already existing requirements.

2.2. Management and control system

2.2.1. Risk(s) identified

No risks identified.

2.2.2. Information concerning the internal control system set up

Management and control systems as provided for in the EIOPA Regulation are already implemented. EIOPA works closely together with the Internal Audit Service of the Commission to ensure that the appropriate standards are met in all internal control areas. These arrangements will apply also with regard to the role of EIOPA according to the present proposal. Annual internal audit reports are sent to the Commission, Parliament and Council.

2.2.3. Estimate of the costs and benefits of the controls and assessment of the expected level of risk of error

No additional costs are foreseen. Expect level of risk of error is low.

2.3. Measures to prevent fraud and irregularities

For the purposes of combating fraud, corruption and any other illegal activity, the provisions of Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) applies to the EIOPA without any restriction.

EIOPA acceded to the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF) and adopted appropriate provisions for all EIOPA staff.

EIOPA is currently working on a dedicated anti-fraud strategy and resulting action plan. The strategy and action plan will be put in place in 2014. EIOPA's strengthened actions in the area of anti-fraud will be compliant to the rules and guidance provided by the Financial Regulation (anti-fraud measures as part of sound financial management), OLAF's fraud prevention policies, the provisions provided by the Commission Anti-Fraud Strategy (COM(2011)376) as well as set out by the Common Approach on EU decentralised agencies (July 2012) and the related roadmap.

3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE

3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected

Existing budget lines

In order of multiannual financial framework headings and budget lines.

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
	Number [...]Heading 1a Smart and Inclusive Growth – Economic, Social and Teritorial Cohesion.....]	Diff./non-diff. (⁵³)	from EFTA countries ⁵⁴	from candidate countries ⁵⁵	from third countries	within the meaning of Article 21(2)(b) of the Financial Regulation
	12.0303 (budget heading 1a) European Insurance and Occupational Pensions Authority [EIOPA – Subsidy under Titles 1 and 2 (Staff and administrative expenditure)]	Non Diff.	YES	NO	NO	NO

New budget lines requested

In order of multiannual financial framework headings and budget lines.

⁵³ Diff. = Differentiated appropriations / Non-Diff. = Non-differentiated appropriations.

⁵⁴ EFTA: European Free Trade Association.

⁵⁵ Candidate countries and, where applicable, potential candidate countries from the Western Balkans.

3.2. Estimated impact on expenditure

No new resources will be needed. Operation appropriations which are necessary for the implementation of this initiative will be covered by redeployment within the contribution granted to EIOPA during the annual budgetary procedure, in accordance with the financial programming set by the Communication from the Commission "Programming of human and financial resources for decentralised agencies 2014-2020" (COM (2013)519 final).

3.2.1. Summary of estimated impact on expenditure

EUR million (to three decimal places)

Heading of multiannual financial framework	Number	[...][Heading.....]
--	--------	--

DG: MARKT			Year 2015 ⁵⁶	Year 2016	Year 2017	Year 2018	Year 2019	Year 2020	TOTAL
Operational appropriations									
12.0303	Commitments	(1)	0.185	0.370	0.370	0.370	0.370	0.370	2.035
	Payments	(2)	0.185	0.370	0.370	0.370	0.370	0.370	2.035
Appropriations of an administrative nature financed from the envelope for specific programmes									

⁵⁶

These estimates are based on an average cost of an AD official of €132,000 per year. It is estimated that the 7 posts in question will be recruited at different times during the year 2015, so the total cost is half of the full year cost of 7 full-time staff. Amounts based on current financing mechanism in EIOPA regulation (Member States 60%, Community 40%).

Number of budget line		(3)							
TOTAL appropriations for DG MARKT	Commitments	=1+1a +3	0.185	0.370	0.370	0.370	0.370	0.370	2.035
	Payments	=2+2a+3	0.185	0.370	0.370	0.370	0.370	0.370	2.035

• TOTAL operational appropriations	Commitments	(4)							
	Payments	(5)							
• TOTAL appropriations of an administrative nature financed from the envelope for specific programmes		(6)							
TOTAL appropriations for HEADING <....> of the multiannual financial framework	Commitments	=4+6	0.185	0.370	0.370	0.370	0.370	0.370	2.035
	Payments	=4+6	0.185	0.370	0.370	0.370	0.370	0.370	2.035

If more than one heading is affected by the proposal / initiative:

• TOTAL operational appropriations	Commitments	(4)							
	Payments	(5)							
• TOTAL appropriations of an administrative nature financed from the envelope for specific programmes									
TOTAL appropriations under HEADINGS 1 to 4 of the multiannual financial framework	Commitments	=4+6	0.185	0.370	0.370	0.370	0.370	0.370	2.035
	Payments	=4+6	0.185	0.370	0.370	0.370	0.370	0.370	2.035

(Reference amount)									
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Heading of multiannual financial framework	5	" Administrative expenditure "
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EUR million (to three decimal places)

		Year N	Year N+1	Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)			TOTAL
DG: <.....>									
• Human resources									
• Other administrative expenditure									
TOTAL DG <.....>	Appropriations								

TOTAL appropriations for HEADING 5 of the multiannual financial framework	(Total commitments = Total payments)								
--	---	--	--	--	--	--	--	--	--

EUR million (to three decimal places)

		Year N ⁵⁷	Year N+1	Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)			TOTAL
TOTAL appropriations	Commitments								

⁵⁷

Year N is the year in which implementation of the proposal/initiative starts.

under HEADINGS 1 to 5 of the multiannual financial framework	Payments								
--	----------	--	--	--	--	--	--	--	--

3.2.2. *Estimated impact on operational appropriations*

The proposal/initiative requires the use of operational appropriations, as explained below:

The various tasks directly ascribed to EIOPA arising from the legislative proposal are the following: advice to the Commission on the preparation of the delegated acts and on the evaluation of the application of the Directive, as preparation of the Commission's evaluation report. In addition, EIOPA will have to monitor the application of the Directive and take action to ensure correct implementation, in accordance with article 17 of its founding Regulation (Council and Parliament Regulation 1094/2010), and to resolve differences between national supervisors regarding matters of application (article 19 of the EIOPA Regulation). In particular EIOPA may have to resolve disagreements between home and host supervisors regarding the cross-border transfer of IORPs. It can also prepare guidelines and recommendations, in accordance with article 16 of the EIOPA Regulation. In addition, given the focus of the proposal on governance and reporting issues, it is planned that an expert group of national supervisors will need to be created on governance and reporting and coordinated and administered by EIOPA.

The total staff requirements of all of these tasks is estimated at 7 annual FTE staff. Four of these are for the preparation of the above-mentioned advice to the Commission, one for administration and coordination of a new working group on governance and transparency, and two on monitoring of implementation and resolution of differences between national authorities. These should all be establishment plan posts, given the difficulty of recruiting contractual agents for such specialised functions, and the increasing difficulties of national authorities to provide seconded national experts.

3.2.3. *Estimated impact on appropriations of an administrative nature*

3.2.3.1. Summary

- ✓ The proposal/initiative does not require the use of appropriations of an administrative nature

3.2.3.2. Estimated requirements of human resources

- ✓ The proposal/initiative does not require the use of human resources.

Comment:

No additional human and administrative resources will be needed in DG MARKT as a result of the proposal. Resources currently deployed to follow directive 2003/41/EC will continue to do so.

3.2.4. *Compatibility with the current multiannual financial framework*

- ✓ Proposal/initiative is compatible with the current multiannual financial framework.
- ☐ Proposal/initiative will entail reprogramming of the relevant heading in the multiannual financial framework.

Explain what reprogramming is required, specifying the budget lines concerned and the corresponding amounts.

- ☐ Proposal/initiative requires application of the flexibility instrument or revision of the multiannual financial framework⁵⁸.

Explain what is required, specifying the headings and budget lines concerned and the corresponding amounts.

Comment:

The Commission Communication COM(2013) 519 of 10 July 2013 "Programming of human and financial resources for decentralised agencies 2014-2020" lays down the Commission's resource plans for decentralised agencies, including EIOPA, for the period of the next Multiannual Financial Framework. Until 2014, EIOPA is categorised as a "start-up phase" agency in the Communication. Section 5.1.2 of the Communication states that EIOPA's total number of posts is expected to increase from 80 in 2013 to 112 in 2020. The settlement of the budgetary authority for EIOPA in 2014 allows for 87 establishment plan posts. It is expected that the present legislative proposal will enter into force in 2015, and that the 7 establishment plan posts provided for in the present Legislative Financial Statement will be recruited at various points of time during 2015, and will be included among the additional posts already envisaged for the period 2014-2017.

3.2.5. *Third-party contributions*

The proposal/initiative provides for the co-financing estimated below:

Appropriations in EUR million (to 3 decimal places)

	2015	2016	2017	2018	2019	2020	Total
National competent authorities in Member States	0.277	0.554	0.554	0.554	0.554	0.554	3.049
TOTAL appropriations cofinanced	0.277	0.554	0.554	0.554	0.554	0.554	3.049

* These estimates are based on an average cost of an AD official of €132,000 per year. It is estimated that the 7 posts in question will be recruited at different times during the year 2015, so the total cost is half of the full year cost of 7 full-time staff. Amounts based on current financing mechanism in EIOPA regulation (Member States 60%, Community 40%).

3.3. **Estimated impact on revenue**

- ☒ Proposal/initiative has no financial impact on revenue.
- ☐ Proposal/initiative has the following financial impact:
- ☐ on own resources
 - ☐ on miscellaneous revenue

⁵⁸ See points 19 and 24 of the Interinstitutional Agreement (for the period 2007-2013).

EUR million (to three decimal places)

Budget line:	revenue	Appropriations available for the current financial year	Impact of the proposal/initiative ⁵⁹					
					Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)	
Article								

For miscellaneous ‘assigned’ revenue, specify the budget expenditure line(s) affected.

Specify the method for calculating the impact on revenue.

--

Proposed establishment plan

Function Group and Grade	Temporary Posts
AD16	
AD15	
AD14	
AD13	
AD12	
AD11	
AD10	1
AD9	1
AD8	1
AD7	2
AD6	1
AD5	1
AD total	7

⁵⁹ As regards traditional own resources (customs duties, sugar levies), the amounts indicated must be net amounts, i.e. gross amounts after deduction of 25% for collection costs.