

Directive (EU) 2016/2341 of the European Parliament and of the Council
of 14 December 2016 on the activities and supervision of institutions for
occupational retirement provision (IORPs) (recast) (Text with EEA relevance)

TITLE II

QUANTITATIVE REQUIREMENTS

Article 13

Technical provisions

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

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

3 The calculation of technical provisions shall take place every year. However, the home Member State may allow a calculation once every three years if the IORP provides members or the competent authorities with a certification or a report of adjustments for the intervening years. The certification or the report shall reflect the adjusted development of the technical provisions and changes in risks covered.

4 The calculation of the technical provisions shall be executed and certified by an actuary or by another specialist in that field, including an auditor, where permitted by national law, on the basis of actuarial methods recognised by the competent authorities of the home Member State, according to the following principles:

- a the minimum amount of the technical provisions shall be calculated by a sufficiently prudent actuarial valuation, taking account of all commitments for benefits and for contributions in accordance with the pension arrangements of the IORP. It must be sufficient both for pensions and benefits already in payment to beneficiaries to continue to be paid, and to reflect the commitments which arise out of members' accrued pension rights. The economic and actuarial assumptions chosen for the valuation of the liabilities shall also be chosen prudently taking account, if applicable, of an appropriate margin for adverse deviation;
- b the maximum rates of interest used shall be chosen prudently and determined in accordance with any relevant rules of the home Member State. Those prudent rates of interest shall be determined by taking into account:
 - (i) the yield on the corresponding assets held by the IORP and the projected future investment returns;
 - (ii) the market yields of high-quality bonds, government bonds, European Stability Mechanism bonds, European Investment Bank (EIB) bonds or European Financial Stability Facility bonds, or;

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- (iii) a combination of points (i) and (ii);
 - c the biometric tables used for the calculation of technical provisions shall be based on prudent principles, having regard to the main characteristics of the group of members and the pension schemes, in particular the expected changes in the relevant risks;
 - d the method and basis of calculation of technical provisions shall in general remain constant from one financial year to another. However, discontinuities may be justified by a change of legal, demographic or economic circumstances underlying the assumptions.
- 5 The home Member State may make the calculation of technical provisions subject to additional and more detailed requirements, with a view to ensuring that the interests of members and beneficiaries are adequately protected.

Article 14

Funding of technical provisions

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

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

- a the IORP shall set up a concrete and realisable plan to re-establish the required amount of assets to cover fully the technical provisions in due time. The plan shall be made available to members or, where applicable, to their representatives and/or shall be subject to approval by the competent authorities of the home Member State;
- b in drawing up the plan, account shall be taken of the specific situation of the IORP, in particular the asset/liability structure, risk profile, liquidity plan, the age profile of the members entitled to receive retirement benefits, start-up schemes and schemes changing from non-funding or partial funding to full funding;
- c in the event of winding up of a pension scheme during the period referred to in the first sentence of this paragraph, the IORP shall inform the competent authorities of the home Member State. The IORP shall establish a procedure in order to transfer the assets and the corresponding liabilities of that scheme to another IORP, an insurance undertaking or other appropriate body. This procedure shall be disclosed to the competent authorities of the home Member State and a general outline of the procedure shall be made available to members or, where applicable, to their representatives in accordance with the principle of confidentiality.

3 In the event of cross-border activity, the technical provisions shall at all times be fully funded in respect of the total range of pension schemes operated. If this condition is not met, the competent authority of the home Member State shall promptly intervene and require the IORP to immediately draw up appropriate measures and implement them without delay in a way that members and beneficiaries are adequately protected.

Article 15

Regulatory own funds

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

2 For the purposes of calculating the minimum amount of additional assets, the rules laid down in Articles 16, 17 and 18 shall apply.

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

Article 16

Available solvency margin

1 Member States shall require of every IORP referred to in Article 15(1) which is registered or authorised in their territories an adequate available solvency margin in respect of its entire business at all times which is at least equal to the requirements in this Directive in order to ensure long-term sustainability of occupational retirement provision.

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

- a the paid-up share capital or, in the case of an IORP taking the form of a mutual undertaking, the effective initial fund plus any accounts of the members of the mutual undertaking which fulfil the following criteria:
 - (i) the memorandum and articles of association must stipulate that payments may be made from those accounts to members of the mutual undertaking only insofar as this does not cause the available solvency margin to fall below the required level or, after the dissolution of the undertaking, where all the undertaking's other debts have been settled;
 - (ii) the memorandum and articles of association must stipulate, with respect to any payments referred to in point (i) for reasons other than the individual termination of membership in the mutual undertaking, that the competent authorities must be notified at least one month in advance and can prohibit the payment within that period; and
 - (iii) the relevant provisions of the memorandum and articles of association may be amended only after the competent authorities have declared that they have no objection to the amendment, without prejudice to the criteria referred to in points (i) and (ii);
- b reserves (statutory and free) not corresponding to underwriting liabilities;
- c the profit or loss brought forward after deduction of dividends to be paid; and

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

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

- 3 Member States may provide that the available solvency margin may also comprise:
 - a cumulative preferential share capital and subordinated loan capital up to 50 % of the lesser of the available solvency margin and the required solvency margin, no more than 25 % of which shall consist of subordinated loans with a fixed maturity, or fixed-term cumulative preferential share capital, provided that binding agreements exist under which, in the event of the bankruptcy or liquidation of the IORP, the subordinated loan capital or preferential share capital ranks after the claims of all other creditors and is not to be repaid until all other debts outstanding at the time have been settled;
 - b securities with no specified maturity date and other instruments, including cumulative preferential shares other than those referred to in point (a), to a maximum of 50 % of the available solvency margin, or the required solvency margin, whichever the lesser, for the total of such securities, and the subordinated loan capital referred to in point (a), provided they fulfil the following conditions:
 - (i) they must not be repaid on the initiative of the bearer or without the prior consent of the competent authority;
 - (ii) the contract of issue must enable the IORP to defer the payment of interest on the loan;
 - (iii) the lender's claims on the IORP must rank entirely after those of all non-subordinated creditors;
 - (iv) the documents governing the issue of the securities must provide for the loss-absorption capacity of the debt and unpaid interest, while enabling the IORP to continue its business; and
 - (v) only fully paid-up amounts must be taken into account.

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

- (i) only fully paid-up funds shall be taken into account;
- (ii) for loans with a fixed maturity, the original maturity shall be at least five years. No later than one year before the repayment date, the IORP shall submit to the competent authorities for their approval a plan showing how the available solvency margin will be kept at or brought to the required level at maturity, unless the extent to which the loan may rank as a component of the available solvency margin is gradually reduced during at least the five years before the repayment date. The competent authorities may authorise the early repayment of such loans provided application is made by the issuing IORP and its available solvency margin will not fall below the required level;
- (iii) loans the maturity of which is not fixed shall be repayable only subject to five years' notice unless the loans are no longer considered as a component of the available solvency margin or unless the prior consent of the competent authorities is specifically required for early repayment. In the latter event the IORP shall notify the competent authorities at least six months before the

date of the proposed repayment, specifying the available solvency margin and the required solvency margin both before and after that repayment. The competent authorities shall authorise repayment only where the IORP's available solvency margin will not fall below the required level;

- (iv) the loan agreement shall not include any clause providing that in specified circumstances, other than the winding-up of the IORP, the debt will become repayable before the agreed repayment dates; and
- (v) the loan agreement may be amended only after the competent authorities have declared that they have no objection to the amendment.

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

- a where Zillmerising is not practised or where, if practised, it is less than the loading for acquisition costs included in the premium, the difference between a non-Zillmerised or partially Zillmerised mathematical provision and a mathematical provision Zillmerised at a rate equal to the loading for acquisition costs included in the premium;
- b any hidden net reserves arising out of the valuation of assets, insofar as such hidden net reserves are not of an exceptional nature;
- c one half of the unpaid share capital or initial fund, once the paid-up part amounts to 25 % of that share capital or fund, up to 50 % of the available or required solvency margin, whichever is the lesser.

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

Article 17

Required solvency margin

1 The required solvency margin shall be determined as laid down in paragraphs 2 to 6 according to the liabilities underwritten.

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

- a the first result:
 - a 4 % fraction of the mathematical provisions relating to direct business and reinsurance acceptances gross of reinsurance cessions shall be multiplied by the ratio, which shall not be less than 85 %, for the previous financial year, of the mathematical provisions net of reinsurance cessions to the gross total mathematical provisions;
- b the second result:
 - for policies on which the capital at risk is not a negative figure, a 0,3 % fraction of such capital underwritten by the IORP shall be multiplied by the ratio, which shall not be less than 50 %, for the previous financial year, of the total capital at risk retained as the IORP's liability after reinsurance cessions and retrocessions to the total capital at risk gross of reinsurance.

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

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

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

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

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

- a insofar as the IORP bears an investment risk, a 4 % fraction of the technical provisions, calculated in compliance with paragraph 2(a);
- b insofar as the IORP bears no investment risk but the allocation to cover management expenses is fixed for a period exceeding five years, a 1 % fraction of the technical provisions, calculated in compliance with paragraph 2(a);
- c insofar as the IORP bears no investment risk and the allocation to cover management expenses is not fixed for a period exceeding five years, an amount equivalent to 25 % of the net administrative expenses of the previous financial year pertaining to such assurances and operations;
- d insofar as the IORP covers a death risk, a 0,3 % fraction of the capital at risk calculated in compliance with paragraph 2(b).

Article 18

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

1 The required solvency margin shall be determined on the basis either of the annual amount of premiums or contributions, or of the average burden of claims for the past three financial years.

2 The amount of the required solvency margin shall be equal to the higher of the two results as set out in paragraphs 3 and 4.

3 The premium basis shall be calculated using the higher of gross written premiums or contributions as calculated below, and gross earned premiums or contributions.

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

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

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

The amount so obtained shall be divided into two portions, the first extending up to EUR 50 000 000, the second comprising the excess; 18 % of the first portion and 16 % of the second shall be added together.

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

4 The claims basis shall be calculated, as follows:

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

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

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

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

One third of the amount so obtained shall be divided into two portions, the first extending up to EUR 35 000 000 and the second comprising the excess; 26 % of the first portion and 23 % of the second, shall be added together.

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

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

Article 19

Investment rules

1 Member States shall require IORPs registered or authorised in their territories to invest in accordance with the ‘prudent person’ rule and in particular in accordance with the following rules:

- a the assets shall be invested in the best long-term interests of members and beneficiaries as a whole. In the case of a potential conflict of interest, an IORP, or the entity which

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- manages its portfolio, shall ensure that the investment is made in the sole interest of members and beneficiaries;
- b within the prudent person rule, Member States shall allow IORPs to take into account the potential long-term impact of investment decisions on environmental, social, and governance factors;
 - c the assets shall be invested in such a manner as to ensure the security, quality, liquidity and profitability of the portfolio as a whole;
 - d the assets shall be predominantly invested on regulated markets. Investment in assets which are not admitted to trading on a regulated financial market must in any event be kept to prudent levels;
 - e investment in derivative instruments shall be possible insofar as such instruments contribute to a reduction in investment risks or facilitate efficient portfolio management. They must be valued on a prudent basis, taking into account the underlying asset, and included in the valuation of an IORP's assets. IORPs shall also avoid excessive risk exposure to a single counterparty and to other derivative operations;
 - f the assets shall be properly diversified in such a way as to avoid excessive reliance on any particular asset, issuer or group of undertakings and accumulations of risk in the portfolio as a whole.

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

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

Where an IORP is sponsored by a number of undertakings, investment in those sponsoring undertakings shall be made prudently, taking into account the need for proper diversification.

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

2 Taking into account the size, nature, scale and complexity of the activities of the IORPs supervised, Member States shall ensure that the competent authorities monitor the adequacy of the IORPs' credit assessment processes, assess the use of references to credit ratings issued by credit rating agencies as defined in point (b) of Article 3(1) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council⁽¹⁾, in their investment policies and, where appropriate, encourage mitigation of the impact of such references, with a view to reducing sole and mechanistic reliance on such credit ratings.

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

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

5 Without prejudice to Article 30, Member States shall not subject the investment decisions of an IORP registered or authorised in their territory or its investment manager to any kind of prior approval or systematic notification requirements.

6 In accordance with the provisions of paragraphs 1 to 5, Member States may, for the IORPs registered or authorised in their territories, lay down more detailed rules, including

quantitative rules, provided they are prudentially justified, to reflect the total range of pension schemes operated by those IORPs.

However, Member States shall not prevent IORPs from:

- a investing up to 70 % of the assets covering the technical provisions or of the whole portfolio for schemes in which the members bear the investment risks in shares, negotiable securities treated as shares and corporate bonds admitted to trading on regulated markets, or through MTFs or OTFs, and deciding on the relative weight of those securities in their investment portfolio. However, provided that it is prudentially justified, Member States may apply a lower limit of no lower than 35 % to IORPs which operate pension schemes with a long-term interest rate guarantee, bear the investment risk and themselves provide for the guarantee;
- b investing up to 30 % of the assets covering technical provisions in assets denominated in currencies other than those in which the liabilities are expressed;
- c investing in instruments that have a long-term investment horizon and are not traded on regulated markets, MTFs or OTFs;
- d investing in instruments that are issued or guaranteed by the EIB provided in the framework of the European Fund for Strategic Investments, European Long-term Investment Funds, European Social Entrepreneurship Funds and European Venture Capital Funds.

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

8 The competent authority of the host Member State of an IORP carrying out cross-border activity as referred to in Article 11 shall not lay down investment rules in addition to those set out in paragraphs 1 to 6 for the part of the assets which cover technical provisions for cross-border activity.

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- (1) Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies ([OJ L 302, 17.11.2009, p. 1](#)).