

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:	European Association of Paritarian Institutions of Social Protection (AIEP)	
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<p>Please follow the instructions for filling in the template:</p> <ul style="list-style-type: none"> ⇒ Do not change the numbering in column "Reference". ⇒ Please fill in your comment in the relevant row. If you have <u>no comment</u> on a question, keep the row <u>empty</u>. ⇒ Our IT tool does not allow processing of comments which do not refer to the specific question numbers below. <ul style="list-style-type: none"> ○ 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. <p>Please send the completed template to firstconsultationiorpcf@eiopa.europa.eu, in MSWord Format, (our IT tool does not allow processing of any other formats).</p> <p>The question numbers below correspond to Consultation Paper No. 01 (EIOPA-CP-11/01).</p>		
Reference	Comment	
General Comment	<ol style="list-style-type: none"> 1. AEIP regrets that the consultation period is taking place during such a short period in summer time. Therefore we reserve the right to come back to some of the issues at a later stage. 2. Review of the IORP directive needs to be in holistic way together with and taking in consideration which has to be adjusted to other measures the commission is putting forward regarding pension policy. 3. In most member states, IORPs are not-for profit institutions who are founded by a sponsoring 	

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	<p>undertaking (employer, social partners, branch, etc.) for the sole and unique goal to manage the occupational pension in the best interests of the pension plan members and the beneficiaries (spouses, orphans, etc.).</p> <ol style="list-style-type: none"> 4. Therefore in most member states they do not compete (not with each other, neither with financial institutions) and cannot be compared with commercial undertakings. 5. In the same logic, the decision to operate cross-border is mostly not a decision that is in the first place made by the IORP but follows out of the desire of a (multinational) company to bundle all his different pension liabilities in the different jurisdictions into one pension vehicle in order to improve among others the risk management. 6. AEIP is convinced that a review of the content of the IORP directive is not the best way to encourage the setup of Pan European Pension Funds and the organisation of cross-border activities, because the main barriers for the setup of a cross border activity are fiscal issues, resistance of local stakeholders, high upfront legal cost because of no clear definition in some cases of SSL legislation, different hidden mechanisms of protectionism, etc. It may also be a basic lack of demand as correctly stated by EIOPA on page 27 of its draft response. 7. We think that more clarification is necessary on the relationship between the following objectives in point 1.2 of the Commission’s Call for advice: <ul style="list-style-type: none"> - “measures that simplify the legal, regulatory and administrative requirements for setting-up cross-border pension schemes”; - “measures that would allow IORPs to benefit from the risk-mitigating security mechanisms at their disposal”; - (measures) “to modernise prudential regulation for IORPs that operate DC schemes”; <p>and the following conditions:</p> <ul style="list-style-type: none"> - “The new supervisory system for IORPs should not undermine the supply or the cost-efficiency of occupational retirement provision in the EU.” (see point 1.3 of the CFA); “The aim is to attain a level of harmonisation where EU legislation does not need additional requirements at the national level.” (see point 7.1. of the CFA). <p>All decisions with regard to pensions have to be taken at level 1. Further harmonization at level 2 seems to be difficult and we would rather like to see the integration of all relevant actors in the legislative process. Therefore, quantitative impact studies and proper</p> 	

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	<p>assessments should be an integral part of the whole process of revising the Directive at all stages in order to oversee all the (indirect) consequences.</p> <p>8. All decisions with regard to pensions have to be taken at level 1. Further harmonization at level 2 seems to be difficult and we would rather like to see the integration of all relevant actors in the legislative process. Therefore, quantitative impact studies and proper assessments should be an integral part of the whole process of revising the Directive at all stages in order to oversee all the (indirect) consequences.</p> <p>9. The basis for the review of the IORP Directive should be the IORP Directive itself and the different reports published by the CEIOPS. It is not appropriate to use the framework of the Solvency II Directive as a starting point.</p> <p>10. A revised IORP Directive should be able to handle different pension systems and the variety of pension agreements, including hybrid systems and leave enough flexibility for national decisions in this respect. A revised IORP directive should also leave enough flexibility for future adjustments of pension arrangements and for new kind of pension agreements. The EU should only intervene in the subsidiarity if national legislation fails to comply with the relevant principles of a single market. Pensions should continue to be considered as part of labour agreements.</p> <p>11. A revised directive should stimulate the accrual of sustainable occupational pension benefits and promote the supply of cost efficient workplace pension provision.</p>	
1.	<p>We do not completely agree and think there are other options and impacts to be considered. If there is a void in legislation after this decision (as it is the case in the new MS), it should be decided according to certain criteria whether the IORP directive (or another legislative tool, such as the insurance dir. etc.) is applied. For this, it is not absolutely necessary to change the IORP dir., but apply coherently its provisions. For example, an occupational PF should always fall under this directive if there is an involvement of the employer in it.</p> <p>Extending the IORP Directive to non-occupational pension schemes would have such an impact in</p>	

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	several member states that it would slow down the entire process of review of the IORP Directive (which, in view of the further promotion of cross-border activities, is urgent). Moreover, we are of the opinion that occupational pension schemes and non-occupational pension schemes are fundamentally different in nature and should thus be covered by a different regulatory framework.	
2.	<p>Occupational scheme operations should fall under the IORP directive. Sometimes occupational pension scheme operators manage also 883/04 or are part of or regarded as insurance companies. In these cases, these institutions should legally separate the entity managing occupational pension schemes and the one managing the rest.</p> <p>The proposal for a definition of an IORP Directive could be the following: "IOPRs include all funded pension schemes that are operating collective schemes and in which all risks are borne by employers and/or members and beneficiaries."</p>	
3.	<p>Option 2 could be the way to go as we agree with 6.3.14. amendments to art. 3. "Clarifying what should be considered as an occupational pension scheme" is the most preferable option and underwrites and modifies little the suggestion made by EIOPA in paragraph 6.3.15 that the Commission examines in the same time the consistency of application of regulation 883/2004 because we consider that all funded occupational pension schemes need to be covered and that no occupational pension scheme may remain unregulated or unsupervised.</p> <p>AEIP underlines that schemes that do not fall under the definition of occupational pension schemes could never be mixed with the IORP directive.</p> <p>Finally, AEIP is strongly opposed against options 5 and 5(i), because there is an important difference in nature between occupational pensions and personal savings. This natural difference should be –as it is today- reflected in a different regulatory framework.</p>	
4.	In our view, all employment-related pension schemes that are funded directly or indirectly through employer's and/or employee contributions and that supplement a basic social security pension are to be considered as occupational pension plans, regardless as to whether they are mandatory or voluntary.	
5.	Yes, we agree with the analysis of the options.	

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6.	<p>We agree with the definition proposed, but see the necessity to leave enough flexibility for special cases as follows:</p> <p>Some (multinational) sponsoring companies keep expatriates with the country of origin as base country whilst on assignment abroad. These expatriates will eventually return to their country of origin for retirement. The continuity and security of their pension rights are best served by continuing the accrual in the base country pension scheme and hence 'protection' in their country of origin. In a specific company pension fund for example this would mean that contributions for accrual during assignments abroad are paid by the sponsor company outside the country of origin. The final responsibility for paying contributions, however, rests with a country of origin based corporation centre. By deeming pension provision cross-border if the sponsoring company is not based in the country of the IORP and making contributions to an IORP outside its country of establishment, the IORP would be forced to adhere to much stricter solvency rules (i.e. minimum funding rate to be maintained at all times within a year and notification with the Supervisor prior to starting operations). This would seem disproportionate for a fund where only a small proportion of the beneficiaries is in that situation (and spread over a number of countries) and the big majority fall under the Social and Labour Law (SLL) of the country where the IORP is based (in this example).</p>	
7.	In principle yes, but we do feel the issue described in our answer to question 6 needs to be solved.	
8.	We think that such procedures might be helpful.	
9.	AEIP wishes to underline that a clear difference would be preferable as this will lower the compliance costs for IORPs (and thus either lower the burden or increase the benefits for the members).	
10.	<p>MS should provide to the EC a clear, comprehensive summary of the applicable social and labour provisions (instead of just a copy of the fully applicable legislation), as it is important to preserve the principle of subsidiarity.</p> <p>AEIP does not agree with EIOPA's statement in paragraph 8.3.7 because we consider also that prudential legislation and social and labour law should mutually exclude each other. In the same logic, AEIP is convinced that article 18.7 (which states that in the event of a cross-border activity the Host Member State may require the application of some investment rules) should at least be reviewed and by preference abolished.</p>	
11.	Yes we agree, preserving the application of SSL. Adding a single article over prudential regulation	

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	could help to have a clear cut distinction. Prudential law could be defined as the set of requirements and standards concerned with financial solidity and financial stability of the pension funds.	
12.	There should be procedures to settle such problems, but it should be defined that the social aspects should always prevail and should never be sacrificed. This should be the key criteria to follow in such decisions.	
13.	<p>AEIP thinks that the following Governance requirements could be applied to pension schemes through the revision of the IORP directive:</p> <p>a) The System of governance which shall provide sound and prudent business management.</p> <p>Paritarian organisations are well prepared to fulfil this requirement because they are owned by their members and their board (and/or other bodies) consist of representatives of these members. As the complex system of governance that requires risk-management, compliance, internal audit and actuarial functions for smaller paritarian institutions are difficult to implement, cooperation and outsourcing of all these functions should be possible. Pension schemes should get a transition period long enough to implement or outsource these functions.</p> <p>b) Transparent organisational structure with clear allocation and appropriate segregation of responsibilities.</p> <p>Again, in the respect of the proportionality principle, already the SII framework allows smaller and less complex undertakings to carry out more than one of these functions by a single person or organisational unit.</p> <p>c) Written policies in relation to risk management, internal controls and internal audit.</p> <p>d) AEIP recommends contingency plans to be taken into account. However, pension scheme operators should get a long-enough transitional period to develop, implement and test contingency plans.</p> <p>We are in favour of a good governance of the IORPs, and agree that OECD and IOPS principles</p>	

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	<p>guidelines and good practices offer a good starting point. Therefore we agree with the broad principles put forward by EIOPA. In general those principle should be fit for purpose and proportionate. They have to be adapted to the complexity of the of the activities and investment of the IORP.</p> <p>Separation of an IORP from a sponsoring undertaking: AEIP agrees with the principle that the management of the occupational pension promise needs to legally separated from the sponsoring undertaking.</p> <p>General proportionality clause: AEIP agrees to the analysis of EIOPA and underlines –as stated by EIOPA- that the principle of proportionality was to be constructed and applied in an appropriate way which needs to be broader than under the Solvency II regime for (re)insurance undertakings. AEIP agrees that the proportionality principle should exist for two categories of IORPs as described in paragraph 10.3.8 and would suggest that this would be explicitly mentioned in the reviewed directive. AEIP wishes to underline that the existence of a cross-border activity may not interfere with the proportionality principle. The regularity whereby documents and policies need to be revised has also to be subject to the proportionality principle.</p> <p>We agree with the positive impact of governance requirements on the protection of the members' and beneficiaries' benefits. We also believe that sound governance requirements will have a positive impact on the general management of the pension schemes, including an appropriate investment policy.</p> <p>We agree with EIOPA that the risk lies in too burdensome governance requirements for small or less complex IORPs. It should be avoided that small IORPs would consider to wind-up because of the governance requirements. Therefore, a clear and unambiguous confirmation of the proportionality principle in the revised IORP Directive is of the utmost importance.</p>	
14.	<p>Persons who run the undertaking have to possess an adequate professional qualification, knowledge and experience ("fit"), and be of good repute and integrity ("proper"). AEIP agrees that a pension</p>	

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	<p>provider has to have sufficient knowledge, must be reliable and apt to fulfil his/her tasks. Therefore this principle could apply to pension scheme operators under the following conditions:</p> <ul style="list-style-type: none"> - The requirements have to be linked to the nature and the content of the pension agreement and the complexity of the activities and the investments. - Professional qualification, knowledge and experience may be acquired by representing the members of pension schemes. - Fitness of non-executive board members or members of a supervisory board should be easier to gain than fitness of executive board members. - The "fit" rule (knowledge and experience) should be applied at the level of the board, which should have the necessary qualification, knowledge and experience as a whole. - "Key functions" should be defined on L1 and should be consistent with the rest of the regulation insofar as it should be clarified that the amount of key functions and separation of duties depends on size and complexity of the IORPs business. Furthermore the qualitative requirements of key personnel should not prevent IORP to establish these kinds of position. - "Internal control" is a bad example for a "key function" because it is the responsibility of every manager to install controls within the processes that he/she owns. The ultimate responsibility for the implementation and operation of an internal control system that comprises the whole pension fund lies with the board. - We think that the current Art. 9 of the IORP Directive is sufficient and should not be revised. 	
15.	<p>Internal Control Requirements could be applied to pension schemes for material risks, respecting the proportionality principle and with an appropriate period of transition. European rules should not overload the internal control function in a way that it is difficult to be organized.</p> <p>AEIP agrees with the analysis and advice made by EIOPA.</p> <p>A regular assessment of compliance is part of an effective internal control system. It also stresses the need to provide for flexibility in the way the compliance function is carried out (by a compliance officer, by a member of a body of the IORP, by an external service provider, by a regular review of the compliance etc..).</p>	

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	<p>If the IORP fills in the compliance function by appointing a compliance officer, the latter should not be required to inform the supervisory authority on its own initiative of possible compliance issues. It should be the responsibility of the compliance officer to inform the IORP of those issues and to assist the IORP in resolving those issues. The compliance function should not be considered as a sort of whistle blowing function towards the supervisory authority. This may jeopardize the relationship between the IORP and the compliance officer which should by all means be based on mutual confidence. This should not prevent the supervisory authority to ask for information regarding the compliance directly from the responsible body of the IORP.</p> <p>Positive impacts: the better an IORP is run, the better the interests of members and beneficiaries are protected.</p> <p>Negative impacts: the requirement of a separate compliance function may be too burdensome for small IORPs or IORPs with little complexity. Therefore it is of the utmost importance to provide for sufficient flexibility in the performance of the compliance function.</p>	
16.	<p>Internal Audit Requirements could be applied to PS, respecting the proportionality principle and with an appropriate period of transition.</p> <p>AEIP agrees with the analysis and advice made by EIOPA. The level 2 implementing measures should take the International Standards for the Professional Practice of Internal Auditing provided by the Institute of Internal Auditors (IIA) into account.</p> <p>Negative impacts: the requirement of an internal audit function may be too burdensome for small IORPs or IORPs with little complexity. Therefore it is of the utmost importance to provide for sufficient flexibility in the performance of the internal audit function.</p>	
17.	<p>Outourcing rules as stated in the Solvency II directive could be applied to pension schemes.</p> <p>We agree with the principles proposed by EIOPA. We would however like to draw the attention to the possible negative impact - especially for small IORPs - of having to provide for a clause in the agreement with an external service provider located outside the E.E.A. allowing the supervisory</p>	

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	<p>authority of the Home Member State to perform on-site inspections at the external service provider. Important service providers located outside the E.E.A. might not be willing to insert such a clause in their service agreement, making it as such in practice impossible for the IORP to call upon their services. This should be avoided. The IORP should remain responsible of procuring all necessary information to the supervisor.</p> <p>The competent supervisory authority should be the supervisory authority of the Home Member State. We propose to define the term "main administration" used in the definition of Home Member State as where the IORP has been registered and/or authorized.</p>	
18.	<p>Pension schemes should be able to outsource various functions. It is also necessary that an adequate transition period is provided to implement or outsource these functions.</p> <p>AEIP agrees with EIOPA's advice that "<i>Member States shall ensure that insurance and reinsurance undertakings [IORPs] remain fully responsible for discharging all of their obligations under this Directive when they outsource functions.</i>" And fully agrees that "The IORP cannot be required to have detailed technical skills or abilities to carry out the activities outsourced to 3rd parties."</p> <p>Considering the role of the supervisor, AEIP underwrites EIOPA's conclusion in paragraph 15.3.13 that "<i>the suggested solution should take into account the administrative burden for both the Supervisory Authority and IORPs</i>" and that "<i>The Supervisory Authority has to be focussed on the supervision of real critical situations that could arise from the outsourced activities/function</i>".</p> <p>Therefore AEIP does not agree with the drafting option proposed by EIOPA concerning the reporting of the IORP on the outsourcing of its activities. AEIP considers that the option of requiring notification of the outsourcing of a function by the IORP, must be left to the discretion of the Member States that has to decide on this, taking in consideration the risks and the possible administrative burden. With regard to outsourcing principles, Art. 9 of the IORP should be the starting point.</p>	