

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:	German Insurance Association – Gesamtverband der Deutschen Versicherungswirtschaft (GDV)	
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. In addition to the CEA-comments which we widely support we would like to emphasise the following aspects.	

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	<p>The GDV 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. 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 GDV 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.</p> <p>In order to achieve fair competition and consistency in prudential regimes, the GDV 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 IORPs. 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. 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 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</p>	

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	<p>2002/83/EC – to be recast by the Solvency II Directive). The GDV 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 views that only IORPs offer occupational pensions. In 2008, life insurance companies had a market share of 47%¹ in the second pillar provision. Furthermore, member states have been given the option to apply 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 GDV 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>----- ¹ CEA Statistics N°28: The role of insurance in the provision of pension revenue</p>	
1.		
2.		
3.	<p>The GDV welcomes EIOPA's intention not to touch upon the current exclusions of the IORP directive. Pension schemes / institutions listed in article 2.2 (such as book reserve schemes, institutions where employees of the sponsoring undertakings have no legal rights to benefits) should be excluded. EIOPA's draft advice sets out five options, ranging from leaving the scope unchanged or merely clarifying the</p>	

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	existing wording, to extending the scope of the Directive to all providers of pension schemes not guaranteed by a public authority. However, 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.	
4.	The GDV 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 the labour contract between the employer and employee.	
5.	The GDV generally agrees with the analysis of the options. However, the GDV 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 GDV welcomes all initiatives with the overall goal of enabling cross-border activities and clarification of loopholes in the current Directive.	
6.		
7.	The GDV fully supports the overall aim of enabling cross border IORPs. As such, the GDV welcomes the proposed clarifications of "sponsoring undertaking" and "host member state".	
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 GDV 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 single market for occupational pensions which requires, amongst others a further harmonization of prudential regulation and consistent application of supervisory requirements.</p>	

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9.	The GDV agrees with the analysis of options.	
10.		
11.	The GDV agrees with option 2, which describes the scope of prudential regulation and supports having prudential regulation based on Solvency II principles. In addition, the GDV 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.	
12.	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 GDV would consider it beneficial if procedures to settle possible future problems that are unavoidable would be included in the Call for Advice.	
13.	<p>The GDV 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.</p> <p>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 requirements. As a</p>	

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	<p>general approach, pillar 2 and 3 principles should be used at least as “blue print approach”.</p> <p>Regarding proportionality, the GDV opposes exclusions from the revised IORP Directive by means of membership size - as is currently the case in Art. 8 and as indicated in paragraph 10.3.8 of the Call for Advice- or by means of the legal form of the IORP. The GDV instead suggests using risk as a distinctive criterion for exclusion from the scope of the IORP Directive. For example, this could be done by the use of a benchmark on technical provisions rather than by the amount of members and beneficiaries, provided that these are calculated in a transparent and harmonised basis.</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 (see Art. 29 of the Solvency II Directive) to ensure the proportionate application of the Directive. The principles should be defined in level 1 and could be further specified at level 2 as under Solvency II. If this is the case, the GDV 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>The GDV 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. Finally, consistent with solvency principles; the GDV believes that written policies should be subject to prior approval by the administrative management or supervisory body.</p> <p>On the other hand, the GDV 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 some IORPs, the proportionality principle could provide the necessary flexibility.</p>	

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	Finally, the German insurance industry would also like to strongly emphasise 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 as it is the case in Germany) consistently throughout the draft response. This is not always the case in the document (e.g. paragraph 10.3.9).	
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 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 GDV 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. As such, proportionality should 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 GDV 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>The GDV 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>	

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	<p>Under point 12.3.11 (see second sentence) EIOPA proposes that the supervisory authority should at all times have the power to 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 as “its agent” having to fulfil 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 GDV disagrees with this sentiment. In line with Solvency II principles, the compliance function should be concentrated first and foremost on supervisory provisions. Not only is such a broad all-embracing competence of Compliance impossible to implement, but also it is not in line with the supervisory aims of the Directive. At least EIOPA should clarify that it depends on the undertakings own risk assessment which fields of law the compliance function should cover primarily.</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 GDV would favor a concrete reference to Art 46 of the Solvency II Framework Directive in EIOPA’s advice.</p>	
16.	<p>The GDV believes that EIOPA’s views referring to Article 47 of the Solvency II Framework Directive are correct. The GDV 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>	

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	In the GDV's opinion the implementation of paragraph 13.3.9 should be in line with the general 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 GDV agrees with EIOPA's view that the material elements of Article 38 of Solvency II should be generally applicable to IORPs. The GDV 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.</p>	
18.	<p>The GDV agrees with EIOPA's view that the material elements of Article 49(1) of Solvency II are generally applicable to IORPs. Furthermore, the GDV 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> <p>Finally, the GDV would like to stress that clarification is needed on how the outsourcing of key functions to the sponsoring undertaking should be handled.</p>	