CBFA

BANKING, FINANCE AND INSURANCE COMMISSION

Circular CBFA_2008_17 of 26 August 2008

Rules of management and operation as referred to in Article 79 of the Law of 27 October 2006 on the supervision of institutions for occupational retirement provision

* *In the text, the words "the CBFA" or "the Banking, Finance and Insurance Commission", shall be replaced by the words "the FSMA" or "the Financial Services and Markets Authority", as a result of the "Twin Peaks" model of financial supervision introduced by the Royal Decree of 3 March 2011 implementing changes to the supervisory architecture for the financial sector, which entered into force on 1 April 2011.*

Scope:

This circular shall apply to the institutions for occupational retirement provision in respect of their activities as referred to in Article 55, paragraph 1, 1°, and, where applicable, Article 74, § 1, 4°, of the Law of 27 October 2006 on the supervision of institutions for occupational retirement provision.

Summary/Objectives:

This circular comments on the rules of management and operation that the institutions for occupational retirement provision must, pursuant to Article 79 of the Law of 27 October 2006 on the supervision of institutions for occupational retirement provision, stipulate in their Articles of Association or in an agreement entered into with the sponsoring undertaking(s).

Dear Sir or Madam,

I. INTRODUCTION

I.1. Article 79 of the Law of 27 October 2006 on the supervision of institutions for occupational retirement provision (hereinafter referred to as "the Law of 27 October 2006") requires the institutions for occupational retirement provision (hereinafter referred to as "IORPs") to stipulate, in their Articles of Association or in an agreement entered into with the sponsoring undertaking(s), such rules of management and operation as will permit a clear definition of the rights and obligations of the sponsoring undertaking(s).

According to the Law of 9 July 1975 on the supervision of insurance undertakings, this obligation used to apply only to the provident institutions formed by several private companies or several legal persons under public law, or by virtue of a sectoral collective labour agreement. This obligation was extended to all IORPs by the Law of 27 October 2006.

I.2. Chapter II of the Royal Decree of 12 January 2007 on the prudential supervision of institutions for occupational retirement provision (hereinafter referred to as "the Royal Decree of 12 January 2007") stipulates how the above-mentioned Article 79 must be applied, and bases itself on most rules of management and operation enumerated in the Royal Decree of 25 March 2004 laying down the specific rules on the management and functioning of provident institutions formed by several private companies or several legal persons under public law, or by virtue of a sectoral collective labour agreement.

II. SCOPE

II.1. Activities concerned

II.1.1. These provisions shall apply to all IORPs governed by Belgian law that are entrusted, in Belgium or abroad, with the management of pension schemes for employees or company managers as referred to in Article 55, paragraph 1, 1°, of the Law of 27 October 2006, and, where applicable, of solidarity schemes as referred to in Article 74, § 1, 4°, of the Law of 27 October 2006[1].

The obligation to stipulate rules of management and operation applies, in other words, to the following activities of IORPs:

1° the management of Belgian pension schemes which, on an individual or a collective basis, accrue fringe benefits in the form of retirement, death, disability or incapacity for work benefits for employees or managers of one or several companies[2];

2° the management of other foreign pension schemes than those referred to in point II.2.1, 2° below;

3° the management of commitments under the solidarity system as referred to in Articles 10 and 11 of the Law of 28 April 2003 on supplementary pensions and on tax regulations applicable to such pensions and to certain additional social security benefits (hereinafter referred to as "the Law of 28 April 2003").

II.1.2. While the above-mentioned Royal Decree of 25 March 2004 only applied to the IORPs formed by several companies (the so-called "multi-company funds"), the IORPs managing one or more pension schemes for one and the same employer (the so-called "mono-company funds") shall henceforth also be required to stipulate rules of management and operation.

II.1.3. As in the past, these provisions shall also continue to apply to the IORPs entrusted with the management of one or more sectoral pension schemes (respectively the "mono-sectoral" and the "multi-sectoral" funds).

II.1.4. Finally, pursuant to Articles 134 to 139 of the Law of 27 October 2006, the obligation to stipulate rules of management and operation shall also apply to the IORPs managing the pension schemes of public administrations and bodies, including the management of statutory pensions.

II.2. Activities not concerned

II.2.1. These provisions shall not apply to the activities which IORPs governed by Belgian law carry out in Belgium or abroad within the framework of the pension schemes for the self-employed within the meaning of Article 55, paragraph 1, 2°, of the Law of 27 October 2006 or, where applicable, of the solidarity schemes as referred to in Article 74, § 1, 3°, of the Law of 27 October 2006.

The obligation to stipulate rules of management and operation does not, in other words, apply to the following activities:

1° the granting in Belgium of fringe benefits relating to retirement, death, disability and incapacity for work for self-employed persons, as referred to in Title II, Chapter I, of the Programme Law (I) of 24 December 2002 (hereinafter referred to as "the Law of 24 December 2002"), as well as for non self-employed persons, as referred to in Article 54 of the Law on compulsory insurance for medical care and benefits, consolidated on 14 July 1994[3] [4];

2° the granting abroad of similar fringe benefits accrued on an individual basis by self-employed persons within the contrext of their professional activity;

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1 Article 4 of the Royal Decree of 12 January 2007.

2 Reference is made to the pension benefits authorized in Belgium as referred to in Article 74, § 1, 1° of the Law of 27 October 2006.

3 Article 54 of the Law on compulsory insurance for medical care and benefits, coordinated on 14 July 1994, pertains to the physicians and dentists considered to have acceded to the terms of the agreements referred to in Article 50, § 1, of that Law, as well as to the pharmacists and physiotherapists acceding to the national agreement with the insurance companies and requesting to fall under its remit.

4 Reference is made to the pension benefits authorized in Belgium as referred to in Article 74, § 1, 2°, of the Law of 27 October 2006.

3° the activitites of the IORPs within the framework of the solidarity schemes for self-employed persons, as referred to in Article 46 of the Law of 24 December 2002[5].

Consequently, an IORP managing both pension schemes for employees and pension schemes or solidarity schemes for self-employed persons shall only be required to stipulate rules of management and operation for the activities that it carries out within the framework of the pension schemes for employees.

II.2.2. Pursuant to Article 3, § 2, 2°, of the Law of 27 October 2006 these provisions do not apply to the institutions exclusively managing solidarity schemes as referred to in Article 46 of the Law of 24 December 2002 or in Articles 10 and 11 of the Law of 28 April 2003.

III. ARTICLES OF ASSOCIATION OR AGREEMENT

III.1. Pursuant to Article 79 of the Law of 27 October 2006 the rules of management and operation must be stipulated either in the Articles of Association of an IORP, or in an agreement entered into by the IORP with the sponsoring undertaking(s).

III.2. As far as the agreement is concerned, the IORP may either enter into a single agreement containing rules of management and operation for all sponsoring undertakings, or into separate agreements with its (group of) sponsoring undertakings. In the latter case, the different agreements entered into must be consistent.

The agreement(s) shall be drawn up by the Board of Directors or the competent operational body of the IORP in consultation with the sponsoring undertaking(s)[6].

Each sponsoring undertaking must be party to an agreement.

III.3. A decision by the General Meeting is required both to amend the Articles of Association[7] and to ratify management agreements with sponsoring undertakings[8].

At least three weeks before the General Meeting, IORPs shall submit to the CBFA the draft amendments to the Articles of Association that are to be proposed during that meeting[9].

The IORP shall submit the amendments to the Articles of Association to the CBFA within a month of their approval by the General Meeting[10].

III.4. Where an IORP manages one or more sectoral pension schemes, the rules of management and operation may be included in the sectoral collective labour agreement introducing the sectoral pension scheme(s) (hereinafter referred to as "sectoral CLA")[11].

In the case of a multi-sectoral fund, the sectoral CLAs may, in addition to the relationship between the IORP and the different organizers, also regulate the mutual relationship between the organizers.

IV. RULES GOVERNING THE MANAGEMENT AND OPERATION OF THE IORPs

IV.1. Common rules for all IORPs

Article 6 of the Royal Decree of 12 January 2007 lists the minimum rules of management and operation to be stipulated by each IORP, irrespective of whether it is a "mono-company fund", a "multi-company fund", a "mono-sectoral fund" or a "multi-sectoral fund" and irrespective of the number of pension schemes that it manages.

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5 Reference is made to the pension benefits authorized in Belgium as referred to in Article 74, § 1, 3°, of the Law of 27 October 2006.

6 Art. 28, paragraph 1, and 31, paragraph 1, of the Law of 27 October 2006.

7 Art. 20, 1°, of the Law of 27 October 2006.

8 Art. 20, 9°, of the Law of 27 October 2006.

9 Art. 98, paragraph 1, of the Law of 27 October 2006.

10 Art. 98, paragraph 4, of the Law of 27 October 2006.

11 In Belgium, for instance, in the sectoral CLA introducing the sectoral pension scheme(s) referred to in Article 8 of the Law of 28 April 2003.

IV.1.1. Management of the assets

The Articles of Association, the agreement or, in the case of a sectoral pension scheme, the sectoral CLA must determine the way in which the assets of the IORP must be managed[12].

The rules in this case refer to those determining how the assets will be managed. The IORP is free to choose between a global management (i.e. management at IORP level) and a split management (management per sponsoring undertaking, per pension scheme, per separate fund, etc.).

IV.1.2. Allocation to the separate funds

Where several separate funds exist, the Articles of Association, the agreement or, in the case of a sectoral pension scheme, the sectoral CLA must determine the rules of allocation to one or more of these separate funds[13].

The Law of 27 October 2006 defines a separate fund as "the liabilities and assets, or the undivided part of the collectively managed assets, which, on the basis of separate accounting, relate to one or several pension schemes in view of conferring a privilege upon members and beneficiaries of this or these pension schemes"[14].

The Law of 27 October 2006 determines the activities for which the IORP must establish separate funds[15]. This mainly involves the management of pension schemes accruing fringe benefits in the form of retirement, death, disability or incapacity for work benefits for employees or managers of a company, as well as the management of pension schemes for self-employed persons, as referred to in Article 55, paragraph 1, 1° and 2° respectively, of the Law of 27 October 2006.

The IORP also has the possibility of establishing one or more separate funds for one of more pension schemes for other activities enumerated in a non-exhaustive way in the Law of 27 October 2006[16].

Moreover, where several separate funds are established, the Law of 27 October 2006 also stipulates that every commitment or operation shall, with regard to the counterparty, be assigned unambiguously to one or more separate funds[17].

It goes without saying that, where a transaction pertains exclusively to one of the separate funds (e.g. the fee charged by the lawyer who drew up the pension regulations for the pension scheme to which the relevant separate fund pertains), this rule poses no problem.

However, where the transaction pertains to several separate funds (e.g. the fee charged by an accredited auditor), the IORP shall have to stipulate a rule allowing the distribution of the costs among the various separate funds.

IV.1.3. Inability to finance one's commitments

The Articles of Association, the agreement or, in the case of a sectoral pension scheme, the sectoral CLA must establish the procedure to be applied and lay down the measures to be taken where a sponsoring undertaking is unable to finance its commitments[18]. Possible solutions could be the introduction of an insolvency procedure, the charging of interest on arrears, etc.

In the case of "multi-company funds" it is also advisable to determine whether the charges of the insolvent company shall be divided amongst the other companies who are members of the IORP[19], or whether the pension scheme of the insolvent company shall be alone in bearing the consequences of the company's inability to finance its commitments.

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12 Art. 6, 1°, of the Royal Decree of 12 January 2007.
13 Art. 6, 2°, of the Royal Decree of 12 January 2007.
14 Art. 2, paragraph 1, 15°, of the Law of 27 October 2006.
15 Art. 80, § 1, of the Law of 27 October 2006.
16 Art. 80, § 2, of the Law of 27 October 2006.
17 Art. 80, § 3, of the Law of 27 October 2006.
18 Art. 6, 3°, of the Royal Decree of 12 January 2007.
19 In other words, whether or not there is solidarity amongst the sponsoring undertakings (Art. 7, paragraph 1, 1°, of the Royal Decree of 12 January 2007) (see below).

It should be pointed out that those rules pertain exclusively to the relationship between the IORP and the sponsoring undertaking(s). The provisions concerning the members and the beneficiaries can be found in the social legislation and regulations[20].

IV.1.4. Withdrawal of a sponsoring undertaking

The Articles of Association, the agreement or, in the case of a sectoral pension scheme, the sectoral CLA must stipulate the rules to be followed where a sponsoring undertaking ceases to entrust the management of all or part of its pension schemes to the IORP[21].

Each sponsoring undertaking must be a member of the IORP as long as the latter is entrusted with managing its pension schemes[22].

Rules must be laid down that shall apply if the sponsoring undertaking changes its financing vehicle for the future, while leaving the IORP in charge of the management of its pension scheme for the past and consequently remains a member of that IORP. In that case, for instance, a decrease in the management fees may be provided for.

Moreover, rules must be laid down that shall apply if the sponsoring undertaking changes its financing vehicle for the past and transfers the reserves to another financing vehicle. In that case it should be specified whether a fee must be paid to cover the administrative costs relating to the disinvestment of the covering assets and whether fines will be imposed, as well as how those costs and fines will be calculated.

Finally, account should also be taken of the applicable social legislation and regulations. As far as the Belgian pension schemes are concerned, Chapter VI of the Law of 28 April 2003 stipulates that neither a fee, nor a loss from profit sharing may be charged to the members or deducted from the accrued reserves at the moment of the transfer. Moreover, the participation procedures provided for in the above-mentioned Chapter VI must be followed.

IV.1.5. Conflicts about the rules of management and operation

The Articles of Association, the agreement or, in the case of a sectoral pension scheme, the sectoral CLA must lay down a procedure to be followed in case of a conflict regarding the application or the interpretation of the rules of management and operation[23].

This procedure must be described with sufficient precision to avoid it becoming the subject of dispute when being applied. If an arbitration procedure is provided for, the way in which the arbitrators are appointed, the time limits, the possibilities of appeal, etc. must be described, or reference should be made to an existing arbitration regulation known to all parties.

IV.1.6. Amending or cancelling the management agreement

Where the IORP enters into an agreement with the sponsoring undertaking(s), the agreement must mention the rules governing its amendment or cancellation (competent body, formalities to be completed, etc.)[24].

If those rules are included in the Articles of Association of the IORP, a simple reference in the management agreement suffices.

In order to avoid conflicts, the rules must be described as precisely as possible.

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[20] For instance, Art. 14-4 of the Royal Decree of 14 November 2003 implementing the Law of 28 April 2003.
[21] Art. 6, 4°, of the Royal Decree of 12 January 2007.
[22] Art. 14 of the Law of 27 October 2006.
[23] Art. 6, 5°, of the Royal Decree of 12 January 2007.
[24] Art. 6, 6°, of the Royal Decree of 12 January 2007.

IV.2. Specific rules for multi-company funds

Article 7 of the Royal Decree of 12 January 2007 enumerates the rules of management and operation that the IORPs composed of several sponsoring undertakings ("multi-company funds") must stipulate in addition to the rules enumerated in Article 6.

IV.2.1. Degree of solidarity amongst the sponsoring undertakings

The Articles of Association, the agreement or, in the case of a sectoral pension scheme, the sectoral CLA must mention whether or not there is solidarity amongst the sponsoring undertakings and, if so, to what degree[25].

Solidarity is used here within the meaning of Article 1200 et seq. the Civil Code and not to solidarity as referred to in Chapter IX of the Law of 28 April 2003.

The solidarity only concerns the sponsoring undertakings in their relationship to the IORP, inter alia regarding the financing of the pension schemes and the apportionment of costs of whatever nature. It does not pertain to the relationship between the members and the beneficiaries, on the one hand, and the IORP or the sponsoring undertakings, on the other hand.

If there is solidarity, the cases in which it is practised (e.g. when a sponsoring undertaking is unable to finance its commitments), the level at which it is practised (e.g. with regard to the solvency margin) and, where applicable, the limits within which it is practised (e.g. up to a certain amount) must be mentioned explicitly.

Moreover, it must be ensured that the rules governing solidarity that are laid down in the Articles of Association or in the agreement, do not conflict with the provisions of the financing plan as referred to in Article 86 of the Law of 27 October 2006.

Where neither the Articles of Association nor the agreement contain rules excluding or restricting the solidarity between the sponsoring undertakings, it may be assumed that solidarity applies without limit[26].

IV.2.2. Share of each sponsoring undertaking in the IORP

The Articles of Association, the agreement or, in the case of a sectoral pension scheme, the sectoral CLA must stipulate the rules making it possible to determine, at any given time, the share of each sponsoring undertaking in the assets, liabilities and profits and losses of the IORP[27].

If the IORP draws upon the services of the appointed actuary to determine the share of each sponsoring undertaking, the rules to be applied by the actuary must be stipulated in advance in the Articles of Association or the agreement.

It is imperative that the rules make it possible to calculate the share of each sponsoring undertaking, especially in the technical provisions and the company funds, if one of the companies leaves the IORP, in order to determine what must be attributed to that company. This does not, however, imply the individualization of the covering assets themselves.

Moreover, specific attention must be paid to the distribution of profit or loss in case the IORP manages several pension schemes, of which at least one is a "pure" plan of the fixed contributions type as described in Article 18 of the Royal Decree of 12 January 2007. In that case, the rules mentioned in the Articles of Association or the agreement with regard to the distribution of profit or loss must accord with the nature of the liabilities and the financing plan.

Finally, the rules determining the share of each sponsoring undertaking in the IORP must take account of the requirements, if any, regarding the solvency margin[28]. The rules of management must be stipulated in such a way as to guarantee that, at any given moment, the solvency margin is and remains in compliance with the relevant prudential rules.

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[25] Art. 7, paragraph 1, 1°, of the Royal Decree of 12 January 2007.
[26] Art. 7, paragraph 2, of the Royal Decree of 12 January 2007.
[27] Art. 7, paragraph 1, 2°, of the Royal Decree of 12 January 2007.
[28] See Chapter III of the Royal Decree of 12 January 2007.

IV.2.3. Apportionment of the management and operating fees

The Articles of Association, the agreement or, in the case of a sectoral pension scheme, the sectoral CLA must stipulate the rules governing the apportionment of the management and operating fees of the IORP[29].

These fees shall include inter alia the costs relating to the establishment of the pension financing organization, the costs relating to the management of the assets, the actuary's fee and the remuneration of the accredited auditor.

They shall not, however, include costs not directly incurred by the IORPs, such as the costs relating to an ALM study to be paid by the sponsoring undertaking.

V. PERIODS

V.1. IORPs authorized or registered on 1 January 2007 are granted a period of 24 months as from that date, i.e. up to and including 31 December 2008, to bring their Articles of Association, the agreement or the sectoral CLA in line with Articles 6 and 7 of the Royal Decree of 12 January 2007[30].

The "mono-company funds" authorized or registered on 1 January 2007 that were not required to do so in the past, must now also stipulate rules in their Articles of Association or in an agreement before 31 December 2008 at the very latest.

V.2. IORPs authorized after 1 January 2007 are required as from that date to stipulate the rules of management and operation as referred to in Articles 6 and 7 of the Royal Decree of 12 January 2007 either in their Articles of Association or in an agreement with the sponsoring undertaking(s), or – in the case of a sectoral pension scheme – in a sectoral CLA[31].

VI. REPEALING PROVISION

This circular repeals and replaces circular P 38 on the rules of management and operation of the "multi-employer funds" established before 1 January 2004.

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A copy of this circular will be sent to all IORPs governed by Belgian law and to the accredited auditor(s) of those IORPs.

Yours sincerely,

Jean-Paul SERVAIS
Chairman

[29] Art. 7, paragraph 1, 3°, of the Royal Decree of 12 January 2007.
[30] Art. 49 of the Royal Decree of 12 January 2007.
[31] Art. 58 of the Royal Decree of 12 January 2007.