	Comments Template on EIOPA-CP-11/001 **Draft response to Call for Advice on the review of Directive 2003/41/EC** ***Scope, cross-border activity, prudential regulation and governance***	**Deadline** **15.08.2011** **18:00 CET**
Company name:	aba Arbeitsgemeinschaft für betriebliche Altersversorgung e.V. Rohrbacher Strasse 12 69115 Heidelberg, Germany	
Disclosure of comments:	EIOPA will make all comments available on its website, except where respondents specifically request that their comments remain confidential. Please indicate if your comments on this CP should be treated as confidential, by deleting the word Public in the column to the left and by inserting the word Confidential.	Public

Please follow the instructions for filling in the template:

- ⇨ Do **not** change the numbering in column "Reference".
- ⇨ Please fill in your comment in the relevant row. If you have no comment on a question, keep the row empty.
- ⇨ Our IT tool does not allow processing of comments which do not refer to the specific question numbers below.
  - If your comment refers to multiple questions, please insert your comment at the first relevant question and mention in your comment to which other questions this also applies.
  - If your comment refers to parts of a question, please indicate this in the comment itself.

Please send the completed template to *firstconsultationiorpcfa@eiopa.europa.eu*, in MSWord Format, (our IT tool does not allow processing of any other formats).

The question numbers below correspond to Consultation Paper No. 01 (EIOPA-CP-11/01).

Reference	**Comment**	
General Comment	The aba welcomes the opportunity to comment on the draft EIOPA response to the Commission's Call for Advice on the review of the IORP Directive.	Public

As we have already stated in our response to the Green Paper, the aba holds the view that the current IORP Directive has not been in force long enough (taking into account its transposition into national law) to accurately judge its effectiveness. Nevertheless, so far in Germany we have fared well with its implementation. It has accompanied us through the Global Financial Crisis which had limited impact on the system of occupational pension provision, in most part due to strong social and labour law measures. In fact, the crisis has made evident that prudential standards will, at best, never be more than a first line of defence. At worst, they may even cause or exacerbate a financial crisis through their pro-cyclical design.

The biggest policy issue we face in Germany is one of coverage. Coverage levels are highly dependent on economic conditions and the cost effectiveness of provision. Frictional costs such as those imposed by regulatory measures, therefore, have a high impact on the incentive for employers to sponsor occupational pension arrangements. We would appeal to EIOPA to keep this in mind when formulating its advice.

Occupational pension provision is mainly a domestic issue and principally governed by social and labour law. Whilst there are cases of cross border mobility of staff, these represent just a small proportion of the total workforce, and are often best dealt with on a case-by-case basis. Otherwise, there is no internal market for occupational pension provision just as there is no internal market for company car policies or annual leave. These are all components of an employee's pay package. Placing institutions that fund occupational pensions, which are often run by employers, on par with financial services companies ignores the important role that the social partners play in protecting the interests of employees. IORPs, therefore, cannot be subject to the same regulations as financial services companies. The current approach of applying EU regulation at the institutional (and not product) level, where the unique nature of the institution is adequately taken into account, is, therefore, correct. It follows that Solvency II cannot be the starting or only reference point for developing a revised standard for IORPs. Indeed, it is questionable whether a uniform standard is appropriate at all in a European pensions landscape that is diverse and shaped by social and labour law that has evolved over time.

This does not mean that IORPs provide benefits that are somehow of a lower quality or are less

	secure than services provided by other institutions. On the contrary, IORPs work together with their sponsors and the social partners to provide cost effective and secure benefits. In particular, the ability to develop collective solutions creates economies of scale and allows risk sharing features that are not available to individual forms of provision. Moreover, the collective nature of occupational pensions means that coverage is extended to some parts of the population that would not normally be amenable to individual forms of saving. Collective arrangements presuppose high standards of governance, in many instances streamlined in order to gain maximum efficiency benefits. EIOPA's recommendations have, to a large extent, acknowledged this. Again, we would caution against imposing any additional regulatory burden which could add to the frictional costs of workplace pension provision.	
1.	**Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice? Are there any other impacts that should be considered?** The aba, in principal, agrees with the analysis as laid out in this advice. In particular, we agree that book reserve and pay-as-you-go schemes as well as institutions whose beneficiaries have no legal rights to benefits and whose sponsoring employer can redeem assets at any time and not necessarily meet its obligations for payment of retirement benefits are excluded from the scope of the IORP Directive. Book reserve schemes are correctly excluded as the Directive's purpose is to provide a framework for the prudential supervision of institutions that fund retirement benefits. Book reserve schemes, at least in Germany, are provided by employers who are subject to social, labour and tax law but not prudential law as entitlements are secured by a nation-wide insolvency scheme (Pensions-Sicherungs-Verein). To avoid confusion with respect to Art. 17 of the IORP Directive, we would propose changing the wording in Option 4 by substituting the expression "at their own risk" with "not guaranteed by the	Public

	State". In the German context, confusion may arise because some IORPs operate as autonomous institutions i.e. "at their own risk", however, the sponsoring employer or group of employers still has a contingent liability if the IORP fails. Regarding Options 5 and 5(i), we would exclude these from the analysis altogether (see question 2).	
2.	**Are there any other options that should be considered? Please provide details including where possible in respect of impact.** In our view EIOPA has considered the most relevant options, although it is questionable whether Option 5 should be considered at all. The implication of including individual forms of retirement saving into the Directive is that the distinction between workplace pension provision and individual private savings would be abandoned. It would call the whole IORP Directive into question, as private savings are already regulated in other Directives and ignores the fact that individual savers, acting alone and without the benefit of a social partner at their side, require different regulatory treatment than employees who also benefit from labour law provisions. We would, therefore, highlight that consumer protection is not the sole or even the main preserve of prudential regulation. The protection of employees in Germany and other countries is also extensively covered in social and labour law.	Public
3.	**Which option is preferable?** None of the Options 2, 3, 4 or 4(i) would extend the scope of the IORP Directive in Germany. As we have fared well with the current definition and welcome the opportunity to clarify the specific option that Member States already have to apply the Directive to those institutions which currently fall outside the scope, we would prefer Option 3 in the advice.	Public
4.	**How should it be determined whether a compulsory employment-related pension scheme**	Public

	is to be considered as a social-security scheme covered by regulations (EEC) No. 883/2004 and (EEC) No. 987/2009 (see Art. 3). The determination could be achieved by an explicit legal and direct State involvement, usually from central or local Government. Social security schemes fulfill activity which are based on the principle of national solidarity and they are entirely non-profit-making. They are administered by entities of social security authorities under control of Ministries and are not "undertakings" in the meaning of EU competition law.	
5.	**Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?** The aba generally agrees with the analysis laid out in this advice. We would highlight that the limited incidence of cross-border activity to date is due to a lack of demand, rather than supply because: • The bulk of members of retirement schemes have a purely domestic status • Expatriate/third country national cases, which are usually limited in number, are idiosyncratic and more cost effectively dealt with using alternative tools • A high degree of efficiency gains can already be achieved by pooling assets which is possible under current regulations. After this, the marginal efficiency gain does not exceed the marginal cost. Where demand for a cross-border scheme does exist, for example multinationals who want to consolidate their pension arrangements, it is not the definition of cross-border activity in the IORP Directive that is the main barrier to carrying out the activity but rather: • Diverse tax law which prevents past-service benefits from being transferred cross-border and in many countries imposes contribution limits for future service • Diverse social and labour law which prevents a transfer of rights from defeasing the liability in	Public

	the legacy country • The differential regulatory treatment of cross-border schemes and domestic schemes • The application of additional and more detailed prudential requirements than covered by the IORP Directive at the Member State level.	
6.	**Are there any other options that should be considered?** No.	Public
7.	**Do you agree with EIOPA that Option 2 is preferable?** Yes, it also corresponds to current practice in Germany.	Public
8.	**Even with defining the sponsoring undertaking,problems of overlapping or contradicting regulation between member states could emerge. Should the revised Directive include procedures to settle such problems between the home and the host member states and/or also between the home member state and the member state of the applicable social and labour law?** We do not consider the IORP Directive to be the appropriate place to set out procedures for settling problems between Member States. We believe that the Member States themselves need to define what constitutes social and labour law. In the event of overlapping or contradicting regulation we would suggest following the procedures set out in the Budapest Protocol. A similar case can be made with respect to Question 12.	Public
9.	**Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in thid advice?** The aba feels that prudential law cannot be isolated from SLL as in many countries prudential law has	Public

	evolved symbiotically with social and labour law. This has resulted in a system where benefit design, the delivery, protection and methods of financing the pension benefits as well as the supervision of IORPs are inextricably linked. Changing or redesigning the rules for only one part of this system will bring the whole system out of kilter. Because the methods of financing the pension promise, which for example are based on a certain discount rate and biometric tables, are an integral part of the benefit design, changes in prudential regulation that possibly affect these parameters will have a severe impact on the cost of occupational pension provision. To the extent that this may influence the benefit promise, which is guaranteed by SLL, it may be regarded as an infringement of a Member State's competence. We, therefore, do not agree that a catalogue can be produced at EU level which itemizes the components of prudential law. This must be left up to the Member States. As such, we are of the view that the IORP Directive should be left unchanged.	
10.	**Are there any other options that should be considered?** Yes. We believe that to avoid conflict between prudential regulation and SLL, the revised directive should clearly set out the principle of precedence of SLL over supervisory law. This would mean that measures permissible under SLL – individually or collectively – in Member States should not be prevented or blocked by supervisory regulation.	Public
11.	**Do you agree with EIOPA that Option 2 is preferable?** No, the aba prefers Option 1 with the inclusion of the principle that SLL takes precedence over supervisory law. This would mean that measures permissible under SLL – individually or collectively – in Member States should not be prevented or blocked by supervisory regulation.	Public

12.	**Even with defining the scope of prudential regulation, problems of overlapping or contradicting regulation between member states could emerge. Should the revised directive include procedures to settle such problems between the Home and the Host member states and/or also between the Home member state and the member state of the applicable social and labour law?** Similar to Question 8, we see the answer to this question lying in the utilization of the Budapest Protocol for this purpose.	Public
13.	**What is the view of stakeholders on the proposed principles of the revised IORP Directive? How do stakeholders evaluate the positive and negative impacts of the introduction of proposed general governance requirements?** In our response to the Green Paper, we expressed the general view that qualitative guidelines such as those laid down in the BaFin circular MaRisk, with an appropriately modified application of a general proportionality clause, could be a potential governance standard for IORPs. In assessing what is proportionate, we would focus on the criteria of nature and complexity. Scale, in our view, is not a valid criterion as it is conceivable that a large scale IORP administers a simple benefit plan and has processes as well as staff levels that have been streamlined to the point that it operates in a similar manner to a small scale IORP. Remuneration policy: Some IORPs do not employ own staff, but either use staff of the sponsoring undertaking to fulfil their duties who don't receive remuneration from the IORP itself, or outsource functions to external service providers. In these cases the remuneration is usually linked to the pay policy of the sponsoring undertaking and the external service provider respectively. Requirements for a remuneration policy must therefore not be extended to staff of sponsoring	Public

	undertakings or external service providers.	
14.	**What is the view of the stakeholders on the proposed principles of the revised IORP directive? How do stakeholders evaluate the positive and negative impacts of the introduction of proposed fit and proper requirements?** It is fundamentally the IORP's own responsibility to ensure that the persons who effectively run the IORP and have other key functions are fit and proper. This responsibility cannot be transferred to the Supervisory Authority. The requirement of "fit and proper" - and the involvement of the Supervisory Authority in assessing this - should therefore remain restricted to management board members only. Extending this to other functions would only lead to increased bureaucratic burden and cost for IORPs and their sponsoring company/ies. This would be especially cumbersome for company IORPs (that do usually not employ own staff / use staff of the sponsoring undertaking to fulfil their duties) with their outstanding cost-effectiveness. Ultimately this is an obstacle for the sponsoring undertaking and thus a burden for the economy as a whole.	Public
15.	**What is the view of the stakeholders on the proposed principles of the revised IORP directive? How do stakeholders evaluate the positive and negative impacts of the introduction of a compliance function?** The aba is opposed to a separate compliance function as compliance is but one risk category within an overriding function of risk management. The assessment of compliance risk should be able to be performed within the internal (or external/outsourced) risk management function who reports to the Managing Board.	Public

	The aba rejects the idea that the regulation should make it possible for the compliance function, should it exist, to also inform the supervisory authority "on its own initiative" (section 12.3.11). We believe that as a general principle staff of an IORP are responsible to the managing board of the IORP and that the managing board of the IORP is responsible to the supervisory authority.	
16.	**What is the view of the stakeholders on the proposed principles of the revised IORP directive? How do stakeholders evaluate the positive and negative impacts of the introduction of an internal audit function?** The aba agrees with the recommendation of EIOPA to introduce an internal audit function. The function should be able to be carried out by a member of the staff or be outsourced.	Public
17.	**What is the view of the stakeholders on the proposed principles of the revised IORP directive? How do stakeholders evaluate the positive and negative impacts of the introduction of revised outsourcing principles?** The aba would propose to include in the revised IORP Directive the principle that the IORP remains responsible for the outsourced activities. The consequence of this principle are that the supervisor's first contact point is the IORP and not the different service providers which perform activities for the IORP. In this concept, the IORP will ensure that the supervisory authorities will, on request, have access to information necessary to fulfil supervisory functions with respect to outsourced activities. We do not believe there is any added value of having a Level 1 principle to empower the supervisory authority of the IORP to carry out themselves on site inspections at the premises of the service provider in case that service provider is located in another member state. Therefore we oppose to the idea to use Article 38(2) of Directive 2009/138/EC in the revised IORP Directive. We would focus more on due diligence to be performed by the IORP while selecting a service provider.	Public

	Instead, we would encourage EIOPA members to work out a collaboration agreement to deal with on-site inspection when service providers and IORPs are located in different member states across the EU and EEA (see 14.3.4). Outside the EEA reliance is given to due diligence within the IORP and its responsibility for the sound management of the institution. As such, we don't agree with the procedure envisaged under 14.3.8. (contractual agreement with prior notification). Additional rules on chain outsourcing will not increase the level of security of the scheme members. Again, we consider it is the task and responsibility of the IORP to negotiate and control the outsourcing deals, including the impact of chain outsourcing in the agreement. Hence, aba disagrees with EIOPA's proposal to introduce additional rules on chain outsourcing (14.3.14) and on the location of the main administration (14.3.15)	
18.	**What is the view of the stakeholders on the proposed principles of the revised IORP directive? How do stakeholders evaluate the positive and negative impacts of the introduction of revised outsourcing principles?** The aba agrees with EIOPA that the current principles on outsourcing in the IORP Directive have to be maintained in the revised IORP Directive (section 15.3.1). There is a clear trend in the sector that IORPs outsource more and more activities. This is mainly due to the fact that an IORP cannot be required to have all the technical skills and abilities needed to run an IORP (section 15.3.2). We agree with the principle that the IORP remains fully responsible when they outsource functions or activities to third parties and propose to include this principle in the Level 1 Directive without further L2 measures (section 15.3.2). The aba would warn against too many prescriptive rules on the selection process and ongoing monitoring of the outsourced activities. We do not see any beneficial effect of having Level 2	Public

measures stipulating the minimum content of an outsourcing agreement. Every outsourcing agreement is different and imposing a harmonised framework is unworkable.

Role of the supervisory authority

The aba supports option 1 to deal with the role of the supervisory authority in case of outsourced activities.

However, we believe that it is sufficient that "Member States must ensure that supervisory authorities have the necessary powers at any time to request information on outsourced functions and activities".

We do not see the need to introduce a new Member States' option whereby the "Member State may decide to provide that IORPs shall, in a timely manner, inform or notify the supervisory authorities on the outsourcing of critical or important function or activities as well as any subsequent changes with respect to those functions or activities". This would unnecessarily increase bureaucracy, complexity and cost.

The aba fails to see any valid reason to distinguish in the Level 1 Framework Directive between IORPs that are registered or IORPs that are authorised, as proposed in option 2. As stated above, in our opinion a Level 1 principle that "Member States must ensure that supervisory authorities have the necessary powers at any time to request information on outsourced functions and activities" should be accepted as sufficient.