Directive 2003/41/EC on the Activities and Supervision of Institutions for Occupational Retirement Provision

European Federation
for Retirement Provision

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Steptoe & Johnson LLP *has more than 400 lawyers in offices in Brussels, London, Washington, DC, Phoenix and Los Angeles. Its EU practice, based in Brussels, provides expertise across the main regulatory fields governed by EU law, such as competition, trade, environment, free movement of goods and services, consumer protection and privacy as well as in a number of sectoral regulatory areas, including financial services (particularly banking, insurance and pensions), food, medical devices, biotechnology and cosmetics.*

Foreword

The IORP Directive took far too long to become European law. The EFRP followed its troubled prehistory. It tracked the slow passage of what has become Directive 2003/41/EC, the entry of which into force on 23 September 2003 was indeed a milestone, but no final destination. The EFRP is acutely aware that the two-year transposition period is but a brief yet critical phase. Even when it should have taken final, national form in each of the 25 States of our European Union, by 23 September 2005, this will not be the end of the journey.

Why a legal commentary before the law has been implemented? This Directive will be the basic constitution for every occupational pension fund in Europe, whether or not they are purely domestic providers. It will also provide a passport to any IORP wanting access to the single market. For all those with a stake in funded occupational pension provision, this Directive has particular significance. The evolution of EU law on supplementary pensions already includes several visits to the courts on questions of legal meaning. We hope that thorough discussion and analysis in advance of the implementation date will reduce the inevitable areas of misunderstanding and conflict to a minimum.

For a law of such significance, not to say such a long period of gestation, the Directive is remarkably brief. This has been achieved by relying upon a principle-based approach: the prudent person rule plus transparency aim to provide both economic efficiency and security. Member State transposition will inevitably mean extra legal and procedural nuts and bolts. Yet we hope the resulting national systems not only remain true to the basic principles but also join up to form one, interlocking system across the European Union. Since IORPs and, ultimately, their users want long-term clarity and stability, transposition must not be subject to further rounds of piecemeal revision on fundamental points. All this means that everyone must try to get it right first time.

The EFRP is very aware that today no Member State implements EU law in splendid isolation. However, cross-border discussions between civil servants - such as those conducted in the context of CEIOPS - as welcome as they are, are not yet fully transparent. The EFRP also follows the national debates as to what this law means for the stakeholders in each Member State. In all these diverse and sometimes diverging dialogues, there is a role for a neutral, global picture of what the Directive means as law. We thought that an argued, legal commentary on the Directive at this stage, freely accessible to everyone and open to public criticism, would be both a prudent and transparent technique for achieving this.

Although the EFRP monitored the evolution of each sentence in the Directive, rather than provide an in-house study it was clear that such a project must be conducted at arm's length. In Steptoe & Johnson we have found a law firm with the appropriate depth and expertise, and in Simon Arnot we have someone who has unique insider knowledge of the conception of the Directive; for several crucial years in the '90s he worked at the Commission, helping to clear its path. We hope thereby to have combined expertise with neutrality.

On behalf of the EFRP I would like to thank Simon Arnot for his hard work and Steptoe & Johnson for its generosity not only in allowing him to undertake the project but also for the back up provided. The resulting commentary is a document which sits well with EFRP thinking and aspirations. I hope it serves as a useful tool for all those with an interest in the future of European occupational pension provision.

Alan PICKERING
Chairman EFRP

Introduction

Historically and politically, the question of a possible directive concerning occupational pensions has been a sensitive one. Occupational pensions have traditionally been the preserve of Member States, both in respect of pensions governed by social security law (first pillar) and in respect of supplementary pensions, whether occupational (generally, second pillar) or individual (generally, third pillar). Under the EC Treaty, decisions as to the structure of pension arrangements are exclusively a matter for the Member States.

The Pension Funds Directive, Directive 2003/41/EC on the activities and supervision of institutions for retirement provision[1] (the "Directive"), therefore represents a particular step in the overall context of pension provision. It was conceived with a limited aim: to provide a framework for the activities of certain institutions which engage in the provision of prefunded occupational pensions. It makes no changes to national pension provision structures; it does not seek to require Member States to introduce specific types of pension arrangements; it does not introduce pan-European pensions, whereby an individual in one Member State may belong to a scheme set up in another Member State; nor does it introduce provisions affecting the tax treatment of contributions, funds or benefits. However, these limitations should not be overstated: the Directive enables, for the first time, pan-European management of pensions. From a policy perspective, the Directive is part of a strategic framework which will put in place one of the final pieces of the Financial Services Action Plan.

Its limited aim is to optimise as far as possible the conditions in which such institutions operate, so as to increase security for pension scheme members and beneficiaries and to increase returns on investment. It seeks to achieve this by creating a framework for prudential supervision of institutions, including a common approach to registration or authorisation of institutions approved for the purpose of occupational pension provision; rules requiring sufficient assets to cover liabilities; rules on investment of those assets; and rules governing how such institutions can operate on a cross border basis.

As a result, the Directive may be of great relevance in certain Member States, where institutions for retirement provision as defined in the Directive are, or may become, common. In other Member States, where the pension structure is such that these institutions are less prevalent, the Directive may be of less importance. However, companies which set up pension schemes and other "sponsors", and may nevertheless benefit from the Directive's provisions relating to cross border activities, as may undertakings which provide services to such institutions.

In the future, Member States might agree on further developments in the area of pensions, including convergence in some matters relating to pre-funded pension provision, or indeed to tax matters relating to such provision. Given the objectives and legal bases of the Directive, neither was contemplated by the Member States during its preparation; it will be some time yet before they might consider them. Both would have required unanimity among the Member States in the Council of Ministers, which would have been unattainable.

The legal bases for the Directive, set out in the preamble, are entirely based in Single Market provisions:

Article 47(2) EC Treaty: this Article provides for the adoption of directives concerning the "taking up and pursuit of activities as self employed persons", for the purpose of making it easier for the taking up and

[1] OJ L 235, 23.09.03, pp10-21

pursuit of such activities and such persons. The use of this Article as part of the legal basis is aimed at ensuring that industry wide schemes which cover self employed people can benefit from the provisions of the Directive.

Article 55 EC Treaty: this states that the provisions of Articles 45 to 48, regarding the right of establishment, apply to matters relating to freedom of provision of services. This enables persons (physical or corporate) to provide services across borders without an establishment in a "host" Member State, subject to certain parameters.

Article 95(1): this Article provides for the use, for the purpose of achieving the objectives in Article 14, of the qualified majority procedure for the adoption of "measures for the approximation of provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market." Article 14 refers, in turn, to the progressive establishment of the internal market. Article 95(1) needs to be read in the context of the rest of Article 95. In particular, Article 95(2) disapplies Article 95(1) in respect of tax provisions, those relating to the free movement of persons and to "the rights and interests of employed persons". Thus, the Directive's legal basis is in the freedoms of establishment and provision of services.

This commentary comments on legal aspects and implications of the Directive. Institutions for occupational retirement provision are referred to as "IORPs". Although the Recitals have been omitted, references appear throughout the text, where relevant.

Where no comment is made on a particular Article or paragraph of the text of the Directive, this is indicated in the relevant place.

Please note that the *numbering* of footnotes appearing in the quoted text of the Directive does not correspond to that of the official version.

Article 1

Subject

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

No remarks.

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.

Member States can be expected to specify which institutions will be considered IORPs under domestic legislation. IORPs are defined as much by what they are not, as what they are. Article 2 lists the exclusions from the scope of the Directive. IORPs are defined in Article 6 (see below). Paragraph 1 was drafted with a view to accommodating various different national systems within the EU. Thus, it takes into account the situation where the institution chooses not to, or is not permitted to, have legal personality, at the same time accommodating those that must.

IORPs include IORPs that have legal personality (i.e. are incorporated as a company or other legal body such as a mutual), and those that have no such personality. The effect of paragraph 1 is that if an IORP has legal personality, the Directive must be applied directly to it. If it has no such personality, a Member State may choose to apply it either to the IORP or to the "authorised entities" - corporations, physical persons - that manage and act on behalf of such an IORP. This could include a board of trustees or other fiduciaries.

We would envisage that the effect of the reference to paragraph 2 is that, where the managing and representative entity is a financial institution identified in paragraph 2, e.g. an insurance undertaking (but note Article 4), an investment firm, credit institution or UCITS manager, the IORP itself would have to be registered or authorised (see Article 9).

Conceivably, there may be doubt as to whether, in a particular Member State, an entity is outside or within the scope of the Directive. This will be a matter for the relevant Member State to decide on in the light of its interpretation of the Directive (subject, ultimately, to review by the European Court of Justice). This will be considered further in relation to Article 7 concerning the permitted activities of an IORP.

It should be noted that nothing in either paragraph 1 or 2 prevents other financial institutions from managing or acting on behalf of IORPs. Article 2 simply identifies the addressees of any national law implementing the Directive. (Note however Article 9(4) on Member State powers regarding delegated management and also Article 14(2) concerning liability of "persons running" an IORP).

In any event, a financial institution must comply with any other requirements of its national law.

Article 2(2)

2. This Directive shall not apply to:

Paragraph 2, in essence, identifies two categories of operation which may not be treated as IORPs under the Directive. The first consists of those which could otherwise satisfy the definition of IORP in Article 6(a). The second, for purposes of clarification, identifies operations which would not satisfy that definition.

Article 2(2)(a)

(a) ***institutions managing social-security schemes which are covered by Regulation (EEC) No 1408/71[2] and Regulation (EEC) No 574/72[3];***

Indent (a) states that, subject to Article 3, the Directive does not apply to institutions managing social security schemes to which Regulations 1408/71 and 574/72 apply. These are schemes to which social security "legislation" applies, as defined by Article 1 of Regulation 1408/71, covering "the branches and schemes of social security covered by Article 4(1) and (2) [of that Regulation] or those special non-contributory benefits covered by Article 4(2a)", or schemes subject to a declaration by a Member State to the effect that the Regulation applies. Article 4(1) lists various branches of social security, including "old age benefits". In sum, first pillar pension schemes are excluded from the Directive[4].

Article 2(2)(b)

(b) institutions which are covered by Directive 73/239/EEC[5], Directive 85/611/EEC[6], Directive 93/22/EEC[7], Directive 2000/12/EC[8] and Directive 2002/83/EC[9];

Indent (b) precludes application of the Directive to financial institutions already benefiting from other specified Single Market Directives. Those Directives set out rules on the prudential management of each type of institution and for mutual recognition of home State supervision of such undertakings, and therefore it is not appropriate for them to be covered (see Recital 12). However, as noted above, nothing in Article 2 prevents these other institutions from managing IORPs. Arguably, but subject to restrictions in any other legislation applicable to these excluded financial institutions, they may have also subsidiaries which are IORPs.

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[2] Regulation (EEC) No 1408/71 of 14 June 1971, on the application of social security schemes to employed persons, to self employed persons and to members of their families moving within the Community, as amended.

[3] Regulation (EEC) No 574/72 of 21 March 1972, fixing the procedure for implementing Regulation (EEC) No. 1408/71, as amended.

[4] Note that the two large French compulsory supplementary occupational schemes, AGIRC and ARRCO, have recently been redesignated first pillar schemes.

[5] 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 (the First Non Life Directive).

[6] 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 (the UCITS Directive).

[7] Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (the Investment Services Directive). Note that this Directive will be replaced by Directive 2004/39/EC on markets in financial instruments, which must be implemented into national law by 30 April 2006.

[8] Directive 2000/12/EC of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (the Banking Directive).

[9] Directive 2002/83/EC of 5 November 2002 concerning life assurance (the Life Directive).

Indent (b) should be read in conjunction with Recitals 9 and 12. Recital 9 acknowledges that Member States retain full responsibility for the role and function of "the various institutions providing occupational retirement benefits". Yet, as Recital 12 recalls, it is also necessary to avoid distortions of competition. This recital, though phrased as a general policy objective, demonstrates that Member States can decide to allocate specific roles to these financial institutions and explains why the Directive does not grant all financial institutions access to occupational pension provision business. It also emphasises that Member States' pension structures, including occupational pensions, are not affected.

The need to balance these two policy objectives - Member State sovereignty as regards design of national pension systems and the need to avoid distortions of competition - explains the option available to each Member State under Article 4 to apply the Directive to the occupational pension business of life insurance undertakings. It also provides a rationale for the last sentence in recital 12, which states that the Commission should introduce analogous mechanisms for the optional application of the Directive to other financial institutions.

However, it could mean that a Member State which did not make use of the Article 4 option in respect of life insurance undertakings located in its own territory would be compelled to accept as IORPs life insurance undertakings located on the territory of a Member State which exercised the Article 4 option.

The institutions precluded are:

(i) institutions covered by the insurance Directives. Where, however, life insurance undertakings have occupational retirement provision business, Member States may choose to apply certain Articles of the Directive to such business (see Article 4).

(ii) Undertakings for collective investment in transferable securities ("UCITS").

(iii) Investment firms covered by the Investment Services Directive.

(iv) Credit institutions.

Article 2(2)(c)

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

Pay as you go schemes are not expected to require the prudential supervision that is necessary for funded schemes. In any event, such schemes are, by definition, not funded schemes; the definition of IORP, in Article 6, includes a requirement for schemes within the scope of the Directive to be funded schemes.

Article 2(2)(d)

(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;

The Directive does not apply to "support funds" (*Unterstützungskassen* in Germany) where scheme members have no legal right to benefits. The Commission's Explanatory Memorandum to the proposal for a Directive[10] distinguished these funds from other IORPs, partly on the basis that, instead of

[10] (COM (2000) 507 final).

prudential supervision, they are subject to statutory insolvency insurance[11]. This is echoed in Recital 16 of the Directive.

Article 2(2)(e)

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

The Directive also excludes book reserve schemes from its scope. Book reserve schemes, present in Germany, Austria and Sweden, permit a company to use the assets which cover its future pension liabilities in such manner as it sees fit, subject to appropriate guarantees. Therefore, in the view of the Commission, the freedoms provided by the Directive do not appear necessary (Explanatory Memorandum, p. 8). Book reserve schemes will therefore be limited geographically. Member States which excluded such schemes in the past are unlikely to accept them as appropriate means of funding in the future.

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 vice versa.

The purpose of this Article is to separate social security schemes run by an IORP from schemes which are operated by that IORP under the terms of the Directive. Segregation of the non social security business of such IORPs should avoid distortion of competition between these IORPs and IORPs which manage exclusively second pillar schemes, i.e. to prevent cross subsidy. In addition, it prevents the mixing of funds and thereby maintains the independence of the social security scheme. This is as much a political objective as a consumer protection measure.

The meaning of the expression “ring-fencing” in this Article and elsewhere in the Directive is vague and needs to be decided in the light of the different circumstances where the requirement appears[12].

In the present context, ring-fencing would appear to refer to separate funds and accounts, so as to prevent intermixing of the funds of the non compulsory scheme with those of the social security scheme, and vice versa. In practical terms, this suggests separate accounting for contributions, expenses, investments, taxation issues and benefits, to protect the social security scheme as much as the non compulsory scheme (reflecting the principle that Member States alone have responsibility for their own social security systems). It does not suggest separate management and organisation (see Article 4

[11] Page 9.

[12] See box on ring-fencing below.

below), though a measure of organisational separation is necessarily implied by the requirement for segregation of assets and liabilities.

The Life Directive provides a possible analogy in this instance (though it should not be seen as a general guide to what ring-fencing means in any given case). Article 18 of that Directive refers, in essence, to the activities of composite life offices, i.e. those which are authorised to carry on both life and non life insurance business. Article 18(3) requires both activities to be "managed separately". Article 19 meets this requirement to protect the interests of life and non life policyholders by ensuring the minimum financial obligations of the two activities are maintained independently. It requires accounts to show the sources for the results of each activity, i.e. breaking down income and expenditure according to origin; and a statement identifying the items making up each solvency margin in accordance with the relevant insurance Directives.

"Ring-fencing" in the context of this Article could be interpreted in a similar way.

Article 4

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

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 2002/83/EC. In that case, all assets and liabilities corresponding to the said business shall be ring-fenced, managed and organised separately from the other activities of the 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 20 to 26, 31 and 36 of Directive 2002/83/EC.

The home Member State shall ensure that either the competent authorities, or the authorities responsible for supervision of insurance undertakings covered by Directive 2002/83/EC, as part of their supervisory work, verify the strict separation of the relevant occupational retirement provision business.

As stated in Article 2(2)(b), institutions that are covered by the Life Directive are not within the scope of the Directive. Nevertheless, Member States may apply certain provisions to such institutions (life insurance undertakings), where they are carrying on the business of occupational retirement provision, e.g. managing the occupational pension scheme of a sponsoring undertaking.

Ring-fencing

"Ring-fencing" is undefined in the Directive. It has no specific meaning in EU law.

It could mean any of a range of techniques for distinguishing, segregating or separating one set of assets, liabilities, activities or operations from another. These include methods for ensuring that particular assets and liabilities can be identified and traced with ease as well as techniques for protecting one set of assets from the economic fate of another, such as providing them with a privileged status in the case of bankruptcy. More comprehensive forms could involve separation of associated economic operations; this may, but need not, mean full separation of staff or management, no exchange of information, or, conceivably, absence of all other economic and financial links[13].

Given this variety, if a law demands ring-fencing, separation or segregation of assets, liabilities, activities or operations, but does not specify the technique to be used, the most appropriate form is that which best achieves its purpose. The Directive contains several references to ring-fencing:

- Article 3 concerns ring-fencing assets and liabilities of IORPs which operate both social security schemes and schemes constituting operations under the Directive[14].
- Article 4 concerns "separate management and organisation" where life insurance undertakings operate schemes falling under the Life Directive as well as those within the IORP Directive.
- Article 7 clarifies that the ring-fencing requirement regarding life insurers in Article 4 only applies to those operations falling within the scope of the IORP Directive.
- Article 8, although it does not use the expression "ring-fencing", requires "legal separation" of IORP and sponsor to ensure members' and beneficiaries' interests are protected in the event of bankruptcy of the sponsor.
- Article 16(3) allows a home State to require ring-fencing of assets and liabilities in cross-border operations to ensure the funding level in Article 16(1) is always met by an IORP's operations in a host State.
- Article 18(7) permits a home State, where host State quantitative rules are applicable to an IORP, to require ring-fencing of the assets.
- Article 21(5) refers to Articles 16(3) and 18(7): the host State may "ask" the home State authority to "decide" on ring-fencing.

The form of ring-fencing selected by a Member State should suit the context and be consistent with the aims of the Directive. Techniques allowing identification of relevant assets and liabilities should enable multi-jurisdictional compliance. The precise form will depend on what is possible under individual Member State law.

However, ring-fencing provisions which would require separation of an IORP's fund into mini-funds would significantly compromise the benefit to scheme members of the IORP's place in the wider EU financial market envisaged by the Directive, particularly, in this context, the advantages of achieving economies of scale, as referred to in Recital 36.

[13] The use of separate corporate legal persons as form of ring-fencing will not, by itself, guarantee the separation either of assets (different persons can each have proprietorial rights over a common set of assets) or of operations (the same staff and organisational infrastructure can operate through different legal persons).

[14] Recital 38 indicates that the Directive should apply individually to ring-fenced schemes. This view is supported by the Commission but only in relation to those cross-border operations where the home State has insisted upon ring-fencing of the relevant assets and liabilities (Commission Communication to the European Parliament, 14.11.2002, SEC(2002)1215 final, at page 11). However, there appears to be no basis in the Directive for this interpretation. The meaning of this Recital remains unclear. Schemes are defined in Article 6(b) as contracts, agreements, trust deeds or rules and it is therefore hard to see how they could, even in principle, bear the rights and obligations envisaged for IORPs under the Directive. The Directive does not elsewhere require or otherwise envisage ring-fencing of schemes. Therefore, Recital 38 should not have any practical effect upon the operation of IORPs. This conclusion is consistent with the objective in Recital 36 of achieving "significant economies of scale" for IORPs.

The provisions that may be applied are Articles 9 to 16 and 18 to 20. These concern:

- Conditions of operation (Article 9): basic regulatory requirements;
- Requirement for IORPs to draw up annual accounts (Article 10);
- Information to be given to members and beneficiaries (Article 11);
- Statement of investment policy principles (Article 12): to be prepared, and to be reviewed;
- Powers of the competent authorities (Article 13): to obtain information, to supervise, to inspect;
- Duties and powers of competent authorities to intervene (Article 14);
- Requirements for technical provisions (Article 15);
- Funding of technical provisions (Article 16);
- Investment powers and restrictions (Article 18);
- Rules on cross border management and custody arrangements (Article 19);
- Rules applying to IORPs intending to offer services to sponsoring undertakings in other Member States.

At the same time, certain provisions of the Life Directive will not apply:

- Requirement to establish insurance technical provisions (Article 20);
- Requirement for insurance premiums to be sufficient (Article 21);
- Rules on assets covering insurance technical provisions Article 22);
- Authorised assets for technical provisions (Article 23);
- Investment diversification rules (Article 24);
- Rules relating to contracts linked to external or internal funds (Article 25) - i.e. unit linked policies;
- Currency matching rules (Article 26);
- No restrictions on assets not covering technical provisions (Article 31);
- Precontractual and other information to be given to the policyholder (Article 36).

The intention is that the Directive should dovetail with the Life Insurance Directive, so that where the Directive applies, the Life Directive does not. The drafting of Article 4 is not entirely satisfactory in this respect. Therefore, it is to be hoped that Member States and, particularly in a cross border context, CEIOPS (see the discussion concerning Article 21, below), will state how in practice the relationship between the Directive and the Life Directive should work, so as to avoid differences in interpretation and ensure a consistent approach.

Where Member States choose to apply the relevant Articles of the Directive to insurance undertakings which carry on occupational retirement provision business, such business must not only be ring-fenced, but also managed and organised separately, and with no possibility of transfer. Although a separate legal entity is not required, a Member State might decide to require this[15].

The Article puts a positive duty on the home State supervisor of IORPs, or the relevant supervisor for life insurance undertakings, to verify the separation of occupational retirement provision business from other business of the undertaking. Member States determine how this is to be achieved.

[15] The requirement for separate management and organisation clearly goes further than the ring-fencing requirement in Article 3. It is interesting to note that the original proposal for the Directive required (Article 4) the relevant assets and liabilities to be "managed in a separate legal entity". Proposed amendments by the Parliament in its 4 July 2001 amendments referred to a choice of a separate legal entity or ring-fencing of assets and liabilities. The text as settled in the Council's common position, (EC) No 62/2002 of November 2002, OJ C 299 E/16, 03.12.2002, and the final, adopted text, require ring-fencing and separate management and organisation.

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.

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.

The premise for the first paragraph is to introduce a *de minimis* threshold, for two reasons. First, small IORPs are unlikely to be interested in cross border activity; secondly, large numbers of small IORPs could be an excessive burden on supervisors (note also Recital 21). Satisfactory governance requirements might be more easily achieved for smaller IORPs than those for larger, more complex IORPs, owing to the very scale of their operations.

Member States may use this paragraph to exclude such IORPs (by definition, schemes to which the Directive would otherwise apply by virtue of Article 6(a) in conjunction with Article 2(1)) from almost the entirety of the Directive or from part only. The exception is Article 19, relating to custody and asset management. As Recital 15 makes clear, an IORP with fewer than 100 members which wishes to appoint a custodian or asset manager in another Member State should not be prevented from doing so.

Alternatively, a Member State may decide that all IORPs within its jurisdiction will be subject to the requirements of the Directive, regardless of size[16].

The Member State option to exclude small IORPs is, however, subject to a right for such IORPs to "opt into" the main IORP regime: an IORP which might otherwise be excluded by this Article under national law, but wishes to make use of the Directive, should have the right to do so. However, to take advantage of cross border activities by virtue of Article 20 an IORP must comply with all the provisions of the Directive, i.e. must, *inter alia*, fulfil the requirements as to conditions of operations, information, investments, technical provision, funding and, if appropriate, solvency.

The Article states that such IORPs "should" have the right to "apply" the Directive. In this context, "should" means "must"[17] "apply" implies benefiting from, but also being subject to, the requirements of the Directive. There is no option for Member States to exclude them regardless of their wishes.

As regards the second paragraph of Article 5, this is aimed at IORPs, the benefits under which are, in essence, guaranteed by a public body. Member States can exclude application of Articles 9 to 17 to such IORPs.

[16] Although for a Member State such Ireland, which has thousands of employers which have set up small pension schemes, this flexibility is, in principle at least, useful. (In the UK such companies may set up "Stakeholder" schemes, though such schemes are not considered to be within the Directive.)

[17] See Communication of the Commission to the European Parliament concerning the common position of the Council of 14 November 2002, SEC /2002/1215 final, at page 5.

Such IORPs must also make occupational retirement provision "under statute" and "pursuant to legislation"[18]. "Statutes" could include rules arrived at by collective agreement between social partners and which acquire the force of law.

The basis for the exemption for such IORPs is the availability of a guarantee by a public body, since, it must be assumed, such a guarantee provides at least equivalent protection for scheme members.

Nevertheless, if an IORP wishes to offer its services across borders by virtue of Article 20, all the provisions of the Directive must apply. If a Member State has chosen not to apply Articles 9 to 17 to an IORP covered by this paragraph, the institution has no discretion to apply them voluntarily and will therefore be excluded from the benefits offered by Article 20. However, a Member State will not be able to disapply Articles 18 (investment rules) and 19 (management and custody). As a result, such IORPs can in all cases avail themselves of the "prudent person" rule, and appoint a manager or custodian from another Member State.

Article 6

Definitions

Article 6(a)

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;

This definition must be read in conjunction with Article 2. Note that some types of entity otherwise satisfying this definition of an institution are nevertheless not IORPs for the purposes of the Directive by virtue of Article 2(2).

There are various elements to this wide definition of IORP, each of which must be considered individually.

[18] The reference to legislation was added to the existing reference to statute by the Council common position.

"Institution": this is capable of wide meaning, and is neutral as to legal form, so could include not-for-profit associations, companies, trust arrangements.

"Irrespective of its legal form": this is intended to reinforce the reference in Article 2(1) to IORPs without legal personality, and complements the wide meaning of the word "institution" above.

"Operating on a funded basis": this is the corollary of the exclusion from the scope of the Directive of "institutions which operate on a pay as you go basis" per Article 2(2)(c). Pay as you go schemes are not pre-funded through the accumulation of a capital fund. A funded basis means, essentially, that future pension liabilities are represented by assets bought by contributions to the relevant scheme; those assets are accumulated and/or replaced over time by other assets.

"Established separately": the IORP must be legally separate from the sponsoring organisation. Separateness is further discussed in Article 8.

"Sponsoring undertaking or trade": sponsoring undertaking is defined in (c). "Trade" should be interpreted accordingly.

"Retirement benefits" are defined in (d) and discussed below.

"Occupational activity": not defined, but the reference, in the definition of "sponsoring undertaking", to a body which acts "as an employer or in a self employed capacity" indicates clearly that the context is one of benefits relating to retirement from employment or self employment.

"On the basis of an agreement or a contract agreed" either between employers and employees, or with self employed persons: the Directive is intended to include not only employer-employee schemes, but those which provide for benefits to self employed persons where the home State permits this. Thus, in principle, industry-wide schemes set up for, for example, electricians or doctors would be covered by the Directive if other elements of the definition of IORP are fulfilled.

Finally, the IORP must carry on activities directly arising from the provision of retirement benefits in the context of such agreement or contract: the Council and Parliament both took the view that the IORP may carry on activities arising from the provision of such benefits; this is a practical outcome, since there could otherwise be discussion about whether, to take an extreme example, the provision of retirement benefits includes the employment of staff. Ancillary activities that are necessary to the provision of retirement benefits would be within this definition. Member States will enjoy some discretion in interpreting the scope of ancillary activities and this, in turn, could lead to "regulatory arbitrage", where a Member State which grants a broader discretion is perceived as more "IORP friendly". The permitted activities of IORPs are considered further in Article 7.

Article 6(b)

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

A "pension scheme" is, generally, a binding arrangement, entered into by an employer which intends to provide retirement benefits for employees or, for example, an association of self employed persons which intends to provide retirement benefits for members of that association. Home Member State rules will dictate the basis on which such schemes can be set up, the rules for their operation and the legal form the institution will have to take.

Article 6(c)

> ***(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;***

"Sponsoring undertaking" has a wide definition. It can be a company or a collection of companies, a trade association or collection of trade associations (e.g. an industry-wide scheme for self employed persons) or another body or bodies. The definition requires that the undertaking pays the contributions; this does not mean the undertaking must pay from its own resources; it could simply pass on contributions collected from scheme members.

However, this wording also implies that, where an undertaking located in a Member State pays contributions into an IORP located in the same Member State in respect of pension scheme members located in that State or any other Member State, for the purpose of this definition the IORP and the sponsoring undertaking are in the same Member State. If that sponsoring undertaking is part of, for example, a large group of companies, with subsidiaries in various Member States, if none of those subsidiaries pays contributions into the IORP, those subsidiaries are not also sponsoring undertakings. In this case, there is no cross border element which requires notification under Article 20 of the Directive.

Article 6(d)

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

The definition of "retirement benefits" has changed during the gestation of the Directive, to make clear the intention that the primary purpose is payments on retirement (6(a) ties these benefits to employment). The Council common position pointed out that the Commission's draft paid too much attention to ancillary benefits such as payments on disability. Thus the definition now makes clear that benefits on retirement are the principal object, with other benefits being ancillary.

In addition, the definition specifies that such benefits are usually in the form of an annuity, though other payments may be made on a temporary basis, including as a lump sum[19]. The intention is that there should be flexibility in the definition so as not to interfere with Member States' prerogative to design their pension systems in the manner they see fit[20].

Equally, the definition of ancillary benefits is intended to be wide enough in scope to encompass the variety of benefits that are included in Member States' definitions of occupational pension benefit arrangements. Benefits are not solely monetary.

[19] See also Recital 13.

[20] Thus enabling jurisdictions such as Belgium, the Netherlands and the UK to preserve the capacity of members to some, or all, of their benefits on retirement as a tax free lump sum.

Importantly, the definition does not seek to circumscribe when retirement is to take place, how Member States must interpret ancillary benefits or, as indicated above, which benefits should be available[21], and how. In the latter case, the Directive's approach is to give what amounts to firm guidance, leaving it open to Member States to decide otherwise. Thus a system which requires benefits to be taken in the form of an annuity of at least a certain minimum amount, permitting benefits in excess of this to be taken in another form, would be within this definition. A system which provides for all the benefits to be taken, on retirement, in the form of a lump sum also falls within this definition.

In this definition "benefits" is not defined by reference to the person who actually receives them. They are defined and paid by reference to retirement of a person; they could be received by another person - e.g. in the event of the prior death of the person to whose occupation they relate by virtue of the rules of the pension arrangement under which the benefits are to be paid.

Article 6(e)

(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;

No remarks.

Article 6(f)

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

The beneficiary need not be the member. As indicated in (d), a pension scheme under home State rules may provide for other persons, such as spouse or dependent children of the scheme member, to receive benefits.

Article 6(g)

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

No remarks.

Article 6(h)

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

"Biometric(al) risks" this relates principally to Articles 15 and 17, and refers to risks that require actuarial risk calculation and to which technical provisions and solvency margin requirements attach. These risks can also be covered by an IORP, which would have to apply similar actuarial techniques.

Article 6(i)

(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;

"Home Member State": the overriding requirement is that the IORP must have its main administration in the relevant State, whether or not it has legal personality. Where the main administration is situated is a matter of fact to be determined in accordance with EU and national law. Factors which might be taken

[21] Though Recital 14, which states that Member States should consider including longevity risk, occupational disability risks and surviving dependents' provision, indicates the debate that took place in the context of what amounts to good pension scheme provision.

into consideration in determining the main administration of the IORP are found in the Advocate General's opinion in case 81/87 of 27 September 1988 (*Daily Mail*), and, more recently, in case C-208/00 (*Überseering v. NCC*), case C-212/97 (*Centros*) and case C-167/01 (*Inspire Art*). These cases relate to corporate persons; they could apply by analogy to IORPs without legal personality.

Article 6(j)

> ***(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.***

"Host Member State". This definition is not based on the location of the sponsoring undertaking but on the relationship between the sponsor and the member[22], i.e. the applicable social and labour law relevant to occupational pension schemes[23]. This gives rise to the possibility that a sponsoring undertaking - an employer - with its registered office in Member State A has employees in Member State B who are members of a company pension scheme, that scheme will be subject to the social and labour law of Member State B. An obvious example would be a branch.

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.***

The first premise is that each Member State must provide that IORPs located in its territory restrict their activities to retirement benefit "operations" and activities arising from such operations. This is open to a variety of interpretations, enabling Member States, in implementing the Directive, to offer, in principle at least, more or less latitude to IORPs. "Operations" would appear to refer to operations on a funded basis in accordance with the definition in Article 6(a).

Unlike the second paragraph, which refers to "activities directly arising" from retirement benefit related operations, the first paragraph contains no such limitation[24]. This asymmetry appears to be intentional (and it should be noted that the ring-fencing option available to life insurance is not available to "mainstream" IORPs. However, if a Member State wishes to restrict IORPs that are not life insurance undertakings to retirement benefit related operations and activities *directly* arising from them, then presumably this must be classified as an extra condition of operation subject to Article 9(3)).

[22] "Host Member State" was previously defined, in the Commission's proposal, as the place where the sponsoring undertaking or the member is located. The Council's common position, accepted in the final draft, linked the host State specifically to the relevant social and labour law applicable to the relationship between sponsoring undertaking and member.

[23] Note, however, that rights in Article 20 paragraphs (1) and (2) are based on the location of the sponsoring undertaking. This need not be the same as the host Member State.

[24] The Commission's proposal referred to activities arising "directly" from such operations.

The second premise concerns the ring-fencing of assets and liabilities by insurance undertakings when managing their occupational retirement provision business.[25]

Where the Directive applies to insurance undertakings by virtue of Article 4[26], the ring-fenced operation must be restricted to retirement benefit related operations and activities directly arising from them. This appears not to add to the requirement in the first paragraph of Article 4 regarding ring-fencing.

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.

This Article is designed to protect members from the bankruptcy of the sponsoring undertaking, by ensuring that the assets of the IORP are not distributed to other creditors of the sponsoring undertaking.

This Article reiterates the provision already in place by virtue of the definition of IORP in Article 6(a), which requires, *inter alia*, that an IORP be "established separately from any sponsoring undertaking or trade". It makes clear that the separation should be "legal". This does not require specifically that the IORP and the sponsoring undertaking should be separate legal entities. Member State laws could provide a legal mechanism for separation that provides the requisite safeguarding but which falls short of a requirement for separate entities.[27] For example, this could be achieved by introducing the concept of a privileged category of asset which would preclude an IORP's assets from being treated in the same way as the assets available to ordinary or other preferred creditors if the sponsor should become insolvent.

Article 9

Conditions of operation

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

The purpose is to provide a minimum level of protection for scheme members and beneficiaries by requiring appropriate registration, governance and provision of information. As with other Articles in the

[25] The commentary to the Council common position referred to the importance of ring-fencing, and the common position refers accordingly to the provisions of Article 4.

[26] Strangely, Article 7, like Article 4, is not one of those listed in Article as being applicable to life insurance undertakings.

[27] Although the term is not used here, such an arrangement may also be viewed as a form of ring-fencing.

Directive, the conditions of operation are those of the home Member State of the IORP, except where the contrary is expressly indicated.

Article 9(1)(a)

(a) the institution is registered in a national register by the competent supervisory authority or authorised; in the case of cross-border activities referred to in Article 20, the register shall also indicate the Member States in which the institution is operating;

This Article is cast in general terms; it requires an IORP to be registered or authorised[28]. The IORP must be registered by the competent authority, in a national register. Whereas registration might be characterised by a requirement simply to register with the authorities, authorisation indicates a requirement to obtain positive approval based on a vetting process undergone with the relevant authority. A registration approach may be, from an administrative point of view, the only practical option where there is a significant number of IORPs in a Member State. (This interpretation would give meaning to Recital 21.) Authorisation also implies the creation of a register, since IORPs with cross border operations must be authorised, and "the register" must indicate the relevant host State(s).

It is clear that, whether an IORP is subject to registration (*a posteriori* supervision) or authorisation (*a priori* vetting followed by *a posteriori* supervision), the obligation to comply with the provisions of the Directive is the same.

No time scale is set for compliance with registration or authorisation requirements. Member States will need to devise procedures and a practical approach so as to ensure that registration and authorisation are completed (acceptance or refusal) within a reasonable period (failing which the Member State would be liable for inadequate implementation of the Directive).

Article 9(1)(b)

(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;

Indent 1(b) allows for flexible interpretation, in order to coincide with Member States' differing requirements. It requires IORPs to be "run" "effectively"; whilst "run" might reasonably be interpreted as "managed", "effectively" will be interpreted in accordance with relevant Member State standards. As regards "appropriate professional qualifications and experience" it would seem clear that both qualifications and experience will be required. This requirement could be applied to the board of the IORP, or to the board and those responsible for the effective management of the IORP. The good repute requirement adds a moral element, since experience and qualifications alone may be insufficient. Arguably, the increase in corporate governance requirements of supervisors indicates that moral rectitude is also insufficient.

Article 9(1)(c)

(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;

[28] Although there is no explicit requirement for a system of authorisation in any Article, and the notification procedure in Article 20 only applies to authorised IORPs, an obligation to devise such a system is implied by Recital 36.

Indent 1(c) refers to the operation ("functioning") of any scheme operated by the IORP. In a cross border context, it is important to be clear where the supervision of the home State authority ends and that of the host State authority begins. Except where there is specific provision for host State prudential rules (Article 18(7) and Article 20(7)), as well as any social and labour law relevant to the field of occupational pensions, home State rules will apply.

Article 9(1)(d)

> ***(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;***

Good financial governance requires that technical provisions are calculated and certified appropriately. The Directive is general in its approach, deferring to Member States' methods (subject to Article 15), but requires the intervention of an actuary or other specialist.

Article 9(1)(e)

> ***(e) Where the sponsoring undertaking guarantees the payment of the retirement benefits, it is committed to regular financing;***

There is no prescription as to how ensuring commitment to regular financing is to be achieved, or the level of the commitment (in terms of amount or frequency), or the consequences of intervening events such as, for example, the insolvency of the undertaking. In addition, a commitment to regular financing will not, of itself, prevent a sponsoring undertaking from taking payment "holidays" Normally, such a commitment by a sponsor will result from the agreement between it and the IORP.

Article 9(1)(f)

> ***(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.***

The Directive is general about the content of the scheme conditions and does not specify when such information needs to be given to the member. Member States will no doubt draw on existing information requirements in specifying their detailed rules in this area.

There is an overlap between this subparagraph and subparagraph (c), which refers to the existence of "rules" on the functioning of a scheme and their being passed to members. Subparagraph (f) is more specific.

Article 9(2)

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

This paragraph provides, in essence, for additional "biometric" benefits, if Member States permit these (the definition of "retirement benefits" in Article 6(d) permits ancillary benefits beyond "payments for life"). "Longevity" cover is capable of a variety of interpretations, for example: an uplift on reaching certain ages; long term care; death.

Essentially, this paragraph is intended to preserve benefits that are currently available in certain Member States, as well as coherence between first and second pillar social benefits provision. Therefore such benefits may be available at the option of the Member States, in a way consistent with their pension legislation and as agreed between employers and employees and other social partners.

Article 9(3)

> ***3. 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.***

Additional operating rules may be applied to an IORP but only by its home State competent authority. These additional rules would have to (a) be in respect of conditions of operation, and (b) be for the purpose of ensuring adequate protection of members' and beneficiaries' interests. Therefore, prudential rules that have no bearing on conditions of operation (such as rules on investments or solvency requirements that are outside the relevant Articles of the Directive) would not be possible.

Article 9(4)

> ***4. 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.***

Paragraph 4 enables a Member State to permit or require an IORP to delegate management to another entity, or to deny it the right to do so. Although this Article bears a relation to the reference in Article 2(1) to "authorised entities responsible" for managing IORPs, the two provisions need to be distinguished. Article 2(1) identifies the entity to which the rights and obligations envisaged under the Directive should be applied. Under that provision, where an IORP has no legal personality, a Member State may apply the Directive to the managing entity instead. Article 9(4) has no such precondition, and the Directive will continue to apply to the IORP regardless of any delegated or outsourced management functions. Note, however, the implication of Article 14(2) as regards the liability of "persons running the institution", where management is outsourced or delegated. Nevertheless, even if managing third parties were also to be liable, this would not remove from the IORP its ultimate responsibility for outsourced operations.

In line with the principle of "home State control" embodied in the Directive, a home State may only restrict or demand "managerial delegation" to, or require it from, a home State IORP (i.e. an IORP with its registered office or main administration there). If it were otherwise, and the host State were able to require or deny delegation to an IORP offering cross border services in its territory, this would run contrary to the principle of mutual recognition[29].

Article 9(5)

> ***5. In the case of cross-border activity as referred to in Article 20, the conditions of operation of the institution shall be subject to a prior authorisation by the competent authorities of the home Member State.***

[29] However, there is nothing precluding delegation of managerial functions to EU entities outside the home State. Member State supervisory bodies would have to cooperate appropriately to ensure effective supervision. This paragraph does not impinge on an IORP's right to delegate investment management to an appropriately authorised manager located in another Member State.

Paragraph 5 echoes the approach to prior authorisation by the home State in other EU level financial services legislation. IORPs wishing to operate across borders must be authorised within Article 9, rather than merely being registered, by the home State competent authority. Authorised IORPs are free to accept sponsorship from undertakings located anywhere in the EU (Article 20(1)). Although paragraph 5 appears to limit the requirement of authorisation to consideration of the conditions of operation, the wider context of the Directive indicates that compliance with all the provisions of the Directive will be required.

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.

In line with the principle of mutual recognition, the wording confirms that only the home State may set rules governing annual accounts and reports for IORPs located in its territory.

Member States must ensure institutions prepare annual reports and accounts. The requirements are general in tone - the report and accounts must "take into account" each pension scheme operated by the IORP; "where applicable" there must be an annual report and accounts for each pension scheme; the report and accounts must give a true and fair view; and national rules will apply regarding consistency, comprehensiveness, presentation and approval.

The reference to "where applicable", in relation to the requirement for IORPs to prepare reports and accounts for each pension scheme, presents considerable difficulty in interpretation, particularly when this Article is read in conjunction with Article 11(2)(a).

- "Where applicable" implies that there are circumstances where accounts and reports for each scheme are, and are not, required. However, there are two problems with this reading. First, Article 10 does not set out what the relevant circumstances might be. Second, this approach seems to be contradicted if read in conjunction with Article 11(2)(a).

- Article 11(2)(a) appears to require that when, for example, a scheme member demands it, an IORP must provide accounts and reports relating to that member's scheme. Therefore, whatever Article 10 might require in this regard, this would mean IORPs would be likely in practice to prepare scheme specific accounts and reports, as well as those for the institution itself, to cater for such requests. However, there are also problems with this approach. It renders "where applicable" in Article 10 meaningless. It also raises the question why such a potentially onerous requirement, the costs of which could affect benefits received by members and beneficiaries, was not addressed specifically in the Article which deals directly with annual reporting and accounts.

In short, if "where applicable" introduces a conditional or optional requirement for individual scheme reporting, it is unclear when such a requirement is applicable and appears to preclude a literal reading of Article 11(2)(a). Alternatively, one could accept a literal reading of Article 11(2)(a) and treat "where applicable" as meaningless.

Other considerations which may have a bearing upon the relationship between the two provisions are as follows:

- Recital 22 refers, in very similar terms to Article 10, to the requirement for accounts and reports for the IORP and for individual schemes "where applicable". Thereafter, it refers to the importance of the accounts and reports of the IORP (taking into account each scheme operated by the IORP) as a source of information to members and beneficiaries and the competent authorities, particularly, for the latter, in the monitoring of financial soundness and solvency of the institution. Except for the requirement to draw up accounts and reports for each scheme, where applicable, nothing in Recital 22 suggests any intention that Article 10 should require separate accounts and reports.

- Recital 23 provides the rationale for information provision for scheme members and beneficiaries. It deals with information concerning "the financial soundness of the institution", contractual rules and benefits, and "the actual financing of accrued pension entitlements". This last phrase provides the basis for the last paragraph of Article 11(4) (annual statement), though whereas this paragraph requires annual statements to be produced, the Recital refers to "requests for information". There appears, in sum, to be no specific recital for Article 11(2)(a).

- Article 6(b), which defines "scheme", gives Member States considerable discretion in identifying separate schemes. In a cross border context this could give rise to difficulty as an IORP seeks to apply Article 11(2)(a) requirements to individual host State schemes as defined under the IORP's home State law. More generally, Article 6(b) provides no meaningful principle for identifying separate schemes. However, in the context of the current discussion, concerning the application of Articles 10 and 11(2)(a), "each scheme" (Article 10) and members' "particular pension scheme" (Article 11(2)(a) should be interpreted to refer to the scheme to which the member belongs, not to the member's individual "account" within the scheme.

- Conceivably, separate, scheme level, accounts and reports would not be "applicable" where an IORP operates a single scheme, and the accounts and reports of the IORP would be identical to those of the scheme. Whilst such an interpretation would be consistent with Article 11(2)(a), there is certainly no indication that Article 10 was intended to cater for this, possibly esoteric, situation.

- The aim of the Directive is to further the internal market for financial services, by providing a framework for prudential supervision and principles for capital investment, leaving with Member States the responsibility for organisation of their pension systems. The Recitals indicate no explicit intention that members and beneficiaries should receive accounts and reports of their particular schemes. Therefore, it might be argued that Articles 10 and 11(2)(a) could be interpreted so as to facilitate the internal market purpose in its context of explicit scheme member protection provisions. Indeed, members may receive information not only about the IORP, but also about scheme rules, benefits, actual financing of accrued pension entitlements, investment policy, and management of risks and costs; an additional, general requirement for scheme reporting may bring limited additional benefit. Therefore, it might be argued that Articles 10 and 11(2)(a) could be interpreted, though there is no basis for this in the text, in a way that enables Member States to provide that accounts and reports in respect of individual schemes are not a general requirement - interpreting Article

11(2)(a) with an implied "where applicable" in the same terms as in Article 10. This would still require definition of the circumstances where accounts and reports are not applicable.

Fundamentally, Articles 10 and 11(2)(a) are inconsistent. It is not possible to apply a natural meaning to the words of Article 11(2)(a) without ignoring "where applicable" in Article 10; we cannot give meaning to "where applicable" in Article 10 without inferring exceptions to Article 11(2)(a) which are not in the text[30]. Member States should therefore seek a common approach; ultimately, clarifying legislation might be necessary.

Reporting and accounting requirements to supervisors will depend on the laws of the Member State where the IORP is located and, possibly, on the nature of the IORP itself. Thus, if the IORP is a company, it could be subject to requirements that are different from those applicable to an IORP which is a mutual association or a trust. National legislation may require certain accounting standards to apply.

Cost could be a factor in a Member State's decision as to how to implement the requirements of consistency, comprehensiveness, fair presentation and due approval. As regards due approval, cost could be reduced if approval were by the board of the IORP, or by the actuary or other professional referred to in Article 9(1)(d). A requirement for audited accounts for individual schemes would give rise to a significant increase in IORPs' costs.

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.

A Member State ("State A") must apply its rules under Article 11 both to IORPS located in its own territory and to those located in another State ("State B") but which provide services in relation to members whose relationship with their sponsor is subject to State A's relevant social and labour law. This cross border applicability is a result of Article 20(7) which subjects an IORP operating in a host State to provide information in accordance with the information requirements of the host State.

Article 11 sets out the minimum level of information to be provided, in any event, on request by the member or beneficiary, or when certain changes occur. Member States can introduce further requirements, though these further requirements are dependent on "the nature of the scheme". This provision gives Member States flexibility in interpreting this paragraph; the Commission's Explanatory Memorandum referred to contractual conditions of the scheme as being a differentiating factor (defined benefit v. defined contribution schemes being an obvious example of this), as well as the status of the person requesting the information (member or beneficiary).

[30] The difficulty is not clarified by reference to the legislators' intentions. The Council took the view that Article 10 (as amended by it) requires IORPs "in some instances" to draw up scheme-by-scheme reports and accounts (see Council's common position, at page 32). However, the Commission's interpretation of the Council's common position was that where an IORP "operates more than one occupational pension scheme, annual accounts and reports will have to be drawn up for each of them" (Commission Communication to the European Parliament of 14 November 2002, at page 7).

IORPs must produce the information required in Articles 11(2) to 11(5), as well as any additional information required by virtue of Article 11(1) (subject, for cross border operations, to Article 20(7)).

This Article is drafted in general terms. A Member State's additional requirements could be significant: there is no express condition that any extra rules must be for the purpose of protecting members' and beneficiaries' interests. IORPs subject to home and host State information rules (including any additional rules) will, therefore, have to ensure multi-jurisdictional compliance. Discussions between Member States in the context of the Article 21 provisions should aim to ensure workable solutions in this respect, so that information requirements do not create a barrier to cross border activities of IORPs.

Note that the requirement to give information regarding scheme rules is in fact set out in Article 9(1)(c) and (f).

To summarise information outputs:

Information to be provided automatically:

- Relevant information regarding changes to the scheme rules.
- Annual statement: situation of the IORP and the level of financing of accrued benefits.
- On retirement: benefits due and payment options.

On request:

- Annual report and accounts.
- Statement of investment policy principles.
- Target level of benefits on retirement.
- Benefits on termination of employment.
- For defined contribution schemes: investment options, investment portfolio, risk exposure and costs.
- Transfer rights.

Article 11(2)

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

No remarks.

Article 11(2)(a)

(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;

Members and beneficiaries are entitled to receive (and the IORP is required therefore to prepare) accounts and reports for the IORP and for their individual scheme. This subparagraph appears to give no latitude for interpretation, and indicates that Article 10 could be construed to require accounts and reports for each scheme operated by an IORP, with "where applicable" in that Article having no meaning. See further, comments on Article 10 above.

Article 11(2)(b)

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

Each Member State will determine what is meant by a "reasonable time" (though it could be longer than is implied by "on request"), and what is to be regarded as relevant, and what is meant by "changes". As regards members' information, in a cross border context, an IORP might be required to comply with different periods depending upon the rules for each host State and the home State. Member States could agree, in CEIOPS (see commentary on Article 21), a co-ordinated approach.

Article 11(3)

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.

No remarks.

Article 11(4)

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 level of benefits in case of cessation of employment;

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

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

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

This provision relates principally to information to be provided to the member on request. Member States will determine the meaning of "detailed and substantial information". Thus, to take the example of the level of benefits on cessation of employment, the Member State will set the assumed date of the projected benefits - for example, at the anniversary date, or at some future dates, and the assumptions, including actuarial, to be applied.

The benefits referred to are those provided under the rules of the relevant pension scheme, which may be located in another Member State. Indent (c) refers to DC schemes, where the benefit is related to the value of the accrued assets. The "actual investment portfolio" will be interpreted by the individual Member States; it could refer to, for example, underlying collective investment schemes in which the IORP has invested, or, conceivably (though this would be undesirable because of cost), to the investments of those schemes. Equally, "information on risk exposure" and "costs related to the investments" will be subject to differing interpretations, but must still be "detailed and substantial"; these provisions could result in widely differing information requirements.

It would be desirable for Member States to agree on a common approach and common format, to ensure cross border operations are not subject to widely differing requirements.

The final subparagraph of Article 11(4) is the requirement for an annual statement to be given to scheme members. It is drafted in very general terms and gives Member States scope for interpretation as to the level of detail. Unlike the information required by the rest of Article 11(4), this information must be given, each year. "Brief" particulars should not be interpreted to require the IORP to provide the annual accounts and report to each scheme member.

Article 11(5)

> ***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.***

No remarks.

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.***

In line with the principle of mutual recognition, the wording confirms that only the home State may set the rules as regards these statements for IORPs located in its territory.

The statement of investment policy principles must be available to members and beneficiaries on request (see Article 11(3))[31].

A home State must ensure that an IORP subject to its supervision prepares such a statement and reviews it every three years or "without delay" in the event of a significant change in policy. The statement must contain the matters referred to in Article 12, though Member States can require more information to be included.

[31] The Commission's original proposal required IORPs to submit statements of investment policy principles to the competent authorities; this requirement was removed by the Council common position (though Article 13(c) gives the competent authorities the power to obtain a copy of the statement "regularly"). It remains to be seen whether Member States might seek to impose a requirement to lodge systematically the statement with the competent authority.

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;

The purpose is to ensure that home State competent authorities have access to sufficient information to enable them to safeguard the interests of members and beneficiaries. The powers are wide:

- to require information from defined persons about all business matters;
- to supervise outsourced functions;
- to require the production of all business documents including, but by no means restricted to, the list in Article 13(c).

Article 13(b)

(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;

The second element, in Article 13(b), concerns "supervising relationships" with other entities, which is wider in scope than an information collecting function. The entity could be an entity which is supervised by the same competent authority (e.g. because it is an IORP) or by a different competent authority (e.g. because it is an insurance undertaking, investment adviser, fund manager or depositary) or by none (e.g. because it provides IT services where these are relevant). The outsourced function must influence the IORP's financial situation or have material supervisory relevance. Recital 25 refers to functions of material importance, listing fund management, IT and accounting as examples. Materiality will be governed by factors such as function and financial importance of the function in the context of the IORP's activities.

Article 13 (c)

(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;

(iv) 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;

No remarks.

Article 13(d)

(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.

Subparagraph (d) specifically permits inspections of the IORP's premises (which would include branches in host States), and those of the entity to which functions are outsourced. This subparagraph is drafted in general terms, but should be read, in relation to outsourced functions, in the context of the functions referred to in subparagraph (b).

This Article does not address cross border outsourcing of functions. The requirements of Article 21 regarding cooperation between the Member States would provide a suitable basis.

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.

The reference in paragraph 1 to "their territories", underlines the principles of home State control and mutual recognition. This is in line with Recital 36: "Proper enforcement of these prudential standards should be supervised by the competent authorities of the home State, unless specified otherwise." In a cross border context, this supervisory principle is supplemented by Article 20(9)-(10).

Paragraph 1 requires competent authorities to ensure appropriate management and governance procedures are in place. Member States will no doubt develop appropriate rules that reflect their style of supervision. Although not expressly referring to them, these will include all applicable provisions of the Directive. These range from the investment rules in Article 18 to the various requirements for ring-fencing in Articles 3, 4 and 7.

The Article provides a scaled approach to Member States' powers of intervention, from administrative powers (such as specific temporary measures relating to reporting or closer supervision) or fines, to more severe measures such as restriction on disposal of assets; imposition of appointed management; and restriction or prohibition of operations (i.e. effective withdrawal of authorisation or registration).

Recital 25 refers to the need for adequate powers of intervention regarding IORPs or "the persons who effectively run them".

Article 14(2)

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.

The reference to persons who effectively run IORPs is broad in scope. It could therefore encompass the directors (or equivalent, such as trustees) of the IORP, or those in a senior management role (e.g. management committee). Since it also includes both natural and corporate persons, it would also include cases of delegated or outsourced management such as is envisaged under Article 2(1) or Article 9(4). The competent authority could proceed against the persons running an IORP to prevent or remedy any infringement by that IORP.

It is clear from the nature of the powers and duties imposed on the competent authorities that this Article does not contemplate sanctions for minor administrative oversights; the faults of the IORP concerned must relate to acts or omissions prejudicial to the interests of scheme members and beneficiaries.

Competent authorities will have a wide range of measures ("any measures") against IORPs and "the persons running" them, where the interests of members and beneficiaries are threatened. These measures will be in addition to those already applicable under the general law of the Member State in question, for example criminal law. Relevant points include:

- Administrative and financial measures may be taken "where appropriate".
- The measures could include a fine, imposed on the IORP or on any corporate or natural persons running it.

Recital 25 refers specifically to outsourced functions such as investment management, information technology and accounting functions. Unlike Article 13, Article 14 does not refer specifically to powers of the competent authorities concerning outsourced functions; "the persons running the institution" refers to the management of the IORP rather than the performance of the function. Nevertheless, the obligation of the IORP to have adequate controls over its activities will necessarily extend to those functions it outsources.

A competent authority will also be able to prevent disposal of assets in particular where there are insufficient technical provisions or assets covering such provisions, there is a lack of regulatory own funds. "In particular" indicates that the power to prevent disposal is limited to situations relating to the funding of the IORP; and therefore that such a sanction could not be applied to other matters covered by the first paragraph of (2). This is an extreme sanction which should only be used in relation to conduct concerning funding.

Article 14(3)

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.

This enables home State authorities to appoint a "special representative" (not fully defined, though likely to be an appropriately qualified person such as an accountant or actuary) to run the IORP[32].

The Directive does not indicate the circumstances in which a special representative might be appointed. Whereas paragraph 4 relates to a restriction or prohibition of activities, paragraph 3 refers to continuation of the management of the IORP by another person. This is a radical measure, which would indicate a lack of confidence in the IORP's management. Again, it should be used only in cases which cannot be dealt with by measures in (2).

Article 14(4)

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 protect adequately the interests of members and beneficiaries;

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

Paragraph 4 gives the home State authorities the power to prohibit or restrict the activities of an IORP, whereas exercise of the powers in Article 14(2) would not prevent an IORP from continuing to operate. The range of breaches is wide, and not restricted to the list in paragraph 4, though this list illustrates the nature and extent of the breach required for the powers to be invoked. Because of the seriousness of the sanction, including withdrawal of authorisation, this paragraph should be interpreted restrictively.

Since Member States must ensure compliance by IORPs with the requirements of Article 9, it is logical that they also have power to prohibit or restrict activities if conditions of operation are not met.

Article 14(4)(c)

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

Indent (c) is very wide in its scope, since it refers to "obligations under the rules" which could cover a wide range of regulatory, supervisory and prudential obligations, but requires serious failure on the part of the IORP (which, because of the sanctions available under Article 14(2), indicates that such failure must amount to a particularly grave infringement; it might also imply a pattern of misconduct). It could also encompass the failures referred to in Article 14(2). Indents (b) and (c) use, effectively, the same wording as is used in Article 39 of the Life Directive, in the context of withdrawal of authorisation as a life assurance undertaking; Article 14(4) is likely to be interpreted in a similar way.

Article 14(4)(d)

(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.

[32] The Commission's proposal provided for the special representative to exercise the powers in accordance with the bylaws of the IORP; the Council common position amended this to restrict the scope of those powers to those powers exercised by persons running the IORP by virtue of home State laws. (Council common position, Statement of reasons, heading G - Powers and duties of the competent authorities.)

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

The restriction that could be imposed could be the capacity to offer services in the relevant host State. Article 20 covers powers of the host State to intervene in cases where the IORP fails to fulfil its obligations in that State.

The requirement for reasons to be notified appears to relate to paragraph 4, not to paragraphs 2 and 3, since it refers to prohibition of the activities of an IORP, the subject matter of paragraph 4. Evidently, it is not necessary for reasons to be notified if activities are simply restricted. However, since the distinction between restriction and prohibition is by no means absolute, competent authorities should regard it as good practice to provide reasons whenever they rely on paragraph 4. Good practice also indicates that notification an reasoned explanation for action under Articles 14(2) and 14(3) would be necessary. Furthermore, for the right under paragraph 5 to challenge decisions to have any substance, the reasons for having taken those decisions must be made available.

In a cross-border context, where infringements of host State social and labour may be involved, it is unlikely that a home State supervisor would take any action without having had previous discussions with the IORP, except in the most extreme situation. In any event, Article 20 requires the host State authorities to notify the home State authorities in the event that the IORP fails to fulfil requirements as to social and labour law; the home State authorities are required to coordinate with the host State authorities to ensure the breach is remedied (Article 20(9)).

Article 14(5)

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.

The right to judicial review of acts of the competent authorities under paragraph 5 is wider than the scope of the intervention powers in Article 14, and encompasses any decisions taken by the authorities under any provision of the Directive[33].

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.

As with other Articles in the Directive, the reference to the "home Member State", i.e. the State in which the relevant IORP's registered office or main administration is located, makes clear that the home State is solely responsible for ensuring that IORPs that they supervise establish liabilities that reflect all their pension commitments (wherever the scheme to which those liabilities relate).

[33] Paragraph 5 is a standard provision. See for example Article 33 of the Banking Directive or Article 67 of the Life Directive.

The Common Regulatory Framework: mutual recognition and further national rules

Mutual recognition and home State control

The Directive is based on the principle of mutual recognition of home State prudential rules, i.e. each Member State accepts as equivalent to its own the national implementing rules of other Member States[34]. This means that, generally, an IORP engaging in cross-border activities is subject only to the prudential laws and supervision of the home State, and enforcement by it ("home State control"). The general principle is expressed in Recital 36, and concrete instances of the idea are found throughout the Directive:

- in all provisions which refer to a home Member State power or responsibility, i.e. the Member State in which an IORP is located (Article 6(i)), or which refer to a Member State's power or responsibility in relation to IORPs located in its territory [35];
- and, conversely, in the fact that the limited exceptions to this principle are clearly identified.

Further rules, and exceptions to mutual recognition

Mutual recognition assumes co-ordination of framework rules. In limited circumstances, a Member State may introduce extra rules, for IORPs located in its territory. The relevant Articles are listed below. In two cases these further provisions can be applied to non-domestic IORPs, i.e. those operating, but not located, in the Member State which introduced them (indicated in italics).

9(3): The basic conditions of operation can be made subject to "other requirements".

11: The information rules can be extended – *a Member State can apply these, whether or not extended, to an IORP located outside its territory but which is active in that State* (effect of Article 20(7)).

15(5): A home State can introduce additional, more detailed rules regarding technical provisions.

17(3): A home Member State may require IORPs located in its territory to hold regulatory own funds and/or lay down more detailed rules.

18(5): A home Member State may lay down more detailed, including quantitative, investment rules.

18(6): A home Member State may also impose more stringent investment rules in individual cases.

18(7): Provided the same or stricter quantitative investment rules are imposed upon IORPs located in a home Member State, *that State, as a host State, may also impose any of the rules listed in Article 18(7) on IORPs located outside its territory but which provide services into it.*

In addition, the Directive refers to Member States' national social and labour laws. These fall outside the scope of the Directive (and are not co-ordinated by EU legislation). Any IORP operating in a host State must also comply with that State's rules in this field (Article 20(6), and see also Recital 37).

Exceptions to the home State control principle

The principle of home State supervision applies to the generality of prudential rules in cross-border operations. The Directive provides in certain cases for host State rules to apply. The manner in which those exceptional host State rules are supervised differs according to the type of rule and whether one is dealing with the monitoring or enforcement aspects of supervision. The table below shows the situations where host State rules apply, and the responsibility for supervision and enforcement.

category of host State rule	*monitoring authority*	*enforcing authority*	*comment*
information rules	host	home	Article 20(7), (9) together with (10)
investment rules	home	home	Article 20
social and labour rules	*host*	*home*	*Article 20(10), note host State's residual right to enforce*

[34] See discussion in the Commission's White Paper "Completing the Single Market", COM (85) 310, at paragraphs 95-107.

[35] These forms should be seen as a matter of stylistic variation. There is no distinction in principle.

Recital 26 refers to the need for prudent calculation of technical provisions to ensure future obligations can be met; these provisions are to be calculated according to actuarial methods and certified; and maximum interest rates should be in accordance with prudent national rules.

Article 15(2)

> ***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.***

This requirement is at the level of all the schemes operated by the IORP, not at an individual scheme level. The IORP might therefore have flexibility in relation to each scheme (subject to funding requirements in Article 16).

Article 15(3)

> ***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.***

Since the calculation of technical provisions is an onerous operation, and since liabilities do not generally change dramatically except in exceptional circumstances (e.g. drastic increase or decrease in members; turbulence in the financial markets), a three yearly calculation should generally be acceptable. Member States may, in such a situation, wish to make provision for a requirement to calculate technical provisions in the intervening years, if circumstances demand it.

Article 15(4)

> ***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:***

Paragraph 4 sets out the actuarial principles to be followed in calculating the technical provisions by a recognised specialist in accordance with nationally accepted actuarial principles.

The following criteria reinforce the requirement for calculation of technical provisions subject to home State rules, on a prudent basis and encompassing actuarially established present and future commitments of the IORP. The provisions of the present Directive are in stark contrast to those in Article 20 of the Life Directive (covering technical provisions); this reflects the different nature of pension commitments as opposed to those of life assurance. It also reflects the varied nature of Member States' current approach to prudential requirements.

Article 15(4)(a)

> ***(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;

- The minimum technical provisions must be calculated prudently;
- The calculation must take account of commitments for benefits and contributions;
- It must take account of pensions/benefits already in payment and accrued pension rights;
- Assumptions for valuing liabilities must be prudent and include a margin for adverse economic and actuarial performance;

Article 15(4)(b)

(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;

Maximum interest rates must be chosen prudently, taking into account asset yields, future investment returns and appropriate bond yields;

Article 15(4)(c)

(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;

Biometric tables must be established prudently, reflecting the characteristics of the members and schemes and the evolution of risks. Clearly, scheme specific or IORP specific tables will be acceptable, provided they conform to the criteria in (c);

Article 15(4)(d)

(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.

The calculation method and basis must be constant; changes must be justifiable on legal, demographic or economic criteria.

Article 15(5)

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.

Paragraph 5 will affect only IORPs located in the Member State which sets such additional and more detailed requirements. Therefore, requirements of a host State that exceed those of the IORP's home State supervisor's rules will not be binding on the IORP in respect of its operations in that host State.

Any requirement of home State rules that exceed the provisions of Article 15 must be for the purpose of protecting members' and beneficiaries' interests.

Article 15(6)

> ***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 shall, every two years or at the request of a Member State, issue a report on the situation concerning the development in cross-border activities.***
>
> ***The Commission shall propose any necessary measures to prevent possible distortions caused by different levels of interest rates and to protect the interest of beneficiaries and members of any scheme.***

Paragraph 6 was inserted by the Council in its common position to encourage future developments regarding technical provisions, specifically, greater harmonisation where it "may be justified". The Council envisaged greater harmonisation, to avoid possible distortions.

Paragraph 6 requires action by the Commission either if it perceives distortions as a result of different interest rates or in order to protect the interests of members and beneficiaries. Unless a Council Decision is proposed enabling action by the Commission alone, subject, probably, to advice from CEIOPS, to make any amendments to the rules on technical provisions, a further directive will be required to implement any Commission proposals in connection with paragraph 6. This indicates that developments in this area will be slow at best.

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.***

The initial premise is that home Member States should ensure that IORPs always have "sufficient and appropriate" assets in place to cover technical provisions. This sets the standard for references to full-funding in the following paragraphs.

The standard wording referring to the role of the home Member State makes clear that an IORP's operations in a host Member State will not subject the IORP to the host State's requirements as to funding of technical provisions. However, although home State rules only apply, regardless of whether an IORP is active domestically or on a cross border basis, paragraph 3 of this Article ensures that home State rules are applied with particular stringency in instances of cross border activity.

Article 16(2)

> ***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 home Member State may permit an IORP to have insufficient assets. The precondition for this permission is that the IORP adopt a "concrete and realisable" plan to ensure that "the requirements of paragraph 1" are met again, i.e. it has "sufficient and appropriate assets".

Paragraph 2 does not define "a limited period of time". Member States, if they decide to implement the provisions of that paragraph, will determine what that period will be. In principle, this period could, say, exceed one year; it should be sufficiently long to enable a realistic recovery plan to be effective.

Article 16(2)(a)-(c)

(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 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.

Indents (a) and (b) refer to covering technical provisions fully or to full funding. There is no alternative definition of these requirements. The first paragraph of paragraph 2 requires restoration of sufficient and appropriate assets referred to in paragraph 1. Therefore, it is clear that an IORP will be (once again) fully funded for the purposes of paragraph 2 when it holds sufficient and appropriate assets. Consistency requires the reference to full funding in paragraph 3 to be understood in the same way.

Further, (a) does not require that a recovery plan must be "approved" by the competent authorities.

With regard to indent (b), the assets required to satisfy the sufficiency and appropriateness test must be invested in accordance with Article 18; the prudent person principle referred to in that Article indicates the intention in the use of the terms "sufficient" and "appropriate". The requirement for full funding should not be an opportunity for Member States to impose rules which exceed the benchmark in paragraph 1. Furthermore, account is to be taken of the IORP's specific situation.

Indent (c) refers to requirements in the event of termination of the scheme during the period of recovery; whilst it requires notification to the competent authorities and information to be given to the scheme members (but, interestingly, not beneficiaries), it makes no reference to any requirements as to the shortfall in assets covering technical provisions, which would be a matter for home State law.

Further, paragraph 2 does not require that a recovery plan must always be approved by the competent authorities. However, it must always be made available to members (again, not beneficiaries).

Neither does paragraph 2 define "a limited period of time". Member States, if they decide to implement the provisions of that paragraph, will determine what that period will be. In principle, this period could, say, exceed one year; it should be sufficiently long to enable a realistic recovery plan to be effective.

Article 16(3)

> ***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.***

Paragraph 3 concerns the case where an IORP carries out cross border activities. In this case its technical provisions must at all times be "fully funded", i.e. be covered by sufficient and appropriate assets. This means that paragraph 2 is not available: if such an IORP is not fully funded, the home State authorities are required to intervene in accordance with Article 14, which sets out the circumstances and procedures for intervention by the competent authorities. Paragraph 3 permits home Member States to require "ring-fencing of the assets and liabilities".

The significance of the final sentence of paragraph 3 in relation to the phrase "in respect of the total range of pension schemes operated" is uncertain. Paragraph 3 could require all of an IORP's pension schemes to be fully funded in the sense of paragraph 1 - regardless of whether the schemes relate to the home or host State. If an IORP's technical provisions are fully funded for all its pension schemes (i.e. home and host State) in accordance with Article 16, there should be no reason for ring-fencing. The ring-fencing requirement in paragraph 3 therefore implies that whilst an IORP cannot be underfunded in respect of its cross-border business, it may be in respect of its home State business.

Article 21(5) provides for host State authorities to "ask" those of the home State to "decide on" such ring-fencing. This provision could be interpreted to refer to specific cases, where the situation of an IORP in a host State requires particular intervention by agreement between the host and home States. This appears to accord with the purpose of the Council, which referred in its common position to the intention to ensure that, where the requirement for full funding under paragraph 3 is not met, the home Member State can require the IORP to "ring-fence" its assets and liabilities[36]. Thus, this paragraph should not be used as a means of requiring ring-fencing of technical provisions except in relation to specific situations arising out of potential difficulties in full funding requirements.

In addition, if, a home Member State determines that "assets and liabilities" should be ring-fenced, and ring-fencing in the context of this paragraph were to be interpreted as requiring completely separate funds, it could remove the effectiveness of cross border operations; a requirement for completely separate funds would run counter to the idea of achieving the significant economies of scale identified in Recital 36.

[36] Council common position, Statement of Reasons, heading H - Technical provisions and own funds.

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.

As with other Articles in the Directive, the reference to the "home Member State", i.e. the State in which the relevant IORP's registered office or main administration is located, signals that only home State rules apply to IORPs, regardless of whether they are purely domestic operators or engage in cross-border activity.

The purpose of this provision is to ensure an appropriate solvency margin where biometric risks are underwritten by the IORP itself, or where guarantees of investment performance or of certain levels of benefits are given by the IORP, rather than by the sponsoring undertaking. The IORP must itself establish the necessary solvency margin[37].

These own funds are in addition to technical provisions. The amount of such own funds is to be determined "qualitatively", in that it should reflect the circumstances of all the schemes operated by the IORP. There is no requirement for own funds to be ring-fenced between the individual schemes to which they relate.

Note that under Article 22(3), a home State may postpone the application of paragraph 1 to IORPs located in its territory until 23 September 2010. However, any IORP making use of this period of grace may hot operate pension schemes on a cross border basis.

Article 17(2)

2. For the purposes of calculating the minimum amount of the additional assets, the rules laid down in Articles 27 and 28 of Directive 2002/83/EC shall apply.

Paragraph 2 imports directly Articles 27 (available solvency margin, i.e. assets less liabilities, less certain items) and 28 (required minimum solvency margin) of the Life Directive for the purpose of calculating, for each IORP, the minimum level of regulatory own funds required. The provisions of those Articles will not be considered further here.

Again, a home State may delay applying paragraph 2 to IORPs located in its territory until 23 September 2010. However, any IORP making use of this period of grace may not operate pension schemes on a cross border basis.

Article 17(3)

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.

[37] Clearly, the capacity of an IORP to have regulatory own funds may be determined by its legal form.

Member States may require IORPs to hold own funds or to hold own funds in excess of the minimum amount as required in paragraph 2. This may be required despite the fact that the IORP underwrites no biometric risks, gives no investment performance guarantees or guarantees no levels of benefit. There is an inherent inconsistency in this provision, given the explicit statement that a Member State cannot impose requirements that are in excess of what is justifiable "prudentially".

The concept of what is justifiable prudentially can be widely interpreted; however a requirement to hold own funds cannot be justified under the Directive where the IORP undertakes no relevant risks. Such a requirement will serve no prudential purpose where there are already adequate prudential measures by virtue of the provisions of the Directive, and there are no biometric risks requiring coverage, and technical provisions are adequate.

Additional requirements under this paragraph might be a factor which would be taken into account in determining whether to establish an IORP in a particular Member State rather than another.

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:

The achievement of the Commission in obtaining agreement to the use of the "prudent person" principle in the investment rules was significant. This is, in essence, a "qualitative" approach, which means that the characteristics of the particular fund must be taken into account in determining the investments. In principle, and in marked contrast to the provisions of the Life Directive, this should mean that quantitative restrictions - providing limits in the types, amounts and location of investments - should be fewer. However, whilst the prudent person rule applies in the first instance, limited derogation is possible.

Although the general principle of Article 18 is that an IORP should be subject to its home State rules only, a restricted number of host Member States' investment rules may also have to be applied to schemes operated by an IORP active on a cross border basis in those host States. This may even entail a requirement to ring-fence the relevant assets (see paragraph 7).

Paragraph 1 outlines the basic requirements: investment in the best, or sole, interests of members and beneficiaries; requirement for security, quality, liquidity and profitability of the portfolio to be ensured; investment "predominantly" in regulated markets; use of derivatives only in defined circumstances and subject to prudent valuation; diversification and concentration rules, and rules against excessive investment in the sponsoring undertaking or its group (subject to a derogation regarding government bonds). It puts into effect Recital 33, which states the intention of permitting investment in illiquid assets, foreign assets and other currencies without restriction except on prudential grounds.

Article 18(1)(a)

(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;

Subparagraph (a) requires the interests of the members and beneficiaries to be paramount, and therefore the interests of other persons - sponsors and other third parties - are subordinate; and the sole interest of members and beneficiaries are to be taken into account where a conflict of interests may occur. However, such conflict has the potential to occur whenever a third party is involved: the interests of a third party investment manager are likely not to coincide with those of the scheme members, simply because that manager's interest is likely to be in making a profit from his or her business. Therefore the interests of the members and beneficiaries are paramount. Nevertheless, a remuneration structure that rewards a fund manager on the basis of the performance of the fund (taking into account security, quality, liquidity and profitability) in the context of the fund's profile should satisfy this criterion.

Contracts between IORPs and external investment managers, or investment guidelines where funds are managed internally, will have to make clear the duties and requirements of each party, in conformity with national regulatory provisions implementing this Article.

Article 18(1)(b)

(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;

The IORP must, in the context of the prudent person rule, invest so as to achieve the overarching objectives of ensuring security, quality, liquidity and profitability for the entire portfolio. Thus the portfolio as a whole, not each asset or category of assets, must be judged according to these criteria. These overarching rules apply to all assets of an IORP, with further requirements for assets representing technical provisions. However, it is difficult to see how these criteria can be "ensured"; the aim of these rules is to provide a framework where the interests of members and beneficiaries are *optimised*. Security can be guaranteed, but generally at the expense of, for example, quality and profitability.

The second sentence of (b) encapsulates part of the rationale for the prudent person rule. It gives effect to Recital 31, which states that IORPs "should be able to opt for an asset allocation that suits the precise nature and duration of their liabilities". That recital also refers to the need for efficient supervision; for IORPs to have flexibility in deciding the optimal investment policy and requiring them to act prudently; and to have an investment policy "geared to the membership structure" of the IORP. Article 18 sets the parameters of supervision and prudence within which asset allocation may take place, subject to discretion by Member States resulting from their different supervisory methods and practices (Recital 32).

This sentence refers specifically to assets held to cover technical provisions, as opposed to the total assets of the fund. This means that this does not apply to the "free" assets over and above technical provisions. This requirement does not apply to assets which do not form part of the technical provisions. Nevertheless, all other provisions of this Article, except paragraph 5 (a) and (b), apply to all assets of the IORP, rather than just those representing technical provisions.

Article 18(1)(c)

(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;

An IORP will be able to determine the extent to which it will invest in assets not traded on regulated markets, subject to the overall requirement of prudence. Member States have a limited capacity to set down quantitative rules in this context (paragraph 5 below). "Regulated market" is not defined in the Directive; it is, however, defined in the Investment Services Directive[38], and in the recently adopted Financial Markets Instruments Directive[39], by reference to a market which is regulated by the rules of a Member State which is the home Member State for that market. In short, a regulated market is a market established in a Member State. It is possible that a Member State will interpret "regulated market" in a way that widens the meaning of regulated market beyond this interpretation. Nevertheless, "predominantly" clearly gives the IORP significant latitude in its choice of investment; the quantitative limits referred to in paragraph 7(a) below indicate that the discretion to invest in assets in non regulated markets is wide.

Article 18(1)(d)

(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;

Use of derivatives as assets is only permitted for the purpose of reducing investment risk or facilitating efficient portfolio management. The IORP determines the extent to which it should use such instruments, subject to the requirements of prudence in valuation and avoiding excessive exposure. (Again, Member States may introduce quantitative limits under paragraph 5, provided that they are prudentially justified).

Article 18(1)(e)

(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;

The diversification and non-concentration requirements are expressed in general terms, consistent with the prudent person approach. It is for the IORP to determine what amounts to excessive reliance in the context of this subparagraph. (The overriding requirement for prudence remains, though Member States may introduce prudentially justified quantitative limits under paragraph 5).

Article 18(1)(e)

(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.

[38] See footnote on Article 2(2)(a) above.

[39] See footnote on Article 2(2)(a) above.

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.

The quantitative concentration limits in subparagraph (f) are tempered by the second sentence, which can be interpreted to require that, notwithstanding the concentration limits in the first sentence, the overarching requirement of prudence and the need for appropriate diversification in all the circumstances could restrict aggregate self investment limits further, especially for multi-employer funds. This echoes the second sentence of subparagraph (e).

Note that under Article 22(4) a home State may postpone the application of paragraph 1(f) to IORPs located in its territory until 23 September 2010. However, any IORP making use of this period of grace may not operate pension schemes on a cross border basis.

Article 18(1) (continued)

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

There is no definition of "government bonds" in the Directive. Member States will not be able to restrict this provision to their own State bonds, though restriction to OECD government bonds could be acceptable for the purpose of this provision.

An IORP intending to take advantage of derogation from the requirements of (e) and (f) must nevertheless do so in accordance with its assessment of the scheme's profile and the need to invest in the best interests of members and beneficiaries.

Article 18(2)

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.

Whilst an IORP may not under any circumstances act as guarantor for a third party (including, it would appear, a member of the same group) it may borrow for liquidity purposes. The IORP must determine whether borrowing for liquidity is consistent with the overarching requirement, set out in paragraph 1 (b), to invest so as to ensure liquidity as well as security, quality and profitability, bearing in mind the interests of the members and beneficiaries.

Article 18(3)

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

An IORP must be free to invest in such assets as it thinks appropriate, given the profile of the scheme and its members and beneficiaries. Any requirement to invest in particular kinds of asset is inconsistent with the prudent person principle.

Article 18(4)

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.

Prior approval and notification requirements are means which might enable Member States to regulate investment decisions of an IORP or its investment manager. Such requirements are forbidden by this Article; given the prudent person approach, they are also inappropriate. Nevertheless, Member States must have the capacity to ensure IORPs' statements of investment policy principles meet the requirements of the Directive as implemented in national law. This can be achieved through general reporting requirements and the provision of investment principles (see Article 13).

Article 18(5)

> ***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 2002/83/EC.***

Paragraph 5 allows Member States to introduce more detailed rules and quantitative limits. However, this power is restricted by the overarching prudent person rule in paragraph 1 as well as the principles in paragraphs 2 to 4. Any further requirements must be prudentially justified, i.e. Member States must be able to demonstrate the prudential basis for introducing extra rules - this should not be an easy test to pass, because of the impact these rules could have on cross border operations. So paragraph 5 cannot be used as a basis for imposing arbitrary rules. Furthermore they must also respect the "minimum freedoms" set down in indents (a) to (c). Given the primacy afforded to the prudent person principle by paragraph 1, such extra rules must be seen as "local detail" which act as a gloss on a wider principle.

Additional rules must "reflect the total range of pension schemes operated" by IORPs. This provision is not entirely clear, though it appears to require that, where restrictions are imposed, they should be imposed at the level of the IORP rather than at the scheme level.

As regards the application of investment rules similar to those in the Life Directive, the rules in the Life Directive relating to investment derive from a totally different approach from that of the present Directive. Articles 22 to 26 of the Life Directive impose quantitative limits for the investment of the technical provisions, for example: listing the types of asset that may be invested in (Article 23) and thereby forbidding investment in other assets; specifying in detail the diversification requirements (Article 24) and requiring Member States to introduce more restrictive treatment of certain investments such as non co-ordinated UCITS and bonds of non OECD Member States; and detailed rules on currency matching (Article 26 and Annex II). In addition the Life Directive requires Member States to introduce more detailed rules on the use of acceptable assets (Article 23(3)) and diversification (Article 24(2) and 24(3)).

The Life Directive requires a life insurer to use appropriate actuarial discretion: Article 22 states that assets must take account of "the type of business carried on by an insurance undertaking" so as to ensure the safety, yield and marketability of its investments which must be diversified; assets must be valued prudently; derivatives may be used in circumstances similar to those in the IORP Directive, subject to a prudent basis for valuation, though such basis is to be laid down by the Member States. In short, there is no equivalent in the Life Directive of the use of the prudent person rule.

The treatment of the IORP Directive's investment provisions should therefore reflect the wholly different basis for setting quantitative limits. Paragraph 5 permits Member States to apply investment provisions

"similar to" those of the Life Directive. This is in keeping with Recital 32, which recognises that Member States will have different approaches currently to investment restrictions[40]. However, any use of the provisions of the Life Directive must, nevertheless, be subject to further requirements:

- that it be prudentially justified – prima facie this does not mean that such requirements should be in accordance with the prudent person rule (since that would give Member States little discretion). However, the overarching nature of the prudent person principle means that it provides a reference point for determining what is prudentially justifiable. In any event any extra rules under paragraph 5 must be for prudential, rather than arbitrary, reasons (although demonstrating, in any given case, that a provision is not prudentially justified may be difficult); and

- it must "reflect the total range" of schemes operated by the IORP - i.e. it must apply across the whole portfolio rather than on a scheme by scheme basis.

This provision could be read restrictively, i.e. to refer to situations where the liabilities and risks are similar to those of life insurance policies - such as where an IORP carries biometric risks or guarantees benefits. In such a case, an IORP's liabilities could in certain circumstances be similar in that respect to those of an insurer: applying quantitative restrictions for life insurance undertakings would avoid distortion of competition.

Article 18(5) (continued)

However, Member States shall not prevent institutions from:

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

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

(c) investing in risk capital markets.

The Directive limits the extent to which Member States can exercise the right under paragraph 5 to introduce more detailed rules (including rules "similar to" those in the Life Directive), by introducing its own quantitative "minimal freedoms" in (a) and (b).

As regards assets covering technical provisions (for DB schemes), and the whole portfolio for DC schemes, home Member States can impose a ceiling on, and decide on the relative weights of, the portfolio' investment in shares and equivalent assets. This is a "pure" quantitative limit - there is no obligation for Member States to have prudential reasons for imposing such limit. This does not mean that a Member State can prevent investment on a non regulated market - IORPs must always be free to invest up to 70% in shares and equivalent securities, and these must be "predominantly" in regulated markets, subject to the overall prudence requirement (Article 18(1)(c)).

[40] Indeed, the Parliament's July 2001 amendments to the Directive proposed a five year transitional period for Member States which do not apply the prudent person principle, to enable them to "come to terms with" it.

Where an IORP itself provides a guarantee or bears the investment risk, lower investment limits for technical provisions may be imposed by the home Member State, provided these are prudentially justified.

As regards (b), home Member States may limit investment in non matching currencies to 30% of the assets representing the technical provisions. This restriction does not apply to assets over and above the technical provisions.

As regards (c), IORPs cannot be prevented from investing in venture capital, hedge funds or other risk capital market investments. This provision is tempered, in respect of all the schemes operated by an IORP, by the requirement to abide by the prudent person principle. However, the first paragraph of Article 18.5 would permit home Member States to impose a quantitative limit on such investment, provided that the limit was prudentially justified.

Article 18(6)

> ***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.***

Paragraph 6 permits further restrictions in addition to those in paragraph 5. It reflects the "risk based supervision" approach that IORPs are subject to in the application of the prudent person principle. This paragraph gives home Member States the right to impose additional investment limits on IORPs, though these must be prudentially justified. The use of the word "also" in the paragraph will give rise to difficulty in interpretation. It could mean "in addition to" the rules in paragraph 5, implying that individual IORPs could be required to conform to stricter rules; or it could permit home States to apply stricter prudential rules to all IORPs on their territory – these could be more stringent quantitative limits which could undermine the prudent person principle.

The better view, however, is that the paragraph should be construed to refer only to individual IORPs, and to apply in exceptional cases where prudential circumstances and requirements demand it. Construing paragraph 6 as enabling Member States to introduce more stringent rules for general application would also threaten to remove the purpose of paragraph 5 which already allows for more detailed rules. Finally, the proposition that paragraph 6 is a fallback provision for dealing with individual IORPs accords with the overarching prudent person principle in paragraph 1.

Article 18(7)

> ***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:***

Paragraph 7 enables host State authorities to impose specific restrictions on the IORP "in the home Member State", i.e. to impose investment restrictions on that IORP despite the fact that investment matters are a supervisory issue for the home State authorities. In the event that some or all of these rules are imposed by a host State, they can apply only to assets corresponding to the business carried

on in the host State, and then only where the same (or stricter) restrictions apply also to IORPs located in the host State (i.e. to avoid discrimination against cross border service providers).

Article 18(7)(a)

> ***(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;***

This provision has the effect of reducing the capacity of an IORP to invest in non EU assets or in non regulated securities, and therefore to require a different investment policy to be applied in relation to the pension liabilities in the relevant host State. IORPs which are active in a host State may not have an investment strategy which would result in its exceeding the threshold, or may not, in fact, exceed the threshold; in which case it could be argued that a requirement from the home State, in accordance with the final paragraph of this Article, requiring ring-fencing of the assets, would be unnecessary.

Article 18(7)(b)

> ***(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;***

Under this provision the host State may restrict IORPs' "self investment" and concentration limits. This could apply even though the home State may have deferred the application of the equivalent provision in Article 18(1)(f). Again, where an IORP's investment strategy limits such investment so as not to exceed the thresholds in this subparagraph, it would not appear necessary to ring-fence those assets relating to commitments in the host State.

Article 18(7)(c)

> ***(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.***

The IORP will still be able to invest up to 30% of assets relating to activities in the host State in assets in a non matching currency. As with the other restrictions set out in paragraph 7, it would not appear necessary to introduce ring-fencing where the 30% threshold is not crossed.

Article 18(7) (continued)

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

The home State has the option to introduce ring-fencing (in accordance with Article 21(5), the host State may ask the home State to decide on ring-fencing). It would do so if it felt it necessary to ensure that the restrictions in this paragraph, if introduced by a host State on whose territory an IORP located in the home State might carry on activities, would be complied with. Ring-fencing would involve administrative cost, and therefore would have an impact on profitability (see paragraph 1(b) above).

It could be argued that it should be invoked only where necessary, which would be consistent with the protection of the interests of members and beneficiaries, with satisfying the requirements of the host State, and with a proportional approach.

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, 93/22/EEC, 2000/12/EC and 2002/83/EC[41], as well as those referred to in Article 2(1) of this Directive.

This Article is intended to guarantee the free movement of capital, enshrined in Article 56 EC Treaty, and reflects Recital 35 which refers to the elimination of restrictions on the choice of asset managers and custodians on the basis that such restrictions limit competition. Thus, an IORP may appoint any investment manager established in another Member State appropriately authorised to manage funds in accordance with the relevant enabling Directive (including, following amendments to Directive 85/611/EEC, UCITS managers). It may also appoint an IORP for this purpose.

Article 19(2)

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 depositary 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 depositary or a custodian compulsory.

Equally, and as mentioned in relation to Recital 35, a Member State cannot prevent an IORP from appointing a custodian or depositary established in another Member State. Nevertheless, a home Member State may require a depositary or custodian to be appointed.

Article 19(3)

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 depositary or custodian located within its territory at the request of the institution's home Member State.

Article 14(2) refers to a home State's power to prohibit the disposal of an IORP's assets where there are insufficient technical provisions, or insufficient regulatory own funds.

Paragraph 3 gives effect to Article 14(2) by requiring all Member States to provide for the prohibition of the disposal of assets held by the custodian or depositary. Such prohibition would result from a request from the IORP's home State authority to the competent authority of the custodian or depositary.

Whilst Article 14(2) gives Member States the power to restrict or prohibit the free disposal of assets, paragraph 3 is limited to a requirement for Member States to have the power to prohibit disposal of assets. Thus, for "domestic" matters, Member States may prohibit disposal in certain cases; however, where a custodian or depositary is appointed, that institution's home State must have capacity to prevent disposal of assets, whether there is a cross border element or not.

[41] See footnotes on Article 2(2)(a) above.

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.

Paragraph 1 establishes the fundamental freedom for authorised IORPs to provide cross-border services anywhere in the European Union. It does so by imposing two reciprocal obligations on Member States:

- to allow undertakings located in their territories to sponsor authorised IORPs located in other Member States; and
- to allow authorised IORPs in their territories to accept sponsorship from undertakings located in other Member States.

The following points should be noted:

- Apart from social and labour law requirements, this freedom is unqualified and unrestricted: an authorised IORP (see paragraph 2) wanting to accept cross-border sponsorship is not subject to any further approvals or conditions. This means that the notification procedure (see below) is not the second element of a two-part approval system (the first part being set out in Article 9), but a limited "disapproval" procedure allowing the home State to restrict this freedom.
- The cross-border freedom concerns the relationship between an authorised IORP and a (potential) sponsoring undertaking: it does not therefore extend to the relationship between an IORP and a (potential) member. The Directive creates no right for employees to opt out of a domestic IORP in favour of a non-domestic IORP.
- The "without prejudice" reference to national social and labour law reiterates that this Directive can only address the financial services aspects of IORP activity (by virtue of its legal basis). Therefore, an IORP wanting to accept cross border sponsorship must respect host State requirements of social and labour law relevant to occupational pensions. The reference to "compulsory membership" covers situations where a Member State's social and labour legislation requires undertakings to be members of specific IORPs. In such a situation, the sponsoring undertaking may not be able to engage an IORP authorised in another Member State to operate its pension scheme.

Article 20(2)

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(5). It shall notify its intention to accept sponsorship from a sponsoring undertaking located within the territory of another Member State to the competent authorities of the home Member State where it is authorised.

Paragraph 2 introduces the notification procedure for IORPs wanting to accept a (new) cross border sponsor.

The reference to authorisation and Article 9(5) expands on paragraph 1, i.e. that only authorised IORPs may engage in cross border activities. Therefore, a merely registered, not authorised, IORP may not use Article 20.

Paragraphs 1 and 5 of Article 9 clearly indicate that authorisation is general in scope. This is confirmed by the reference in Article 20(1) to "authorised IORPs" and not, say, "IORPs authorised in relation to a sponsor". The requirement for "a prior authorisation" cannot therefore be construed as meaning authorisation per sponsor. (That authorisation is general in scope is also in line with other financial services legislation.)

By contrast, notification is by reference to an individual sponsor. This is clear from the requirement that an IORP "notify its intention to accept sponsorship from a sponsoring undertaking" together with the information requirements in paragraph 3. Each time an IORP intends to enter into an agreement to offer its services to another potential sponsor undertaking, it must submit a new notification to its home State authority.

Article 20(3)

> ***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.***

An IORP notifying its home State authorities of its intention to be sponsored by an undertaking in another Member State must provide certain information.

Indent (a) requires an IORP to identify the host Member States involved (the name of the host State is to be entered in the national register - Article 9(1)). It should be noted that:

- The definition of host Member State in Article 6(j) means that this State need not be the same as the Member State in which the sponsor is located (note, too, the lack of any definition of sponsor location).

- There may also be several host States in relation to a single sponsor (e.g. where a sponsor has employment contracts with individuals which are subject to the social and labour law relevant to occupational pensions of two or more Member States).

Nevertheless, the typical case should be that of a sponsor and employees located in one and the same Member State and the main focus of making the Directive operational should concentrate on this.

Indent (b) confirms that notification is on a sponsor-by-sponsor basis.

The requirement in (c) means that the IORP need not provide full details of the intended pension scheme, but its main characteristics. (Nevertheless, the home State will determine what amounts to main characteristics.) The wording is also in line with notification on a sponsor-by-sponsor basis.

Paragraph 3 requires no further items of information. This has practical relevance for paragraph 4 which identifies five headings under which a home State authority may raise "compatibility doubts" as to the proposed cross border sponsorship. The scope of the required information, particularly in relation to (c), should be sufficiently well defined to prevent competent authorities relying without proper cause on claims of incomplete information to delay the elapse of the time period in paragraph 4.

Article 20(4)

> ***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.***

Paragraph 4 imposes a general obligation on the home State competent authority to communicate the information in the paragraph 2 notification to the host State authorities. This must be done within three months of receipt of all the information required.

However, a home State competent authority is not obliged to communicate that information to the host State competent authority if it has reasons to doubt the compatibility of the proposed operation with the five headings identified in paragraph 4:

Regarding the IORP, its
1. administrative structure;
2. financial situation;

Regarding the persons running the IORP, their
3. good repute;
4. professional qualifications;
5. experience.

The home State's assessment as to whether there may be "compatibility doubts" is not an approval procedure, for the following reasons:

- Apart from the reference to host State social and labour law, the general freedom set out in Article 20(1) is not expressed to be subject to any further conditions or approvals. Therefore, notification cannot be an extra requirement to be satisfied.

- Furthermore, the information requirements in paragraph 3 are restricted (see below). The home State authority's compatibility doubts must either be based on the headings of information required under the paragraph 2 notification or on any other information about the IORP the authority may have as a result of its ongoing supervision. There is therefore a presumption in favour of an authorised IORP, and the burden of evidence lies with the home State competent authority seeking to rely on such doubts.

Nevertheless, in practice, home States' authorities should develop a means of ensuring that IORPs notifying them of their intention to carry on activities in relation to a sponsor located in another Member State provide the information that will enable them to determine that there are no "compatibility doubts".

The consequences of a home State authority having unresolved compatibility doubts are not expressly spelled out in Article 20. Arguably, since the freedom for authorised IORPs in paragraph 1 is unrestricted, the home State authority would have to take steps to prohibit the exercise of this freedom under Article 14(4) in relation to the particular sponsor. It would not be sufficient merely to fail to pass the file on to the host State authority.

Article 14(4) and (5) would require the home State authority to:

- notify the IORP of its decision to prohibit it from accepting the sponsorship of the undertaking in the host State;
- set out the precise reasons for the prohibition; and
- give the IORP the right to challenge the decision before a court.

In any event, if the host State authority receives no paragraph 4 communication, from the home State authority, it will be impossible to set a "start date" as implied by paragraph 6.

The three month period in paragraph 4 sets the time frame for the home State authority to resolve any doubts it may have. Such doubts are, arguably, more likely in relation to a situation where, for example, an IORP intends to operate cross border in a different Member State for the first time. IORPs which have a good track record in relation to the requirements of paragraph 4 should not give rise to the same level of doubts, and the procedure should reflect this. Member State authorities, individually and collectively through CEIOPS, could develop, in due course, a process for ensuring that previous experience is taken into account so that procedures under paragraphs 3 and 4 can operate more quickly.

Article 20(5)

> ***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.***

Paragraph 5 is relevant where a home State authority, having had no compatibility doubts or having had them been resolved, has communicated the paragraph 3 information to the host State authorities. Paragraph 5 gives the host State authorities a two month period in which to forward information on host State rules applicable to cross border operations to the home State authority. The latter must then forward this to the IORP.

The two month period begins with the date of the host State authorities' receipt of the information in the paragraph 2 notification. This date is important for both paragraph 5 and 6:

- The host State competent authority must send certain information within two months of that date to the home State authority;

- This date is also important for determining when an IORP may begin its cross border activities in relation to the relevant sponsor. Although the Directive provides no mechanism for this, it would be useful if this date could be advised to the IORP (see paragraph 6).

The information which the host State must forward to the home State is limited to three possible categories of host State rules which might be applied to IORPs located outside the host State but which wish to operate in the host State. Host State relevant rules are therefore limited to any applicable:

- requirements of social and labour law relevant to occupational pensions under which the pension scheme sponsored by an undertaking in the host Member State must be operated;

- quantitative investment rules that comply with Article 18(7);

- information requirements imposed by the host State competent authorities on IORPs located in that host State, under Article 11.

There are mechanisms to prevent such host State rules from creating unjustifiable obstacles in the way of non-domestic IORPs:

- In respect of quantitative investment rules and information requirements the Directive requires the host State to apply the same rules to IORPs located in its territory as to any non-domestic IORPs. In the case of investment rules the host State may even apply stricter rules to its own IORPs (see Article 18(7), first paragraph, last sentence).

- Member States retain full responsibility for the organisation of their pension systems, and IORPs must fully respect host State social and labour law as relevant to occupational pensions (see Recitals 9 and 37). Nevertheless, Member States must ensure that the exercise of these powers complies with their EC Treaty obligations. There is an overriding obligation to ensure that providers from another Member State are not discriminated against.

Article 20(6)

> ***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.***

The home State authority must pass the information referred to in paragraph 6 on to the IORP. Although there is no time period in respect of this final requirement, because the home State is not required to assess it or otherwise deal with it before forwarding it to the relevant IORP, there is no reason why it cannot be forwarded to the IORP immediately on receipt. Nor is there any reason why a host State cannot publish such information (or at least the basic outlines) in advance, for example, on the internet.

In any event, paragraph 6 enables the IORP to start operations even without having received the relevant information.

The Notification Procedure in Article 20

	Stage 1	*Stage 2*	*Stage 3*	*Stage 4*	*Stage 5*
The IORP:	must already be authorised (Articles 20(2) and 9(5)) must notify the home State authority (Article 20(2)) and provide (Article 20(3)): • name of host State(s) • name of proposed sponsor • main character-istics of scheme				can operate in the host State (Article 20(6)) after earlier of: • receipt of host State rules from home State authority (see 4) • 2 months from receipt by host State of communication by home State (see Stage 2)
Home State authority must:		consider whether it has compatibility doubts (Article 20 (4)). If so: • it is likely to follow Article 14(4) procedure to restrict the cross border activities of the IORP (with reasons). If not: • communicate to the host State the information provided by IORP • within 3 months of receipt of all the information.		communicate host State rules in stage 3 to the IORP	
Host State authority must:			inform home State authority of host State rules: • social and labour laws (Article 20(6)) • investment rules (Article 20(6); 18(7)) • information (Article 20 (6), (7) and Article 11)		
		3 months maximum*	**2 months maximum***		
		Overall maximum 5 months*			

* IORPs should be aware that Member States may have the capacity to delay communication: e.g. failure of the IORP to provide a complete file to the home State authority as part of stage 1 could mean the clock may not start running until the file is complete.

Paragraph 6 determines the moment at which the IORP may start operating the sponsoring undertaking's scheme; it is the earlier of either:

- When the IORP receives the paragraph 5 information on relevant host State rules, or
- If no such information is received by the IORP, the lapse of the two month period referred to in paragraph 5.

In either case, the IORP must comply with host State relevant rules. In other words, the IORP must take it upon itself to determine the requirements of the host Member State in this regard, and not rely on the communication of these requirements or seek to rely on their non communication.

Note that as there is no mechanism expressly envisaged for communicating to the IORP the date of the host State's date of receipt of the information in the paragraph 2 notification, the IORP will not know when the two month period begins to run or ends. It would therefore be useful if these dates, or at least the date the two month period ends, could be advised to the IORP as soon as possible after the host State receives the paragraph 3 information.

Article 20(7)

> ***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.***

An IORP must conform to information requirements imposed by the host State in respect of scheme members in the host State - Article 11(1) gives Member States the right to require more information to be given or made available to members and beneficiaries. In essence, an IORP must be subject to the same information requirements in a host State that must be met by IORPs authorised or registered in that State.

Article 20(8)

> ***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.***

Paragraph 8 creates a continuing responsibility on the part of host State authorities to inform the home State authorities of rules to be applied under Article 18(7) and paragraph 7 of this Article, and of significant changes to relevant social and labour laws, where these might affect the characteristics and the operation of a scheme. Therefore, there may be changes to relevant social and labour laws that do not require to be communicated to the home State authorities. Where changes are so communicated, there is no specific obligation on the part of home State authorities to pass on the information to those IORPs which have made a notification under paragraph (2). Nevertheless, it might be expected that home State authorities will take on this obligation. (Discussion at CEIOPS might cover this issue.) In any event, the IORP is under a general obligation to comply with relevant host State social and labour law and should therefore put in place its own monitoring arrangements.

Although Recital 37 refers to host State provisions which are in "in force" and Article 14(4)(d) is not restricted to compliance by an IORP with only those host State rules which have been communicated to the IORP, the fact that the host State has communicated specific rules identifies these as the relevant ones. Nevertheless, it is conceivable that a host State might communicate rules that are identified as social and labour law but which are in fact not of that category.

Article 20(9)

> ***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.***

Paragraphs 9 and 10 deal with supervision and enforcement of compliance with host State rules applicable to IORPs with cross border operations. The general rule is that the home State is the main supervisor and enforcer, with a residual role for the host State authority.

Paragraph 9 consists of two parts. The first states that the host State authorities are to supervise compliance with relevant host State social and labour law and the information rules. The host State competent authority must inform the IORP's home State authority immediately on learning of any irregularity. As paragraph 9 does not refer to host State quantitative investment rules that may be applied to cross border operations, the implication is that these must be supervised by the home State authority.

The final sentence concerns measures to be taken to rectify infringements of host State social and labour law. Home States must take necessary measures to ensure that the IORP puts a stop to the breach (see also Article 14(4)(d)). Note, however, that there is no provision regarding the rectification of any breach. The position as regards the host State information rules is unclear. Since it is not covered elsewhere, it is the home State competent authority which should ensure compliance (see also Recital 36 on proper enforcement of prudential standards).

(See the table in the "Outline" on a Common Regulatory Framework.)

Article 20(10)

> ***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.***

Paragraph 10 is an instrument of last resort and is restricted to persistent infringements of host State relevant social and labour laws which prove resistant to treatment under paragraph 9. It allows a host State authority, ultimately, to intervene directly with an IORP operating on a cross-border basis, to

remedy breaches of the host State's relevant social and labour laws. However, there are limits to the capacity of a host State to take such steps:

- There must be persistent breaches of relevant social and labour law;
- There must have been a failure on the part of the home State authority to take effective measures, or no such measures available;
- It must first inform the home State authority.

Where the host State is able to intervene, its powers are extensive. It may prevent further breaches; it may apply "penalties", though these are unspecified; and it may prevent the IORP from operating in that host State in relation to a particular sponsor. The last power may be exercised "insofar as is strictly necessary". Thus there is a proportionality requirement: it would not be possible for the host State authority to ban the IORP's operations if other steps would be sufficient. The use of "strictly" underlines the intention of the legislator in this regard.

(See the table in the "Outline" on a Common Regulatory Framework.)

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.

Recital 39 considers that information exchange between Member States' competent authorities is important to enable them to carry out their supervisory duties and to help achieve consistent and timely implementation of the Directive.

Paragraph 1 states the purpose of exchange of information and developing best practice and closer cooperation as being to prevent distortions and to facilitate cross border pension scheme membership. This goes beyond the home State/host State cooperation required under Article 20; it includes broader forms of multilateral cooperation and is not tied to issues relating to individual IORPs.

An important vehicle for ensuring this exchange of information takes place is the Committee of European Insurance and Occupational Pensions Supervisors ("CEIOPS"), established by Commission Decision[42]. CEIOPS's remit is, in part, to contribute to the consistent implementation of Community Directives and the convergence of Member States' supervisory practices, and to be a forum for supervisory cooperation, including the exchange of information on supervised institutions (Article 2 of the Commission Decision). To achieve this consistency and convergence, CEIOPS could seek to promote a uniform interpretation of the Directive, e.g. regarding information requirements, technical provisions, own funds and investment rules.

[42] Commission Decision 2004/6/EC of 5 November 2003 establishing the Committee of European Insurance and Occupational Pensions Supervisors.

Article 21(2)

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.

CEIOPS's remit does not permit it to address social and labour law aspects of occupational pensions, particularly "compulsory membership and the results of collective bargaining agreements" (Article 3 of the Commission Decision, and cf. particularly Article 20 above). In the context of "creating the conditions required for unproblematic cross border membership", CEIOPS's approach could be to focus on communicating, rather than addressing, the content of host State social and labour law requirements and information on compliance and enforcement. This could facilitate cross border activities through creating an EU wide framework to ensure comprehension and effectiveness of social and labour law rules.

Outside the sensitive area of social and labour law, CEIOPS has a clear role in considering the cross border aspects of the Directive. These may be addressed in the context of a protocol between national competent authorities, similar to the Sienna Protocol[43], which has provided, for some time, the framework for cooperation between national supervisors in relation particularly to life and non life insurance. This commentary has identified several areas where cooperation between supervisors could contribute to a more consistent implementation in the Member States.

Whilst CEIOPS itself may not address social and labour law matters, national supervisors might discuss such issues outside the context of CEIOPS.

Apart from CEIOPS's role as regards supervisory aspects, this Directive contains none of the "comitology clauses" which are to be found in many financial services Directives which embody the "Lamfalussy procedure". This means that any modification to the Directive must be set out in a fresh Directive.

The Directive therefore currently provides no structure for involvement of European Insurance and Occupational Pensions Committee ("EIOPC"), the body in which in Member State regulators cooperate in advising the Commission on technical adjustments to the Life Insurance Directive. The reference to occupational pensions in its title implies a general intention for EIOPC to have at some point a comitology role as regards the Directive.

However, it is worth noting that Article 17(2) of the Directive effectively imports Article 27 of the Life Directive wholesale into this Directive. Article 27 of the Life Directive is subject to the comitology procedure provided for in Articles 64 and 65 of the Life Directive. Arguably, amendments to Article 27 of the Life Directive achieved under the comitology procedures, could have an impact on Article 17(2) of the present Directive.

Article 21(3)

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

[43] Protocol relating to the collaboration of the supervisory authorities of the Member States of the European Community in particular in the application of the Directives on life assurance and non life assurance (current version - 30 October 1997).

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.

Member States are obliged to inform the Commission where "difficulties arise" in applying the Directive. No indication is given as to whether these difficulties might arise before or after implementation of the Directive; if such difficulties arise before implementation, i.e. while a Member State is developing its implementing legislation, that Member State should at that point notify the Commission. There is no requirement for such difficulties to be discussed at the level of CEIOPS (since the Lamfalussy procedure does not apply), but the benefit of involvement of CEIOPS in this situation is clear.

Article 21(4)

4. Four 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 Council introduced the requirement for a report by the Commission. Paragraph 4 is selective about the matters which the Commission will review for the purpose of this report; it restricts the Commission's remit to:

- The application of investment rules. The text of this provision refers also to progress in the adaptation of national supervisory systems; it is drafted in a way that suggests this relates solely to investment rules. However, the Council's statement of reasons to its common position endorsed a Parliamentary proposal to review the adaptation of supervisory systems. This indicates the Council's intention was to treat this as a separate item. Given the ambiguity of (a), it is possible to construe the text by reference to the Council's common position, and not to the text of (a) alone.

- The application of the provision in Article 19.2 whereby a Member State may require the appointment of a custodian or depositary. The particular concern, as expressed in Article 21.4(b), is over depositaries[44].

Notwithstanding the Commission's lack of power, under the Directive, to report otherwise than on these two aspects, CEIOPS has the capacity to advise the Commission on its own initiative, and its role includes contributing to the consistent implementation of Directives and the convergence of supervisory practices.

Article 21(5)

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

[44] In a different context, that of UCITS, the Commission has issued a Communication on methods of reducing differences in national rules: Communication from the Commission to the Council and to the European Parliament, Regulation of UCITS depositaries in the Member States: review and possible developments, COM(2004) 207 final.

In keeping with the sole competence of the home State to make rules for the prudential supervision of IORPs authorised by them, this provision entitles the host State authority to ask the home State authority to "decide on" the ring-fencing of assets and liabilities; there is no requirement on the part of the home State to comply. Whilst Article 16(3) could be interpreted to apply only to IORPs in specific circumstances, Article 18(7) is drafted in such a way as to apply generally to institutions carrying on cross border operations; in reality, therefore, discussions in relation to the latter could take place in the context of CEIOPS.

Article 22

Implementation

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

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.
2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field governed by this Directive.

One of the Treaty duties of the Commission is to monitor the implementation of a directive; the provisions in the Directive relating to informing the Commission of implementation and communicating the main provisions of the relevant national law reflect this.

Article 22(3)

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

Paragraph 3 introduces a transitional provision regarding minimum solvency for biometric risks or guarantees of performance or benefits (Article 17(1) and 17(2)). The lengthy period indicates that in some Member States much work needs to be done to bring IORPs up to the required level of solvency for regulatory own funds. Nevertheless, cross border activities cannot be engaged in until compliance with Article 17(2) and 2 is achieved. The same applies to compliance with the maximum permissible level of investment in a sponsoring undertaking or its group, in accordance with Article 18(1)(f).

Article 22(4)

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

No remarks.

Article 23

Entry in force

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

The Directive was published on 23 September 2003. As a result, the Commission's report referred to in Article 21(4) must be published by 23 September 2007.

Article 24

Addressees

This Directive is addressed to the Member States.

No remarks.

EFRP: EIORPs and the IORP Directive

The EIORP 2005 report

The EFRP's "EIORP 2005" report came out shortly after publication of the IORP Directive. Its main purpose was to review how developments at EU level between 2000 and 2003 had enhanced the feasibility of the EIORP concept first proposed in 2000.

A key objective of the Directive is to make EIORPs possible. Although neither the Directive nor the commentary employs the term "EIORP", any IORP engaging in "cross-border activity" having used the Directive's notification procedure in Article 20 is an EIORP. EIORPs range from those IORPs providing services into just two Member States as well as a pan-European pension fund active across the entire EU.

The "EIORP 2005" report considered the joint impact of several lines of development at EU level on EIORPs. These included taxation. These other aspects are not addressed here since the focus of the commentary is the Directive. One exception, referred to in passing in the EIORP 2005 report, but dealt with in slightly more depth in the context of Article 21 is the effect of the new regulatory and supervisory structure for financial services, in particular the role of the Committee of European Insurance and Occupational Pension Supervisors (CEIOPS).

The EIORP 2005 report argued that the viability of the EIORP concept had been enhanced by the IORP Directive because:

- *There is now an EU-wide harmonized procedure envisaged for becoming an EIORP based on home State authorization. The commentary sets out the procedure, explaining the conceptual link between authorization, the right to take up cross-border activity and the powers of intervention of the home State authority. This link makes clear that the notification procedure in Article 20 is not a further approval process, but an opportunity for the home State to raise doubts if it has reasons for doing so. The burden of proof lies with the home State authority and is limited to defined issues. To restrict an authorized IORP's freedom to provide services across borders, the home State authority must actively intervene. This analysis supports a stronger view of the single licence than that presented in the EIORP 2005 Report (see the analysis on Article 20, paragraphs 1 to 4).*

- *We also agree with the observation made in the commentary that despite the absence in the Directive of an express obligation for every Member State to introduce such systems of authorization, this is implied by the legal bases used together with a stated objective of the Directive that IORPs must have the "the possibility of providing their services in other Member States" (Recital 36). The wording in Article 9(1), although phrased as an option, demands that all Member States must introduce a system. The optional element is whether "authorization" or "registration" is the norm for all IORPs. It is also clear from the wording of Articles 9(5) and 20(1) that such authorization must result in a general "licence" to operate throughout the single market.*

- *In the EIORP 2005 report, the key to making EIORPs practicable was how to make one and the same entity comply with the differing requirements of two or more Member States: the challenge of "multi-jurisdictional compliance".*

- *From a regulatory perspective, the Directive has swept away the need for multi-jurisdictional compliance as regards most financial services issues. Possible exceptions concern Member State options to introduce a limited number of quantitative investment rules and also extend information rules. The commentary identifies issues associated with both of these. However, the extent to which these exceptions to the mutual recognition principle will create real difficulties in a cross-border context is unclear. It could be that developing optimal cross-border information requirements that make sense of the Directive will require a joint approach by competent authorities (see the analysis on Articles 11 and 20(7) in particular).*

- *From a supervisory perspective, the counterpart to mutual recognition is the single supervisor approach. The commentary explains how this objective has been largely achieved as regards the main prudential rules and approximates to it elsewhere (see the commentary's "Outline" on Mutual Recognition). Even in the area of social and labour law, references to which in the Directive serve only to confirm that Member State rules fall outside its scope and must be respected, the Directive facilitates the emergence of a cooperative framework. Article 14(4)(d) makes clear that serious non-compliance by an EIORP with relevant host State social and labour law could result in the prohibition or restriction of it activities by the home State authority (see also Article 20(9)-(10)).*

In short, the overall approach in the commentary confirms that of the "EIORP 2005" report.

National sections, ring-fencing and local compliance

In its EIORP report of 2000, the EFRP introduced the idea of national sections to address the issue of how one entity, the EIORP, on the basis of a single, undivided fund could simultaneously comply with two or more Member States' rules, i.e. multi-jurisdictional compliance. The "EIORP 2005" report indicated that although national sections do not figure in the Directive, they are entirely consistent with it and would also make it easier to comply with those few provisions in the Directive on prudential matters which could require multi-jurisdictional compliance. The idea of national sections fits neatly into the framework provided by the Directive and is consistent with the approach taken in the commentary.

A national section would correspond to identifiable members and beneficiaries located in a particular State. The relevant set of assets and liabilities would have themselves to be identifiable and quantifiable. However, it should be possible for the assets to be part of the same, single pool containing assets used for operations in other Member States. As the commentary indicates, only in this way will the economies of scale envisaged by the Directive be achievable (Recital 36, see also the commentary's "Outline" on ring-fencing). This approach will provide both security and efficiency.

National sections are thus a light but effective form of "ring-fencing" enabling multi-jurisdictional compliance. The precise techniques for realizing them will vary from Member State to Member State. Since a practical aspect of this is to ensure that a host State can be confident that its domestic rules applicable to cross-border providers will be complied with, it may be advisable if each Member State were to make clear to all other Member States what these rules are and how they operate. Perhaps approaches on this issue could be discussed within CEIOPS.[45]

[45] The Directive also envisages ring-fencing for purposes other than multi-jurisdictional compliance. For example, Articles 3 and 4 serve, in broad terms, to keep First and Third Pillar pension provision structurally

The EFRP supports the recommendation in the commentary that in all instances where ring-fencing is required[46], a context-sensitive approach should be taken and that the lightest form of ring-fencing which achieves effectively the purpose in hand should be chosen. Any form of ring-fencing that would split up funds on national lines into mini-funds should be avoided. Splitting would preclude the economies of scale envisaged by Recital 36. In any event the technique chosen must satisfy the proportionality principle as developed by the ECJ.

In only one case does the Directive indicate that ring-fencing may be used in relation to cross-border activity for reasons which are not motivated by a need to ensure multi-jurisdictional compliance. Article 16(3) permits a home State to require ring-fencing of the assets and liabilities relating to the host pension scheme in order to ensure compliance with home State funding rules.

In no case does the Directive allow the host State to impose ring-fencing arrangements on non-domestic EIORPs. This is always a matter for the home State. The most a host State may do is "ask" the home State "to decide on" ring-fencing in relation to Articles 16(3) and/or 18(7). It should also be noted that although the Directive allows the home State to prohibit or restrict an EIORP's activity if it does not respect host State social and labour law relevant to occupational pension law (Article 14(4)(d)), there is absolutely no requirement for ring-fencing either in relation to compliance with host State information rules or social and labour law.

More broadly, an EIORP's national sections, using appropriate personnel, would work in conjunction with sponsoring employers so as to ensure appropriate compliance with host State requirements. It must be remembered that it is employers who bear the primary responsibility under Member State social and labour provisions for their employees' occupational pensions. This view reflects the role of EIORPs as a business-to-business wholesale provider with the employer functioning as the retail outlet.

Mutual recognition, extra host State rules and derogations from the common regulatory framework

Mutual recognition implies that each set of national laws on IORPs reflects a harmonized regulatory framework, and that an IORP complying with its home State rules must be treated as compliant with the common framework. However, at various points the Directive also allows Members States to introduce, under certain conditions, additional or more detailed national rules.[47] It also allows a Member State to derogate from that framework for IORPs located in its territory.

In the context of the Directive this approach means that :

- *any authorized IORP (in simplified terms one deemed by the home State authority to comply with home State rules implementing the common regulatory framework) is free to provide services into all other Member States (Article 20(1)).*

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and operationally distinct. This is reflected by more rigorous or reinforced requirements as to ring-fencing than those needed for multi-jurisdictional compliance.

[46] See the commentary's "Outline" on ring-fencing.

[47] These are in Article 9(3) (conditions of operation), 11 (information to members and beneficiaries), 12, 15(5) (calculating technical provisions), 17(3) (possible rule requiring all IORPs and EIORPs to hold regulatory own funds as well as more detailed rules for their calculation), 18(6) (stringent investment rules on an individual basis). (See the commentary's "Outline" on a common regulatory framework).

- *An EIORP must also comply with any additional rules imposed by its own home State that are permitted under the Directive.*

But how do variations upon the common regulatory framework otherwise affect EIORPs?

- *EIORPs and extra host State rules*

  Mutual recognition of the common regulatory framework means that any rules introduced by a host State A above and beyond the harmonized regulatory framework provided by the Directive, cannot be imposed on an EIORP located in a Member State B but operating in Member State A.

  However, there are two limited exceptions in the Directive.

  - *Member State A's information rules for members and beneficiaries that implement Article 11 can be applied, in relation to the members, to any EIORP located outside State A which provides services into it (Article 20(7)). Furthermore, this cross-border applicability also includes A's additional information rules. The wording of the Directive makes clear that these cross-border information rules must not be discriminatory: they must be the same as those which apply to IORPs located in A.*

  - *Although a Member State power to lay down more detailed investment rules, including quantitative ones does not generally apply to non-domestic EIORPs, a limited range, allowed under Article 18(7) may apply to non-domestic EIORPs. State A may impose such limited rules on an EIORP located in State B that is active in State A provided that the same or stricter quantitative investment rules are imposed upon IORPs located in State A.*

  See the commentary's "Outline" on a Common Regulatory Framework.

- *EIORPs and home State derogations from the common regulatory framework*

  Where the Directive envisages that a home State may allow IORPs to operate without complying with the full, common regulatory framework, any IORP benefiting from such Member State derogations may not become an EIORP:

  - *Article 5 enables Member States to introduce a separate or modified regime for "small IORPs" which need not comply with the regulatory framework. However, such IORPs must always have the right to become EIORPs provided they comply with the entire Directive. This means that the Directive implies that if a Member State introduces a de minimis regime, there must be a "transfer" mechanism allowing small IORPs to "upgrade" to the full regime and thereby have the possibility of being authorized. Although broadly analogous provisions apply to statutory schemes, the right to "upgrade" may not apply to them.*

  - *A Member State may allow the domestic operations of its IORPs to deviate from the funding standard set in Article 16(1) in certain circumstances (Article 16(2)). Article 16(3) does not allow this derogation to apply to the cross-border operations of EIORPs.*[48]

[48] A Home State may demand ring-fencing of relevant assets and liabilities (Art 16(3). The Host State may "ask" the home State to ring-fence (Art. 21(5).

- *Furthermore, although this does not come out in the commentary, the EFRP considers that any Member State making use of the temporary derogations in Article 22 as regards regulatory own funds and investment in sponsor undertakings[49], must nevertheless have national rules in place, even though their general application may be suspended for seven years. This will allow those IORPs located there who are able and willing to comply with them, to become EIORPs. Only in this way can the wording in Article 22 relating to IORPs "wishing to operate pension schemes on a cross-border basis" be given legal sense.*

The Directive also envisages further varieties of national option which concern the range of financial services providers for whom this Directive may be relevant and which fit into neither of the foregoing categories. For example, if a Member State exercises its option to allow life insurance companies with an occupational pensions business to be classed as IORPs in relation to that business, then such IORPs may become EIORPs (Article 4). Such EIORPs must be accepted by other Member States even where those Member States have not exercised this option (see Commentary in relation to Article 2(2)). However, the national option in Article 9(4), which allows the "outsourcing" of managerial functions to other entities might allow for a variety of other financial services providers to become active as "IORP managers" in the provision of occupational retirement provision.

(On monitoring compliance and enforcement of home and host State rules, please see the commentary's "Outline" on the Common Regulatory Framework.)

Conclusion

Overall the commentary reinforces EFRP proposals for pan-European pension institutions. In particular, the views expressed on authorization, funding, ring-fencing and cross-border notification and supervision are generally in line with the EFRP's "EIORP 2005" model.

Perhaps only in the area of information rules, and the possibility of scheme-by-scheme reporting and accounts, does the commentary diverge from that of the EFRP. The EFRP thinks that, on balance, scheme-by-scheme reporting is not a general requirement of the Directive. Nor is it a logical consequence of having national sections. However, there are some sensitive issues to be addressed here[50]. Although they also concern the generality of IORPs they may acquire greater complexity in a cross-border context for EIORPs.

We trust that national regulators and supervisors will deal with the Directive in a manner which facilitates the emergence of pan-European pension provision, using discretions and addressing problem areas so to create bridges rather than re-erect hurdles.

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[49] Article 22(3) allows a Member State to delay for seven years application of the rules on regulatory own funds (Article 17(1) and (2)). Article 22(4) allows a Member State to delay for ten years application of the rules on investment in sponsor undertakings (Article 18(1)(f)).

[50] These include what it is to be a "particular pensions scheme" (Article 11(2)(a)), the definition of a "scheme" (Article 6(b)) and the relation of Article 10 to Article 11.

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