	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:	The Association of the Luxembourg Fund Industry (**ALFI)** and the Association of the Luxembourg Pension Funds (**ALFP**) are pleased to provide a common response to the Call for Evidence	
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 paragraph, keep the row empty.
- ⇨ Our IT tool does not allow processing of comments which do not refer to the specific paragraph numbers below.
  - If your comment refers to multiple paragraphs, please insert your comment at the first relevant paragraph and mention in your comment to which other paragraphs this also applies.
  - If your comment refers to sub-bullets/sub-paragraphs, 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 paragraph numbers below correspond to Consultation Paper No. 01 (EIOPA-CP-11/01).

Reference	**Comment**	
General Comment		
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?** ALFI and ALFP agree with the deep and very helpful analysis and assessments of the different options	

	established by EIOPA. We adhere to and support the proposal that the new EU Member States should be able to benefit from the advantages offered by the IORP Directive. Therefore, it appears absolutely necessary to us that the current scope of the Directive be adapted to include these new Member States' occupational retirement schemes that fulfil the same purpose and reply to the same need as in the existing Member States but which currently fall outside the scope of the Directive. It seems unacceptable to us that the residents of these Member States cannot benefit from the achievements of the common market in such an important matter (individually and collectively speaking) as retirement provisions.	
2.	**Are there any other options that should be considered? Please provide details including where possible in respect of impact.** In order for European citizens to benefit efficiently from the common market in terms of their pensions planning, ALFI and ALFP support the idea of extending the benefits of the IORP Directive to all providers of occupational pension schemes operating at their own risk. ALFI and ALFP further share EIOPA's concerns in view of personal pension plans. Indeed, one of the characteristics of modern life within Europe is a high degree of mobility of workers, combined with a much lower degree of continuity in employment relationships. Unlike standards in place a few decades ago, workers nowadays change their employers several times during their working lifetime – not only intra-group but across employers, countries, market segments, etc. sometimes interrupted by shorter unemployment periods. As one consequence of such a changing lifestyle, the importance of *occupational* retirement provisions compared to *personal* pension plans (or products having a similar effect) is decreasing. In our view, submitting a personal pension product to the IORP Directive and therefore mixing the 3rd and	

	2d pillars may create confusion as a result of their own specific legal, economical, structural characteristics. However, a new EU-wide personal pension regime, the 28th regime, (including harmonised standards, transferability, recognition of vested rights, etc.) which would be a new financial product alongside existing instruments would be welcomed. The new regime should result from a voluntary adhesion of the sponsor, be exclusive and not superimposed on other products, inter alia to avoid regulatory gaps and overlays. Even more importantly though, current financial products such as UCITS (although they may in theory be used by employees to invest their savings in view of their personal retirement provisions) pursue different objectives and differ fundamentally from pension plans strictly speaking. In our view the conflicting fundamentals of investment funds and personal pension plans don't allow for a combined regime and employees should be very clear about which of the two products he or she buys when subscribing to a contract. This leads ultimately to the question of distribution of investment funds and pensions products respectively (including PRIPs) which in our view are of the highest importance, but which go beyond the scope of this consultation.	
3.	**Which option is preferable?** Subject to the comment above, ALFI and ALFP have sympathy for Option 4 of the draft response.	
4.	**How should it be determined whether a compulsory employment-related pension scheme is to be considered as a social security scheme covered by Regulations (EEC) No 883/2004 and (EEC) No 987/2009(see Art. 3)?** Regarding the fourth question of Question 6.5 ALFI and ALFP do not feel in a position to form an opinion on the definition of social security schemes.	

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5.	**Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?** The directive defines the Home member state as "the Member State, in which the institution has its registered office and its main administration or, if it does not have a registered office, its main administration" (Art. 6.i) The host member state is defined in Art 6.j as "the Member State whose social and labour law relevant to the field of occupational pension schemes is applicable to the relationship between the sponsoring undertaking and members". In the case of "cross-border" activities a specific cross border application process must be respected in which Home and Host supervisor are sufficiently involved in (authorization and approval procedure). In consequence the host member state is the state where the IORP intends to carry out its activities for a sponsoring undertaking in form of a specific pension scheme. As the use of different definitions has led to a number of cases where Member States involved in cross border activities came to different conclusions, we agree on EIOPA's recommendation to give further clarification through amending the IORP directive and to reflect the position, that cross border activities arise when sponsor and IORP are located in two different member states. ALFI and ALFP agree that the decisive criterion for a cross border activity should be the different location of the sponsor and the IORP in two different member States. We share EIOPA's analysis with respect to the clarification of the host member states' definition. The new wording as proposed by EIOPA ensures that the ability to take measures against the IORP in case of breaches of SLL is limited to the newly defined host member state (i.e. the member state where the sponsoring undertaking is located). This is all the more relevant and effective if the social and labour law applicable to members of the scheme is the law of the host member state.	

	We think that the proposed modification of article 6 (c) will ensure that the identity of the sponsoring undertaking will be clearly established. The combination of payment of the premium and the existence of a direct agreement with the institution or the member will give the employer the status of sponsoring undertaking (even if the member is not paid by the latter).	
6.	**Are there any other options that should be considered?** From our experience scheme members should mostly fall under the social and labour law of the (newly defined) host member state, where the sponsoring undertaking is situated. In specific cases people who are required by their employment contract to work habitually in another state for an indefinite period are likely to be subject to the relevant social and labour law of that state . If the employer is considering sending employees who are members of the pension scheme to work in another EU member state, this could cause the scheme to start accepting contributions in respect of such members working in such other member state, whose social and labour law will often apply to the employees' employment contract. In this context an essential question is still whether the labour law governing a member's employment contract has to be complied with by the scheme in respect of that member. A specific treatment or cooperation between member states could be included in Article 21 of the directive. The directive could also oblige member states to allow members working in such member state to opt for their employment contract to be governed by the social and labour law of the host member state (i.e. of the member state where the sponsoring undertaking is located). Concerning the requested advice, we think that the outlined options are the only valid ones.	
7.	**Do you agree with EIOPA that option 2 is preferable?** We confirm that for ALFI and ALFP option 2 is the preferable one to adopt.	

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 or labour law?** So far the tax discrimination and other issues of free movement of workers are left outside the scope of the directive. As long as these issues remain subject to local requirements, crossborder activities will be limited. Apart from labour and social law issues, tax discrimination is the greatest obstacle to a single market for pensions. Switching schemes can lead to a loss of rights and benefits but also it can become expensive or even prohibitive on a tax level to maintain membership in the home country during a foreign assignment. A solution could be a provision which Member State Countries can include in their bilateral treaties to provide reliefs for these pension contributions. Furthermore it could be useful to consider procedures in the directive to settle such problems between Home member state and host member state. However, if the member state of the applicable social or labour law is not identical with the host member state and considering the new definition under 6(j), the first one should not be part of the cross border process. If necessary, a more flexible and workable modus operandi could be imagined whereby, for example, the problems of implementation of the Directive are to be reported to EIOPA and whereby EIOPA, acting as a superior authority, will seek a solution with the national supervisory authorities concerned and will be called upon to decide as a last resort. Furthermore, its decisions could be published, which would thus generate some administrative case law.	
9.	**Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?** We share EIOPA's analysis, with however a slightly dissenting opinion with respect to point 8.3.1:	

	"According to the responses to the Green Paper there is a lack of clear definition of the scope of SLL and its interaction with prudential regulation. EIOPA studies have shown that there is a wide variety in the scope of SLL amongst Member States and therefore it is likely that there is the same level of diversity of prudential legislation." If there is indeed a great diversity in terms of social and labour law, which is clearly an obstacle to the development of pan-European IORPs (see answer to question 10 below), the situation should, in principle, be less critical with respect to prudential rules since those rules are coordinated by the Directive and should consequently follow a common line. In our view, these problems should not be of the same magnitude.	
10.	**Are there any other options that should be considered?** The Green Paper emphasized the issue: "*According to the responses to the Green Paper there is a lack of clear definition of the scope of SLL".* In our contribution to the Green Paper we had already identified this major obstacle to the development of cross-border IORPs. The key brake on cross border activity is undoubtedly the obligation for a pension fund to apply the host Member State's social and labour law to the relationships between the sponsoring undertaking and its pension scheme members. Those provisions are so diverse and so divergent within the EEA that it becomes very difficult, even impossible for a pension fund to administer schemes governed by foreign laws. Some Member States have moreover an extensive interpretation of the concept of "social and labour law". Each Member State has, in addition, its own criteria with regard to this matter. Most of the Member States have chosen a "defensive" approach. As a result, would it not be possible at European level to give less latitude to the Member States in this field? Could we not only impose on the pan-European funds the obligation to comply with "core"	

social provisions with regard to occupational pensions, such as, for instance, the social principles which are applicable when an employee is posted in an EEA State?

This would not aim at limiting the rights of pension scheme members, which would remain governed by ad hoc social provisions; however, the management of those pension funds would be simplified via this minimum harmonisation of the social provisions at European level.

Those pension funds could be obliged to comply with some specific rules set forth by social law.

Those principles could be named “core” social rules, but only where related to occupational pensions (2nd pillar), which would be applicable when it comes to cross-border structures, the sponsoring undertaking itself being responsible for compliance with any other social provisions.

Indeed, it is not necessary for pension funds to ensure compliance with the entire social law of the 27 Member States (and EEA States) where the sponsoring undertakings are likely to be established. The latter are solely responsible for the particular aspect of supplementary pension. Moreover, perfect knowledge of the social legislation of every EEA Member State by a pension fund established in one of those States remains a mere utopia.

It seems therefore essential to reduce the scope of social rules that the host State may impose on an IORP located in another Member State. If not, we fear that there will never be a major development of pan-European IORPs in view of the difficulty involved in knowing, implementing and monitoring all of these social rules.

The creation of pan-European IRPs should permit, in principle, the reduction of the cost of creating supplementary pensions through economies of scale. This goal will certainly not be met if applying the social law of 27 Member States is required.

This is why we insist on limiting the obligations of IORPs to comply with a "base" of selected social rules relating to supplementary pensions. There is no question of reducing the rights of members. On the contrary, they must remain fully protected, but we recommend that we should avoid falling into a

	formalism which would serve as a substitute for a "State protectionism." IORPs should thus be required to comply with social rules of the host State, applicable in the following areas, including: • Setting-up, amendment and repeal of supplementary pension schemes; • Conditions for membership; • Participation of the members and / or their representatives in the management • Vested rights (conditions, calculation); • Options for affiliates if they leave the sponsoring company before retirement age; • Benefits: conditions (retirement age, designation of beneficiaries ...) and payment options (annuities or lump sum ...). The respect of the other social provisions should remain the responsibility of the sponsoring undertakings themselves.	
11.	**Do you agree with EIOPA that option 2 is preferable?** Yes, at a prudential level, but it is doubtful that a simple list of ongoing prudential rules in the Directive will meet the issues raised in that the "prudential" aspect of these rules is not controversial. What else will an enumeration of these rules bring? By contrast, it would be essential to take initiatives with respect to the application of social and labour law (see question 10 above).	
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?** It is not necessarily required to define a new procedure to solve these problems.	

	Indeed, the current Directive already provides in article 21 for a form of co-operation between Member States on this issue. In this respect, paragraph 3 of this provision sets forth that each Member State shall inform the Commission of the major difficulties arising out of the application of the Directive. The Commission and the competent authorities of the Member States concerned shall examine such difficulties as quickly as possible to find an appropriate solution. If necessary, a more flexible and workable modus operandi could be imagined whereby, for example, the problems of implementation of the Directive are to be reported to EIOPA and whereby EIOPA, acting as a superior authority, will seek a solution with the national supervisory authorities concerned and will be called upon to decide as a last resort. Furthermore, its decisions could be published, which would thus generate some administrative case law.	
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?** Despite regulatory and industry initiatives, governance weaknesses persist across OECD and non-OECD countries. Therefore, ALFI and ALFP welcome and agree to these amendments. Governance is increasingly recognized as an important aspect of an efficient private pension system, enhancing investment performance and benefit security. ALFI and ALFP agree to these amendments that suggest the importance of governance through a more balanced representation of stakeholders in the governing body, higher levels of expertise (and the implementation of codes of conduct addressing conflicts of interest. Consolidation of the pension industry in some countries may also be required to achieve economies of	

	scale and reduce costs, which in turn would allow pension funds to dedicate more resources to strengthening their internal governance. Although these amendments need to be applied to all elements of the governance system, ALFI and ALFP stress out the amendments have to be put into relation with the principle of proportionality (nature, scale).	
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?** ALFI and ALFP generally support EIOPA's proposition to introduce the same fit and proper requirements for IORPs as were introduced for insurance and reinsurance undertakings in article 42 (1) of the Solvency II Framework Directive. We fully adhere to the suggestion that the requirement for persons who effectively run the IORP be subject to the fit and proper requirements as it is already the case. The submission of persons who are responsible for other key functions to the fit and proper requirements should take into account the proportionality principle and the differences between the different types of IORPs in Europe, the nature, scale and complexity of their operations as well as their operational structures. These key functions are not necessarily carried out internally and for certain types of IORPs will be outsourced. ALFI and ALFP also fully agree that these requirements have to be complied with at all times and that it should be ensured that effective procedures and ongoing controls be in place to enable the supervisory authority to assess the fitness and propriety and that supervisory authorities be granted the relevant powers to take adequate measures when fit and proper requirements are not fulfilled. ALFI and ALFP do not foresee any negative impact as a result of the application of these principles which are in the best interest of the affiliated members of the IORPS and which participate to strong governance principles.	

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?** ALFI and ALFP generally support EIOPA's proposition to introduce the same internal controls systems and compliance function requirements for IORPs as introduced for insurance and reinsurance undertakings in article 46 of the Solvency II Framework Directive. We fully adhere to the suggestion that the requirements for internal control systems and compliance function should take into account the proportionality principle and the differences between the different types of IORPs in Europe, the nature, scale and complexity of their operations as well as their operational structures. In case of important activities outsourced, the IORP should be required to perform due diligence in order to determine whether the third party has a well-adapted and effective internal control system in place. In regards to the point 12.3.7 we do not necessarily share the EIOPA view that there is no major difference in the internal control system between IORPs that manage DC schemes and those that manage DB schemes. We support the view that the internal control system should take into account the specific risks that are attached to DB and DC schemes. The compliance function may be assigned to a member of the Board of Directors. For certain types of IORPs it is important to leave the possibility for IORPs to outsource the compliance function. On the grounds of proportionality, the IORPs should be allowed to implement alternative measures meeting the general objectives of a compliance function, an example of alternative measure could be that the compliance function is carried out by the management of the IORP, which for instance discuss the subject at least one a year with a reference in the minutes of the meeting. The supervisory authorities should have the possibility to review the proposed alternative measures. ALFI and ALFP fully share the view that in any case the principle of proportionality should fully apply to the compliance function to prevent overly burdensome and additional costs that would undermine the supply of occupational pensions.	

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16.	**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 an internal audit function?** ALFI and ALFP generally support EIOPA's proposition to introduce the same internal audit requirements for IORPs as introduced in article 47 of the Solvency II Framework Directive. The internal audit function should include an evaluation of the adequacy of the internal control systems and the governance system of the IORP, including the outsourced activities. We fully adhere to the suggestion that the principles of internal audit must be implemented in a reasonable and proportionate manner and that it is the responsibility of the IORP to define an adequate and consistent way of performing the internal audit. The internal auditor must be independent and cannot be involved in the management of the IORP. The IORP should also be allowed to outsource the internal audit function. Or employ alternative measures to carry out the function that could be reviewed by the supervisory authorities. ALFI and ALFP fully share the view that the introduction of an internal audit function could be overly burdensome without a corresponding increase in benefits on some scheme, with potential adverse costs impacts for members if the principle of proportionality is not taken into account.	
17.	**What is the view of stakeholders on the proposed principles of the revised IORP Directive ?** We share EIOPA's analysis with respect to the way • Article 13 (b) – cooperation of the service provider with the Supervisory authorities	

- effective access by IORP, auditors & Supervisory authority to data related to outsourced function
- access by the Supervisory authority to the business premises of the service provider

and

- Article 13 (d)
  - Member States must ensure the Supervisory authority has the necessary powers to intervene on outsourced functions or activities

of Directive 2033/41/EC should be clarified in order to guarantee proper supervision of outsourced functions and activities. What has been done within the Solvency II Framework Directive seems indeed to be an accurate benchmark.

We also share the view of EIOPA to "introduce additional rules on chain outsourcing stating that Member States must ensure that in case of sub-contracting of the outsourced activity (chain outsourcing) IORPs and Supervisory authorities have the same controlling powers to the actual service provider."

Further, we agree that further details on the case where the service provider is located in a non-EEA country could be considered in level 2 implementing measures in order to ensure access of the Supervisory authority to the information and premises of the service provider.

Finally, we also share EIOPA's conclusion on clarifications that should be made about the location of the main administration of the IORP as it influences duties of the Supervisory authorities – home state and host state in cross-border activities. We agree

- that it seems to be most appropriate that the home state is defined as the state where the IORP was authorized
- that the revised IORP Directive could include a requirement that main administration is always located in the home member state

How do stakeholders evaluate the positive and negative impacts of the introduction of revised outsourcing principles ?

	Our view is that considering what reforms are on their way in other financial sectors (insurance, investment funds, …) the considered revised outsourcing principles are justified.	
18.	**What is the view of stakeholders on the proposed principles of the revised IORP Directive ?** We agree that outsourcing of critical or important functions or activities of IORPs should be made subject to certain limitations that would be included in the revised IORP Directive. Outsourcing can not lead to operating inefficiency in IORPs. Furthermore, it cannot hinder the exercise of an effective supervision by Supervisory authorities. We also agree that Member States shall ensure that IORPs remain fully responsible when they outsource functions or activities to third parties. In this context, we agree with EIOPA's view that Art. 49 of Directive 2009/138/EC (Solvency II), reformulated in a positive way, is a good basis for addressing the specificities of IORPs in relation to outsourcing. Further, we fully agree that the revised IORP Directive contains a principle requiring IORPs to have a written outsourcing agreement and that Level 2 would then provide for the minimum contents of the agreement. We would also welcome a precision by the IORP Directive (or on Level 2) on • which functions and activities are considered as being critical and important and • which functions would be considered as other functions that could eventually be carried out by undertakings which do not fall under specific prudential supervision. Our opinion is that outsourcing by IORPs to non-supervised entities should be avoided. Finally, as to the role of the supervisory authority, we are in favor of Option 2, i.e. a system where • For IORPs that are registered, the Supervisory authority should have the necessary powers at any time to request information on outsourced functions and activities and • For IORPs that are authorized, the IORP shall in timely manner notify the supervisory authority	

	prior to the outsourcing of critical or important functions or activities as well as any subsequent changes with respect to those functions or activities. **How do stakeholders evaluate the positive and negative impacts of the introduction of revised outsourcing principles ?** The revision of the outsourcing principles of the IORP Directive is in the interest of the affiliated members of the IORPs. This can only be positive.	