

**FINANCIAL SERVICES (OCCUPATIONAL PENSIONS INSTITUTIONS) ACT 2006****Principal Act**

**Act. No. 2006-29**      *Commencement (LN. 2007/009)*      18.1.2007  
*Assent*      14.12.2006

Amending enactments	Relevant current provisions	Commencement date
LN. 2012/171	ss. 2, 5(4A), 10(3), 16(8) & (9) & 16A	22.11.2012
2013/103	s. 3(2)(b)	22.7.2013
Act. 2015-07	ss. 4A, 10(1)	3.9.2015
LN. 2017/046	ss. 4A, 10(1)(ba), 13(2), Sch.	16.3.2017
2017/061	ss. 3A, 3B	31.3.2017

**English sources:**

None cited

**Transposing:**

Directives 98/26/EC	Directive 2004/109/EC
Directive 2002/87/EC	Directive 2005/60/EC
Directive 2003/6/EC	Directive 2006/48/EC
Directive 2003/41/EC	Directive 2006/49/EC
Directive 2003/71/EC	Directive 2009/65/EC
Directive 2004/39/EC	

**EU Legislation/International Agreements involved:**

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AN ACT TO IMPLEMENT IN GIBRALTAR DIRECTIVE 2003/41/EC OF  
THE EUROPEAN PARLIAMENT AND THE COUNCIL ON THE  
ACTIVITIES AND SUPERVISION OF INSTITUTIONS FOR  
OCCUPATIONAL RETIREMENT PENSIONS.

**Title and commencement.**

1. This Act may be cited as the Financial Services (Occupational Pensions Institutions) Act 2006 and comes into operation on the day appointed by the Minister by notice in the Gazette.

**Interpretation.**

2. In this Act—

“the Authority” means the Commissioner for Financial Services appointed under section 8 of the Financial Services Commission Act 1989;

“beneficiary” means a person receiving retirement benefits;

“biometrical risks” means risks linked to death, disability and longevity;

“the Directive” means Directive 2003/41/EC of the European Parliament and the Council on the activities and supervision of institutions for occupational retirement provision as the same may be amended from time to time;

“EIOPA” means the European Insurance and Occupational Pensions Authority established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC;

“institution for occupational retirement provision” 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 contact 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 relevant legislation of Gibraltar and the Member State where the institution is established,

and which carries out activities directly arising therefrom;

“member” means a person whose occupational activities entitle or will entitle him to retirement benefits in accordance with the provisions of a pension scheme;

“Minister” means the Minister with responsibility for financial services;

“pension scheme” means a contract, an agreement, a trust deed or rules stipulating which retirement benefits are granted and under which conditions;

“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, whether in the form of payments for life, for a temporary period or as a lump sum;

“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;

### **Scope.**

3.(1) Subject to subsection (2), this Act applies to institutions for occupational retirement provision.

(2) This Act does not apply to—

- (a) social security or assistance provided by the Government of Gibraltar;
- (b) institutions licensed or authorised under the Insurance Companies Act or the Financial Services (Alternative Investment Fund Managers) Regulations 2013;
- (c) institutions where the employees of the sponsoring undertaking can withdraw the assets at any time and not necessarily apply them to retirement benefits;

- (d) companies using book-reserve schemes with a view to paying out retirement benefits to their employees;
- (e) institutions in Gibraltar operating pension schemes in Gibraltar with fewer than 100 members in total;
- (f) any pension scheme provided, guaranteed or administered by the Government of Gibraltar.

**Opt-in by institutions with fewer than 100 members.**

3A.(1) This section applies to institutions to which the Act does not apply by virtue of section 3(2)(e) (“small institutions”).

(2) A small institution may opt to be subject to the provisions of this Act by making an application to the Authority in such form and manner as the Authority may require.

(3) On receipt of an application under subsection (2), the Authority must give the small institution a notice under subsection (4).

(4) The notice must-

- (a) be in writing;
- (b) acknowledge that the small institution has voluntarily opted to be subject to the provisions of this Act;
- (c) state the effect of subsection (5); and
- (d) specify the date on which the notice comes into force.

(5) With effect from the date specified in the notice, this Act applies to a small institution to which the notice has been given as it applies to any other institution for occupational retirement provision which is subject to the provisions of the Act.

(6) Any small institution which was complying with this Act before the date on which this section comes into force (“the commencement date”) is to be treated as if it had-

- (a) opted to be subject to the provisions of this Act by making an application under subsection (2); and
- (b) received a notice under subsection (4) which specified the commencement date as being the date on which the notice comes into force.

**Cancellation of opt-in under section 3A.**

3B.(1) An institution to which this Act applies by virtue of section 3A may apply to the Authority for its opt-in under that section to be cancelled.

(2) An application under subsection (1) must be made in such form and manner as the Authority may require.

(3) If the Authority considers that it is necessary or desirable to refuse the application for the protection of customers or that refusal is otherwise in the public interest, the Authority must inform the institution of its decision by a notice in writing stating the reasons for refusal.

(4) If the Authority decides to grant the application, it must give the institution a notice which-

- (a) is in writing;
- (b) states that the institution has applied for the cancellation of its option to be subject to the provisions of the Act;
- (c) states the effect of subsection (5); and
- (d) specifies the date on which the notice comes into force.

(5) With effect from the date specified in the notice, this Act ceases to apply to an institution to which the notice has been given.

**Activities and separation.**

4.(1) An institution shall limit its activities to retirement benefit related operations and activities arising therefrom.

(2) An institution shall be legally separate from the sponsoring undertaking and set up under a trust to ensure that its assets are safeguarded in the interests of the members and beneficiaries in the event of the bankruptcy of the sponsoring undertaking.

4A. *Omitted.*

**Licensing.**

5.(1) An institution or trustees of a trust managing a pension scheme shall not operate without a licence issued by the Authority.

(2) The Authority shall only issue a licence if he is satisfied that—

- (a) every person who is to be a manager or trustee of the institution is a fit and proper person to hold that position; and in determining whether a person is “fit and proper” regard shall be had to—
- (i) his probity;
  - (ii) his competence and soundness of judgement for fulfilling the responsibilities of that position;
  - (iii) the diligence with which he is fulfilling or likely to fulfill those responsibilities; and
  - (iv) whether the interests of members or potential members of the institution or the reputation of Gibraltar are, or are likely to be, in any way prejudiced by his holding that position,

and without prejudice to the generality of the foregoing provisions, regard may be had to the previous conduct and activities in business or financial matters of the person in question and, in particular, to any evidence that he has—

- (aa) committed an offence involving fraud or other dishonesty or violence;
- (bb) contravened any provision made by or under any enactment appearing to the Authority to be designed for protecting members of the public against financial loss due to dishonesty, incompetence or malpractice by persons concerned in the provision of financial services or the management of companies or against financial loss due to the conduct of discharged or undischarged bankrupts;
- (cc) engaged in any business practices appearing to the Authority to be deceitful or oppressive or otherwise improper (whether unlawful or not) or which otherwise reflect discredit on his method of conducting business;
- (dd) engaged in or been associated with any other business practices or otherwise conducted himself in such a way as to cast doubt on his competence and soundness of judgment;

- (ee) contravened any internal rules of, or exceeded his authority in, any previous or current employment and/or appeared to mislead or attempt to mislead any person or persons in any previous or current employment, investigation or enquiry;
- (b) 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;
- (c) all technical provisions are computed and certified by an auditor registered under the Auditors Approval and Registration Act 1998;
- (d) where the sponsoring undertaking guarantees the payment of the retirement benefits, it is committed to regular financing;
- (e) 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.

(3) A licence shall be valid from the date of issue and is subject to renewal each year on the anniversary of the date of issue.

(4) The authority may on or at any time after issuing a licence, by notice in writing served on the institution, impose such conditions as appear to the Authority to be necessary or desirable for the protection of members and may vary or revoke any conditions so imposed.

(4A) Without prejudice to subsection (4), where the holder of a licence under this section intends to pursue cross-border activity prior authorisation by the Authority under section 16 shall be deemed to be a condition of the licence.

(5) Without prejudice to the generality of subsection (4), a condition imposed under this section may—

- (a) prohibit an institution—



- (i) entering transactions of any specified description or in specified circumstances or to a specified extent or with persons or a specified description;
  - (ii) soliciting pensions business in a specified place, or from persons of a specified description or otherwise than from such persons;
  - (iii) carrying on pensions business in a specified manner or otherwise than in a specified manner;
  - (iv) disposing of, or otherwise dealing with any, or with specified, property assets, in any specified manner or otherwise than in a specified manner;
- (b) require an institution to maintain in Gibraltar property or assets of such value and of such description as appear to the Authority in its absolute and unfettered discretion to be desirable with a view to ensuring that the institution will be able to meet his liabilities in respect of the pensions business carried on.

(6) A prohibition or requirement under subsection (5) may relate to property assets outside Gibraltar.

(7) By virtue of this subsection it shall be a condition of every licence issued that the institution will at all times comply with—

- (a) any conditions imposed by the Authority under this section; and
- (b) the requirements of this Act and any rules or regulations made under it.

**Register.**

5A.(1) Every licence issued under this Act shall be entered in a register to be maintained by the Authority in such form as the Authority may require.

(2) In the case of a licensee which is engaged in cross-border activity pursuant to section 16, the register shall also indicate the EEA States in which the institution is operating.

(3) The Authority shall ensure that EIOPA is informed of the particulars in the register.

**Accounts.**

6.(1) Each institution and trustees of a trust operating a pension scheme shall draw up annual accounts and annual reports in accordance with the Companies (Accounts) Act 1998.

(2) The Authority may, with the prior consent of the Minister, prescribe through Rules the form, nature and frequency of returns in respect of the finances of the institution to be made to the Authority.

**Information to Members and Beneficiaries.**

7.(1) An institution and trustees of a trust operating a pension scheme shall provide to members and beneficiaries relevant information about any changes to the scheme's rules.

(2) A member, beneficiary or their representatives shall receive on request—

- (a) the annual accounts and the annual reports referred to in Section 6 and, where an institution is responsible for more than one scheme, those relating to their particular pension scheme;
- (b) the statement of investment policy principles provided for in section 8;

(3) If a member so requests, the institution or trustees shall provide, within a reasonable timeframe—

- (i) the target level of the retirement benefits, if applicable;
- (ii) the level of benefits in case of cessation of employment;
- (iii) 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;
- (iv) the arrangement relating to the transfer of pension rights to another institution for occupational retirement provision in the event of termination of the employment relationship.

(4) 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.

(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.

**Investment Policy Statement.**

8.(1) An institution and trustees of a trust operating a pension scheme shall prepare and, at least every three years, review a written statement of investment policy principles which shall include—

- (a) the investment risk measurement methods;
- (b) the risk management processes used; and
- (c) the strategic asset allocation with respect to the nature and duration of pension liabilities.

(2) The statement referred to in subsection (1) shall be revised without delay if there is any significant change in investment policy.

**Information to the Authority.**

9.(1) The Authority may require the institution or the trustees of a trust operating a pension scheme to provide him with—

- (a) information about all business matters or to forward all business documents;
- (b) information enabling him 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;
- (c) the statement of investment-policy principles, the annual accounts and the annual reports, and all the documents necessary for the purposes of supervision, including 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;
  - (v) evidence that contributions have been paid in as planned;

- (vi) reports by the persons responsible for auditing the annual accounts referred to in section 6.

(2) The Authority, or a person appointed by him for the purpose, may at any reasonable time enter premises of an institution, of trustees of a trust operating a pension scheme or of a manager of a pension scheme acting on behalf of an institution in order to check that the provisions of the scheme and the Act are being complied with.

**Powers of the Authority.**

10.(1) The Authority may suspend or cancel the licence or authorisation of an institution in Gibraltar if–

- (a) any conditions of the licence or authorisation are not complied with;
- (b) the institution does not have sound administration and accounting procedures and internal control mechanisms;
- (ba) an institution to which section 13(1) applies is failing to hold additional assets in accordance with that section.
- (c) the institution does not comply with the social and labour laws relating to occupational pension provision of a Member State in which it is acting under section 16.

(2) The Authority may remove a trustee of a scheme or transfer the powers of an institution or a trustee to another appropriate person where the institution or the trustee fails properly to protect the interests of the members or otherwise fails in the duties of the institution or trustee.

(3) Any action taken by the Authority under this section shall contain detailed reasons and be notified to the institution in question and to EIOPA.

**Technical provisions.**

11.(1) An institution shall establish at all times in respect of the total range of its pension schemes an adequate amount of liabilities corresponding to the financial commitments which arise out of their portfolio of existing pension contracts.

(2) An institution shall, 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.

(3) The calculation of technical provisions shall take place every year. However, the calculation may be made once every three years if the institution provides members and the Authority with a certification or a report of adjustments for the intervening years, reflecting 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, if not by an actuary, by another specialist in this field, including a registered auditor, on the basis of actuarial methods 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 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;
- (b) the maximum rates of interest used shall be chosen prudently. These prudent rates of interest shall be determined by taking into account—
  - (i) the yield on the corresponding assets held by the institution and the future investment returns, and/or
  - (ii) the market yields of high-quality or government bonds;
- (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 remain constant from one financial year to another unless discontinuities are justified by a change of legal, demographic or economic circumstances underlying the assumptions.

**Funding of technical provisions.**

12.(1) An institution shall have at all times sufficient and appropriate assets to cover the technical provisions in respect of the total range of pension schemes operated.

(2) An institution may, provided immediate notice is given to the Authority, for a period of time approved by the Authority, have insufficient assets to cover the technical provisions, in which case the Authority shall require the institution to adopt a concrete and realisable recovery plan in order to ensure that the requirements of subsection (1) are met again. The plan shall be subject to the following conditions—

- (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 shall be subject to approval by the Authority;
- (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 in this subsection, the institution shall inform the Authority. 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 and approved by the Authority before being given effect 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;
- (d) such other conditions as the Authority may impose.

(3) If the institution is involved in cross-border activity as referred to in section 16, the technical provisions shall at all times be fully funded in respect of the total range of pension schemes operated and if these conditions are not met, the Authority shall intervene in accordance with section 10.

**Regulatory own funds.**

13.(1) An institution 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, shall 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.

(2) The Schedule applies for the purposes of calculating the minimum amount of the additional assets.

**Investment rules.**

14.(1) An institution shall invest in accordance with any rules issued by the Authority with the consent of the Minister.

(2) Any rules issued by the Authority shall include provision to ensure—

- (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;
- (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 and 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;
- (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;
- (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;
- (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 and 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;

- (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;
- (g) 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;
- (h) the requirements referred to in paragraphs (e), (f) and (g) do not apply to investment in government bonds.

(3) The Authority shall provide the Minister with written notice of its intention to make rules under section 14(1) or issue guidance under subsection (2), or to revoke or amend rules or guidance already made thereunder and shall provide to the Minister the text of any such proposed rules or guidance.

#### **Asset Management.**

15.(1) The Authority may apply to the Supreme Court for an order freezing the assets of an institution in Gibraltar and may request the competent authority of any Member State to seek an order freezing any assets of the Gibraltar institution in that Member State.

(2) Where an institution from a Member State operates in Gibraltar under section 16, the Authority shall, at the request of the competent authority of the state in which the institution is authorised, immediately apply to the Supreme Court for an order freezing the assets in Gibraltar of that institution.

(3) The Supreme Court shall have power to make any order in respect of the assets in Gibraltar as it sees fit.

#### **Cross-border activity.**

16.(1) An institution may apply to the Authority for authorisation to accept contributions from an employer in another Member State (“a sponsoring undertaking”).

(2) The Authority shall grant an authorisation under subsection (1) if he is satisfied that, in relation to the institution—



- (a) its administrative structure;
- (b) financial situation;
- (c) repute, professional qualifications and experience,

are compatible with the requirements of the State of the sponsoring undertaking.

(3) The grant (or refusal) of an authorisation under subsection (1) shall be made within three months of the application and the Authority shall inform the competent authority of the State of the sponsoring undertaking of the grant of an authorisation.

(4) The Authority shall, on request from the competent authority of a Member State of a sponsoring undertaking wishing to operate through an institution in Gibraltar, inform that competent authority and the institution concerned of the requirements imposed by the social and labour laws of Gibraltar in relation to pension schemes, and the information requirements for members.

(5) An institution which is receiving contributions from a sponsoring undertaking in another Member State shall operate in a way, as respects the members of the scheme employed by the sponsoring undertaking, which is consistent with the social and labour law of that Member State.

(6) The Authority shall ensure that an institution complies with subsection (5) and, if he detects any irregularities or is informed of any irregularities by the competent authority of the other Member State, shall take appropriate measures within two months, including the cancellation of any licence or authorisation, to rectify the problem.

(7) If the Authority considers, in relation to a Gibraltar sponsoring undertaking making contributions to an institution in another Member State, that the institution is not complying with the social and labour law of Gibraltar he shall inform the competent authority of that Member State and, if no appropriate action is taken to rectify the problem, may direct the Gibraltar sponsoring undertaking to take such action as he deems necessary, including ceasing to make further contributions.

(8) The Authority shall ensure that the EIOPA is immediately informed of an authorisation issued under this section.

(9) The Minister shall—

- (a) ensure there is reported to EIOPA national provisions of a prudential nature relevant to the field of occupational pension

schemes, except those provisions to which the first paragraph of Article 20(11) applies; and

- (b) update that information on a regular basis and at least every 2 years.

**Cooperation.**

16A.(1) The Authority shall regularly exchange information and experience with equivalent competent authorities in EEA States, with a view to achieving a uniform application of the Directive and 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.

(2) The Authority shall collaborate closely with the European Commission with a view to facilitating supervision of the operations of institutions for occupational retirement provision.

(3) The competent authority shall cooperate with EIOPA for the purposes of the Directive, in accordance with Regulation (EU) No 1094/2010 and shall, without delay, shall ensure that EIOPA is provided with all information necessary to carry out its duties under the Directive and under Regulation (EU) No 1094/2010, in accordance with Article 35 of that Regulation.

(4) The Authority shall ensure there is informed the Commission and EIOPA of any major difficulties to which the application of the Directive gives rise to.

(5) The Authority shall cooperate with the Commission and EIOPA to examine any difficulties as quickly as possible in order to find an appropriate solution.

(6) Where Gibraltar acts has host jurisdiction to an institution to which this Act applies, the competent authority may ask the competent authority of the home jurisdiction to rule on the ring-fencing of the institution's assets and liabilities, as provided for in Article 16(3) and Article 18(7) of the Directive.

(7) In this section–

“home jurisdiction” means the jurisdiction in which the institution has its registered office and its main administration or, if it does not have a registered office, its main administration;

“host jurisdiction” means the jurisdiction whose social and labour law relevant to the field of occupational pension schemes is applicable

to the relationship between the sponsoring undertaking and members.

**Rules and Guidance.**

17.(1) The Minister may make rules in respect of anything required or permitted to be prescribed by this Act.

(2) The Authority, may issue guidance consisting of such information and advice as it considers appropriate—

- (a) with respect to the operation of this Act and of any rules made under it;
- (b) with respect to any matters relating to functions of the Authority;
- (c) for the purpose of meeting any regulatory objectives issued by the Authority;
- (d) with respect to any other matters about which it appears to the Authority to be desirable to give information or advice.

(3) The Authority shall provide the Minister with written notice of its intention to make rules under section 14(1) or issue guidance under subsection (2), or to revoke or amend rules or guidance already made under that subsection and shall provide to the Minister the text of any such proposed rules or guidance.

(4) The period of notice to be provided under subsection (3) shall be—

- (a) not less than 28 days prior to the date that the rules take effect;  
or
- (b) such shorter period as the Minister may agree to accept.

(5) The Minister may, during the period specified under (4)(a), require the Authority to do the following—

- (a) not to issue the intended rules or guidance;
- (b) not to revoke or amend the existing rules or guidance in the manner proposed; or
- (c) to issue the intended rules or guidance, revocation or amendment in a manner prescribed by the Minister.

(6) Rules or guidance made under subsections (1) or (2) may make different provision for different persons, circumstances or cases.

(7) A breach of any rules made under subsection (1) may be used by the Authority as grounds for action in respect of the institution as permitted by this Act.

#### **Fees.**

18.(1) The Minister may prescribe by Notice in the Gazette the fees to be charged and payable to the Authority in respect of applications for and renewal of a licence.

(2) The Authority may suspend or cancel a licence if the prescribed fee is not paid.

#### **Appeals to the Supreme Court.**

19.(1) Any person aggrieved by—

- (a) the refusal, variation or revocation of a licence;
- (b) the imposition of any condition on the grant of a licence;
- (c) the refusal of any approval or consent required under the Act;
- (d) a direction, determination, prohibition or restriction by the Authority;

may appeal to the Supreme Court on a point of law.

(2) An appeal shall be instituted within 28 days of the notification to the appellant of the matter complained of.

(3) The Supreme Court may confirm or quash the decision by the Authority appealed against, or may remit the matter to the Authority for further consideration.

(4) The court may make such order as to the costs of an appeal as it may consider proper.

(5) The institution of an appeal shall not operate as a stay of a decision appealed against, but the court shall have power, in its discretion, to order such a stay.

## SCHEDULE

## CALCULATING THE MINIMUM ADDITIONAL ASSETS

**Available solvency margin.**

1.(1) An institution to which section 13(1) applies must at all times and in respect of its entire business have an adequate available solvency margin which is at least equal to that required by this Act.

(2) The available solvency margin shall consist of the assets of the institution free of any foreseeable liabilities, less any intangible items, including—

- (a) the paid-up share capital or, in the case of an institution 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 in so far 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 subparagraph (i) for reasons other than the individual termination of membership in the mutual undertaking, that the Authority 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 Authority has declared that it has no objection to the amendment, without prejudice to the criteria in subparagraphs (i) and (ii);
- (b) reserves (statutory and free) not corresponding to underwriting liabilities; and
- (c) the profit or loss brought forward after deduction of dividends to be paid.

(3) The available solvency margin shall be reduced by the amount of own shares directly held by the institution.

(4) 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 institution, 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 paragraph (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 paragraph (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 Authority;
  - (ii) the contract of issue must enable the institution to defer the payment of interest on the loan;
  - (iii) the lender's claims on the institution 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 institution to continue its business; and
  - (v) only fully paid-up amounts must be taken into account.

(5) For the purposes of sub-paragraph (4)(a), subordinated loan capital shall also fulfil the following conditions–

- (a) only fully paid-up funds shall be taken into account;

- (b) 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 institution shall submit to the Authority for its 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 Authority may authorise the early repayment of such loans provided application is made by the issuing institution and its available solvency margin will not fall below the required level;
  - (c) 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 Authority is specifically required for early repayment. In the latter event the institution shall notify the Authority 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 Authority shall authorise repayment only where the institution's available solvency margin will not fall below the required level;
  - (d) the loan agreement shall not include any clause providing that in specified circumstances, other than the winding-up of the institution, the debt will become repayable before the agreed repayment dates; and
  - (e) the loan agreement may be amended only after the Authority has declared that it has no objection to the amendment.
- (6) Upon application, with supporting evidence, by the institution to the Authority and with the agreement of the 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, in so far 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.

(7) The figure referred to in sub-paragraph (6)(a) shall not exceed 3.5% of the sum of the differences between the relevant capital sums of life assurance 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.

**Required solvency margin.**

2.(1) Subject to paragraph 3, the required solvency margin shall be determined in accordance with sub-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 institution 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 institution's liability after reinsurance cessions and retrocessions to the total capital at risk gross of reinsurance.

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 Article 2(3)(a)(iii) of the Solvency II Directive, the required solvency margin shall be equal to the required solvency margin for institutions as laid down in paragraph 4.



(4) For capital redemption operations referred to in Article 2(3)(b)(ii) of the Solvency II Directive, the required solvency margin shall be equal to a 4% fraction of the mathematical provisions calculated in compliance with sub-paragraph (2)(a).

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

(6) For assurances covered by Article 2(3)(a)(i) and (ii) of the Solvency II Directive linked to investment funds and for the operations referred to in Article 2(3)(b)(iii), (iv) and (v) of that Directive, the required solvency margin shall be equal to the sum of the following—

- (a) in so far as the institution bears an investment risk, a 4% fraction of the technical provisions, calculated in accordance with sub-paragraph (2)(a);
- (b) in so far as the institution 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 accordance with sub-paragraph (2)(a);
- (c) in so far as the institution 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 business;
- (d) in so far as the institution covers a death risk, a 0.3% fraction of the capital at risk calculated in accordance with sub-paragraph (2)(b).

(7) In this paragraph “the Solvency II Directive” means Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II), as amended from time to time.

**Guarantee fund.**

3.(1) One third of the required solvency margin as specified in paragraph 2 shall constitute the guarantee fund.

(2) That fund shall comprise the items listed—

- (a) in paragraphs 1(2) and 1(4); and
- (b) subject to the agreement of the Authority, in paragraph 1(6)(b).

(3) The guarantee fund shall be not less than EUR 3 million or, in the case of a mutual or mutual type undertaking, not less than EUR 2.25 million.

**Required solvency margin for the purpose of paragraph 2(3).**

4.(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 sub-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—

- (a) 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;
- (b) to that sum there shall be added the amount of premiums accepted for all reinsurance in the previous financial year;
- (c) 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;
- (d) the amount so obtained shall be divided into two portions, the first extending up to EUR 50 million, the second comprising the excess; 18% of the first portion and 16% of the second shall be added together; and
- (e) 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 institution 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—

- (a) 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 sub-paragraph (1) shall be aggregated;

- (b) 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;
- (c) from that sum there shall be deducted the amount of recoveries effected during the periods specified in sub-paragraph (1);
- (d) 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;
- (e) one third of the amount so obtained shall be divided into two portions, the first extending up to EUR 35 million and the second comprising the excess; 26% of the first portion and 23% of the second, shall be added together; and
- (f) 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 institution 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 under sub-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.