

**COMMON POSITION (EC) No 62/2002****adopted by the Council on 5 November 2002****with a view to adopting Directive 2002/.../EC of the European Parliament and of the Council of ... concerning the activities and supervision of institutions for occupational retirement provision**

(2002/C 299 E/02)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95(1) thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

Having regard to the Opinion of the Economic and Social Committee <sup>(2)</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty <sup>(3)</sup>,

Whereas:

- (1) A genuine internal market for financial services is crucial for economic growth and job creation in the Community.
- (2) Major achievements have already been made in the establishment of this internal market, allowing financial institutions to operate in other Member States and ensuring a high level of protection for the consumers of financial services.
- (3) 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.
- (4) 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.
- (5) 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.
- (6) 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.
- (7) 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.
- (8) 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.
- (9) 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.

<sup>(1)</sup> OJ C 96 E, 27.3.2001, p. 136.

<sup>(2)</sup> OJ C 155, 29.5.2001, p. 26.

<sup>(3)</sup> Opinion of the European Parliament of 4 July 2001 (OJ C 65 E, 14.3.2002, p. 135) (not yet published in the Official Journal), Council Common Position of 5 November 2002 and Decision of the European Parliament of ... (not yet published in the Official Journal).

- (10) Institutions managing social security schemes, which are already coordinated at Community 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.
- (11) Financial institutions which already benefit from a Community 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.
- (12) 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.
- (13) 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.
- (14) 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.
- (15) 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.
- (16) 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.
- (17) Institutions for occupational retirement provision are financial service providers and therefore should meet certain minimum prudential standards with respect to their activities and conditions of operation.
- (18) 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.
- (19) 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.
- (20) 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.
- (21) 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.
- (22) 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.

- (23) 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.
- (24) Risks covered by institutions vary significantly from one Member State to another. Home Member States should therefore have the possibility to make the calculation of technical provisions subject to additional and more detailed rules than those laid down in this Directive.
- (25) 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.
- (26) If the institution does not work on a cross-border basis, Member States should be able to permit underfunding provided that a proper plan is established to restore full funding and without prejudice to the requirements of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer <sup>(1)</sup>.
- (27) 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.
- (28) 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.
- (29) 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 not restrict the free movement of capital, unless justified on prudential grounds.
- (30) 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 risk capital markets within prudent limits. They can also benefit from the advantages of international diversification. Investments in shares, risk capital markets and currencies other than those of the liabilities should therefore not be restricted except on prudential grounds.
- (31) 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.
- (32) Restrictions regarding the free choice by institutions of approved asset managers and custodians limit competition in the internal market and should therefore be eliminated.
- (33) 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 to provide their services in other Member States. They should be allowed to accept sponsorship from undertakings located in 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 Community 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.

<sup>(1)</sup> OJ L 283, 28.10.1980, p. 23. Directive as last amended by the 1994 Act of Accession.

- (34) 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.
- (35) When a scheme is ring-fenced the provisions of this Directive apply individually to that scheme.
- (36) It is necessary to make provision for cooperation between the competent authorities of the Member States and between those authorities and the Commission.
- (37) The Commission should be assisted by an insurance and pension committee, which in its work will take account of the distinct specificities of institutions for occupational retirement provision and insurance undertakings and take the necessary measures to organise its work accordingly.
- (38) Since the objective of the proposed action, namely to create a Community 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 Community, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. 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,

2. This Directive shall not apply to:
- (a) institutions managing social security schemes which are covered by Regulation (EEC) No 1408/71<sup>(1)</sup> and Regulation (EEC) No 574/72<sup>(2)</sup>;
- (b) institutions which are covered by Directive 79/267/EEC<sup>(3)</sup>, Directive 73/239/EEC<sup>(4)</sup>, Directive 85/611/EEC<sup>(5)</sup>, Directive 93/22/EEC<sup>(6)</sup> and Directive 2000/12/EC<sup>(7)</sup>;
- (c) institutions which operate on a pay-as-you-go basis;
- (d) institutions where employees of the sponsoring undertakings have no legal rights to benefits and where the sponsoring undertaking can redeem the assets at any time and not necessarily meet its obligations for payment of retirement benefits;
- (e) companies using book-reserve schemes with a view to paying out retirement benefits to their employees.

HAVE ADOPTED THE FOLLOWING DIRECTIVE:

#### *Article 1*

##### **Subject**

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.

- <sup>(1)</sup> Regulation (EEC) No 1408/71 of the Council 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).
- <sup>(2)</sup> Regulation (EEC) No 574/72 of the Council 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).
- <sup>(3)</sup> First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance (OJ L 63, 13.3.1979, p. 1). Directive as last amended by Directive 2002/12/EC of the European Parliament and of the Council (OJ L 77, 23.3.2002, p. 11).
- <sup>(4)</sup> First Council Directive 73/239/EEC 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, 23.3.2002, p. 17).
- <sup>(5)</sup> 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).
- <sup>(6)</sup> 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).
- <sup>(7)</sup> 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. 37).

### 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 and (EEC) No 574/72 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 viceversa.

### Article 4

#### Optional application to institutions covered by Directive 79/267/EEC

Home Member States may choose to apply the provisions of Articles 9 to 16 and Articles 18 to 20 of this Directive to the occupational retirement provision business of insurance undertakings which are covered by Directive 79/267/EEC. 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 insurance undertakings, without any possibility of transfer.

In such case, and only as far as their occupational retirement provision business is concerned, insurance undertakings shall not be subject to Articles 17 and 21 of Directive 79/267/EEC and to Articles 19 to 24 and 31 of Directive 92/96/EEC <sup>(1)</sup>.

The home Member State shall ensure that either the competent authorities, or the authorities responsible for supervision of insurance undertakings covered by Directive 79/267/EEC, 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, 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 nevertheless be given the right to apply this Directive on a voluntary basis. Article 20 may be applied only if all the other provisions of this Directive apply.

<sup>(1)</sup> Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive) (OJ L 360, 9.12.1992, p. 1). Directive as last amended by Directive 2000/64/EC.

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

### Article 6

#### Definitions

For the purposes of this Directive:

(a) 'institution for occupational retirement provision', or 'institution', means an institution, irrespective of its legal form, operating on a funded basis, established separately from any sponsoring undertaking or trade for the purpose of providing retirement benefits in the context of an occupational activity on the basis of an agreement or a contract agreed:

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

and which carries out activities directly arising therefrom;

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

(c) 'sponsoring undertaking' means any undertaking or other body, regardless of whether it includes or consists of one or more legal or natural persons, which acts as an employer or in a self-employed capacity or any combination thereof and which pays contributions into an institution for occupational retirement provision;

(d) 'retirement benefits' means benefits in the form of payments, whether for life time, for a temporary period or as a lump sum, 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;

(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;
- (i) 'home Member State' means the Member State in which the institution has its registered office and its main administration or, if it does not have a registered office, its main administration;
- (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.
- (c) 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;
- (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;
- (e) where the sponsoring undertaking guarantees the payment of the retirement benefits, it is committed to regular financing;
- (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.

2. A Member State may make the conditions of operation of an institution located in its territory subject to other requirements, with a view to ensuring that the interests of members and beneficiaries are adequately protected.

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

4. 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.

#### Article 7

##### Activities of an institution

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

When, in accordance with Article 4, an 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 State 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

1. Each Member State shall, in respect of every institution located in its territory, ensure that:

- (a) the institution is registered or authorised;
- (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;

#### Article 10

##### Annual accounts and annual reports

Each Member State shall 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 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 national law.

*Article 11***Information to be given to the members and beneficiaries**

1. Depending on the nature of the pension scheme established, each Member State shall ensure that every institution located in its territory provides at least the information set out in this Article.

2. 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.

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

4. Each member shall also receive, on request, detailed and substantial information on:

- (a) the target level of the retirement benefits, if applicable;
- (b) the actual financing of accrued pension entitlements;
- (c) the level of benefits in case of cessation of employment;
- (d) 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.

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.

*Article 12***Statement of investment policy principles**

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

*Article 13***Information to be provided to the competent authorities**

Each Member State shall ensure that the competent authorities, in respect of any institution located in 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;
- (b) to supervise relationships between the institution and other companies or between institutions, when institutions transfer functions to those other companies or institutions (outsourcing), influencing the financial situation of the institution or being in a material way relevant for effective supervision;
- (c) to obtain regularly the statement of investment policy principles, the annual accounts and the annual reports, and all the documents necessary for the purposes of supervision. These may include documents such as:
  - (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 10;
- (d) to carry out on-site inspections at the institution's premises and, where appropriate, on outsourced functions to check if activities are carried out in accordance with the supervisory rules.

#### Article 14

##### **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.

They 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.

3. 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.

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

(a) the institution fails to adequately protect the interests of 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.

Any decision to prohibit the activities of an institution shall be supported by precise reasons and notified to the institution in question.

5. Member States shall ensure that decisions taken in respect of an institution under laws, regulations and administrative

provisions adopted in accordance with this Directive are subject to the right to apply to the courts.

#### Article 15

##### **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:

— the yield on the corresponding assets held by the institution and the future investment returns and/or

— 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.

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 will, every two years or at the request of a Member State, report to the Insurance and Pension Committee on the situation concerning the development in cross-border activities. After consultation of the Insurance and Pension Committee, the Commission will 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.

#### Article 16

##### 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 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/or 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 20, 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 14. To comply with this requirement the home Member State may require ring-fencing of the assets and liabilities.

#### Article 17

##### 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.

2. For the purposes of calculating the minimum amount of the additional assets, the rules laid down in Articles 18 and 19 of Directive 79/267/EEC shall apply.

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

#### Article 18

##### Investment rules

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

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

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

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

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

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

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

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

2. 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.

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

4. Without prejudice to Article 12, 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.

5. In accordance with the provisions of paragraphs 1 to 4, Member States may, for the institutions located in their territories, lay down more detailed rules, including quantitative rules, provided they are prudentially justified to reflect the total range of pension schemes operated by these institutions.

In particular, Member States may apply investment provisions similar to those of Directive 92/96/EEC.

Member States shall, however, 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 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 liabilities are expressed;
- (c) investing in risk capital markets.

6. Paragraph 5 shall not preclude the right for Member States to require the application to institutions located 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.

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.

#### Article 19

##### Management and custody

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 Directives 85/611/EEC, 92/96/EEC, 93/22/EEC and 2000/12/EC, as well as those referred to in Article 2(1) of this Directive.

2. Member States shall not restrict institutions from appointing, for the custody of their assets, custodians established in another Member State and duly authorised in accordance with Directive 93/22/EEC or Directive 2000/12/EC, or accepted as a depository for the purposes of Directive 85/611/EEC.

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.

3. Each Member State shall take the necessary steps to enable it under its national law to prohibit, in accordance with Article 14, the free disposal of assets held by a depository or custodian located within its territory at the request of the institution's home Member State.

#### Article 20

##### Cross-border activities

1. Without prejudice to national social and labour legislation 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 for occupational retirement provision authorised in other Member States. They shall also allow institutions for occupational retirement provision authorised in their territories to accept sponsorship by undertakings located within the territories of other Member States.

2. An institution wishing 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(4). 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 their territories and proposing to be sponsored 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 of the sponsoring undertaking;
- (c) the main characteristics of the pension scheme to be operated for the sponsoring undertaking.

4. Where a competent authority of the home Member State is notified under paragraph 2, and unless it has reason to doubt that the administrative structure or the financial situation of the institution or the good repute and professional qualifications or experience of the persons running the institution are compatible with the 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.

5. Before the institution starts to operate a pension scheme for a sponsoring undertaking in another Member State, the competent authorities of the host Member State shall, within two months of receiving the information referred to in paragraph 3, inform the competent authorities of the home Member State, 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 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.

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.

8. 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 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.

9. The institution shall be subject to ongoing 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.

10. 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.

#### Article 21

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

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

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

Each Member State shall inform the Commission of any major difficulties to which the application of this Directive gives rise.

The Commission and the competent authorities of the Member States concerned shall examine such difficulties as quickly as possible in order to find an appropriate solution.

Five years after the entry into force of this Directive, the Commission shall issue a report reviewing:

- (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.

The Commission shall also be assisted by an Insurance and Pension Committee.

3. 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 Articles 16(3) and 18(7).

#### Article 22

##### Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before ...(\*). They shall forthwith inform the Commission thereof.

(\*) 24 months from the date of the entry into force of this Directive.

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 . . . (\*) the application of Article 17(1) and (2) to institutions located in their territory which at the date specified in paragraph 1 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 . . . (\*) 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 Communities*.

#### Article 24

#### Addressees

This Directive is addressed to the Member States.

Done at . . .

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

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(\*) 5 years from the date referred to in paragraph 1.

## STATEMENT OF THE COUNCIL'S REASONS

### I. INTRODUCTION

1. On 13 November 2000, the Commission submitted a proposal for a directive on the activities of institutions for occupational retirement provision <sup>(1)</sup>.
2. The Economic and Social Committee delivered its opinion on 28 March 2001 <sup>(2)</sup>.
3. On 4 July 2001, the European Parliament adopted its opinion containing 99 amendments to the Commission proposal <sup>(3)</sup>.
4. On 5 November 2002, the Council adopted its common position and these reasons.

### II. OBJECTIVES

1. When putting forward its proposal, the Commission stated as its objectives:
  - to ensure that investments are secure and efficient,
  - to enable institutions to choose their asset managers and custodians freely,
  - to ensure a level playing field between all service providers,
  - to facilitate cross-border activities,
  - to ensure the protection of present and future pensioners,
  - to build a single market for financial services,
  - in particular for supplementary pensions.

According to the Commission proposal, these objectives are to be achieved by establishing a scope that does not interfere in the organisation of Member States' pension systems while ensuring consistency with other financial services legislation and taking into account national diversity while ensuring a high level of protection.

2. In principle, the Council can subscribe to the objectives of the Commission proposal. However, the Council differs from the proposal in its view of their relative importance as well as the means to achieve them, and is of the opinion that some of the objectives are immediate, others for the longer term. It has been of paramount importance to the Council that 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. These views have led the Council to modify the Commission proposal on a number of points as outlined in the following section, in many cases drawing directly or indirectly on the amendments of the European Parliament. As a result, the Council believes that its common position is more balanced than the Commission proposal and that it adequately respects the principle of subsidiarity and addresses the concerns of Member States, the European Parliament and the Commission.

### III. MODIFICATIONS

#### A. Title

The Council shares the view of the European Parliament (in its amendment 1) that the title proposed by the Commission is overly restrictive and potentially misleading. The common position therefore refers in its title not only to the activities of institutions for occupational retirement provision, but also to their supervision.

<sup>(1)</sup> OJ C 96 E, 27.3.2001, p. 136.

<sup>(2)</sup> OJ C 155, 29.5.2001, p. 26.

<sup>(3)</sup> OJ C 65 E, 14.3.2002, p. 116.

## B. Scope

The Commission proposal did not adequately cover institutions without legal personality. However, in a number of Member States institutions without legal personality can also provide occupational retirement services. The Council has chosen to take this into account in an addition to Article 2(1) using parts of amendment 33 of the European Parliament, which had also recognised this ambiguity in the Commission proposal.

In Article 2(2)(a), the Council has deleted the reference to Annex II to Council Regulation (EEC) No 1408/71, which it found misleading since Article 2(2) excludes certain institutions from the scope, and in Article 2(2)(b) it has added a reference to the non-life insurance directive 73/239/EEC as a complement to the already existing reference to the life assurance directive 79/267/EEC.

In Article 2(2)(d), the Council feels that the reference to 'German Unterstützungskassen and other institutions operating in a similar way' as proposed by the Commission was at the same time too restrictive and precariously vague and has therefore replaced it with a factual description of what Unterstützungskassen are.

As for the rest of Article 2, the Council is of the opinion that the scope proposed by the Commission is appropriate and respects each Member State's organisation of its pension system.

## C. Institutions operating social security schemes; insurance undertakings; de minimis rules

In Article 3 the Council agrees with the Commission proposal that if institutions operate compulsory social security schemes as well as non-compulsory occupational retirement provision schemes, the directive should apply to the latter schemes, provided however that assets and liabilities are ring-fenced and non-transferable between compulsory and non-compulsory schemes. The Council has not accepted amendment 34 of the European Parliament since it would be imprudent to refer to all activities falling outside the two social security regulations.

In Article 4, the Council has applied the same logic as in Article 3 to life assurance undertakings also operating occupational retirement provision schemes. Provided that the retirement provision business is ring-fenced and organised and managed separately without any possibility of transfer, home Member States have the option to apply relevant provisions of this directive. Contrary to the Commission proposal, the Council is of the opinion that Articles 9 to 16 and 18 to 20 are relevant, i.e. that three articles (on operating conditions; accounts and reports; and cross-border activities) not proposed by the Commission should also apply if Member States use this option.

In so doing, the Council has taken on board parts of amendment 120 of the European Parliament, with the exception that the Council does not share the view of the European Parliament that Article 17 on regulatory own funds is applicable if Member States use the option referred to above (on the other hand, amendments 122 and 13 of the European Parliament have not been included). Finally, the Council has included the requirement in amendment 36 of the European Parliament for the strict separation of businesses to be verified by an authority in the Member State in question. However, the Council has taken a more flexible approach than the European Parliament by recognising — in keeping with the policy of not interfering with Member States' pension systems — that it may in some instances be more natural for supervisory authorities in the insurance field to ensure this separation than for the competent authorities designated under this directive. Recital 15 has been aligned on the new wording of Article 4 using amendment 17 of the European Parliament.

In Article 5 on small schemes and statutory schemes, the Council has adopted the approach of the European Parliament in its amendment 37 to make Article 19 on management and custody applicable even if a Member State has exempted institutions from one or more of the other provisions of the directive due to the small size of their schemes. As a consequence, it has also adapted recital 12 to the spirit of amendment 15 of the European Parliament. However, the Council does not share the view of the European Parliament that the threshold for the possibility of exempting institutions should be set at 50 persons. Instead, the Council prefers 100 persons as proposed by the Commission.

Finally, the Council considers it useful to add two new elements to Article 5. In the case where a Member State has chosen to exempt small institutions from one or more provisions of the directive, such an institution should nevertheless have the possibility to apply the directive on a voluntary basis, e.g. for the purpose of cross-border activities. Secondly, the Council wishes to make it clear that institutions exempted from Articles 9 to 17 because they have a statutory obligation to provide occupational retirement benefits cannot undertake cross-border activities.

#### D. *Definitions*

The definition of institutions for occupational retirement provision in Article 6(a) is central to the directive and the Council believes that the Commission proposal by and large contains a workable definition. However, the Council objects to direct individual membership being part of the definition and thereby falling within the scope of the directive. It also feels that two of the three changes proposed by the European Parliament in its amendment 38 improve the definition. Consequently, the Council makes it clear that the legal form of institutions is irrelevant (to address the possibility of institutions without legal personality as described in section B above). Moreover, the Council agrees with the Parliament that occupational retirement provision need not be the only purpose of the institution, as long as it carries out activities arising therefrom. As a consequence, the Council has also partly included amendment 16 of the European Parliament in recital 14.

As regards the definition of sponsoring undertakings in Article 6(c), the Council shares the view of the European Parliament that the Commission proposal does not adequately address the situation of individuals and self-employed acting as sponsors. It has therefore extended the definition along the lines of amendment 40 of the European Parliament.

In the definition of retirement benefits in Article 6(d), the Council shares the view of the European Parliament that the Commission proposal gives undue prominence to death, disability and cessation of employment over what the Council considers the natural starting point, namely reaching retirement. In the same line of thought as amendment 41 of the European Parliament, it has therefore reversed the order of these elements, making clear that benefits paid out on death, disability or cessation of employment only fall under the definition of retirement benefits if they are supplementary to benefits paid out in connection with reaching retirement.

On the other hand, the Council has not been able to accept the part of amendment 41 stating life-long financial provision as the purpose of retirement benefits, which the Council fears would make the definition unnecessarily restrictive and would interfere with the organisation of national pension systems. Nor has it therefore included amendment 18 of the European Parliament.

In order not to include family members and other possible beneficiaries in the definition of members, the Council has narrowed it down to persons entitled to benefits by virtue of their occupational activities. The Council has also shortened and clarified the definition of biometrical risk and deleted the definitions of risk capital markets and location.

In the definition of home Member State in Article 6(i), the Council has replaced 'is located' with more precise references to where the registered office and main administration are. Furthermore, it considered it useful to link the definition of host Member State in Article 6(j) to the applicable social and labour law. The Council has not been prepared to accept amendment 42 of the European Parliament as it found it unclear exactly from what competent authorities should be independent.

#### E. *Activities and conditions of operation*

In Article 7 on the activities of institutions, the Council has taken up the underlying idea of amendment 46 of the European Parliament concerning the restrictions placed on ring-fenced assets and liabilities. However, the Council is of the opinion that nowhere is the importance of ring-fencing greater than in the situation described in Article 4 whereby an insurance undertaking also operates occupational retirement provision schemes. It has therefore chosen to make specific reference to Article 4.

In Article 9 on operating conditions, the Council feels that the addition proposed by the European Parliament in its amendment 47 is a useful precision and has therefore included it in several places in Article 9 and elsewhere (albeit in a modified form). It also shares the view of the European Parliament that the registration requirement proposed by the Commission is not sufficient in all Member States, and has therefore added 'or authorised', which it believes captures the spirit of amendment 124 of the European Parliament. However, it does not share the view of the European Parliament that definitions of registration and authorisation (amendments 123 and 45 respectively) are called for. It also fails to see the point of adding a condition to make arrangements for the participation of members and beneficiaries in accordance with relevant national provisions, because relevant national provisions that are part of social and labour law will automatically apply to pension institutions operating across borders. It has therefore not taken on board amendments 21 and 49 of the European Parliament.

Whereas the Commission proposal put actuaries on an equal footing with other specialists in the field when it comes to computing and certifying technical provisions, the Council has a preference for technical provisions being computed and certified by actuaries. However, as an alternative the Council has also provided for auditors or other experts in the field to compute and certify the technical provisions, as long as national legislation in this field and actuarial methods recognised by the competent authorities are respected.

The Council considers amendments 121, 125 and 126 of the European Parliament inappropriate as they would require every institution to offer additional benefits to those laid down in the scope of the directive and in the definition of institutions. Instead, the Council believes that the correct way to introduce the possibility of such benefits is through the provision in Article 9(2) allowing Member States to add requirements on a national basis if they desire. In accordance with Article 20(5), institutions operating across borders must then comply with the requirements of the host Member State in so far as they are part of social and labour law. This principle is also expressed in recital 34. The Council is therefore also unable to accept amendment 51 of the European Parliament. Nor does the Council believe that amendment 127 to Article 9(4) is a useful addition, since it is already laid down in Article 9(1) that institutions must be registered or authorised.

On the other hand, the Council shares the view of the European Parliament on the possibility for institutions to delegate management functions to other entities and has therefore included the spirit of amendment 52 in Article 9(3). The Council would however prefer Member States to have complete freedom to permit or require (or not at all) such delegation.

#### F. *Accounts and reports; information requirements*

The Council attaches great importance to the information requirements in Articles 10 to 13 and has therefore endeavoured to make them more explicit:

- in Articles 10 and 11(2) the Council has underlined the necessity for institutions to consider every scheme when drawing up annual accounts and annual reports and, in some instances, to draw up annual accounts and annual reports on a scheme-by-scheme basis;
- the Council has also added requirements for annual accounts and annual reports to be comprehensive and fairly presented, and for their approval to be in accordance with national law; this latter amendment aligns Article 10 on the corresponding provision in Article 9(1) (cf. preceding section);
- in Article 11(1) the Council has made it possible for Member States to request, and for institutions to provide, more information than required in the remainder of the Article;
- the Council believes that Article 12(2) of the Commission proposal — a requirement to provide statements of investment policy principles on request — more naturally forms part of Article 11 on information to be given to members and beneficiaries; it therefore appears in the common position as Article 11(3) and has been extended to apply also to representatives of members and beneficiaries;

- the Council has deleted from Article 11(4) the requirement to provide detailed and substantial information on the target level of benefits with the annual account and annual report, as the Council is of the opinion that it is sufficient for such information to be provided only if requested;
- in Article 11(5) the Council has specified at what point in time beneficiaries are entitled to information on benefits and payment options;
- the Council has deleted from Article 12 the obligation for institutions to submit to their competent authorities statements of investment policy principles, attaching more weight to the availability and regular review of such statements than to their automatic submission; instead, a provision has been added in Article 13(c) to the effect that competent authorities must be able to obtain these statements;
- in Article 13(b) on information to be provided in case of outsourcing, the Council prefers the more general concept of 'relationships' to 'contracts' as proposed by the Commission as not all outsourcing is the subject of a contract; moreover, the Council has broadened the scope of the paragraph to cover also the situation in which an institution outsources functions to another institution;
- finally, in Article 13(c)(ii) the Council believes that actuarial assumptions can be of limited interest unless the underlying detailed assumptions are also included, and Article 13(c)(vi) has been aligned on the corresponding provisions in Articles 9 and 10 (cf. this and preceding sections).

In making the above changes to Articles 10 to 13, the Council has also taken on board amendments 62, 128 and 54 (albeit in a modified form) of the European Parliament. On the other hand, the Council has not been able to accept any part of amendments 56-59, 61, 129 and 64 since, in the opinion of the Council, they would appear to increase the administrative burden on institutions without bringing any obvious benefits for members and beneficiaries. Furthermore, being of the opinion that 'territory' as proposed by the Commission is the term normally used in Community legislation and therefore more appropriate than 'jurisdiction' as put forward by the European Parliament in several of its amendments, the Council has not been able to take on board amendment 53 of the European Parliament.

#### G. Powers and duties of the competent authorities

The Council has identified the same shortcoming in the title of Article 14 as the European Parliament in its amendment 66, namely that whereas the article deals with the powers and duties of competent authorities, the title proposed by the Commission referred only to powers.

In addition to amendment 66, the Council has also taken on board amendments 67 and 69 of the European Parliament, albeit in a modified form in line with previous sections. The corresponding parts of amendments 68, 70 and 71 have also been included in a modified form.

Furthermore, the Council considered 'may' in Article 14(2) of the Commission proposal ambiguous and has therefore replaced it with 'shall have the power to'. It also found it useful to specify that among the measures competent authorities shall have the power to take are administrative and financial measures. At the end of the same paragraph, it also wanted to make clear that the two situations in which assets can be frozen are not an exhaustive list.

In Article 14(3) the Council found the proposal of the Commission inadequate with regard to the transfer of powers to special representatives. Contrary to the proposal, the Council is of the opinion that this provision should apply only to powers laid down by the law of the home Member State, not to powers laid down in the statutes of the institution concerned.

As regards Article 14(5) proposed by the Commission, the Council has transferred it to Article 20(9) as it considers this a more natural place for a provision on powers and duties in the case of cross-border activities. In so doing, the Council has also modified and incorporated parts of amendment 72 of the European Parliament and added a reference to the information requirements set out in Article 20(7).

Finally, the Council is not in favour of requiring competent authorities to draw up annual activity reports with detailed information about investigations carried out, as this could prove too onerous while making ongoing and future investigations more difficult for authorities. Amendment 73 of the European Parliament is therefore not included in the common position.

#### H. *Technical provisions and own funds*

The Council considers the provisions on technical provisions in Articles 15 and 16 of paramount importance for the prudential supervision of institutions. On the whole it can subscribe to the principles set out in the Commission proposal, although it believes that the text of the Commission proposal needs to be complemented and, in some cases, made more precise. For instance, in order to avoid any ambiguity in connection with cross-border activities the Council has specified throughout Articles 15 to 17 that the provisions contained therein concern *home* Member States. In the same way, the Council wanted to make it absolutely clear that the liabilities and commitments referred to in Article 15(1) are in respect of the whole range of schemes operated by an institution, and that the liabilities must correspond to the commitments.

In Article 15(3) the Council has relaxed slightly the requirements linked to the option to extend to three years the period between recalculating the technical provisions. Rather than require institutions to certify their adjustments for intervening years, the Council foresees an obligation to report or certify either to authorities or to members, or both.

Article 15(4) has been aligned on the new wording of Article 9(d) as far as actuaries, auditors and other specialists are concerned. As regards the principles listed in paragraph 4, the common position of the Council is considerably more detailed than the Commission proposal on what to consider when calculating minimum amounts and maximum interest rates. The Council has also added a subparagraph on the biometric tables to be used and added demographic changes to those circumstances justifying possible discontinuities in the calculation of technical provisions. On the other hand, the Council has not considered it necessary to include amendment 74 of the European Parliament concerning the valuation of any transfer of pension rights, which the Council believes the paragraph addresses already. Nor can the Council accept deleting Article 15(5), to which it attaches great importance. Amendment 75 of the European Parliament is therefore rejected as well.

With a view to possible future Commission initiatives in the field of technical provisions on the basis of experience gained across Member States in implementing this directive and in order to avoid distortions caused by different levels of interest rates in different Member States, the Council has also foreseen, in Article 15(6), biennial reports from the Commission to the committee assisting it in these matters. These reports could be more frequent if requested by one or more Member States.

Concerning the funding of technical provisions (Article 16), the Council firmly believes that the general rule should be for institutions to have sufficient assets at all times. To refer in this context to average assets calculated over a one-year period would, it fears, introduce uncertainty or even a contradiction into Article 16(1). It therefore cannot accept amendment 76 of the European Parliament.

On the other hand, the Council has incorporated large parts of amendments 130, 77, 78 and 23 of the European Parliament concerning the recovery plan to be drawn up in case of momentarily insufficient assets. In addition, the Council believes that such plans (Article 16(2)(b)) as well as information regarding the possible termination of schemes (Article 16(2)(c)) should be made available to the members or their representatives.

The Council is of the opinion that a stronger funding requirement for institutions involved in cross-border activities, as proposed by the Commission in Article 16(3), is justified and that the wording proposed by the European Parliament in its amendments 79 and 22 could be perceived as weakening this provision. It has therefore not been able to take on board these amendments. Instead, it felt that the paragraph as put forward by the Commission needed more clarity on the consequences of breaching it. In such a case, the Council foresees intervention by the competent authority of the home Member State, which may then require the institution to ring-fence its assets and liabilities.

As regards Article 17 on regulatory own funds, the Council has taken on board amendment 80 of the European Parliament, which it feels is a useful addition to the Commission proposal. Furthermore, by inserting 'not the sponsoring undertaking' it has endeavoured to elucidate what situations are referred to in paragraph 1. Likewise, in paragraph 2 the Council has clarified that it refers to *minimum* amounts and that the relevant provisions of the life assurance directive in this respect are Articles 18 and 19. In so doing, the Council has partly incorporated amendment 81 of the European Parliament, but fails to see the justification for the rest of the amendment (or for the related amendment 24) since the two directives referred to by the European Parliament have been implemented already in all Member States.

Finally, the Council sees a need for an additional paragraph enabling Member States to lay down additional requirements and more detailed rules concerning own funds as long as they are prudentially justified.

#### I. *Investment rules*

Like the technical provisions referred to above, the investment rules to which institutions must adhere are of utmost importance to the Council, which is why Article 18 has undergone more changes with respect to the Commission proposal than any other article of the common position.

As a starting point, the Council agrees with the Commission proposal that the so-called prudent person rule should be the basic principle for all investment rules. However, bearing in mind the limited experience in several Member States of this rule and misgivings as to whether it is sufficient on its own in every situation, the Council has firstly identified a need to state clearly what is to be understood by the prudent person rule (paragraph 1), secondly given Member States the opportunity to complement it with other rules if necessary (paragraph 5). In this context the following new features merit particular attention:

- paragraph 1(a) of Article 18 stresses the importance of investments being made in the best interest of members and beneficiaries;
- paragraph 1(c) specifies that investments should be mainly on regulated markets;
- paragraph 1(d) addresses investments in derivative instruments;
- paragraph 1(e) addresses risk exposure, including risk concentration arising from investments in assets issued by issuers belonging to the same group;
- paragraph 1(f) puts a ceiling on investment in the sponsoring undertaking as well as in the group to which the sponsoring undertaking belongs;
- Member States are given an option not to apply the latter two paragraphs to investments in government bonds;
- paragraph 2 restricts the possibilities for institutions to act as lenders or guarantors;
- paragraph 5 authorises Member States to lay down more detailed rules, including quantitative rules, as long as they are prudentially justified and subject to subparagraphs (a), (b) and (c) thereof; in this context particular attention is drawn to the investment rules applicable to life assurance undertakings;
- paragraph 7 contains three additional investment rules which host Member States may require institutions to comply with if they are involved in cross-border activities in the host Member State in question, provided however that the host Member State applies at least the same rules to its own institutions.

The Council therefore adopts a different approach than the European Parliament, whose solution to the problem of not all Member States being familiar with the prudent person rule amounted to a transitional period of up to five years. Consequently, the Council has not been able to incorporate all European Parliament amendments when redrafting Article 18. It has been possible to accept, in a modified form, amendments 82, 83, 86, 87 and 89 as well as parts of amendments 25 and 26, whereas amendments 84 and 85 have not been accepted. Amendment 88 has been taken on board only insofar as the Commission report is concerned, albeit in a modified form and in the new Article 21 rather than Article 18. The common position does not however contain the remainder of amendment 88, nor the related amendment 27.

J. *Management and custody*

Whilst supporting Article 19 as proposed by the Commission, the Council recognises that the reference to the UCITS directive put forward by the European Parliament is a useful one, in particular in view of the provisions modified in and added to the UCITS directive by the amending directive adopted by the European Parliament and the Council and signed on 21 January 2002. It has therefore incorporated into paragraph 1 amendment 90, and into recital 32 parts of amendment 28 on the same subject.

Furthermore, recognising that in some Member States it is compulsory to appoint depositaries and custodians, the Council has added a provision to that effect in paragraph 2.

Finally, the Council has also added a new paragraph concerning the freezing of assets held by depositaries and custodians in one Member State at the request of the competent authority of another Member State.

K. *Cross-border activities*

The Council regards as one of the most important features of this directive the provisions on cross-border activities in Article 20. Moreover, it believes that the provisions proposed by the Commission are appropriate but that they need to be complemented in some respects. It is also of the opinion that many of the amendments tabled by the European Parliament are useful additions to the text proposed by the Commission. For instance, with the new definition of sponsoring undertakings in Article 6(c) it no longer appears appropriate or necessary to refer to individual sponsorship in Article 20. These references have therefore been deleted, in line with amendments 91, 92 and 131 of the European Parliament. Also in line with these three amendments, and with the partially accepted amendment 29, the Council has incorporated into paragraph 2 a requirement for institutions to be authorised by their home Member State competent authorities before accepting sponsorship from undertakings in other Member States. On the other hand, the Council has not been able to accept amendments 30 and 31 in this context.

The Council has also taken on board, in a modified form, amendments 94 and 132 of the European Parliament, which it believes are clearer and more precise than the corresponding provisions proposed by the Commission and also in line with the Council's policy of always respecting the social and labour law of Member States, as expressed in recital 8.

Furthermore, the Council has combined, in paragraphs 9 and 10, the spirit of amendment 95 with Article 14(5) as proposed by the Commission (cf. section G above concerning its transfer to Article 20). However, the Council is of the opinion that the withdrawal of authorisation, as proposed by the European Parliament in amendment 95, should only be considered in extreme cases, and that in the majority of cases of breach of requirements other measures are more appropriate, as elaborated in these two paragraphs.

In addition to the above amendments, the Council has modified paragraph 1 to make clear that the right to sponsor institutions in other Member States is without prejudice to national social and labour legislation on the organisation of pension systems, including compulsory membership and the outcome of collective bargaining agreements, partly drawing on amendment 106 of the European Parliament. It has also aligned paragraph 3(a) on the new definition of host Member States, and added references to Articles 18(7) and 20(7) in paragraphs 5, 6, 8 and 9.

#### L. *Concluding provisions*

The Council has added an article not originally in the Commission proposal concerning cooperation between Member States as well as between Member States and the Commission, both of which it considers essential for the implementation of the directive. The objectives of Article 21 are, firstly, to identify best practices through information exchange and experience exchange between Member States and, secondly, to ensure that information relevant to the implementation of the directive flows freely between Member States and the Commission. To that effect, the Council has endorsed the ideas launched in amendments 133 and 97 of the European Parliament to set up a committee of Member States representatives to assist the Commission.

Moreover, the Council shares the concerns expressed by the European Parliament in its amendment 88 that a Commission report on the progress made in adapting national supervisory systems would be useful. The Council, however, would like the Commission also to report on the application of the investment rules and on the use of depositaries.

Concerning the implementation of the directive, several Member States have indicated that a two-year period will be needed, which consequently is the date the Council has opted for in Article 22. Moreover, the Council has decided to grant transitional periods of up to five years for the implementation of certain provisions as set out in paragraphs 3 and 4 of Article 22. However, the Council insists that institutions operating on a cross-border basis must not be the subject of by such transitional periods.

#### IV. CONCLUSION

The Council believes that the directive, if adopted along the lines of the common position, would make a significant contribution to more secure and rewarding future pensions in Europe, while at the same time expanding and helping construct the single European market for financial services. Whilst recognising that this directive will only take a first step in that direction and that further directives will need to be adopted in future, the Council is confident that the balance struck in its common position will enable Member States to implement the directive efficiently and to the benefit of current and future pension scheme members and beneficiaries.

In modifying the Commission proposal as set out above, the Council is to a large extent in agreement with the European Parliament. More than half of the 99 amendments of the European Parliament have been incorporated, either completely, partially or in spirit, into the common position of the Council.

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