

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:	CEA European Insurance and reinsurance Federation	
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 private sector plays a significant role in the provision of pension income for European citizens, as a complement to public pension systems. To guarantee both the protection of members and beneficiaries and the continued viability and stability of the sector, appropriate regulation of all players is critically important.	

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	<p>The CEA welcomes the EC's intention to review the IORP Directive with the aim of creating a true EU market for occupational pension provision based on a solid risk-based prudential regime for all occupational pension providers thereby providing more secure pensions to the Members and beneficiaries. This would have the additional benefit of aligning the Solvency II Framework Directive — which follows a risk-based approach — and the IORP Directive more closely, thereby ensuring a level regulatory playing field.</p> <p>In line with the principle of "substance over form", the CEA strongly believes that all financial institutions that provide occupational pension products should be regulated not on the basis of the legal vehicle through which products are sold, but rather according to the risks those products present to the provider, members and beneficiaries. As a result, Members' and beneficiaries' protection shall neither depend on the legal form of the institution they are affiliated to nor on the supervisory regime.</p> <p>In order to achieve fair competition and consistency in prudential regimes, the CEA strongly supports the application of the "same risks, same rules, same capital" principle to all financial institutions providing occupational pension products. More specifically, Solvency II should serve as a benchmark for the regulatory treatment of all financial institutions offering occupational pension products, including pension funds. The Solvency II principles as agreed in the Solvency II Framework Directive follow a risk-based approach and create a sound prudential regime. These principles should serve as the basis for regulating all financial institutions providing occupational pension products, provided the economically significant characteristics of the different pension products or schemes are taken into account. Examples of specific occupational pension product characteristics that could be prudentially relevant include the use of sponsoring covenants, pension protection schemes, or options to reduce benefit promises or payments. These potential specificities should be taken into account in a similar way for all providers, including insurers.</p> <p>The importance of a level playing field between insurance providers and pension funds has been</p>	

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	<p>recognised and enacted into European law in the past. For instance, Article 17 of the current IORP Directive states that IORPs underwriting the liability to cover against biometric risk or guarantee a given investment performance or a given level of benefits shall hold a minimum amount of additional assets above the technical provisions, calculated according to the Life Insurance Directive (Directive 2002/83/EC – to be recast by the Solvency II Directive). The CEA insists that it is of utmost importance to review the IORP directive in such a way that a level playing field is guaranteed between all financial institutions providing occupational pensions.</p> <p>Additionally, the review of the IORP Directive should not only be based on the view that only IORPs offer occupational pensions. In 2008, life insurance companies had a market share of 47%¹ in the second pillar provision of pensions. Furthermore, member states have been given the option to apply the core prudential rules of the IORP Directive to the occupational-retirement-provision business of insurance undertakings (Article 4 of the current IORP Directive). Additionally, the insurance sector has a keen interest in the review of the IORP directive beyond the article 4 option, as insurance companies are directly affected by a number of provisions of the directive. For instance, under article 9 of the current IORP Directive several types of institutions, including insurance companies, are allowed to manage IORPs. Similarly, the insurance sector is a key service provider for IORPs via 'outsourcing'. The insurance sector is therefore very keen to contribute to the review of the directive in order to achieve an outcome in the interest of all concerned parties.</p> <p>On the more specific rules to be included in the revised IORP Directive, the CEA wishes to highlight that adequate capital requirements should be imposed on IORPs for the risks they bear. Where the IORPs do not fully bear the risks of the pension product or scheme, appropriate financial safeguards need to be in place to ensure sufficient consumer protection. Next to this need for adequate capital requirements,</p>	

1. ¹ CEA Statistics N°28: The role of insurance in the provision of pension revenue

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	<p>there is a need for greater transparency and common methodology enabling meaningful comparison and overview between the different pension products or schemes. Such methodology for description and measurement should be applied to all providers of pensions not only to ensure comparability but also to prevent the opportunity of regulatory arbitrage.</p> <p>The CEA understands that the timetable set by the Commission for EIOPA is very ambitious, and as a result EIOPA has had to impose an extremely short consultation period. However, the CEA believes this does not allow sufficient time to provide a throughout analysis and detailed comments on the extremely complex issues discussed.-Given this short framework, the CEA believes that the issues dealt with in this public consultation should also be addressed in the second EIOPA consultation which will enable all aspects of the Call for Advice to be taken into account.</p>	
1.	<p>The CEA welcomes the Commission's and in turn EIOPA's willingness to open up a discussion on the scope of the IORP Directive. However, the CEA is of the opinion that this discussion would benefit from a clarification by EIOPA regarding the institutions which would potentially be included in the scope.</p> <p>Additionally, the CEA is very concerned by and regrets the fact that insurers are not directly taken into account in the analysis of all scope options. As mentioned in our general remarks, the insurance sector is a key stakeholder in the debate on the review of the IORP Directive. As such the CEA would welcome a deeper analysis, also taking into account insurers, in the EIOPA draft response.</p>	
2.	<p>The CEA is very concerned by and regrets the fact that insurers are not directly taken into account in the analysis of all scope options. Therefore, it should be considered how the role of insurers providing occupational pensions should be treated ensuring a level playing field between all providers of occupational pensions in a true internal market. This should include advice on how to achieve a level playing field as is currently the case amongst others by means of article 4 of the IORP Directive.</p>	

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3.	<p>EIOPA's starting point seems to be the observation that there are a number of occupational schemes currently not covered by the IORP-Directive or any other EU legislation, most notably pension plans in the new Member States, and that these should be covered. Against this background, EIOPA invites comments on five possible options, ranging from leaving the scope unchanged or merely clarifying the existing wording, to extending the scope of the Directive to all providers of pension schemes not guaranteed by a public authority.</p> <p>The CEA is of the opinion that further clarification is needed on EIOPA's options, which as they stand give rise to various interpretations. In addition, in our view the analysis of EIOPA is incomplete in the sense that for instance the insurance sector is not referred to, despite the important role insurance companies play in providing occupational pensions. In this context, and considering that only a certain number of topics were addressed in the EIOPA consultation and that key topics such as capital requirements were not touched upon, the CEA cannot express a preference for any of the five options put forward by EIOPA. The CEA wishes however to make a number of comments which may guide EIOPA and the European Commission in their future work on the scope of the revised IORP Directive.</p> <p>The CEA strongly supports a consistent application of the fundamental principle "same risk - same rules - same capital" that was explicitly highlighted by the European Parliament in its response to the Green Paper. As such, and in line with this principle and with the CEA's own key principle, "substance over form", the CEA believes that the IORP Directive should apply to IORPs providing occupational pension schemes on a funded basis, regardless of how contributions are collected and whether they are subject to a voluntary agreement or legal obligation. In this context, the CEA welcomes EIOPA's intention not to touch upon the current exclusions of the IORP Directive. These exclusions mentioned in article 2.2 of the current IORP Directive should be retained so far as sufficient protection of the pension rights is ensured.</p> <p>Furthermore, in order to ensure a level playing field within the Single Market for occupational pension schemes the role of insurers providing occupational pensions must be considered. This should include</p>	

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	<p>advice on how to achieve a level playing field as is currently the case amongst others by means of article 4 of the IORP Directive.</p> <p>For the purpose of the revised IORP Directive the CEA suggests that the notion of "occupational pensions" should comply with the three following cumulative criteria:</p> <ul style="list-style-type: none"> • Having the provision of retirement benefits as a primary purpose; • Based on an occupational activity; • Supplementary to national statutory social security schemes. <p>Using the three criteria mentioned above would explicitly exclude institutions managing social security schemes and employers, from the scope of the Directive. However, Member States should, in case the sponsoring employer bears the risk, ensure the security of the pension promise and retain the right to ensure in their national legislation that sponsoring employers in case they bear the risk subscribe to an insurance policy, enter a pension protection scheme or provide a guarantee or a similar financial arrangement appropriate to the nature and extent of the risk for beneficiaries.</p> <p>Also the choice to include institutions managing social security schemes should remain a Member State option. Such an approach would protect members/beneficiaries in the member states that joined the EU after the entry into force of the IORP Directive without including social security schemes for all countries.</p>	
4.	<p>The CEA believes that the "compulsory" factor should not be used to determine whether a pension scheme is to be regarded as social security or not. Such a decision should be taken on the basis of national law and the labour contract between the employer and employee, including existing collective agreements.</p>	

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5.	<p>The CEA understands that EIOPA considers that the existing text of the IORP Directive creates difficulties in the operation of cross-border IORPs and in terms of the notification, authorisation and approval process. Therefore EIOPA proposes clarifying the current Directive.</p> <p>The CEA generally agrees with the analysis of the options. However, the CEA feels that, rather than the actual text of the IORP Directive, the greatest obstacles to the development of cross-border IORPs stem from a lack of demand created by national differences in tax and labour laws. In any case, the CEA welcomes all initiatives with the overall goal of enabling cross-border activities and clarification of loopholes in the current Directive.</p>	
6.		
7.	<p>The CEA fully supports the overall aim of enabling cross border IORPs. As such, the CEA welcomes the proposed clarifications of “sponsoring undertaking” and “host member state”.</p> <p>Member States should not only be obliged to allow cross border activity in the sense of article 20(1) but also support other cross border arrangements to promote the development of a single market for pensions. There is a great variety of possible cross-border situations. These should be dealt with via level 2 measures rather than in the revised IORP Framework Directive.</p>	
8.	<p>In its accompanying letter, the Commission states that the call for advice aims to achieve full harmonisation of pension fund regulations “where EU legislation does not need additional requirements at the national level”. As such the aim of the revised Directive should be to avoid the problems created by contradicting regulation. However, the CEA would consider it beneficial if procedures to settle possible future problems that are unavoidable would be included in the Call for Advice.</p> <p>The revised IORP Directive should also include a requirement for national supervisors to strengthen the</p>	

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	single market for occupational pensions which requires, amongst others a further harmonization of prudential regulation and consistent application of supervisory requirements.	
9.	The CEA agrees with the analysis of options.	
10.		
11.	<p>The Call for Advice sought EIOPA's guidance on making a clearer distinction between prudential regulation and social and labour law. It argued that this would make cross-border activity easier, because it would give a clear definition of the scope of social and labour law and its interaction with prudential regulation, and therefore clarify the responsibilities of the home and host states of a cross-border IORP.</p> <p>EIOPA's draft advice proposes to include a new article in the revised IORP Directive describing the scope of prudential regulation.</p> <p>The CEA agrees with option 2, which describes the scope of prudential regulation. In addition, the CEA believes that social and labour law should focus on the relation between the employer and the employee whereas prudential regulation should regulate IORPs. As a result, there could be an overlap between both regulations and the boundaries must be clearly defined.</p> <p>Furthermore, it is acknowledged in article 26 of the Lisbon treaty that the EU shall adopt measures with the aim of establishing or ensuring the functioning of the internal market.</p> <p>In this context the CEA supports having prudential regulation based on Solvency II principles in at least the following domains:</p>	

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	<ul style="list-style-type: none"> • Methods to calculate assets, liabilities and technical provisions • Capital requirements to protect the consumers' interests • Investment policy • Supervision of pension funds • General governance requirements • Information obligations for the purpose of prudential regulation. 	
12.	<p>In its accompanying letter, the Commission states that the call for advice aims to achieve full harmonisation of pension fund regulations "where EU legislation does not need additional requirements at the national level". As such the aim of the revised Directive should be to avoid the problems created by contradicting regulation. However, the CEA would consider it beneficial if procedures to settle possible future problems that are unavoidable would be included in the Call for Advice.</p>	
13.	<p>It is acknowledged by EIOPA that the IORP Directive does not contain rules on general governance requirements, such as a clear allocation of responsibilities, written documentation of key governance functions, or contingency plans, as the Solvency II Framework Directive does. Therefore EIOPA advises incorporating the requirements of Art. 41 of the Solvency II Directive into the IORP-Directive.</p> <p>EIOPA also advises that the principle of proportionality in Art. 41(2) of the Solvency II Directive needs to apply to all elements of the governance framework (for example, internal audit, internal controls, etc). The advice also suggests including provisions to ensure a sound remuneration policy, possibly based on the Level 2 implementing measures for Art. 41 of the Solvency II Directive, provided the characteristics of the IORP (such as unpaid trustees) do not make this irrelevant.</p>	

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The CEA strongly supports EIOPA's view that the **governance requirements for IORPs should be similar to those of insurance and reinsurance undertakings according to the "same risks, same rules" principle whilst taking into account the specific characteristics of the pension products or schemes**. Indeed, as correctly indicated by EIOPA, the governance system of an IORP should be aligned with the aims of the insurance industry which: (i) ensure that management is sound and prudent, (ii) secure a high standard of Members' and Beneficiaries' protection and (iii) assist the management board if appropriate.

Additionally, pillars 2 and 3 of the Solvency II Framework Directive offer useful principles that are also applicable to IORPs, particularly in areas around governance, risk management supervisory reporting and public disclosure and as such, certain pillar 2 and 3 provisions should be directly applied to IORPs, such as Art. 41 of the Solvency II Framework Directive on the general governance requirement. As a general approach, pillar 2 and 3 principles should be used at least as a basis; and where appropriate for those areas that seem less appropriate for IORPs adjustments could be made.

Furthermore, the CEA supports some of EIOPA's concrete proposals. For instance, the CEA supports the principle that there should be a legal separation between the sponsoring undertaking and the IORP as is currently stated in Art. 8 of the IORP Directive. This principle should be retained in the revised IORP Directive. Additionally, the CEA recognises that the governance system should not prevent Member and beneficiary participation in the governance structure of an IORP if appropriate. Finally, consistent with solvency principles; the CEA believes that written policies should be subject to prior approval by the administrative management or supervisory body. Again, where this would be overly burdensome for IORPs with a very small risk profile, the proportionality principle should provide the necessary flexibility.

On the other hand, the CEA does not agree with reviewing certain policies on governance "regularly" instead of "annually", as is the case for insurers. In case an annual review would be too burdensome for

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	<p>some IORPs, the proportionality principle could provide the necessary flexibility.</p> <p>Regarding proportionality, the CEA would welcome further discussions regarding the exclusions from the revised IORP Directive by means of membership size - as is currently the case in Art. 5 and as indicated in paragraph 10.3.8 of the Call for Advice- or by means of the legal form of the IORP. Other criteria for exclusion from the scope of the IORP Directive could be considered in order to ensure that exclusions are based on risk. For example, this could be done by the use of a benchmark on technical provisions – similarly to article 4 of the Solvency II Framework Directive - rather than by the amount of members and beneficiaries, provided that these are calculated in a transparent and harmonised basis. In any case, this benchmark should be balanced in a fair and transparent way against the need to ensure security for members and beneficiaries.</p> <p>Additionally, along with this benchmark, allowing the exclusion of certain IORPs from the Directive, the proportionality principle should be applied based on the individual risk profile of an IORP. This would involve taking into account its nature, scale and complexity of risks to ensure the proportionate application of the Directive. The principles should be defined in level 1 and could be further specified at level 2. If this is the case, the CEA supports EIOPA’s view that proportionality should be applied to all elements of the governance system and, as a consequence, to all future implementing measures.</p> <p>Finally, the CEA would also like to stress that EIOPA should take into account the differences between a single-tier (Board) and a two-tier Governance systems (separation of Executive Board and Supervisory Board) consistently throughout the draft response. This is not always the case in the document (e.g. paragraph 10.3.9).</p>	
14.	<p>It is in the interest of the Members and Beneficiaries that “fit and proper” requirements are imposed on IORPs. EIOPA suggests that the new IORP Directive should draw on Articles 42 and 43 of Solvency II. This would require individuals who run the IORP or have other key functions to have “professional</p>	

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	<p>qualifications, knowledge and experience [that] are adequate to enable sound and prudent management of the IORP or to properly perform their key function.”</p> <p>The CEA welcomes the protection of Members and Beneficiaries in the best possible way, as described in Articles 42 and 43 of the Solvency II Framework Directive, to have fit and proper requirements by those really performing the function. These are critical requirements for persons running any kind of business and should be legislated in a way that explicitly reflects the specific responsibilities associated with taking care of the retirement interest of members and beneficiaries. In any case, these criteria should be in line with the same risks same rules principle. However, requirements for professional qualifications could also be applied to those running the IORP as a group in order to ensure that members can still nominate their own trustees. As such, proportionality should also be taken into account, e.g. allowing certain smaller entities to employ advisors with the necessary qualification rather than having these qualifications themselves.</p> <p>Finally, the CEA supports EIOPA’s view on procedure, i.e. making general principles in level 1 and elaborating details in the level 2 implementation.</p>	
15.	<p>EIOPA’s advice on internal control systems would introduce the requirement for a compliance function for IORPs, but on proportionality grounds this would allow outsourcing or the introduction of alternative measures for carrying out the function, both of which must meet its general objectives.</p> <p>The CEA generally concurs with EIOPA’s views on the internal control system. It is important that IORPs should have an effective internal control system and a regular assessment of compliance is part of this.</p> <p>Nevertheless there are some critical comments:</p> <p>Under point 12.3.11 EIOPA proposes that the supervisory authority should at all times have the power to</p>	

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	<p>require reports from the compliance function of the IORP. This recommendation conflicts with the allocation of rights and duties in the field of corporate law. The addressee of the compliance obligations is the board of management, which involves the compliance officer having to fulfill these obligations in the interest of the company. Therefore, the compliance officer is subject to information and reporting requirements only vis-à-vis “his principal”, i.e. the board of management. Therefore the second sentence under point 12.3.11 should be deleted. Similarly, paragraph 12.3.12 suggests that the compliance function should include compliance with “all legislation relative to the operations of the IORP, e.g. Social & Labour law”. The CEA disagrees with this sentiment. In line with Solvency II principles, the compliance function should be concentrated first and foremost on supervisory provisions. Besides that it should be clear that it depends on the undertakings’ own risk assessment which fields of law the compliance function covers.</p> <p>Furthermore, in paragraph 12.3.5 a reference is made to concrete wording that would better suit the specificities of IORPs. Unfortunately, this is not done.</p> <p>Finally the CEA would favor a concrete reference to Art 46 of the Solvency II Framework Directive in EIOPA’s advice.</p>	
16.	<p>The draft advice proposes introducing an internal audit function into the IORP Directive. It also envisages that IORPs should be allowed to outsource the internal audit function.</p> <p>The CEA believes that EIOPA’s views referring to Article 47 of the Solvency II Framework Directive are correct. The CEA also believes that an internal audit function should include an evaluation of the adequacy and effectiveness of the internal control system and other elements of the system of governance of the IORP as indicated in Article 47 of the Solvency II Framework Directive.</p> <p>In the CEA’s opinion the implementation of paragraph 13.3.9 should be in line with the general</p>	

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	proportionality principle as described above. As such, proportionate measures should only depend on the nature, complexity and scale of the risk; not on the size and legal form of the IORP.	
17.	<p>The draft advice would make Art. 38(1) of the Solvency II Directive applicable to IORPs. This would introduce more explicit powers for supervisors of pension funds to insist on co-operation from providers of outsourced services than under the current IORP Directive.</p> <p>In cases where the management of the IORP is entrusted to other entities operating on behalf of the IORP, prudential regulation needs to cover such entities as well. Therefore, the CEA agrees with EIOPA's view that the material elements of Article 38 of Solvency II should be generally applicable to IORPs. The CEA also shares EIOPA's views on chain outsourcing and location of the main administration. However, in the event that an entity is already supervised by another authority clarification is needed to avoid overlap of supervision, especially where there are two regulators responsible for pension regulation and financial regulation. The advice should therefore be amended to make clear that where the entity performing the outsourcing function is itself a regulated financial entity, any requests for information etc should come from its primary supervisor, not the supervisor of the IORP. The primary supervisory authority of the entity performing the outsourced function should co-operate with the supervisory authority of the IORP to obtain access to data etc.</p>	
18.	<p>The draft advice recognises that the level of outsourcing and the approach followed on the supervision of outsourced activities varies enormously between countries, and the solution should therefore guarantee a certain degree of flexibility in the system.</p> <p>The CEA agrees with EIOPA's view that the material elements of Article 49(1) of Solvency II are generally applicable to IORPs. Furthermore, the CEA supports the replacement of article 49(2) by point 3 in EIOPA's advice. In addition, as is currently the case, the ultimate responsibility for outsourced functions should be borne by the IORP.</p>	

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	<p>Finally, the CEA would like to stress that clarification is needed on how the outsourcing of key functions to the sponsoring undertaking should be handled.</p> <p>As stated in our answer to question 17, in the event that an entity performing the outsourced function is already supervised by another authority, clarification is needed to avoid overlap of supervision, especially where there are two regulators responsible for pension regulation and financial regulation. The advice should make clear that where the entity performing the outsourcing function is itself a regulated financial entity, any requests for information etc should come from its primary supervisor, not the supervisor of the IORP.</p>	