

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:	Bundesarbeitgeberverband Chemie e.V. (BAVC) (German Federation of Chemical Employers' Association)	
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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	Occupational pension systems are social schemes used by the employers and are therefore not a financial product traded freely on the market. A clear distinction between second and third pillar pension systems has to be made to safeguard the interests of both the collectively organised pension savers and the individual pension savers to ensure the functionality of the (different) regulatory frameworks.	

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	<p>BAVC is convinced that cross border activities can be better achieved without a far-reaching change in the IORP Directive and without creating a market for cross-border products in this area. This is mainly due the fact that national fiscal policies are not necessarily compatible, yet at the same time Member States remain sovereign in this policy area. Moreover, the decision to operate cross-border is not a decision made by IORPs but by the companies.</p>	
1.	<p>From the perspective of BAVC it is the Member States that decide whether institutions fall under IORP. Only certain requirements may be imposed, depending on definitions of occupational pension schemes.</p> <p>With respect to occupational pension schemes that fall within the scope of the IORP Directive, protection must be offered to old commitments so that supervisory requirements, particularly on equity, are not subsequently tightened. Internal schemes that keep liquidity in the companies would be hit particularly hard by any obligation to transfer this liquidity and may absolutely not be included in portability regulations. BAVC agrees with EIOPA, that unfunded schemes (i.e. book reserves) should not be under the scope of the IORP Directive. A transfer of liquidity in the event of a portability requirement would cause unreasonable and unnecessary financial burdens, especially for small and medium-sized employers and funds, which cannot afford transfer-outs because of limited available liquidity. Ultimately, the retirement provisions for the employees would not be strengthened but weakened.</p> <p>As EIOPA suggests the dividing line between the different pillars of pension systems is not always clear - clarifying explanations might enhance a common understanding.</p>	
2.	<p>There are no other options that should be considered.</p>	
3.	<p>Option 2 is preferable, but would imply a necessity to clarify what should be considered an occupational pension scheme.</p> <p>BAVC would propose replacing "at their own risk" with "not guaranteed by the state". The wording "at their own risk" may create confusion concerning article 17 of the current Directive because in the</p>	

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	<p>german context 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.</p> <p>In BAVCs point of view Option 5 should not be applied: Individual privat savings concerns consumer protection, which have to be separated from workplace pension provisions and are already regulated in other Directives.</p>	
4.	<p>The determination could be achieved by an explicit legal and direct state involvement. Social security schemes are based on solidarity and non-profit-principles and are administred by entities of social security authorities under control of ministries and are not "undertakings" in the meaning of EU competition law. There is no "economic activity" – therefore, these social security funds fall outside the scope of EU internal market rules.</p> <p>A scheme cannot be considered as a social security scheme if it is:</p> <ul style="list-style-type: none"> - An autonomous economic actor - Not entirely non-profit - Free to determine general conditions of service provisions - Able to influence the use of assets and the fixing of the level of benefits <p>According to the opinion of BAVC all employment-related pension schemes that are funded directly or indirectly through employer and/or employee contributions are to be considered as occupational pension plans – regardless of whether they are mandatory or voluntary. It is necessary to separate company pension schemes as social welfare institutions from financial market products of commercial undertakings (second vs. third pillar pensions).</p>	
5.	<p>In principle BAVC agrees with the analysis laid out in this advice. The internal market plays a subordinate role for IORP – in contrast to life insurance companies. For the overwhelming majority of German IORPs, which operate as social institutions for their sponsoring organisations, activity is</p>	

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	<p>restricted to their own sponsoring organisation. Hence, IORPs do not have a vocation to compete on the retirement provision market with a profit motive. For that reason, the vast majority of IORPs have no current or future need for a single market.</p> <p>BAVC highlights that the limited incidence of cross-border activity is due to a lack of demand. Where demand for a cross-border scheme does exist it is not corresponding to the definition of cross-border activity in the IORP Directive that is the main barrier to carrying out the activity but rather a result of dissimilar taxation, social and labour law systems, differential regulatory treatment of cross-border schemes and domestic schemes and the application of additional and more detailed prudential requirements than covered by the IORP Directive at Member State level.</p> <p>A definition of cross-border activities would therefore need to include relevant social and labour law regulations.</p>	
6.	From the perspective of BAVC there are no other options.	
7.	Yes, it also corresponds to current practice in Germany.	
8.	The revised Directive should not include procedures to settle problems between the Home and the Host states and/or also between the Home state and the Member State of applicable social and labour law. This lies within the responsibility of the Member States themselves.	
9.	<p>BAVC disagrees with the analysis of the options als laid out in this advice. Occupational pension entitlements are based on national labour law supplemented by national social law and taxation. Prudential law cannot be isolated from SLL as in many countries prudential law has evolved symbiotically with social and labour law. In the opinion of the employers in the German chemical industry, the protection must be linked to the national pension models to be able to function correctly. Changing or redesigning the rules for only one part of this system will unbalance the whole system.</p> <p>BAVC is of the view that the IORP Directive should be left unchanged: the methods of financing the</p>	

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	<p>pension promises are an integral part of the benefit design – any changes of prudential regulation (of calculating and certification of technical provisions, funding of technical provisions, regulatory own funds etc.) would only unnecessarily increase the costs of any forms of occupational pension scheme. The more expensive occupational pensions systems are, the lower not only their range will be but also the benefits for the employees. The pension promise and its protection against insolvency, is guaranteed by SLL. Again, this lies within the competence of the Member States.</p> <p>The Treaty on European Union determines that “the limits of Union competences are governed by the principle of conferral” (Art. 5 (1)). On the area of SLL, there was no conferral upon the European Union by the Member States that would give room for an indirect negative scope definition. Furthermore, Article 114 of the Treaty on the Functioning of the European Union (formerly Art. 95 TEC), which is the legislative competence for the current IORP Directive and will that probably again for a “revised” IORP Directive, especially excludes measures on the area of SLL. Therefore, a “revised” IORP Directive cannot be used to limit the scope of the national SLL.</p> <p>BAVC rejects that a catalogue produced at EU level itemizes the components of prudential law.</p>	
10.	Yes: 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 and might avoid conflicts between prudential regulation and SLL.	
11.	BAVC disagrees: we prefer Option 1.	
12.	See answers to questions number 8 + 9.	
13.	<p>BAVC is convinced that IORPs already have a effective governance – the introduction of similar fit and proper requirements for IORPs as were introduced for insurance companies in article 42 of Solvency II Framework Directive is indiscriminate.</p> <p>As stated by EIOPA, IORPs differ widely across Member States as well as within Member States. Therefore governance requirements shall not impose burdensome requirements on IORPs.</p>	

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	<p>In the opinion of BAVC in assessing what is proportionate, we would not focus on the criteria of scale than of nature and complexity.</p> <p>Underlining the principle of EIOPA (section 10.3.14) the responsibility for good governance stays with the IORP and cannot – and should not – be transferred to the supervisor.</p> <p>Nevertheless 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.</p> <p>Some pension schemes are collective systems designed by social partners or employers and works councils at corporate or sectoral level. They are prepared to fulfil the requirement of good governance more effectively, because their boards (and/or other bodies) consist of representatives of their members. There is evidence that this participation of members or their representatives impacts on the governance of IORPs.</p> <p>Remuneration policy: Some IORPs do not employ own staff, but either use staff of the sponsoring undertaking to fulfil their duties 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.</p>	
14.	<p>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 lies within the IORPs and cannot be transferred to the supervisory authority. The requirement of "fit and proper" should therefore remain to management board members only.</p> <p>Extending this to other functions would only lead to increased bureaucratic burden and cost for IORPs and their sponsoring company/ies.</p>	
15.	<p>The implementation of a compliance function should depend on the nature and complexity of the IORP (principle of proportionality). BAVC refuses the proposal to enable a compliance officer to report "on its own initiative" to the supervisory authority. We believe that as a general principle staff of an IORP is responsible to the managing board and the managing board of the IORP is responsible to the supervisory authority.</p>	

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16.	BAVC agrees with the analysis and advice stated by EIOPA. The requirement of an internal audit function may lead to overburdening smaller IORPs and has to be avoided by flexible performance of internal audit function.	
17.	<p>BAVC would propose to include in the revised IORP Directive the principle that the IORP remains responsible for outsourced activities. Therefore we reject considerations to empower the supervisory authority for direct inspections to the service provider in case the service provider is located in another Member State. Instead, we would encourage 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. Outside the EEA reliance is given by due diligence within the IORP and its responsibility for the sound management of the institution. BAVC does not agree with the procedure envisaged under 14.3.8. (contractual agreement with prior notification).</p> <p>Again, negotiation and control of outsourcing deals lies within the responsibility of the IORP. As a result BAVC disagrees with EIOPA's proposal to introduce additional rules on chain outsourcing and on the location of the main administration.</p>	
18.	From BAVCs' perspective IORPs are allowed to outsource functions to 3rd parties remaining fully responsible. BAVC supports the statement that "IORP cannot be required to have detailed technical skills or abilities to carry out the activities outsourced to 3rd parties" and the undertaken list of functions and activities. However, BAVC does not agree with the drafting options concerning reporting of the IORP – it has to be left to the discretion of the Member States.	