

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:	BDA Bundesvereinigung der Deutschen Arbeitgeberverbände, Berlin	
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
<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	The review of the Directive on Institutions for Occupational Retirement Provision (IORP directive) calls for special prudence, not least against the background that the most recent amendment has only recently been implemented by all member states. Even though this issue is not specifically addressed by EIOPA in this section of the call for advice, we would like to point out, that in particular, capital adequacy requirements ("Solvency II") should not be transposed into the IORP directive. Imposition of these requirements would cause great harm to institutions for occupational retirement	

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	<p>provision (IORPs) and subscriber companies, and would markedly reduce the readiness of employers to enter into occupational pension commitments. This would run diametrically counter to the need to expand and strengthen occupational pension provision. Incorporation of Solvency II would ignore the risks faced by IORPs in terms of subsidiary employer liability as well as of insolvency cover by the pension protection association (<i>Pensions-Sicherungs-Verein</i> - PSV) differ fundamentally from those faced by private life assurance companies. In particular the last finance crises in 2009 showed, that the legal framework of the finance authority stood the test.</p>	
1.	<p>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?</p> <p>We agree basically with the analysis of the options as laid out in this advice. The position of EIOPA is correct, not to extend the scope of the IORP directive to direct pension commitments (book reserves) and other unregulated forms of occupational pension schemes. The main difference to the other occupational pension schemes which are covered by the IORP-Directive is the fact, that the beneficiaries have no legal right to the benefits to the institution but only to the employer. Thus there is no need for regulation here, because the employer is <u>directly</u> liable for such promises and PSV would intervene in the case of insolvency.</p> <p>The IORP-Directive should only regulate prudential supervision of institutions that fund retirement benefits. These pension provisions are imperatively related to an employer – employee relationship. Therefore the distinction between second and third pillar pension systems has to be made safeguard interests of pension savers and to ensure the functionality of the different national framework which include many labour law provisions.</p> <p>In particular the Option 5 should not be applicable, because according this option private savings could also be covered by IORP-Directive. But the IORP-Directive must not blur the important distinction between occupational schemes and other forms of provisions. The IORP-Directive is not designed as “fall back solution” for all kinds of retirement savings, which are not clearly covered by other directives.</p>	

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2.	<p>Are there any other options that should be considered? Please provide details including where possible in respect of impact.</p> <p>There are no other options that should be considered.</p>	
3.	<p>Which option is preferable?</p> <p>Option 2 is preferable</p>	
4.	<p>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).</p> <p>The IORP-Directive must be applicable to all institutions for occupational retirement provisions, regardless of whether they are mandatory or voluntary. But social security systems are carried by States and are administered by social security authorities or by Government. In cases of doubt the clarification should be laid down in the special regulations No. 883/2004 for social-security-schemes.</p>	
5.	<p>Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?</p> <p>We agree in principle with the analysis laid out in this advice. It should be noted by all stakeholders that the internal market plays a subordinate role for IORPs – by contrast with life insurance companies. For the overwhelming majority of German IORPs, which operate as social institutions for their sponsoring organisations, business activity is 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 common rules to achieve a single market.</p>	

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	<p>Notwithstanding, it is a good idea to verify with respect to businesses with IORPs and which are active across borders how existing barriers can be dismantled on the basis of the IORP directive and its implementation through national supervisory bodies. This applies in particular for cross-border undertakings which want to merge their separate IORPs within Europe in a central IORP in order to be able to realise synergy effects and cost advantages for the business with a single administration.</p>	
6.	<p>Are there any other options that should be considered?</p> <p>No</p>	
7.	<p>Do you agree with EIOPA that Option 2 is preferable?</p> <p>Yes, because it is practise in Germany already</p>	
8.	<p>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?</p> <p>The revised Directive should not include procedures to settle problems between the home and the host member states and/or also between the home member state and the member state of applicable social and labour law.</p>	
9.	<p>Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?</p> <p>We do not agree with the analysis of the options as laid out in this advice. Occupational pension entitlements are based on national labour law supplemented by national social- and tax-law. The</p>	

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	<p>design of these entitlements, the delivery and their protection, the methods of financing and of the surveillance of the IORPs are inextricably linked to each other. Changing one part of the system (prudential law) without adjusting the other would interrupt the equilibrium and lead to overregulation and thus to additional costs. Therefore any changes in prudential regulation, i.g. of calculating and certification of technical provisions, funding provisions or regulatory own funds will have severe impact of costs of financing defined benefit plans. This is because the methods of financing the pension entitlements - for example the discount rate to be applied or the biometrical tables to be used – are an integral part of the delivered pension plan.</p> <p>From this follows, that changing prudential regulation will likewise also have a severe impact to SLL. As SLL covers the pension promises and its protection against insolvency, the co-determination, etc. in its entirety, prudential regulation can not prevail over SLL, because this would mean that in fact prudential regulation will play the decisive role whether or not there will be a vital environment for pension schemes on a state level. As pointed out and also mentioned by EIOPA on the draft response (8.3.7), a precise definition of the scope of prudential law at EU-level would in effect result in an indirect limitation to the competences of the member states on the area of SLL. A positive scope-definition of prudential law would at the same time mean to limit the scope of SLL by reducing its scope to those parts, which are not to be determined as prudential law. However, such an indirect negative impact on SLL would not be covered by the competences conferred upon the European Union.</p> <p>The Treaty on European Union determines that “the limits of Union competences are governed by the principle of conferral” (Art. 5 p. 1). This principle means that “the Union shall act only within the limits of the competences conferred upon it by the Member States” while competences not conferred upon the Union “remain with the Member States” (Art. 5 p. 3). 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 be 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>	

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	<p>When appropriate, it may be helpful in cases of doubt or conflicts to clarify the precedence of national SLL in relation to prudential law in the Directive. Prudential regulation should give member states the choice to implement the different parts of prudential legislation. If the same level of security is reached by other elements of labour law (i.g. insolvency protections systems) member states should be able to opt out.</p>	
10.	<p>Are there any other options that should be considered?</p> <p>No</p>	
11.	<p>Do you agree with EIOPA that Option 2 is preferable?</p> <p>No, we prefer Option 1.</p>	
12.	<p>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?</p> <p>Please see answer number 9 above.</p>	
13.	<p>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?</p> <p>In our view the proposed principles of the revised directive are applicable, provided they are modified by a general proportionality clause. It seems more effective not to refer to the size of the IORPs but</p>	

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	rather to the nature and complexity. It is very important, to avoid needless bureaucracy and additional costs for IORPs. Account must be taken of the fact, that many IORPs have rather simple pensions plans and no staff of their own, because they are administered by the staff of the undertakings. Such IORPs should not have with additional burdens imposed on them.	
14.	<p>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?</p> <p>Of course it is essential, that the staff and all responsible persons of IORPs are fit and proper. But the responsibility has to remain by the management board members and should not be extended to staff members who have key-functions.</p>	
15.	<p>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?</p> <p>The implementation of a compliance function should depend on the nature and complexity of the IORP (principle of proportionality). Nothwithstanding we refuse the proposal to enable the person in compliance function to report "on its own initiative" to the supervisory authority. This proposal would lead to confusion regarding the responsibilities within the IORPs and to distrust. The chain of responsibility should remain from the staff to the management board and from the management board to the authority.</p>	
16.	<p>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?</p> <p>We agree that the proposed principles of the revised IORP directive would be beneficial for IORPs. The level 2 implementing measures should take the International Standards for the Professional</p>	

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	Practice of Internal Auditing provided by the Institute of Internal Auditors (IIA) into account.	
17.	<p>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?</p> <p>The revised directive should include the principle, that the IORP remains responsible for the 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.</p>	
18.	<p>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?</p>	