

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
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<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 paragraph, keep the row <u>empty</u>. ⇒ Our IT tool does not allow processing of comments which do not refer to the specific paragraph numbers below. <ul style="list-style-type: none"> ○ If your comment refers to multiple paragraphs, please insert your comment at the first relevant paragraph and mention in your comment to which other paragraphs this also applies. ○ If your comment refers to sub-bullets/sub-paragraphs, please indicate this in the comment itself. <p>Please send the completed template to firstconsultationiorpcf@eiopa.europa.eu, in <u>MSWord Format</u>, (our IT tool does not allow processing of any other formats).</p>		

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Draft response to Call for Advice on the review of Directive 2003/41/EC
Scope, cross-border activity, prudential regulation and governance

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The paragraph numbers below correspond to Consultation Paper No. 01 (EIOPA-CP-11/01).

Reference	Comment
General Comment	<p>Pensioenfonds Zorg en Welzijn (PFZW) is the not-for-profit mandatory pension fund for the Dutch health care and welfare sector. We manage the pensions for more than 2.3 million participants. Our assets under management contribute to 99.5 billion euro (end of 2010).</p> <p>PFZW has contracted PGGM to administer its pension scheme and manage the assets of the pension fund. PFZW was also assisted by its services provider PGGM in answering the questions of this response.</p> <p>For further information on PFZW and its pension services provider PGGM: PFZW : http://www.pfzw.nl/about_us/Corporate_information/Corporate_information.asp PGGM : http://www.pggm.nl/About_PGGM/Corporate_information/Corporate_information.asp</p> <p>PFZW is a member of the Pensioenfederatie, the Dutch federation of pension funds. PFZW has been involved in the drafting of the reaction of the Pensioenfederatie. Some of our answers may show a resemblance with the reaction of the Pensioenfederatie.</p> <p>Preliminary Remarks</p> <ol style="list-style-type: none"> 1. A revised IORP Directive should be able to handle different pension systems, including pension systems with a hybrid character. A revised Directive should stimulate the accrual of sustainable pension benefits and be able to cope with new pension agreements like the one recently negotiated between employers, employees and government in the Netherlands. 2. The European Commission should stick to a holistic approach as brought forward in its Green Paper, relating pension security to sustainability and adequacy. 3. Proportionality should be defined and be part of Level 1 regulations (Lamfalussy process). 4. The EU should only intervene in the subsidiarity if national legislation fails to comply with the relevant principles of a single market. Pensions should continue to be considered as part of labour agreements.

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	<p>5. We subscribe to the idea that there can be a need to review/revise the current IORP Directive. The starting point should however be the current IORP Directive and not the Solvency II Directive, even though in general the principles and the structure behind Solvency II seem sensible. In general Solvency II as such should not be applied to IORPs without taking into account the specificities of IORPs.</p> <p>6. Impact studies should be part of the process of revising the Directive at all stages.</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 with the analysis of the options described.</p>	
2.	<p>Are there any other options that should be considered? Please provide details including where possible in respect of impact.</p> <p>It should be kept in mind that – seen from a financial as well as from a competition and governance perspective – retirement schemes fully run by member states (usually financed on a pay-as-you-go basis) completely differ from pension arrangements that are freely bargained on a sectoral, corporate or individual level. This is a reasoning for the distinction between a first and a second pillar. However, situations occur in which it is questionable whether a pension system should be categorized as a first or as a second pillar system.</p> <p>In this respect, it could be helpful to gain further clarification on what should be considered 1st, 2nd and 3rd pillar pensions and how this is reflected in the scope of the IORP Directive. A narrow scope will have an impact on only a limited number of IORPs which in turn could lead to excluding certain pension systems from supervision on the one hand and level playing field issues on the other hand. A narrow scope could also lead to a situation in which certain IORPs or pension systems deliberately try to become exempt from the scope. How will supervision on other IORPs and/or pension systems be arranged for in these cases?</p> <p>To give a few examples:</p>	

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	<p>The call for advice mentions the existence of occupational pension funds operating on a funded basis, which are excluded so far from the Directive. This apparently refers to mixed systems (particularly in CEE countries) which combine elements from the 1st, 2nd and 3rd pillar. One example are systems in which national law rules the obligation (1st pillar element) to effect a pension arrangement with a private supplier (3rd pillar element) in case of a labour agreement (2nd pillar element). It is obvious that such systems are aiming at the social protection of workers. This justifies the conclusion that these systems must be subject to either the 1st pillar or the 2nd pillar regulations of the EU. A firm choice should be made in those cases. Therefore it must be sorted out on a country to country basis, what characteristics prevail: those of the 1st pillar or those of the 2nd pillar.</p> <p>The restriction to "pension funds" eventually evokes the question whether occupational pension arrangements which operate on a book reserve basis, as well as <i>Unterstützungskassen</i> can remain excluded from the scope of the Directive. Given the fact that in the country involved (Germany) employers are given the choice between safeguarding their pension schemes by means of book reserves, an <i>Unterstützungskasse</i>, <i>Direktversicherung</i> (direct insurance), a <i>Pensionskasse</i> or a <i>Pensionsfonds</i> it may be assumed that Germany will certainly be keen on striking a balance between the social protection of workers participating in book reserve schemes and workers participating in pension arrangements of another kind. Nevertheless, a large scale practice of book reserves could cause systemic risks.</p> <p>Furthermore, French pension systems like AGIRC and ARRCO are workplace related as well as negotiated and run by social partners. These systems, which are operating on a pay-as-you-go basis, originally belonged to the second pillar but have decided to be subject to Regulation 1408 at the time, thus becoming part of the first pillar. In fact, this results in allowing a 0% coverage ratio for supplementary pension schemes. One could question this practice on grounds of fair competition as well as the risk that other countries follow the same route just to avoid any strict requirement of the IORP Directive.</p>	
3.	<p>Which option is preferable?</p> <p>We would plead for broadening the scope of the Directive to all not for profit pension funds operating collective schemes and in which all risks are shared between employers and members and</p>	

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	<p>beneficiaries. We suggest considering option 4, though we recognize the consequences can be far reaching. Instead of using the term "which operate at their own risk", we would propose the following wording:</p> <p style="text-align: center;"><i>"IORPs include all not for profit occupational pension schemes that are operating collective schemes and in which all risks are borne by employers and/or members and beneficiaries."</i></p> <p>If option 4 is not feasible, there is a necessity to clarify at European level, what should be considered an occupational pension scheme as stated in option 2 of the EIOPA reaction.</p> <p>More analysis is needed on how this would affect the national sovereignty in setting up pension systems and whether there is a political will of Member States to do so.</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) N° 883/2004 and (EEC) N° 987/2009 (see Art. 3)?</p> <p>We suggest to leave this to the individual Member States to decide which schemes should fall under the above mentioned regulations.</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>	
6.	<p>Are there any other options that should be considered?</p>	
7.	<p>Do you agree with EIOPA that option 2 is preferable?</p>	
8.	<p>Even with defining the sponsoring undertaking, problems of overlapping or contradicting</p>	

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	<p>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>	
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>Yes, we agree with the analysis of the options.</p> <p>It would be advisable to list the issues on which there currently is prudential regulation in the Member States on the one hand and, on the other hand, to distill the issues that are regulated from the existing clauses in the current IORP Directive. In this way it is possible to establish a (possible) discrepancy between what is and what might need to be regulated. Following this an overall article could be formulated in which the prudential themes (scope) and the prudential articles could be put together in one section.</p> <p>The definition as used in the Dutch Pension Act (the <i>Pensioenwet</i>), Article 151, could be considered as a good practice in this respect. This definition says: "supervision directed at the rules with regard to financial solidity of pension funds and the contribution to the financial stability of the pension fund sector". In this definition, prudential law is defined as the set of requirements and standards (as partly put down in written rules of law) concerned with the financial solidity and financial stability of pension funds and the overall financial stability of all pension funds together. The Pension Act and the underlying provisions contain prudential law as well as social and labour law. It is clear that prudential regulation is needed to maintain a sound, solid and healthy system of organisations that administer occupational pensions.</p>	
10.	<p>Are there any other options that should be considered?</p> <p>No, we think the analysis does not need to consider other options.</p>	

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11.	<p>Do you agree with EIOPA that option 2 is preferable?</p> <p>Yes, the IORP Directive needs to determine the scope of prudential regulation as administered by the home Member State.</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>Yes, we are of the opinion that the revised directive should include procedures to settle such problems. Prudential regulation should not overrule social and labour law. Therefore, it has to be ensured that there is a clear distinction between prudential regulation and social and labour law.</p>	
13.	<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 general governance requirements?</p> <p>We agree on the analysis of EIOPA concerning the general principles on governance. EIOPA rightly states: "A new supervisory system for IORPs should not undermine the supply or the cost efficiency of occupational retirement provision in the EU" (as stated on page 41 of the EIOPA Draft Response). In our opinion governance rules for IORPs at a European level should be principle based, fit-for-purpose and proportionate. We stress that it is important that any governance model for pension funds should be tailored to the pension fund specificities. The complexity of the pension fund, its scheme(s) and its investments should be the leading principle for the required level of knowledge. The size of a pension fund should however not imply variations in the rights and protection of members and beneficiaries of the pension fund.</p> <p>In particular we agree with the following proposed principles:</p>	

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	<ul style="list-style-type: none"> • In general we are of the opinion that the principles laid down in Article 41 of Directive 2009/138/EC are fully applicable to self-administrating pension funds. In those cases the material elements of Article 41 do not need to be amended, nor removed to adequately address the specificities of IORPs in relation to general governance requirements. • We particularly agree with the statements made by EIOPA regarding the participation of members in the management of the IORP. <p>In addition, we would like to draw attention to some specificities of IORPs:</p> <ul style="list-style-type: none"> • Questions arise in situations where pension funds have outsourced their operational tasks, which is common practice for pension funds but highly uncommon for insurance companies. Outsourcing means that the pension fund is still bearing the risks, remains owner of the assets and bears responsibility for a correct execution of the pension scheme. Nevertheless, in those cases the Board of the pension fund does not need to have all the skills to run a professional organisation. In stead, they should meet other competences, in particular the ability to form a countervailing power towards their provider(s), which is a matter of "fit and proper". • Another aspect of outsourcing is that the Board of Trustees can not be in (direct) charge of matters such as the remuneration of the pension services provider. In that respect authorities should be aware that the principles of Article 41 of Solvency II should not result in discrimination between organisations directly run by pension funds and organisations run by their providers. 	
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>We adhere to the conclusions and argumentation of the Dutch Pensioenfederatie:</p> <ul style="list-style-type: none"> • The requirements for a Board of an IORP should be in line with the characteristics of the institution. • In general, requirements for a self-administrating institution will differ from a not self-administrating institution that has outsourced its activities, most notably the level of detailed knowledge and experience on financial matters versus the extent of being able to execute 	

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	<p>countervailing power.</p> <ul style="list-style-type: none"> • It is important to notice that an insurer would, generally speaking, rather provide the pension agreement "in house" whereas an IORP may outsource its activities. • Therefore, we are of the opinion that article 9 of the current IORP Directive is sufficient and this article does not have to be changed in the revised IORP Directive. • Penalties or fines are powerful instruments which can be imposed by supervisors. One has to keep in mind that in a pension fund, add-ons have to be paid by participants, beneficiaries or employers. Therefore, we think it should only be used as a measure of last resort. 	
15.	<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 a compliance function?</p> <p>From our point of view, a one-size-fits-all solution must be prevented. As long as the independence and the quality of compliance functions are guaranteed, the exact specificities should be left to the discretion of the pensions institution. Proportionality should be defined and be an important part of Level 1 regulations (Lamfalussy process) as mentioned in our third general remark under General Comment. All decisions with regard to the internal control systems and the compliance function for pension institutions should therefore be taken at level 1.</p> <p>In order to oversee all direct and indirect consequences of applying Article 46 of Directive 2009/138/EC we urge to implement quantitative impact studies and proper impact assessments at every stage of the legislative process of revising the IORP Directive.</p>	
16.	<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 an internal audit function?</p> <p>We would welcome the inclusion of an internal audit function in the IORP Directive. The internal audit</p>	

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	<p>function should be effective, objective and independent from operational functions. The IORP Directive currently does not provide for such an internal audit function. However, we underline that too strict requirements should be avoided since this can also be fulfilled by outsourcing. As long as the independence and quality of the control, compliance and audit function are guaranteed, the exact specificities of such an internal audit function should be left to the discretion of the pensions institution.</p>	
17.	<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 revised supervision of outsourced functions and activities?</p> <p>PFZW would be in favour of including in the newly revised IORP Directive the principle that the IORP remains responsible for the outsourced activities. The consequence of this would be that the supervisor firstly contacts the IORP and not the service provider which performs activities for the IORP. In this concept, the IORP will ensure that the supervisory authorities have (access to) all the necessary information in order to fulfill supervisory functions on the outsourced activities. Site visits by the supervisor should, in principle, be possible. The competent supervisory authority should be the supervisory authority of the Home Member State.</p>	
18.	<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 revised outsourcing principles?</p> <p>In general we agree with EIOPA on the material elements of Article 49 of Directive 2009/138/EC that need to be amended or removed to adequately address the specificities of IORPs in relation to outsourcing (section 15.4 of the EIOPA draft response).</p> <p>In addition we would like to state the following:</p> <p>PFZW agrees with EIOPA that the current principles on outsourcing in the IORP Directive have to be</p>	

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	<p>maintained in the revised IORP Directive (section 15.4.1). We also agree with the principle that the IORP remains fully responsible when they outsource functions or activities to third parties and propose to include this principle in the Level 1 Directive without further Level 2 measures (section 15.4). In this respect, too many prescriptive rules on the selection process and ongoing monitoring of the outsourced activities need to avoided. We do not see any beneficial effect of having Level 2 measures stipulating the minimum content of an outsourcing agreement. Every outsourcing agreement is different and imposing a harmonised framework is unworkable.</p>	