	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:	Groupe Consultatif Actuariel Européen.	
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

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- ⇨ Do **not** change the numbering in column "Reference".
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The paragraph numbers below correspond to Consultation Paper No. 01 (EIOPA-CP-11/01).

Reference	**Comment**	
General Comment	This consultation covers the following aspects of the Call for Advice: scope, cross-border activity, prudential regulation and governance. The GCAE responses set out below are based on the views of its Pensions Committee on these issues, where relevant, but these are not "actuarial" issues as such. We are working with EIOPA on the actuarial issues raised in questions 5, 6 and 19 of the Call for Advice which we understand will be the subject of a separate consultation later in the year.	
1.	This is not an issue on which the Groupe has detailed expertise and some of the issues raised are	

	primarily political in nature. We note that the Commission has stated that it does not wish to consider extending the Directive to include arrangements which are currently explicitly excluded by the Directive. Having said that, we do not have any comment on the analysis of the options laid out.	
2.	No	
3.	This is a political issue.	
4.	This is a political issue.	
5.	There is no disagreement that the home state is where the IORP is established and prudentially regulated, but there are different approaches to defining the host state (which may lead to the same conclusion in practice): 1. the states whose Social and Labour Law applies to the members 2. the state where the sponsoring employer is established 3. nationality of the scheme We agree that the different interpretation has led to some difficulty in practice, and that clarity is desirable, although we would question the view expressed in paragraph 7.3.2 that this has had a major negative impact on the establishment of cross border schemes (as is recognised in paragraph 7.3.13). The Call for Advice explicitly requested that the Directive be amended to define cross border activity by reference to the location of the sponsoring undertaking i.e. approach 2 above. The draft response notes that approach 1 considers the position from the perspective of the members, whereas approach 2 is looking at it from the employer's perspective. Difficulties will arise when the IORP is in country A, the sponsoring employer in country B and the members in country C. Under option 2, the social and labour law applicable to the members would be that of B, although they are working in C. In our view, approach 1 is the most appropriate basis for determining the host state or states in relation to	

	an IORP operating cross-border. We agree with the response in relation to the need for clarity around the sponsoring employer i.e. is it the parent company, or the subsidiary or branch in the country where the members work – and we support the proposed amendment to Article 6(c) in this regard	
6.	The option to define "host member state" as "the state whose Social and Labour Law applies to the members" should be considered, although we accept that this is not consistent with the Commission's request.	
7.	No – if the alternative option in 6. above is not put forward, we consider Option 1 (no change) is preferable as it permits member states who consider that "host member state" should mean "the state whose Social and Labour Law applies to the members" can continue to operate in this manner, and that cross border IORPs which have been set up on this basis are unaffected.	
8.	It would seem more appropriate for any such provisions to be considered at Level 2.	
9.	We agree with the analysis and impacts as laid out.	
10.	No	
11.	Yes	
12.	It would seem more appropriate for any such provisions to be considered at Level 2.	
13.	We are supportive of the need for "an effective system of governance which provides for sound and prudent management" of the IORP as described in Article 41 (1) of the Solvency II Framework Directive. However, we would emphasise (as has been recognised in the draft response) that there are three key aspects where it may be necessary to depart from the way in which Solvency II is applied to insurance undertakings: 1. The heterogeneity of IORPS (and other arrangements not currently covered under the Directive) across Europe, so that a one-size-fits all solution may not be possible 2. The vital importance of proportionality given the small size of many IORPS. Under the current Directive, Member States are permitted to excuse "small" IORPS (less than 100 members) from some of the supervisory/reporting requirements, but this approach may not be appropriate in any new regime, given the focus on risk management i.e. a "small" IORP	

satisfies one of the three criteria set out in Article 41 (2) of the Solvency II Framework Directive for the exercise of proportionality ("scale") but not necessarily the other two – "nature" and "complexity".

3. The fact that many IORPS (and in practice almost all medium/small IORPS) outsource most or all of their functions to third parties.

We support the proposed response that Article 41 of the Solvency II Framework Directive should be amended to

a. permit (but not require) member representation in the management of the IORP,

b. require the legal separation between IORP and sponsoring employer

c. provide for "regular" rather than "annual" reviews of written policies which must be approved by the "management body" of the IORP – not by the supervisory authority.

We note the comment in 10.3.21 that EIOPA does not see any major differences between DB and DC schemes in relation to governance requirements. We accept that the principles of good governance apply equally to both types of arrangement but we consider that some differences would be appropriate, given the different way in which risks are apportioned between employers and members.

We note the comments in 10.3.22 and 10.3.23 that EIOPA does not expect a high (cost) impact from the introduction of general governance requirements as proposed, but that an impact study is required and that the application of the proportionality principle is important.

We strongly support the need for an impact assessment before any decision is taken to introduce the general governance requirements proposed, and that proportionality must be taken into account appropriately.

	We also note the references in the draft response that "contingency plans" as required under Article 41 (4) should be required for IORPS and that the principles of a "sound remuneration policy" being developed in Level 2 measures under Solvency II should apply to IORPS, where relevant. In our experience, it is not common for an IORP to have explicit contingency plans although the outsourced functions will have these e.g. back up for records, investment managers etc and the contract with the third party will address these contingencies. Most IORPS do not employ or remunerate management or staff, which are either employees of the sponsor, third parties who charge a fee or volunteers. It is not clear if the reference to remuneration policy is intended to include fees or charges paid to outsourced functions, but in practice the IORP management will endeavour to get value for money when making such appointments. We appreciate that the intention is to ensure that remuneration policy does not incentivise inappropriate behaviours and we are supportive of this objective in principle.	
14.	We support the recommendation that the fit and proper requirements be applied to the management board and key function holders, many of whom will in practice be outsourced functions and may be required to meet fit and proper criteria in order to offer the service. In our view, the decision as to whether a member of the management board meets the criteria should not be left to the IORP (i.e. the management board) but should be the subject of pre-approval by the supervisory authority (even where "registration" of the IORP is required rather than "authorisation"). We also support the proposal that supervisors have power to investigate whether individuals in management/key functions are "fit and proper" at all times, and to take action if they find that this is not the case.	
15.	We would emphasise that there are three key aspects identified in the draft response where it may	

	be necessary to depart from the way in which Solvency II is applied to insurance undertakings: 1. The heterogeneity of IORPS (and other arrangements not currently covered under the Directive) across Europe, so that a one-size-fits all solution may not be possible 2. The vital importance of proportionality given the small size of many IORPS. Under the current Directive, Member States are permitted to excuse "small" IORPS (less than 100 members) from some of the supervisory/reporting requirements, but this approach may not be appropriate in any new regime, given the focus on risk management i.e. a "small" IORP satisfies one of the three criteria set out in Article 41 (2) of the Solvency II Framework Directive for the exercise of proportionality ("scale") nut not necessarily the other two – "nature" and "complexity". 3. The fact that many IORPS (and in practice almost all medium/small IORPS) outsource most or all of their functions to third parties. We support the proposed extension of the control framework (in terms of authority for the provisions, functions covered and outsourced activities), and the proposal to empower the compliance function to "whistleblow" to the supervisory authority. We note the comment in 12.3.18 that EIOPA does not expect a high (cost) impact from the extension of internal control requirements, but that the application of the proportionality principle is important. We recommend that an impact assessment be undertaken before any decision is taken to introduce a compliance function, and that proportionality must be taken into account appropriately.	
16.	We would emphasise that there are three key aspects identified in the draft response where it may be necessary to depart from the way in which Solvency II is applied to insurance undertakings: 1. The heterogeneity of IORPS (and other arrangements not currently covered under the	

	Directive) across Europe, so that a one-size-fits all solution may not be possible 2. The vital importance of proportionality given the small size of many IORPS. Under the current Directive, Member States are permitted to excuse "small" IORPS (less than 100 members) from some of the supervisory/reporting requirements, but this approach may not be appropriate in any new regime, given the focus on risk management i.e. a "small" IORP satisfies one of the three criteria set out in Article 41 (2) of the Solvency II Framework Directive for the exercise of proportionality ("scale") but not necessarily the other two – "nature" and "complexity". 3. The fact that many IORPS (and in practice almost all medium/small IORPS) outsource most or all of their functions to third parties. We note the comment in 13.3.18 that EIOPA does not expect a high (cost) impact from the extension of internal control requirements, but that "the introduction of an internal audit function could have the potential to be overly burdensome without a corresponding increase in benefits on the scheme, with potential adverse cost impacts for members if the principle of proportionality is not taken into account". We would share this concern. We recommend that an impact assessment be undertaken before any decision is taken to introduce an internal audit function, and that proportionality must be taken into account appropriately.	
17.	We agree with the analysis and impacts as laid out.	
18.	We agree with the analysis and impacts as laid out.	