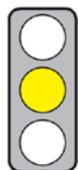


## KEY ISSUES

**Objective of the Directive:** The Commission wants to strengthen the internal market for occupational pensions.

**Affected parties:** Institutions for occupational retirement provision (IORPs), employers (sponsors) and employees



**Pro:** (1) The new definition of cross-border IORPs business creates legal clarity.

(2) The ability to transfer pension schemes across borders increases efficiency.

(3) The fact that the home Member State's information and investment requirements apply, reduces administrative costs.

**Contra:** The fully funded requirement impedes cross-border business. In the case of cross-border business, the host member state's funding requirements should therefore apply.

## CONTENT

### Title

**Proposal COM (2014) 167** of 27 March 2014 on the **activities and supervision of institutions for occupational retirement provision**

### Brief Summary

#### ► Definitions

- "Institutions for occupational retirement provision" (IORPs) provide retirement benefits based on agreements between employers and employees which are linked to an occupational activity; they operate on a funded basis (Art. 6 a)).
- "Pension schemes" are contracts, agreements or provisions stipulating the type of benefits and the conditions under which they are granted (Art. 6 b)).
- "Sponsor undertakings" are companies or bodies which offer their employees an occupational pension by way of a pension scheme (Art. 6 c)).
- "Members" are persons who have a right to retirement benefits. "Beneficiaries" are persons who receive retirement benefits. (Art. 6 e) and f))
- "Home Member State" is the Member State in which the IORP is authorised or registered. "Host Member State" is the Member State whose "social and labour law" is applicable to the relationship between the sponsor undertaking and the members or beneficiaries. (Art. 6 i) and j)).

#### ► Context, scope and objectives

- The Directive replaces the existing Directive on occupational pensions ("IORPs I"), 2003/41/EC).
- The Directive applies to IORPs and - subject to the relevant provisions and only at the request of the Member State - life assurance companies which offer occupational pension provision business ("direct insurance") (Art. 2 (1), Art. 4).
- The Directive does not apply to (Art. 2 (2))
  - institutions managing social-security pension schemes,
  - institutions which operate on a pay-as-you-go basis,
  - institutions where employees have no legal rights to benefits and
  - companies using book-reserve schemes for their employees ("direct commitments").
- By way of the Directive the Commission wants (Explanatory Memorandum p. 3 and 4)
  - to make the cross-border business of IORPs easier,
  - to ensure effective supervision of IORPs and enhance the governance of IORPs,
  - to adjust the investment rules and
  - to extend the requirements for providing information to members and beneficiaries.

#### ► Cross-border business and transfer of IORPs

##### – New definition of IORPs cross-border business

- IORPs carry out cross-border business where they have a sponsor undertaking which is located (Art. 12 (1)):
- in another Member State or
- in the same Member State but is subject to the social and labour law requirements of another Member State.

- In order to undertake cross-border business, IORPs only require the authorisation of the competent authority in their home Member State (Art. 12 (2)).
- **Cross-border transfer of pension schemes**
  - IORPs can transfer their pension schemes to other IORPs that are authorised or registered in other Member States (Art. 13).
  - The transfer must be authorised by (Art. 13 (1)-(3))
    - the authority responsible for the receiving IORP and
    - the members and beneficiaries or, where applicable, their representatives, unless the social and labour law requirements provide otherwise.
  - The receiving IORP must comply with the social and labour law requirements of the host Member State (Art. 13 (6) and (7)).
- **Fully funded requirement**  
IORPs can only carry out cross-border business if and for as long as the technical provisions are "fully funded" (Art. 15 (3)).
- ▶ **New principles of supervision of IORPs (with cross-border business)**
  - All IORPs - including those with cross-border business - are supervised by the competent authority in the home Member State (Art. 61 (1)).
  - The primary aim of the supervision of IORPs is the protection of the members and beneficiaries. However, the supervisory authorities also "duly" consider the stability of the financial system (Art. 59).
  - The competent authority possesses the necessary powers - e.g. implementation of stress-tests -, in order to be able to remedy "weaknesses or deficiencies" in the IORPs (Art. 63 (2) and (3)).
- ▶ **Introduction of a governance system for IORPs**
  - All IORPs must introduce "effective" systems of governance which are "proportionate" to the nature, scale and complexity of their activities (Art. 22).
  - IORPs must provide departments for the "key functions" of risk-management, internal auditing and, provided the members and beneficiaries do not bear all the risks, for actuarial functions. Risk management must be managed "separately" from internal auditing. (Art. 25 (1) and (2), Art. 26-28)
  - Both the managers of IORPs and the managers of their "key functions" must be professionally qualified and personally reliable ("fit and proper") (Art. 23 (1)).
  - IORPs must establish a "sound remuneration policy" for the management. The Commission can adopt delegated acts in this regard. (Art. 24)
- ▶ **Investment rules for IORPs**
  - All IORPs must invest in accordance with the "prudent person" rule and comply with a series of general EU-wide investment rules - such as the avoidance of cluster risks (Art. 20). Member States can exempt investments by IORPs in government bonds from the rules on avoiding cluster risks (Art. 20 (1), subparagraph 1).
  - The Member States can adopt "more detailed" investment rules for IORPs located in their territories. They cannot, however, prohibit IORPs from investing, in particular, in "instruments that have a long-term economic profile" - e.g. infrastructure projects. Member States may adopt "more stringent" rules for individual IORPs where they are "prudentially justified". (Art. 20 (6) and (7)).
  - For IORPs with cross-border business, the investment rules in the home Member State apply in addition to the general EU investment rules (Art. 20 (8)).
- ▶ **Information for members and beneficiaries**
  - **EU-wide uniform pension benefit statement**
    - Every year, free of charge, IORPs inform every member, by way of a "pension benefit statement", about the key elements - guarantees, costs, risks, target values - of their retirement pension (Art. 40).
    - The pension benefit statement must comprise a predetermined EU-wide structure (see [cepAccompanyingDocument](#)). The Commission specifies details about the content of the statement in delegated acts. (Art. 45-54)
  - **Information to be provided by IORPs**
    - IORPs inform
      - "prospective members" about the "features" of the pension scheme, any investment options and any environmental, climate and social issues of the investment approach (Art. 55),
      - members, at least two years prior to retirement age and on request, of the options available when claiming their retirement benefits - e.g. different payment options - and their advantages and disadvantages (Art. 56),
      - beneficiaries about the benefits and payment options open to them; where they bear an investment risk, they must also be informed accordingly (Art. 57).
    - For IORPs with cross-border business, the information obligations in the home Member State apply in addition to the general EU rules on information (Art. 12 (10)).

## Main Changes to the Status Quo

- ▶ The existing vague definition of cross-border IORPs business has been replaced by a more precise one.
- ▶ Until now, there has been no EU legislation on the cross-border transfer of pension schemes, on a system of governance for IORPs and a uniform pension benefit statement.
- ▶ As before, in the case of cross-border business there is a requirement for fully-funded provisions.
- ▶ Until now, the investment rules have been geared towards "risk capital markets", in future they will be geared towards "instruments that have a long-term economic profile".
- ▶ Until now Member States have been able to impose stricter national investment rules on IORPs with cross-border business. In future, only the rules in the home Member State will apply.
- ▶ Until now Member States have been able to impose stricter information obligations on IORPs with cross-border business. In future, only the information obligations in the home Member State will apply.
- ▶ Until now, there has been no clear division of responsibility for the supervision of IORPs with cross-border business. In future the authorities of the home Member State will have exclusive responsibility.

## Statement on Subsidiarity by the Commission

According to the Commission only EU action can remove the barriers to cross-border IORPs business and ensure a higher level of consumer protection EU-wide.

## Policy Context

As early as 2010 the Commission submitted the Green Paper "Adequate, sustainable and safe European pension systems" [COM (2010) 365, see [cepPolicyBrief](#)]. That was followed, in 2012, by the White Paper "An Agenda for Adequate, Safe and Sustainable Pensions" [COM(2012) 55, see [cepPolicyBrief](#)]. The introduction of solvability rules for IORPs like those introduced for insurance companies was the subject of long discussions ["Solvency II", Directive 2009/138/EC]. However, the European insurance supervisory authority (EIOPA) recommended that the Commission carry out further impact studies.

## Legislative Procedure

27 March 2014 Adoption by the Commission  
Open Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

## Options for Influencing the Political Process

Directorates General:	DG Internal Market
Leading Committee of the EP:	Economic and Monetary Affairs, Rapporteur: TBA
Leading Federal Ministry:	Finance
Leading Committee of the BT:	Finance
Decision-making mode in the Council:	Qualified majority (Adoption by a majority of the Member States and with 260 of 352 votes; Germany: 29 votes)

## Formalities

Legislative competence:	Art. 53 TFEU in conjunction with Art. 62 TFEU (self-employed activities) and Art. 114 TFEU (internal market)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (Ordinary legislative procedure)

# ASSESSMENT

## Economic Impact Assessment

The Directive introduces several individual measures to remove hurdles to cross-border business by IORPs and thereby strengthens the internal market. The following elements of the Directive contribute to this in concrete terms:

**The new definition of cross-border business creates legal clarity.** It ensures that the national supervisory authorities uniformly recognise cross-border IORPs business as such. Divergent application of the law at national level - as under the existing IORP-I-Directive - is avoided.

**The ability to transfer pension schemes from one IORP to an IORP in another Member State,** makes it easier to realise economies of scale. This **increases efficiency** and reduces the costs of retirement provision. Large companies, in particular, that operate in several Member States, gain from this. However, if all members and beneficiaries have to give their authorisation, the said advantages will not be realised.

The rules on supervision of IORPs, and in particular the clarification of the responsibilities and powers, create legal clarity and reduce friction losses and regulatory arbitrage.

**The fact that** in future, for cross-border IORPs business, **the home Member State's investment requirements and information obligations will apply, reduces administrative costs and increases efficiency.** A reduction in employee protection is prevented by the requirement for generally applicable investment

principles, the simultaneous introduction of comprehensive EU-wide governance rules and the fact that national labour and social law, with its employee protection provisions, will continue to apply. This is also guaranteed by way of the simultaneous introduction of comprehensive EU-wide information obligations with respect to members and beneficiaries.

**Whether these** correct and important **changes will actually promote cross-border IORPs business is doubtful**, however, **because of the fully funded requirement** in the case of cross-border business. Firstly, many Member States do not have this requirement - which ensures a high level of protection but also involves costs - for domestically operating IORPs. Therefore there is often no incentive to start cross-border business. Secondly, there is no evidence of a convincing reason for requiring fully-funded provisions in the case of cross-border business. Other national provisions in the host Member State to protect against insolvency - such as employers' obligations to provide additional funding or a protection fund with a duty for the employer to contribute -, which are generally incorporated into labour and social law, in line with the proposal for a Directive, are also applicable to cross-border business. **The funding requirements of the host Member State should therefore apply.** As a result, the requirements for protection against insolvency would be identical for both IORPs operating nationally and those operating across borders.

The requirement for fully-funded provisions could be justified as part of a possible EU statute ("29th Regime") on IORPs operating across borders. Such a statute would reduce transaction costs and allow for improvements in efficiency. However, it would have to contain a comprehensive harmonisation of significant parts of labour, social and taxation law which is a lost cause, both politically and legally, in view of the EU's lack of competence. Uniform governance rules are important. In addition to supervision, they increase the confidence of sponsor undertakings in the risk management of IORPs from other Member States and thus strengthen the internal market. Due to the heterogeneous nature of the occupational pension schemes in the Member States, these cannot be too detailed.

## Legal Assessment

### Legislative Competency

The Directive is correctly based on the competence to coordinate national provisions concerning the taking-up and pursuit of self-employed activities (Art. 53 (1), Art. 62 TFEU) and on the internal market competence (Art. 114 TFEU). Although occupational pensions are in fact very important for social politics in that they supplement the statutory pension, and their structures also differ substantially from those of other financial market stakeholders, the Directive only covers IORPs whose products closely resemble the traditional insurance products of the financial market.

### Subsidiarity

Unproblematic.

### Proportionality with Respect to Member States

Unproblematic.

### Compatibility with EU Law in other Respects

The remuneration rules may be in breach of the freedom to conduct a business [Art. 16 Charter of Fundamental Rights of the EU (CFR)]. Contractual freedom falls within the scope of protection. The remuneration rules constitute interference. Whether this is justified depends on how the Commission's delegated acts are designed. Points of reference for assessing the proportionality of the remuneration rules could arise from the pending judgement of the ECJ on the action for annulment brought by the United Kingdom against the remuneration rules for bank employees contained in Directive (2013/36/EU, CRD IV) and Regulation No. 575/2013 (CRR) (Case No. C-507/13).

### Impact on German Law

In Germany there are five types of occupational pension: Direct commitments by employers, direct insurance, two types of pension fund (*Pensionskassen* and *Pensionsfonds*) and benevolent funds (*Unterstützungskassen*) (Section 1 (1) and Section 1b (2) to (4) Occupational Pensions Act). The *Pensionskassen* and *Pensionsfonds* covered by the Directive are subject to supervision by BaFin [Section 1 (1) Insurance Supervision Act (VAG)]. The VAG must be adapted to comply with the Directive.

## Conclusion

The new definition of cross-border business creates legal clarity. The ability to transfer pension schemes across borders increases efficiency. The fact that the home Member State's investment requirements and information obligations will apply, reduces administrative costs and increases efficiency. Whether these changes will actually promote cross-border IORPs business is doubtful because of the requirement for fully-funded provisions. In the case of cross-border business, the host Member State's funding requirements should therefore apply.