

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(93) 237 final - SYN 363

Brussels, 26 May 1993

Amended proposal for a

COUNCIL DIRECTIVE

**relating to the freedom of management and investment of funds
held by institutions for retirement provision**

**(presented by the Commission pursuant to Article 149(3)
of the EEC-Treaty)**

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(93) 237 final/2 - SYN 363

ADDENDUM

Brussels, 14 June 1993

au document com(93) 237 final - SYN 363
du 26 mai 1993
(ne concerne que la version EN)

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COUNCIL DIRECTIVE

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Contained page 10 left out of the original. Page 10
has been inserted into the text.

EXPLANATORY MEMORANDUM

On the 12th of November 1991 the Commission sent to the Council the Proposal for a Council Directive relating to the freedom of management and investment of funds held by institutions for retirement provision. The aim of the proposal is to provide for the application of the fundamental treaty principles of freedom of capital movements and freedom of services to institutions for retirement provision.

The Economic and Social Committee gave its opinion on the 29th of April 1992. The European Parliament gave its opinion on the 18th of November 1992 on the basis of a report from its Legal Committee, thus completing the first reading of this proposal. Both the European Parliament and the Social and Economic Committee approved the general approach of the initial proposal.

The Commission has accepted two amendments proposed by the European Parliament in their intention, if not their exact wording. In accordance with Article 149, paragraph 3 of the Treaty, the Commission has decided to amend its initial proposal.

In line with the purpose of Amendment No 17, Article 2(a) has been changed to more clearly define the scope of the Directive. While the Annex largely corresponds to the lists included in Council Regulation 1408/71 the purposes of that Regulation and the current Directive are sufficiently diverse to require a separate list to be produced. This avoids any automatic change to the scope of this Directive whenever the lists annexed to regulation 1408/71 are adapted for the purpose of that Regulation. However, the indicative nature of the list has been maintained. An indicative list is appended to the revised proposal as an Annex.

Taking up the spirit of the first part of Amendment 27, Article 4.1(c) has been changed to extend the restriction on investment in the sponsoring undertaking to "associated undertakings". This has required a definition of "associated undertakings" which is based upon the definitions in the Seventh Council Directive of 13th June 1983 (83/349/EEC).

On the other hand the Commission has not considered it appropriate to take up certain other amendments, particularly in the following areas:

1. Amendments outside the scope of the proposal.

Amendments 6 and 14 on pensions surpluses and contribution holidays

Amendment 7 on the economic position of women

Amendments 4 and 9 on members' participation in the decision making processes of institutions and the training of their representatives.

Amendment 15 on insolvency insurance

Amendments 16, 19, 20, 24 and 25 on annual accounts, actuarial valuations, detailed investment rules and the disclosure of investments.

The first part of amendment 26 which would oblige Member States to define the duties and obligations of board members, managers and custodians.

While all these amendments raise issues of concern they go beyond the scope of the proposal which is restricted to the freedom of investment and of provision of services. As the proposal does not envisage any detailed harmonisation of prudential regulations for pension funds these issues cannot be addressed in the context of this proposal. The spirit of amendment 15 is already addressed by Article 8 of Directive 80/987/EEC¹ which deals with the protection of the rights of employees in the event of the employer becoming insolvent.

2. Amendments which the Commission rejects because they make the proposal less clear.

Amendments 8 and 10 are already encapsulated within the present proposal. Amendments 3, 12 and the second part of 26, which require that investments should be made in the long term or in the best interests of the beneficiaries are already, and we believe better, covered by the proposal's present reference to the prudent man rule.

Amendment 1 refers to "professional pension schemes". The Commission's proposal, however, does not deal with "schemes" but with "institutions". It is also unclear what is meant by a "professional" pension scheme. Amendment 27 seeks to introduce the term "first pillar statutory social security bodies". This is legally imprecise and could cause confusion. Both amendments have been addressed in spirit by the changes made to Article 2(a)

1 OJ No L 283, 20.10.1980, p. 23

3. Amendments which the Commission opposes in principle.

There are seven amendments which the Commission cannot accept because they run counter to the policy objectives of this proposed Directive:

Amendments falling into this category are:

Amendments 2 and 5 and 22 would require pension funds to invest in the wider interests of the Community to, for example, stimulate growth. These amendments contradict the principle, accepted by Parliament, that pension funds should be invested in the sole interests of the beneficiaries and participants.

Amendment 11, requiring custodians to be entirely independent of sponsoring undertakings would, for instance, forbid a bank to act as custodian of the pension fund for its own employees, requiring it to engage a competitor to provide this service, and this amendment must therefore, in the view of the Commission, be rejected.

The second part of Amendment 13 proposes a maximum percentage for self investment which in most circumstances would be regarded as too high, but which can be too low in certain situations where self investment is justifiable. Furthermore, such a specific maximum runs counter to the general principle of this proposal which is to establish prudential principles and to leave Member States to translate the principles into detailed requirements appropriate to their own markets and conditions.

Amendment 28, taken together with Amendment 18, would prevent Member States from laying down prudential rules to ensure proper diversification and currency matching while Amendment 18 taken in isolation would enable Member States to require 100% currency matching. These are contrary to the principle of free movement of capital and also to modern investment practice and theory which suggests that proper diversification can improve the yield obtained over the long term.

**Amended Proposal for a
COUNCIL DIRECTIVE
relating to the freedom of management and investment of funds
held by institutions for retirement provision**

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57(2) and 66 thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas institutions for retirement provision are institutions 'sui generis' which are amongst the largest and most important financial institutions within the Community and often represent an alternative means of providing the same benefits as are provided by other competing financial institutions;

Whereas the provision of supplementary retirement benefits through institutions for retirement provision is a matter of considerable importance for social policy within the Community and forms one

part of the overall structure of retirement provision, the components of which vary considerably between Member States, particularly as regards the level and the form of statutory social security retirement benefits; whereas there is no intention to alter at Community level the balance which has been arrived at in individual Member States in this respect; whereas the provision of supplementary retirement benefits can facilitate the effective provision of a satisfactory level of overall retirement income; whereas the protection of rights to retirement benefits is therefore a matter of proper concern and great importance for the Member States;

Whereas the provisions of the Directive apply equally to many different types of institution for retirement provision including institutions which operate on a fully funded basis, but also some institutions operating essentially on a pay-as-you-go basis with compulsory membership and limited reserves on the basis of generational transfers; whereas such institutions are different in many other respects; whereas the characteristics which are necessary for their stability must be taken into account;

Whereas freedom of services extends to the provision of investment management services and custody services to institutions for retirement provision; whereas a situation where such institutions are restricted to the use of investment managers or custodians established in a particular Member State is incompatible with the principle of freedom of services; whereas the requirements for authorisation and mutual recognition of the providers of such services are set out under the legislation applicable to these providers;

Whereas institutions for retirement provision represent major accumulations of capital within the Community; whereas the provisions of Council Directive (88/361/EEC)¹ (capital movements) have a clear impact on such institutions but are without prejudice to the right of Member States to take all requisite measures to prevent infringements of their laws and regulations, inter alia in the field of prudential supervision of financial institutions; whereas it is therefore necessary to define in more detail the prudential investment rules which are consistent with the free movement of capital and the freedom of services; whereas the adoption of common prudential investment principles will facilitate the exercise of the freedom of establishment for institutions for retirement provision;

Whereas the protection of members' rights requires that the assets of institutions for retirement provision be invested in a prudent manner; whereas capital movements within the Community must not lead to a situation where an increased level of risk could endanger those rights; whereas the assets of institutions for retirement provision must therefore be invested with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; whereas those responsible for the investment of the assets of an institution for retirement provision, such as the directors or trustees of such an institution, and their delegates, such as external or internal managers and advisors, must act together in the sole interest of

¹ OJ No L 178, 8.7.1988, p. 5.

plan participants and beneficiaries; whereas no investment should be made for the particular interest of any such directors or trustees or of their delegates, nor should any investment be made to pursue solely the interests of the undertaking or undertakings which sponsor the institution or any associated undertaking; whereas the investment of the assets of an institution for retirement provision should follow the principles of sufficient diversification, quality, liquidity and restraint on investment in the sponsoring undertaking or associated undertakings; whereas the investment of such assets must be considered and judged within the context of the overall portfolio and the performance objectives and risk tolerance of the institution and not within the context of each investment taken in isolation;

Whereas supplementary retirement provision is often organised on an occupational basis either for a particular sector or associated with particular undertakings; whereas as a result of progress towards the single market such undertakings are often organised on a basis which crosses national borders and wish to organise retirement provision on a consistent basis; whereas direct and indirect barriers still exist to the free provision of cross-border services by institutions for retirement provision; whereas in this respect there are also requests from consumer representatives to take the Community dimension into account in the development of supplementary retirement benefits; whereas this dimension could, subject to certain conditions, contribute to the transnational mobility of workers; whereas further work needs to be done on this subject, taking into account the difference between the types of institution for retirement provision and not calling into question the functioning of institutions with compulsory membership,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. This Directive shall apply to institutions for retirement provision in order to ensure certain freedoms concerning the management and investment of their assets.
2. This Directive shall not apply to financial institutions which are covered by

Council Directive 89/646/EEC¹

Council Directive 92/96/EEC²

Council Directive 92/49/EEC³

Council Directive 85/611/EEC⁴

Directive

(Investment Services Directive)

1 OJ No L 386, 30.12.1989, p. 1

2 OJ No L 360, 9.12.1992, p. 1

3 OJ No L 228, 11.8.1992, p. 1

4 OJ No L 375, 31.12.1985, p. 3

Article 2

For the purpose of this Directive

- (a) "Institution for retirement provision" means an institution or a fund, other than a statutory social security body, established separately from any sponsoring undertaking or body for the purpose of financing supplementary retirement benefits, including those prescribed by, or provided for, in social security legislation and which constitute reserves which are capable of being invested in assets.

A non exhaustive list as at the date of adoption of this Directive of the statutory social security bodies, referred to in the above sub paragraph, is contained in the Annex.

Member States shall inform the Commission of any changes to this list which shall be published in the Official Journal.

- (b) "retirement benefits" means benefits in the form of pensions, whether for life-time or a temporary period, or in the form of lump sums paid on death, disability, cessation of employment or when a defined retirement age is reached, or support payments in case of sickness or indigence when they are supplementary to the above-mentioned benefits. Benefits which replace statutory social security benefits are regarded as retirement benefits within this definition.

- (c) "Sponsoring Undertaking" means any private or public undertaking which pays contributions, or the employees or members of which pay contributions, into an institution for retirement provision.
- (d) "Sponsoring Body" means any private or public body which pays contributions, or the employees or members of which pay contributions, into an institution for retirement provision.

Article 3

1. Member States which permit the external management of the investments of certain forms of institution for retirement provision shall not restrict the freedom of such institutions to choose an investment manager, for parts or the whole of their assets, who is established in another Member State and duly authorised for this activity, according to Council Directive 92/96/EEC, Directive (Investments Services Directive) or Council Directive 89/646/EEC.
2. Member States shall allow institutions for retirement provision of which the sponsoring undertakings or bodies belong to a group of undertakings or bodies to organise the management of their investments on a group basis, through one of these institutions. This shall not affect the right of Member States to provide that institutions for retirement provision shall be managed by a separate legal entity.

3. Member States which permit or require that the assets of an institution for retirement provision are held by a custodian shall not restrict the freedom of such institutions to choose a custodian to hold parts or the whole of their assets who is established in another Member State and duly authorised according to Directive 89/646/EEC or Directive (Investment Services Directive), or is accepted as a depository for the purposes of Directive 85/611/EEC.

Article 4.

1. Member States shall require institutions for retirement provision established within their territory to invest all assets held to cover expected future retirement benefit payments in accordance with the following principles:

- (a) The assets shall be invested in a manner appropriate to the nature and the duration of the corresponding liabilities and the level of their funding, taking account of the requirements of security, quality, liquidity and profitability of the institution's portfolio as a whole.
- (b) The assets shall be sufficiently diversified in such a way as to avoid major accumulations of risk in the portfolio as a whole.

(c) Investment in the sponsoring undertaking or undertakings or in affiliated or associated undertakings shall be restricted to a prudent level. "Affiliated undertakings" are those between which a relationship exists as described in Article 1 of Council Directive 83/349/EEC¹ of 13th June 1983. "Associated undertakings" are those over which the sponsoring undertaking or undertakings or an affiliated undertaking exercises a significant influence as described in Article 33(1) of Council Directive 83/349/EEC of 13th June 1983.

In the application of these principles the extent of any insolvency insurance or State guarantees may be taken into account.

2. Member States shall not require institutions for retirement provision to invest in particular categories of assets or to localize their assets in a particular Member State.
3. Member States shall in no case require institutions for retirement provision to hold more than 80% of their assets in matching currencies, after taking account of the effect of any currency hedging instruments held by the institution. In the case of those institutions for retirement provision whose liabilities are not fixed in monetary terms, but are for instance linked to future salary levels, this percentage shall be reduced to 60%.

Assets denominated in ECU shall be regarded as matching any particular currency in the Community.

1 OJ No L 193, 19.7.1983, p. 2

4. Member States shall not subject the investment decisions of an institution for retirement provision or its investment manager to any kind of prior approval or systematic notification requirements.
5. Member States may lay down more detailed rules consistent with paragraphs 1 to 4.

Article 5

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than They shall forthwith inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the texts of the main laws, regulations or administrative provisions which they adopt in the field covered by this Directive.

Article 6

This Directive is addressed to Member States.

Done at Brussels

For the Council
The President

ANNEX

List of Social Security Bodies referred to in Article 2(a)

BELGIQUE/BELGIE

Office national des pensions, Bruxelles - Rijksdienst voor
verknemerspensioenen, Brussel

Institut national d'assurances sociales pour travailleurs indépendants,
Bruxelles - Rijksinstituut voor de sociale verzekeringen der
zelfstandigen, Brussel

DANMARK

Arbejdsmarkedets Tillægspension

DEUTSCHLAND

Bundesversicherungsanstalt für Angestellte (BfA)

Landesversicherungsanstalten (LVAen)

Bundesknappschaft

Altershilfe für Landwirte

Seekasse

Bundesbahnversicherungsanstalt

Berufsständische Versorgungswerke

(doctors, architects, pharmacists, notaries, lawyers, veterinarians,
dentists)

Zusatzversorgung des öffentlichen Dienstes

HELLAS

ΙΚΑ

Ταμείο Συντάξεων Αυτοκινητιστών

Ταμείο Συντάξεων και Επικ. Ασφάλισης Προσωπικού

Γεωργικών Συνεταιριστικών Οργανώσεων

Ταμείο Συντάξεων Προσωπικού ΗΣΑΠ

Ταμείο Συντάξεων Προσωπικού

Θεραπευτηρίου "Ο ΕΥΑΓΓΕΛΙΣΜΟΣ"

Ταμείο Ασφαλ. Προσωπικού Ασφ. Εταιρίας "Η ΕΘΝΙΚΗ"

Ταμείο Συντάξεων Προσωπικού Εθνικής Τραπεζής της Ελλάδος

Κτηματικής
Ταμείο Συντάξεων Προσωπικού Τραπεζής Ελλάδος και

Ταμείο Συντάξεων Προσωπικού Αγοτικής Τραπεζής της Ελλάδος

Ταμείο Ασφάλισης Προσωπικού ETBA

Ταμείο Ασφάλισης Προσωπικού Ο.Τ.Ε.

Ταμείο Ασφάλισης Εμπόρων
Ταμείο Ασφάλισης Ναυτικών Πρακτόρων και Υπαλλήλων

Ταμείο Συντάξεων Εκτελεστών
Ταμείο Πρόνοιας Ξενοδόχων

Ταμείο Νομικών
ΤΑΥ

ΤΙΜΕΛΕ
Ταμείο Συντάξεων Προσωπικού Εφημερίδων
Αθηνών - Θεσσαλονίκης

Τ.Α.Π.Ε.Π. Ιπποδρομίων
Ταμείο Ασφάλισης Διοικητών Συντακτών και

Υπαλλήλων Τύπου
Ταμείο Συντάξεων Εφημερίδων και Υπαλλήλων

Πρακτορείων Θεσσαλονίκης
Ταμείο Ασφάλισης Τύπου Αθηνών και

Θεσσαλονίκης
ΟΤΑ

Τ.Α.Π.Ε.Π. Ιπποδρομίων
Τ.Ε.Α.Π.Ε. Αιμασμάτων

Ε.Τ.Ε. Μετάλλου
Τ.Ε.Α.Ε.Υ.Ε.Ε. Οργανώσεων

Τ.Ε.Α.Π.Ε. Τοιμέντων
Τ.Ε.Α.Π.Ο.Ζ. Ολυμπίας

Τ.Ε.Α.Υ.Ε. Καταστημάτων
Τ.Ε.Α.Α.Π. Ασφ/κών Επιχειρήσεων

Τ.Ε.Α. Ηλεκτροτεχνιών
Τ.Ε.Α.Ε.Δ. Ξυλουργικών Εργασιών

Τ.Ε.Α.Υ. Φαρμακευτικών Εργασιών

- T.Ε.Α.Π.Ε. Πετρελαιοειδών
- T.Ε.Α.Υ.Ε. Τροφίμων
- T.Ε.Α.Π. Αεροπορικών Επιχειρήσεων
- T.Ε.Α.Ε.Ι.Γ. Εκπαίδευσης
- ΙΚΑ - TEAM
- Ταμείο Αρωγής Προσωπικού ΟΤΕ
- Κλάδ. Επικ. Ασφ. Δικηγόρων
- Ταμ. Επικ. Ασφ. Χημικών
- Ταμ. Επικ. Ασφ. Υπαλ. Ραδ. και Τουρισμού
- Ταμ. Επικ. Ασφάλισης Αρτοποιιών
- Ταμ. Επικ. Ασφ. και Πρόν. Προσ. ΕΡΤ 2

ESPAÑA

- Instituto Nacional de la Seguridad Social
- Instituto Nacional de Empleo
- Instituto Social de la Marina
- Mutualidad General de Funcionarios Civiles del Estado
- Mutualidad Nacional de Previsión de la Administración Local
- Mutuas patronales de accidentes de trabajo reguladas en la Ley General de Seguridad Social

FRANCE

- Agence Centrale des Organismes de Sécurité Sociale (ACOSS)
- Unions pour le Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales (URSSAF)
- Caisse Nationale d'Assurance Vieillesse des travailleurs Salariés (CNAVTS)
- Caisses Régionales d'Assurance Maladie (CRAM)
- Caisse Régionale d'Assurance Vieillesse de Strasbourg
- Caisses Générales de Sécurité Sociale des Départements d'Outre-Mer
- Caisses des Français de l'Etranger
- Fonds National de Solidarité
- Caisse Centrale de Secours Mutuels Agricoles
- Caisse Nationale d'Assurance Vieillesse Mutuelle Agricole
- Caisses de Mutualité Sociale Agricole

Caisse de Prévoyance Sociale de Saint Pierre et Miquelon

Caisse Nationale de Retraites des Agents des Collectivités Locales
(CNRACL)

Fonds Spécial des ouvriers de l'Etat

Caisse Autonome Nationale de la Sécurité Sociale dans les Mines
(CANSSM)

Etablissement National des Invalides de la Marine (ENIM)

Caisse de Retraite et de Prévoyance des Clercs et Employés de Notaires
(CRPCEN)

Caisses des Organisations autonome d'Assurance Vieillesse des
Professions Artisanales (CANCAVA, AVA), des Professions industrielles
et commerciales (ORGANIC) et des Professions Libérales (CNAVPL) visées
à l'article L 621-3 du code de la sécurité sociale

Caisse Nationale des Barreaux Français (CNBF)

Caisse Mutuelle d'Assurance Vieillesse des Cultes (CAMAVIC)

Union Nationale Interprofessionnelle pour l'Emploi dans l'Industrie et
le Commerce (UNEDIC)

Associations pour l'Emploi dans l'Industrie et le Commerce (ASSEDIC)

IRELAND

The Social Insurance Fund established under Section 122 of the Social
Welfare (Consolidation) Act 1981.

ITALIA

Istituto nazionale della previdenza sociale

Ente nazionale di previdenza e assistenza per i lavoratori dello
spettacolo

Istituto nazionale di previdenza per i dirigenti di aziende
industriali, Roma

Istituto nazionale di previdenza per i giornalisti italiani 'G.
Amendola'

Ente nazionale di previdenza ed assistenza medici

Ente nazionale di previdenza ed assistenza farmacisti

Ente nazionale di previdenza ed assistenza veterinari

Cassa nazionale di previdenza per gli ingegneri ed architetti

- Cassa nazionale di previdenza ed assistenza a favore dei geometri
- Cassa nazionale di previdenza ed assistenza a favore degli avvocati e dei procuratori
- Cassa nazionale di previdenza ed assistenza a favore dei dottori commercialisti
- Cassa nazionale di previdenza ed assistenza a favore dei ragionieri e periti commerciali
- Ente nazionale di previdenza ed assistenza per i consulenti del lavoro
- Cassa nazionale notariato
- Fondo di previdenza a favore degli spedizionieri doganali
- Ente Nazionale Assistenza Rappresentati di Commercio (ENASARCO)
- Istituto Nazionale della Previdenza Dipendenti Amministrazione Pubblico (INPDAP)
- Ente Ferrovie dello Stato
- Istituto Postelegraphonico

LUXEMBOURG

- Etablissement d'assurance contre la vieillesse et l'invalidité, Luxembourg
- Caisse de pension des employés privés, Luxembourg
- Caisse de pension des artisans, des commerçants et des industriels, Luxembourg
- Caisse de pension agricole, Luxembourg
- Caisse de prévoyance des fonctionnaires et employés communaux

NEDERLAND

Fondsen en instellingen als bedoeld in de Organisatiewet Sociale Verzekeringen en de Wet op de Sociale Verzekeringsbank, in de telkens van kracht zijnde versies.

PORTUGAL

- Centro Nacional de Pensões
- Caixa Nacional de Seguros de Doenças Profissionais
- Caixa de Previdência do Pessoal da Companhia Portuguesa Rádio Marconi

Instituto de Gestão Financeira da Segurança Social
Fundo Especial da Caixa de Previdência do Pessoal da Companhia de
Carris de Ferro de Lisboa
Fundo Especial de Segurança Social da Banca dos Casinos
Fundo Especial da Caixa de Previdência dos Profissionais de
Espectáculos
Caixa de Previdência dos Advogados e Solicitadores
Caixa Geral de Aposentações
Montepio dos Servidores do Estado
Fundo de Pensões dos Militares das Forças Armadas

UNITED KINGDOM

A. Great Britain National Insurance Fund maintained
under the control and management of the Secretary of State under
S.161(1) of the Social Security Administration Act 1992

B. Northern Ireland Northern Ireland National Insurance
Fund maintained under the direction of the Northern Ireland
Department of Finance and Personnel under S.141(1) of the Social
Security Administration (Northern Ireland) Act 1992

C. Gibraltar Social Insurance (Pensions) Fund,
maintained under the control and management of the Director of
Labour and Social Security.

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