

<b>Comments Template on EIOPA-CP-11/001</b> <b>Draft response to Call for Advice on the review of Directive 2003/41/EC</b> <b>Scope, cross-border activity, prudential regulation and governance</b>		<b>Deadline</b> <b>15.08.2011</b> <b>18:00 CET</b>
Company name:	<b>Belgian Association of Pension Institutions (BVPI-ABIP)</b> Contact: Mr. Karel Van Gutte, Secretary General Boulevard A. Reyerslaan 80 – 1000 Brussels – Tel. + 32 2 706 85 45  <a href="http://www.pensionfunds.be">www.pensionfunds.be</a> – <a href="mailto:info@pensionfunds.be">info@pensionfunds.be</a>	
		Public
Reference	Comment	
General Comment	<ul style="list-style-type: none"> <li>- Short answering time. Review of the IORP directive needs to be in holistic way together with and taking in consideration and which has to be adjusted at other measures the commission is putting forward regarding pension policy.</li> <li>- In most member states IORPs, are not-for profit institutions who are founded by the sponsoring 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.). Therefore in most member states they do not compete (not with each other, neither with financial institutions) and cannot be compared with commercial undertakings.</li> <li>- 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.</li> <li>- BVPI-ABIP 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.</li> </ul>	

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	<ul style="list-style-type: none"> <li>- BVPI-ABIP considers however that to encourage cross-border activities it is of uttermost importance that all legislations that may impact occupational pensions (i.e. fiscal, social and labour law, etc.) do not discriminate towards the pension institution (in the largest sense of the word, i.e. an IORP, group insurance, book reserve, etc.) which manages the pension scheme.</li> <li>- BVPI-ABIP agrees with EIOPA's statement in 10.3.17 that <i>"the revised general governance system for IORPs should not prevent Member States from requiring or permitting IORPs to allow for the participation of members in their governance structure, if appropriate. I.e. to provide the equally representation of employers and employees in the IORP's bodies"</i>.</li> <li>- BVPI-ABIP points out the fact that the "fit &amp; proper"-requirements because of the proportional elements should not differentiate between IORP with or without cross border activities.</li> </ul>	
1.	<p><b>"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?"</b></p> <p>We agree with the analysis of the options as laid down in this advice. Extending the IORP Directive to non-occupational pension schemes would have such an impact in 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.</p>	

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2.	<p><b>“Are there any other options that should be considered? Please provide details including where possible in respect of impact.”</b></p> <p>BVPI-ABIP considers taking in account the spirit of the IORP-directive “to guarantee a high degree of security for future pensioners” that EIOPA and the Commission must equally consider the option to review article 2 (d) and (e) of the actual directive.</p> <p>BVPI-ABIP is confident that in order to guarantee a high degree of security for future pensioners the “institutions where employees of the sponsoring undertakings have no legal rights to benefits and where the sponsoring undertaking can redeem the assets at any time and not necessarily meet its obligations for payment of retirement benefits” and “the use of book-reserve schemes” should also be regulated by the IORP directive</p>	
3.	<p><b>“Which Option is preferable”</b></p> <p>Taking in consideration our answer on question 2 (abolishment of article 2 (d) and (e)):</p> <p>BVPI-ABIP considers that option 2 (“clarify 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 <b>the Commission examines in the same time the consistency of application of regulation 883/2004</b> because BVPI-ABIP considers <b>that all funded occupational pension schemes needs to be covered and that no occupational pension scheme may remain unregulated or unsupervised.</b></p> <p>Options 3 and 4(i) should not be withheld because BVPI-ABIP considers that the directive has to be applied to all Institutions for Occupational Retirement Provision and that it could harm the protection of the citizens if the member states would be allowed to opt for the optional</p>	

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	<p>application of the directive.</p> <p>BVPI-ABIP 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.	<p><b>“How should it be determined whether a compulsory employment related pension scheme is to be considered as a social security scheme covered by Regulation EEC N° 883/2004 and EEC N° 987/2009?”</b></p> <p>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 voluntarily.</p>	
5.	<p><b>“Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?”</b></p> <p>BVPI-ABIP agrees with the statement of the European Commission and of EIOPA that a clear and concise definition of ‘cross-border activity’ is required in order to avoid any gaps or conflicting interests between different member states.</p> <p>However some preliminary conditions need to be fulfilled :</p> <p>1. A clear definition of what is covered by prudential regulations and what is covered under</p>	

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	<p>social and labour legislation.</p> <p>2. A good understanding of the employment relationship between a sponsoring company and its employee, affiliated to a pension plan</p> <p>The IORP is based in country A.</p> <p>With regard to the employment relationship between the sponsoring company and the affiliated employee, the following situations could be considered :</p> <ul style="list-style-type: none"> <li>• the sponsoring undertaking and the affiliated employee are resident in the same member state A, and the employment relationship is governed by this country A</li> <li>• the sponsoring undertaking is based in country A, while the employee has been sent on secondment to country B in order to work for another employer (usually a subsidiary of the same multinational company) : he remains affiliated to the social security of country A, and to the sponsoring undertaking's pension plan in country A</li> <li>• the sponsoring undertaking is based in country A : the employee is seconded to a subsidiary in country B, under employment conditions of the subsidiary in country B (= local salary), but remains affiliated to the pension plan of country A</li> <li>• the sponsoring undertaking is resident of country A, but employs the employee in country B, under employment conditions of country B (e.g. a Company based in Belgium has employees in a Luxemburg office under Luxemburg employment and social law, without having a local entity, and pays them from Belgium) – the employees in country B are covered by a qualified pension plan in country B).</li> </ul>	

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	<ul style="list-style-type: none"> <li>• the sponsoring undertaking and the affiliated employee are resident in country B, and their relationship is governed by regulations in country B</li> <li>• the sponsoring undertaking, resident of country B, sends employees on secondment to country C, while the employee continues to be covered by employment conditions of country B, including the pension plan</li> <li>• the sponsoring undertaking, resident of country B, sends the employee on secondment to country C, under employment conditions of country C, while the employee remains affiliated to the pension plan of country B.</li> </ul> <p><b>When do we have a cross-border activity :</b></p> <ul style="list-style-type: none"> <li>- no cross-border activity under point 1 (all players based in the same member state)</li> <li>- no cross-border activity under point 2, although the seconded employee is resident in country B, but remains affiliated to pension plan of country A</li> <li>- no-cross border activity under point 3, although seconded employee is resident in country B under local conditions, but remains affiliated to pension plan of country A</li> <li>- cross-border activity under point 4, as sponsoring undertaking in country A has to respect the local social and labour law of country B, including the pension plan, governed by the rules of country B</li> <li>- cross-border activity under point 5, as sponsoring undertaking and employee are established in country B, under social and labour law of country B</li> <li>- cross-border activity under point 6 and 7 : sponsoring undertaking resident in country B, while employee being employed in country C, remains affiliated to pension plan of country B : in this case no new cross-border activity (both cases to be assimilated to point 5)</li> </ul>	

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	<p><b>Conclusion :</b></p> <p>BVPI-ABIP does not agree with the solutions suggested by the EC, but proposes that:</p> <ol style="list-style-type: none"> <li>1. Criterion to be applied for a cross-border activity: a combination of country of residence of the sponsoring undertaking and nationality of the applicable social and labour law.</li> <li>2. New Directive should also clearly define what is covered by prudential regulation and social and labour legislation, in order to avoid any confusion or conflict of interest.</li> </ol>	
6.	<p><b>“Are there any other options that should be considered?”</b></p> <p>As stated in the answer to question 5, BVPI-ABIP considers that the nationality of the relevant Social and Labour Law needs also be considered to decide if there is a cross-border operation.</p> <p>Based on our experience, it will in our view happen on a regular basis that the Sponsoring Undertaking does not coincide with the Employer. Moreover, in our view sponsorship from outside the European Economic Area (e.g. from a US mother company) should also be allowed. Therefore, we propose the following definitions (taking into account the point of view taken by the European Commission that there is only cross-border activity when the sponsoring undertaking and the IORP are located in two different Member States):</p> <p><b>Home Member State</b> : means 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;</p> <p><b>Host Member State</b> : means 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 <del>and members</del> <u>or any other body, regardless of whether it includes or consists of one or more legal or natural persons, which acts as an employer or in a self-employed capacity, and the members;</u></p>	

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	<p><b>Sponsoring Undertaking</b> : means any undertaking or other body <u>(including a branch or subsidiary)</u>, regardless of whether it includes or consists of one or more legal or natural persons, <del>which acts as an employer or in a self-employed capacity or any combination thereof</del> <u>has a direct agreement with either the institution or the members and which pays contributions into and/or supports the</u> <del>a</del> institution for occupational retirement provision;</p> <p><b>Cross-border activity</b> : means the situation whereby an institution established in a Home Member State <u>accepts sponsorship from a Sponsoring Undertaking located in another state, to manage a pension scheme subject to a Host Member State's social and labour law relevant to the field of occupational pension schemes;</u></p> <p>Article 20 of the IORP Directive should be adapted accordingly, providing for a notification procedure between the Home and the Host Member State (as it currently does) and providing for information to the competent authorities of the state where the Sponsoring Undertaking is located, should that not be the Host Member State.</p> <p><b>Nevertheless the foregoing, BVPI-ABIP considers it of uttermost important that the definition and thus the role of sponsoring undertaking should as well be defined in the light of an eventual review of the "Valuation of Assets, Liabilities and Technical provisions" (CfA 5), the "Security Mechanisms" (CfA 6), the "Objectives and Pro-Cyclically" (CfA 8) and the "General Principles of Supervision scope and transparency and accountability" (CfA 9).</b></p>	
7.	<p><b>"Do you agree with EIOPA that option 2 is preferable?"</b></p> <p>Please check answers on questions 5 and 6.</p>	
8.	<p><b>"Even with defining the sponsoring undertaking, problems of overlapping or contradicting</b></p>	

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	<p><b>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?"</b></p> <p>In any event.</p>	
9.	<p><b>"Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?"</b></p> <p>BVPI-ABIP agrees with the conclusion of EIOPA in paragraph 8.3.7 that some areas that might be on a list of prudential law might eventually also considered as social and labour law, but 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).</p>	
10.	<p><b>"Are there any other options that should be considered?"</b></p> <p>We would propose to ask Host Member States to provide for a comprehensive summary of the applicable social and labour provisions (instead of just a copy of the fully applicable legislation).            BVPI-ABIP considers that the Belgian case may serve as a good practice of a clear distinction between prudential law on the one hand and social and labour law on the other.            BVPI-ABIP reckons in this sense that there is also a need for a clear framework to decide upon the transfer value of the pension rights and a uniform communication concerning the funding of the IORP</p> <p>BVPI-ABIP 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, BVPI-ABIP is convinced that article 18.7 (which states that the in the event of a cross-border activity the Host Member State may require the application of some</p>	

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	investment rules) should at least be reviewed and by preference abolished	
11.	<b>"Do you agree with EIOPA that option 2 is preferable?"</b>  Yes	
12.	<b>"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?"</b>  Yes	
13.	<b>"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?"</b>  BVPI-ABIP is in favour of a good governance of the IORPs, and agrees that OECD and IOPS principles guidelines and good practices offer a good starting point. Therefore BVPI-ABIP agrees with the broad principles putted forward by EIOPA.  <u>Separation of an IORP from a sponsoring undertaking</u> BVPI-ABIP agrees with the principle that the management of the occupational pension promise needs to legally separated from the sponsoring undertaking, and wishes therefore to remind his suggestion to review the appropriateness of articles 2 (d) and (e) of the actual IORP directive.  <u>General proportionality clause</u>	

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	<p>BVPI-ABIP 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. BVPI-ABIP 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. BVPI-ABIP wishes to underline that the existence of a cross-border activity may not interfere with the proportionality principle.</p> <p>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. It also believes 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><b>“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 fit and proper requirements?”</b></p> <p>BVPI-ABIP emphasises that a clarification of article 42(1) of the Solvency II Framework Directive is needed.</p> <p>Proper -requirement          BVPI-ABIP agrees that all persons who effectively run the IORP and who have other key functions need always and at any time to be of good repute and integrity (proper).</p>	

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	<p>Fit -requirement</p> <p>But where the functions and responsibility are exercised by a body who acts as a college, the body as whole needs to dispose at all times all the necessary competences and needs at all times be fit. This does however not mean that every individual member of the body has to be at all times be a specialist in all the matters the body –who acts as college- is dealing with. BVPI-ABIP underlines as well that it is important that 1) Professional qualification, knowledge and experience may be acquired by representing the members of pension schemes, and 2) Fitness of non-executive board members or members of a supervisory board should be easier to gain than fitness of executive board members.</p> <p>Nevertheless, the professional requirements to become a Board member should never be a barrier to the participation of employers or workers and/or their representatives as paritarian management has its specific advantages. Therefore BVPI-ABIP agrees with EIOPA’s statement in 10.3.17 that <i>“the revised general governance system for IORPs should not prevent Member States from requiring or permitting IORPs to allow for the participation of members in their governance structure, if appropriate”</i>.</p>	
15.	<p><b>“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?”</b></p> <p>BVPI-ABIP 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> <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</p>	

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	<p>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 are the interests of members and beneficiaries 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><b>“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?”</b></p> <p>BVPI-ABIP agrees with the analysis and advice made by EIOPA.</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><b>“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 revised outsourcing principles?”</b></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 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</p>	

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	<p>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.</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><b>"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 revised outsourcing principles?"</b></p> <p>BVPI-ABIP 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 <i>"The IORP cannot be required to have detailed technical skills or abilities to carry out the activities outsourced to 3rd parties."</i></p> <p>Considering the role of the supervisor, BVPI-ABIP 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 BVPI-ABIP does not agree with none of the drafting options proposed by EIOPA concerning the reporting of the IORP on the outsourcing of its activities. BVPI-ABIP 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.</p>	