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)

DIRECTIVE (EU) 2016/2341 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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(recast)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53, Article 62 and Article 114(1) thereof,

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee[(1)],

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

(1) Directive 2003/41/EC of the European Parliament and of the Council[(3)] has been substantially amended several times[(4)]. Since further amendments are to be made, that Directive should be recast in the interests of clarity.

(2) In the internal market, institutions for occupational retirement provision (IORPs) should have the possibility to operate in other Member States while ensuring a high level of protection and security for members and beneficiaries of occupational pension schemes.

(3) This Directive is aimed at minimum harmonisation and therefore should not preclude Member States from maintaining or introducing further provisions in order to protect members and beneficiaries of occupational pension schemes, provided that such provisions are consistent with Member States' obligations under Union law. This Directive does not concern issues of national social, labour, tax or contract law, or the adequacy of pension provision in Member States.

(4) In order to facilitate further the mobility of workers between Member States, this Directive aims to ensure good governance, the provision of information to scheme members and the transparency and safety of occupational retirement provision.

(5) The way in which IORPs are organised and regulated varies significantly between Member States. Both IORPs and life insurance undertakings manage occupational

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pension schemes. It is not appropriate, therefore, to adopt a 'one-size-fits-all' approach to IORPs. The Commission and the European Supervisory Authority (European Insurance and Occupational Pensions Authority) (EIOPA) established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council[(5)] should have regard to the various traditions of Member States in their activities and should act without prejudice to national social and labour law in determining the organisation of IORPs.

(6) Directive 2003/41/EC represented a first legislative step on the way to an internal market for occupational retirement provision organised on a Union scale. A genuine internal market for occupational retirement provision remains crucial for economic growth and job creation in the Union and for tackling the challenge of an ageing society. That Directive, dating from 2003, has not been substantially amended to introduce a modern risk-based governance system for IORPs. Appropriate regulation and supervision at Union and national level remain important for the development of safe and secure occupational retirement provision across all Member States.

(7) As a general principle, IORPs should, where relevant, take into account the objective of ensuring the intergenerational balance of occupational pension schemes, by aiming to have an equitable spread of risks and benefits between generations in occupational retirement provision.

(8) Appropriate action is needed to further improve complementary private retirement savings such as occupational pension schemes. This is important since social security systems are coming under increasing pressure, which means that occupational retirement pensions are increasingly relied on to complement other retirement provisions. IORPs play an important role in the long-term financing of the Union's economy and in the provision of secure retirement benefits. They are a vital part of the Union economy, holding assets worth EUR 2,5 trillion on behalf of around 75 million members and beneficiaries. Occupational retirement pensions should be improved, without, however, calling into question the major importance of social security pension systems in terms of secure, durable and effective social protection, which should guarantee a decent standard of living in old age and should therefore be at the centre of the objective of strengthening the European social models.

(9) In light of demographic developments in the Union and the situation regarding national budgets, occupational retirement provision is a valuable addition to social security pension systems. A resilient pension system includes a diverse product range, a diversity of institutions as well as effective and efficient supervisory practices.

(10) Member States should protect workers from old-age poverty and promote supplementary pension schemes linked to employment contracts as additional coverage to public pensions.

(11) This Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular the right to the protection of personal data, the freedom to conduct a business, the right to property, the right of collective bargaining and action and the right to a high level of consumer protection, in particular by ensuring a higher level of transparency of retirement provisioning, informed personal financial and retirement planning as well as

facilitating the cross-border activity of IORPs and the cross-border transfer of pension schemes. This Directive is to be implemented in accordance with those rights and principles.

(12) In particular, facilitating the cross-border activity of IORPs and the cross-border transfer of pension schemes by clarifying the relevant procedures and removing unnecessary obstacles could have a positive impact on the undertakings concerned and their employees, in whichever Member State they work, through the centralisation of the management of the retirement services provided.

(13) The cross-border activity of IORPs should be without prejudice to national social and labour law, relevant to the field of occupational pension schemes of the host Member State, applicable to the relationship between the undertaking offering the pension scheme ('sponsoring undertaking') and members and beneficiaries. Cross-border activity and the cross-border transfer of pension schemes are distinct and should be governed by different provisions. If a cross-border transfer of a pension scheme leads to cross-border activity, the provisions on cross-border activity should then apply.

(14) Where the sponsoring undertaking and the IORP are located in the same Member State, the mere fact that members or beneficiaries of a pension scheme have their residence in another Member State does not in itself constitute a cross-border activity.

(15) Member States should take into account the need to protect the pension rights of workers temporarily sent to work in another Member State.

(16) Despite the entry into force of Directive 2003/41/EC, cross-border activity has been limited due to the differences in national social and labour law. Furthermore, important prudential barriers remain which make it more expensive for IORPs to operate pension schemes across borders. In addition, the current minimum level of protection for members and beneficiaries needs to be improved. This is all the more important as longevity and market risks are increasingly borne by members and beneficiaries rather than the IORP or the sponsoring undertaking. In addition, the current minimum level of information provision to members and beneficiaries needs to be increased.

(17) The prudential rules laid down in this Directive are intended both to guarantee a high degree of security for all future pensioners through the imposition of stringent supervisory standards, and to clear the way for the sound, prudent and efficient management of occupational pension schemes.

(18) IORPs should be completely separated from any sponsoring undertaking and operate on a funded basis for the purpose of providing retirement benefits. IORPs which operate for that sole purpose should have the freedom to provide services and freedom of investment, subject only to coordinated prudential requirements, regardless of whether such IORPs are considered to be legal entities.

(19) In accordance with the principle of subsidiarity, Member States should retain full responsibility for the organisation of their pension systems as well as for the decision on the role of each of the three pillars of the retirement system in individual Member States. In the context of the second pillar, they should also retain full responsibility for the role and functions of the various institutions providing occupational retirement benefits,

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such as industry-wide pension funds, company pension funds and life insurance undertakings. This Directive is not intended to call this prerogative of Member States into question, but rather encourage them to build up adequate, safe and sustainable occupational retirement provision and facilitate cross-border activity.

(20) Taking into account the need to further improve occupational retirement provision, the Commission should provide significant added value at Union level by undertaking further steps in supporting Member States' cooperation with social partners in the improvement of second pillar pension schemes and by establishing a high level group of experts to enhance second pillar retirement savings in Member States, including the promotion of the exchange of best practices between Member States, in particular with regard to cross-border activity.

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

(22) Institutions operating social security schemes which are already coordinated at Union level, should be excluded from the scope of this Directive. Account should nevertheless be taken of the specificity of IORPs which, in a single Member State, operate both social security schemes and occupational pension schemes.

(23) Institutions operating on the principle of capital financing as part of mandatory social security schemes are not covered by this Directive.

(24) Financial institutions which already benefit from a Union legislative framework should in general be excluded from the scope of this Directive. However, as such institutions may also in some cases offer occupational pension services, it is important to ensure that this Directive does not lead to distortions of competition. Such distortions can be avoided by applying the prudential requirements of this Directive to the occupational pension business of life insurance undertakings in accordance with point (a)(i) to (iii) of Article 2(3) and point (b)(ii) to (iv) of Article 2(3) of Directive 2009/138/EC of the European Parliament and of the Council[(6)]. The Commission should also carefully monitor the situation in the occupational pensions market and assess the possibility of extending the optional application of this Directive to other regulated financial institutions.

(25) Since IORPs aim to ensure financial security in retirement, the retirement benefits paid by them should generally take the form of payments for life, payments to be made for a temporary period, lump sum payments, or any combination thereof.

(26) It is important to ensure that older and disabled people are not placed at risk of poverty and can enjoy a decent standard of living. Appropriate cover for biometric risks in occupational pension arrangements is an important aspect of the fight against poverty

and insecurity among elderly people. When setting up a pension scheme, employers and employees, or their respective representatives, should consider the possibility of the pension scheme including provisions for the coverage of the longevity risk and occupational disability risks as well as provision for surviving dependants.

(27) Giving Member States the possibility to exclude from the scope of national implementing law IORPs which operate pension schemes which together have less than 100 members in total can facilitate supervision in those Member States, without undermining the proper functioning of the internal market in this field. However, this should not undermine the right of such IORPs to appoint investment managers established and duly authorised in another Member State for the management of their investment portfolio, and custodians or depositaries established and duly authorised in another Member State for the custody of their assets. In any event, Member States should apply certain provisions concerning investment rules and the system of governance to IORPs which operate pension schemes which together have more than 15 members in total.

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

(29) In order to protect members and beneficiaries, IORPs should limit their activities to those referred to in this Directive and to those arising therefrom.

(30) In the event of the bankruptcy of a sponsoring undertaking, members face the risk of losing both their jobs and their acquired pension rights. This makes it necessary to ensure that there is a clear separation between the sponsoring undertaking and the IORP and that minimum prudential standards are laid down to protect members. Access of IORPs to pension protection schemes or similar mechanisms which protect the accrued individual entitlements of members and beneficiaries against the risk of default of the sponsoring undertaking should be taken into account when such standards are laid down.

(31) The operation and supervision of IORPs differ significantly between Member States. In some Member States, supervision can be exercised not only over the IORP itself but also over the entities or companies which are authorised to manage such IORPs. Member States should be able to take such specificity into account as long as all the requirements laid down in this Directive are effectively met. Member States should also be able to allow insurance entities and other financial entities to manage IORPs.

(32) IORPs are pension institutions with a social purpose that provide financial services. They are responsible for the provision of occupational retirement benefits and should therefore meet certain minimum prudential standards with respect to their activities and conditions of operation, taking into account national rules and traditions. However, such institutions should not be treated as purely financial service providers. Their social function and the triangular relationship between the employee, the employer and the IORP should be adequately acknowledged and supported as guiding principles of this Directive.