

SUPERVISION OF PENSION FUNDS

1. Developments in the pension funds sector in 2005
2. Developments in the legal framework

CHAPTER III



1. DEVELOPMENTS IN THE PENSION FUNDS SECTOR IN 2005

1.1. Pension funds

During the course of 2005, the CSSF authorised three pension funds subject to the law of 13 July 2005 on institutions for occupational retirement provision in the form of pension savings companies with variable capital (sepcav) and pension savings associations (asep), including two multiple compartment sepcav:

- THE PAULIG GROUP SEPCAV,
- FORTIS LUX PRIME PENSION A SEPCAV,

and one multiple compartment asep:

- RBC DEXIA INVESTOR SERVICES PENSION FUND.

The authorisation of these new pension funds raises the number of pension funds subject to the law of 13 July 2005 to fifteen as at 31 December 2005.

It has to be noted that the growth rate of the pension funds sector is very slow. The entry into force on 23 September 2005 of Directive 2003/41/EC, which confers a European passport on institutions for occupational retirement provision, will hopefully facilitate the setting-up of pan-European pension funds in the medium term.

The CSSF expects activities to continue their slow but ongoing pace in 2006. Indeed, various potential promoters have shown an interest in setting up a pension fund in Luxembourg.

1.2. Liability managers

Following the registration in 2005 of AMAZON INSURANCE & PENSION SERVICES S.A R.L. and AXA ASSURANCES VIE LUXEMBOURG S.A. on the official list of professionals authorised to act as liability managers for pension funds subject to the law of 13 July 2005, the number of liability managers of pension funds authorised by the CSSF amounted to thirteen as at 31 December 2005.

2. DEVELOPMENTS IN THE LEGAL FRAMEWORK

The Luxembourg legislation governing sepcav and asep underwent a major change in 2005 with the adoption of the law of 13 July 2005 on institutions for occupational retirement provision in the form of pension savings companies with variable capital (sepcav) and pension savings associations (asep).

The law of 13 July 2005 transposes Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision into Luxembourg law and replaces the law of 8 June 1999 creating pension funds in the form of sepcav and asep. For the majority of provisions, the new law reproduces the text and the wording of Directive 2003/41/EC and leaves unchanged, as far as possible, the provisions of the law of 8 June 1999 as amended. Circular CSSF 05/201 outlines the main amendments this law brings about.

The law of 13 July 2005 confirms the qualitative approach adopted by the law of 8 June 1999. Indeed, the text of the law of 13 July 2005 recognises the qualitative approach for the calculation of technical provisions and introduces two alternative bases for the definition of the maximum interest rate. The law also lays down a requirement for additional assets where the institution itself, and neither the sponsoring undertaking nor a financial institution, underwrites biometrical risks or guarantees a given level of benefits or a given return.

The law also adopts a qualitative approach as regards investment rules for assets. Assets shall be invested in accordance with the principles of security, quality, liquidity, profitability and diversification and in the light of the commitments entered into by the fund (“prudent person rule”) and not in accordance with quantitative rules that apply uniformly to all pension funds. Every three years, pension funds shall prepare, respectively review, a statement of their investment strategy containing elements such as the risk measurement methods and the strategic asset diversification.

In accordance with the requirements of the Directive, the law introduces a European passport for asset managers and depositaries of sepcav and assep, operating pursuant to the principle of free provision of services.

Asset managers established in Luxembourg or in another EU Member State and duly authorised for the management of the investment portfolio, in accordance with Directives 85/611/EEC, 93/22/EEC, 2000/12/EC, 2002/83/EC and 2003/41/EC are henceforth eligible as asset managers.

The law also allows the appointment of asset managers of non-EU origin provided that they have been authorised by the CSSF. The Grand-Ducal regulation of 20 September 2005 specifies the criteria of competence, good repute and financial soundness that need to be fulfilled for the authorisation of non-EU professionals as asset managers of institutions for occupational retirement provision in the form of sepcav and assep.

As regards the depositaries of sepcav and assep, they shall be established in Luxembourg or in another EU Member State and duly authorised for the activity of custodian of assets in accordance with Directive 93/22/EEC or Directive 2000/12/EC, or authorised as depositary for the purposes of Directive 85/611/EEC.

For umbrella-type pension funds, the law lays down the possibility that the articles of incorporation can provide for the appointment of a depositary per subfund, provided that the assets of a subfund exclusively respond to the members’ rights relating to this subfund and to the creditors’ rights whose debt arose from the establishment, operation or liquidation of this subfund.

The law also strengthens the role of the liability manager. Liability managers are henceforth required to co-operate with the CSSF. The Grand-Ducal regulation of 20 September 2005 specifies the criteria of competence, good repute and financial soundness that need to be fulfilled for the approval of liability managers.

As regards the structure of the pension funds’ constitutive documents, the pension rules are now separated from the articles of incorporation and can have a life of their own. The articles shall specify the terms of establishment and amendment of the pension rules and can provide for the possibility of multiple pension rules within a fund or a structure in the form of general rules accompanied with specific rules per subfund, employer or scheme. Certain technical elements which have so far featured in the pension rules shall henceforth be included in a separate technical note. A more comprehensive description of the characteristics of every pension scheme shall be made in the pension rules and in a technical note.

The central administration of the pension fund shall be located in Luxembourg. Every pension fund shall have a sound administrative and accounting organisation and adequate internal control procedures.

In accordance with the Directive, the law introduces the right for institutions for occupational retirement provision to freely accept sponsorship by undertakings located abroad. It establishes, within the European Union, the legal basis for notification and co-operation mechanisms between competent authorities for the cross-border management of pension schemes by institutions for occupational retirement provision in the form of sepcav and assep.

Henceforth, any institution for occupational retirement provision that has been granted authorisation and falls under the supervision of a competent authority of another Member State can accept sponsorship from sponsoring undertakings established in Luxembourg. Performing these activities is not subject to an authorisation by the Luxembourg competent authorities, but submitted to a notification procedure by the home Member State.

Likewise, where Luxembourg sepcav and assep wish to manage pension schemes for a sponsoring undertaking in other EU Member States, they shall notify their intention to the CSSF in accordance with article 97, paragraphs (2) and (3) of the law. The notification file shall comprise the following information:

- the host Member State(s);
- the name of the sponsoring undertaking(s);
- the main characteristics of the pension scheme to be operated for the sponsoring undertaking(s).

Where the CSSF receives such notification, and unless it has reason to doubt that the administrative structures or the financial situation of the pension fund or the good repute and professional qualifications or experience of the persons running the pension fund are compatible with the operations proposed in the host Member State, it shall within three months of receiving all the information comprised in the notification file, communicate that information to the competent authorities of the host Member State and inform the pension fund accordingly.

Before a pension fund starts to operate a pension scheme for a sponsoring undertaking in another Member State, the competent authorities of the host Member State shall, within two months of receiving the information, inform the CSSF, if appropriate, of the requirements of social and labour law relevant to the field of occupational pensions under which the pension scheme sponsored by an undertaking in the host Member State must be operated and of any rules that are to be applied in accordance with article 83(1) and article 97(7) of the law. The CSSF communicates this information to the pension fund.

On receiving the communication, or if no communication is received from the CSSF on expiry of the period of two months, the pension fund may start to operate the pension scheme sponsored by an undertaking in the host Member State in accordance with the latter's requirements of social and labour law relevant to the field of occupational pensions, as well as any provisions that are to be applied in accordance with article 83(1) and article 97(7) of the law.

Pension funds sponsored by an undertaking located in another Member State shall also be subject, in respect of the relevant members, to any information requirements imposed by the competent authorities of the host Member State on institutions for occupational retirement provision located in that Member State.

In February 2006, the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) has adopted the "Protocol Relating to the Collaboration of the Relevant Competent Authorities of the Member States of the European Union in Particular in the Application of the Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the Activities and Supervision of Institutions for Occupational Retirement Provision Operating Cross-Border". The Protocol describes the practical framework for the co-operation between the different competent national authorities for the notification process of cross-border activities of institutions for occupational retirement provision. One of its Appendices also lists the minimum level of information on the pension scheme's characteristics that must be included in the notification file. The Protocol is available on CEIOPS' website www.ceiops.org.