

APL (Final): 15.08.2011

Comments Template on EIOPA-CP-11/001		Deadline
Draft response to Call for Advice on the review of Directive 2003/41/EC		15.08.2011
Scope, cross-border activity, prudential regulation and governance		18:00 CET
Company name:	Association of Pension Lawyers	
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>		

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General Comment	<p>A. <u>Introduction</u></p> <ol style="list-style-type: none"> 1. This document sets out the comments of the UK Association of Pension Lawyers on the EIOPA “Draft response to Call for Advice on the review of Directive 2003/41/EC: Scope, cross-border activity, prudential regulation and governance”¹. 2. This response is submitted by the International Sub-Committee of the Association of Pension Lawyers (the “APL”) of the United Kingdom. 3. The APL represents members of the UK legal profession with a particular interest in pensions. Currently it has over 1100 members. Our members include most, if not all, of the leading practitioners in the UK in this field. 4. Unlike Pension Funds established in some countries, Pension Funds established in the UK are not regulatory own funds for the purposes of Article 17 of the IORP Directive². 5. Pension Funds in the UK are normally established under trust. This means that they act through their trustees and the Pension Fund does not have a separate legal personality, in contrast to a foundation or stichting which may be used in Belgium or the Netherlands. <p>B. <u>General comments on additional regulation of pension funds</u></p> <ol style="list-style-type: none"> 1. <u>Burden of proof</u> <ol style="list-style-type: none"> 1.1 Superficially, the proposals initially appear difficult to argue with. 1.2 However, every additional layer of regulation in what is, at least in the UK, already an extremely well to over regulated area, imposes additional cost burdens. 1.3 Every additional Euro or Pound spent on compliance with additional regulations puts up the cost of occupational pension provision by a Euro or a Pound and reduces the amount that can be spent on retirement benefits. 1.4 We consider that the burden of proof should lie with those proposing additional regulations for pension funds to show that the additional regulation adds real value. 	

¹ EIOPA – CP-11/001: 08 July 2011.

² Directive 2003/41/EC.

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	<p>1.5 In general, we do not believe that the proposed additional level of regulation will add real value (as distinct from theoretical value in a non-commercial environment).</p> <p>1.6 It should also be noted that, at a time of severe financial pressure on economies in Europe, unnecessary additional regulation is difficult to justify.</p> <p>2. <u>Disproportionate impact on those member states that have IORPs</u></p> <p>2.1 Based on the available statistical information we have been able to find, it would appear that the 2 EU member states, the Netherlands and the United Kingdom between them have IORPs which represent over 75% by value of the assets of IORPs established in the EU. See Appendix 1.</p> <p>2.2 These countries are:</p> <p style="margin-left: 20px;">(a) The United Kingdom</p> <p style="margin-left: 20px;">(b) The Netherlands</p> <p>2.3 A similar conclusion flows from a survey carried out by Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS), which concluded that, with regard to Defined Benefit Schemes, in 2006:</p> <p style="margin-left: 20px;">(a) UK IORPs represented 43% of premiums and 61% of Technical Provisions in Europe; and</p> <p style="margin-left: 20px;">(b) IORPs in the Netherland represented 30% of premiums and 24% of Technical provisions in Europe.</p> <p>Note: Please see Appendix 1.</p> <p>2.4 In contrast, as shown in Appendix 1 and Appendix 2, insofar as there are IORPS in France, Germany, Italy and Spain, they represent under 5% by value of assets and under 5% of technical provisions. In other words, IORPs are of limited importance to date in those countries.</p> <p>2.5 The European Insurance and Occupational Pensions Authority have recorded a total of 84 cross-border IORPS in Europe as at June, 2011. By home country the UK and Ireland have by far the most number of cross-border IORPs with 31 and 28 each respectively.</p> <p>2.6 It is therefore anticipated that the proposed additional regulation of IORPs will have a disproportionate impact on the UK and the Netherlands.</p> <p>2.7 In part, the differing importance of IORPs in the different EU member states reflects the different approaches of those member states to the balance between:</p> <p style="margin-left: 20px;">(a) first pillar retirement provision, and</p>	

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	<p>(b) second pillar retirement provision.</p> <p>2.8 It appears that there is a desire to increase the level of second pillar retirement provision, but the method of encouraging the level of increase of second pillar retirement provision is to over-regulate the second pillar retirement provision so that the opposite effect is achieved. In other words, the over-emphasis on security has material adverse negative consequences for both adequate and sustainable second pillar retirement provision at a time of very substantial financial pressure on public finances within the EU.</p> <p>3. <u>Solvency II is not appropriate to the regulation of IORPs</u></p> <p>3.1 There is an assumption throughout the draft response that Solvency II is an appropriate benchmark to use in the regulation of IORPs.</p> <p>3.2 This confuses 2 concepts:</p> <p>(a) the concept of the insurance company operated for profit, and</p> <p>(b) the concept of the IORP established on a not-for-profit basis by employers to provide retirement benefits for their employees.</p> <p>3.3 We understand that much of the pressure to treat IORPs in the same way as insurance companies comes from countries where either there are no IORPs or IORPs are not the dominant method of pension provision.</p> <p>3.4 The UK Government and other organisations, including those that may be viewed as corresponding to the “UK Government’s Social Partners”, oppose the suggestion that Solvency II is an appropriate benchmark for the regulation of IORPs.</p> <p>(a) <u>The UK Government</u></p> <p>(i) In its response to the consultation on the Green Paper³, the UK Government supported the use of Solvency II for insurers but claimed that the “application of a similar solvency regime for pension funds would raise funding requirements beyond those needed for financial stability and member security purposes”.</p> <p>(ii) The response drew attention to the “fundamental differences between occupational pension schemes and insurance products”.</p>	

³ European Commission’s Green Paper - Towards adequate, sustainable and safe European pension systems – UK Government response. 12 November 2010. <http://www.dwp.gov.uk/docs/ec-pensions-green-paper-uk-gov-response.pdf>

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	<ul style="list-style-type: none"> (iii) Solvency II is inappropriate in the UK context as UK legislation already provides extra layers of protection for pension schemes, for example, the employer covenant legally enforces the sponsoring employer to increase funding if there are unexpected shortfalls. (iv) The UK Government fears that a 'one size fits all' approach would "arbitrarily raise capital levels". (v) The response suggested that Solvency II may provide some useful principles but only with regards to governance and disclosure. <p>(b) <u>Other organisation including those that may be viewed as corresponding to "Social Partners" of the UK Government</u></p> <ul style="list-style-type: none"> (i) A large number of other UK organisations have spoken out against the application of Solvency II principles in the regulation of IORPs: (ii) The National Association of Pension Funds (NAPF) represent members which provide retirement income to nearly 15 million people, operate almost 1,200 separate pension schemes and have combined assets of nearly £800billion. Its response⁴ was vigorously opposed to the proposals: <ul style="list-style-type: none"> (I) NAPF contends that IORPs have distinct characteristics and risks from insurance companies. (II) It claims that Solvency II was designed for a very "different set of risks and products". (III) NAPF argues that the technical provisions requirement in the IORPs Directive require IORPs to hold sufficient assets to meet their liabilities. This is in addition to individual Member states' range of protections. (IV) NAPF also considers that the varying vehicles used in pension provision (i.e. Germany's extensive use of book reserve systems as opposed to the UK's fully developed pension benefit guarantee systems) mean that a single EU wide solvency system would be extremely challenging to design and implement. (V) NAPF is concerned that Solvency II style regulation of IORPS will make pension 	

⁴ The European Commission Green Paper "Towards adequate, sustainable and safe European pension systems" A response by The National Association of Pension Funds, November 2010. http://www.napf.co.uk/PolicyandResearch/DocumentLibrary/~media/Policy/Documents/0151_EC_Pensions_Green_Paper_November_2010_NAPF_response_181110.ashx

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	<p style="text-align: center;">schemes more expensive and possibly “harmful”. It could “undermine adequacy”.</p> <p>(iii) The Confederation of British Industry (CBI) is the premier lobbying organisation for UK business on national and international issues. Its membership includes senior professionals from all sectors and sizes of business and are directly involved in the policy-making process.⁵ Its response⁶ expressed disappointment in the proposals and opposed them for the following reasons:</p> <p>(I) “We are particularly disappointed by misguided proposals to apply insurance-style funding rules to pensions. These could force British companies to put about £500bn of extra money into their final salary pension schemes.”</p> <p>(II) “The Commission is seeking to treat pensions in the same way that it deals with insurance schemes – as if they could suddenly face large, unexpected demands on their capital. In fact, pensions pay out over time in fairly predictable ways”.</p> <p>(III) “Britain already has a well-regulated system thanks to the Pensions Regulator. Applying a “one-size-fits-all” approach to the EU’s pension schemes would be a mistake. Each of the 27 countries has different kinds of pension arrangements and the rules would be particularly harmful to UK’s remaining final salary pensions. Unlike those in many other countries, the UK’s final salary schemes are index-linked and rise in line with inflation.”</p> <p>(IV) “The proposals would tie up large amounts of capital in pensions, in low-return assets like gilts and cash rather being invested more productively.”</p> <p>(iv) The Trade Union Congress has a membership totalling 58 Trade Unions, representing 6.5 million people.⁷ The Institute of Chartered Accountants in England and Wales has over 134,000 individual members.⁸ The Institute of Chartered Accountants of Scotland has over 21,000 members. Along with the National Association of Pension Funds (see</p>	

⁵ <http://www.cbi.org.uk/ndbs/staticpages.nsf/staticpages/Aboutcbi/index.html?OpenDocument>

⁶ News Release CBI Comments On EU Pensions Green Paper. 7 July 2010. Available to download from: <http://www.eupensiondebate.eu/LibraryLinks.aspx>

⁷ http://www.tuc.org.uk/tuc/unions_main.cfm

⁸ <http://www.wlrstore.com/waterlow-professional/accountants-list-members.aspx>

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	<p>paragraph (b)(ii) and the Confederation of British Industry (see paragraph (b)(iii)), the above organisation published a joint letter⁹ to the European Commissioners which stated:</p> <ul style="list-style-type: none"> (I) Solvency II is “simply not appropriate for pension schemes that have long-term, predictable liabilities and are backed by a participating employer”. (II) The UK already has a “very robust system of protection in place” including the sponsor covenant which passed a severe ‘stress test’ in the recent recession and the Pension Protection Fund which provides compensation where sponsors become insolvent. (III) There is “no need to provide an additional layer of protection”. <p>(v) UNISON is a public service Trade Union in the UK with over 1.3 million members¹⁰. UNISON’s response to the Green Paper¹¹ expressed:</p> <ul style="list-style-type: none"> (I) “strong reservations in relation to the Green Paper’s suggestion that there should be a revised solvency regime for pension schemes which applies insurance style funding requirements to pension schemes”. (II) It warned the requirements would “significantly increase defined benefit pension scheme liabilities and threaten their very existence”. (III) With regards to defined contribution schemes, UNISON suggests the proposals would “simply result in even smaller pensions for members” as a consequence which could further deteriorate in annuity rates. <p>(vi) The Association of Consulting Actuaries (ACA) is the representative body for UK consulting actuaries. Its members provide advice to thousands of pension schemes, including most of the UK’s largest schemes. ACA’s response¹² stated that:</p>	

⁹ Quoted within: The European Commission Green Paper “Towards adequate, sustainable and safe European pension systems” A response by The National Association of Pension Funds. November 2010. http://www.napf.co.uk/PolicyandResearch/DocumentLibrary/-/media/Policy/Documents/0151_EC_Pensions_Green_Paper_November_2010_NAPF_response_181110.ashx

¹⁰ <http://www.unison.org.uk/about/about.asp>

¹¹ UNISON Response to European Commission Green Paper: Towards adequate, sustainable and safe European pension systems. 15 November 2010. <http://www.unison.org.uk/acrobat/GreenPaperConsultationResponse.pdf>

¹² ACA response to Green Paper Towards adequate, sustainable and safe European pensions systems. Not dated. Available to download from: <http://www.eupensiondebate.eu/LibraryLinks.aspx>

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	<p>(I) It “strongly dispute[s] the need for any solvency regime for pension funds and do not believe that the EU has a mandate to conclude that there should be a solvency regime for pension funds”.</p> <p>(II) “Increasing security comes at a cost, which would reduce the funds available to provide benefits. Establishing a solvency regime for pensions would therefore be very likely to mean that lower benefits would be provided. Such a regime would also be economically inefficient, pegging DB funding to bonds, which would lead to capital-seeking entities being deprived of sources of long-term funding”</p> <p>(c) <u>The German Responses</u></p> <p>(i) The aba Arbeitsgemeinschaft für betriebliche Altersversorgung e.V. is the German industry association representing all matters concerning occupational pensions in the private and public sector.</p> <p>(ii) It has 1,400 members including corporate sponsors of pension schemes, pension funds, actuaries and consulting firms, employer associations and unions, as well as insurance companies, banks and investment managers.</p> <p>(iii) Its response¹³ to the proposal concerning Solvency II were as follows:</p> <p>(I) “Full harmonization – such as the case of Solvency II for insurers – should not be the aspired target.”</p> <p>(II) “IORPs should be subject to solvency rules that are qualitative and risk-based in nature and respect their character as social entities with recourse to the sponsor in case of underfunding. The focus of solvency rules should, therefore, be on the long-term ability to meet obligations as they fall due rather than on mitigation of short-term fluctuations.”</p> <p>(III) “The “Solvency II” rules do not fit occupational pensions.”</p> <p>(d) <u>The Dutch Responses</u></p> <p>Stichting van de Arbeid, the Dutch Labour Foundation which represents a number of Trade Unions in the Netherlands¹⁴, “agrees with the Dutch Government that the Solvency II buffer</p>	

¹³ aba Response Submission (short version) European Commission Green Paper Towards adequate, sustainable and safe European pension systems COM (2010) 365/3. 15 November 2010. Available to download from: <http://www.eupensiondebate.eu/LibraryLinks.aspx>

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	<p>requirements are not suitable for pension funds that can ultimately pass on risks to participants".¹⁵</p> <p>3.5 In addition, we have seen no case made that there is any defect in the existing systems of regulation for IORPs. There seems to be almost relentless pressure to apply insurance company rules to IORPs without any real analysis of why this should be done.</p> <p>3.6 As can be seen from the above, we do not see where the EU Commission considers it derives any mandate to propose that IORPs should be regulated via Solvency II type approach.</p>	
1.	<p><u>Comments on Call for Advice 1: Scope of the IORP Directive</u>¹⁶: 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>1.1 See the points made in the response to general comments at Section B above.</p> <p>1.2 We believe that the options identified are indeed the full range of options for funded schemes, if one discounts the possibility of a reduction in the scope of the IORP Directive. We believe that there are elements of the IORP Directive that ought to apply to unfunded and book reserved arrangements and note that this option is not covered by the response. We accept, however, that the range of exclusions is not the subject of the CfA.</p> <p>1.3 We question whether the examples of the pension models in new member states given in 6.3.3 should really be considered to be occupational pension schemes (as seems to be suggested) given the level of government involvement and the likelihood of intervention should failure occur.</p> <p>1.4 Option 2 – the proposed "legal obligation" test would need to be defined carefully to avoid overlap with social security arrangements. In the UK, new auto enrolment legislation will blur the line between compulsory and non compulsory models as well as arrangements to which there is a legal obligation to contribute. While we agree that non-compulsion should not be a definitive feature for a scheme's exclusion from IORP, compulsion is effectively used as a proxy for social security elements and removing compulsion as a defining feature puts more stress on the definition of social security arrangement.</p>	

¹⁴ <http://www.stvda.nl/>

¹⁵ Response of the Dutch Labour Foundation to the European Commission's Green Paper "Towards Adequate, Sustainable and Safe European Pension Systems" (EU/7 July 2010; COM(2010)365 final; SEC(2010)830 15 November 2010
http://www.stvda.nl/~media/Files/Stvda/Talen/Engels/2010/20101115_en.ashx

¹⁶ See the EIOPA Draft Response, Section 6.

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1.5 1.6 1.7 1.8	<p>Option 3 – we have no comments on this option.</p> <p>Option 4 – we are not in favour of extending the IORP Directive and the inclusion of social security arrangements within the Directive has profound implications which would (a) need to be considered very <u>carefully (given especially that social security system is currently undergoing reforms in the UK, with the UK government planning to change the state pension)</u> and (b) are not mandated by any current legislative policy. The proposed scope could well bring the UK's Pension Protection Fund within the scope of the IORP Directive. In any case, the concept of "not guaranteed by a public authority" should be extended to include "not operated by a public authority". For instance, there are a number of arrangements in the UK operated by a public authority where the authority is responsible for funding the arrangements but does not "guarantee" funding as such.</p> <p>Option 5 – the extension of the IORP Directive to personal pension arrangements would give rise to regulatory issues in the UK, in terms of duplication of effort between the FSA (or its replacement) and the Pensions Regulator. It would create extra administration for the pension providers (e.g. provision of accounts and a statement of investment principles) which provide no worthwhile information to members and would simply represent an additional cost which would be passed on to members.</p> <p>If there are truly arrangements in new member states which are not covered by the current IORP Directive then we can see the need for its extension. However, we question whether there are any such arrangements.</p>	
2.	<p>Comments on Call for Advice 1: Scope of the IORP Directive¹⁷: Are there any other options that should be considered? Please provide details including where possible in respect of impact.</p> <p>2.1 See the points made in the response to general comments at Section B above.</p> <p>2.2 We believe that partial coverage of unfunded and book reserved schemes ought also to be considered.</p>	
3.	<p>Comments on Call for Advice 1: Scope of the IORP Directive¹⁸: Which option is preferable?</p> <p>3.1 See the points made in the response to general comments at Section B above.</p> <p>3.2 Our preference is option 1.</p>	
4.	<p>Comments on Call for Advice 1: Scope of the IORP Directive¹⁹: 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) No</p>	

¹⁷ See the EIOPA Draft Response, Section 6.

¹⁸ See the EIOPA Draft Response, Section 6.

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	<p>883/2004 and (EEC) No 987/2009(see Art. 3)?</p> <p>4.1 See the points made in the response to general comments at Section B above.</p> <p>4.2 The distinction should be made based on the level of the powers of potential government interference, including the ability of the member state government to reduce benefits within the scheme and its obligation to guarantee/stand behind those benefits.</p>	
5.	<p>Comments on Call for Advice 2: Definition of cross border activity²⁰: Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?</p> <p>5.1 See the points made in the response to general comments at Section B above.</p> <p>5.2 Our experience is that the main reason that cross-border IORP activity has been so limited is because of the restrictions and limits imposed by the legislation. The funding obligations at Article 16(3) of the Directive, for instance, has deterred many funded IORPs from considering the option and, in the UK particularly, resulted in a large number of occupational pension schemes retreating from previous cross-border operations in order to avoid the legislation.</p> <p>5.3 In addition, pension provision is very different between jurisdictions, both in terms of legal obligations and the IORP by which the benefit is provided. As such, it is difficult for employers and for other providers to demonstrate the attraction of a foreign IORP. Pension provision is notably poorly understood by employees, and those from another member state are even more so.</p> <p>5.4 However, we agree that, given the difference in interpretation between member states, some clarity is required. As such, your draft amendments to the Directive would seem appropriate.</p>	

¹⁹ See the EIOPA Draft Response, Section 6.

²⁰ See the EIOPA Draft Response, Section 7.

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6.	<p><u>Comments on Call for Advice 2: Definition of cross border activity²¹</u>: Are there any other options that should be considered?</p> <p>6.1 See the points made in the response to general comments at Section B above.</p> <p>6.2 In the light of a need to clarify in the way that the Commission intended the Directive to read, we cannot see that any other option is available.</p>	
7.	<p><u>Comments on Call for Advice 2: Definition of cross border activity²²</u>: Do you agree with EIOPA that option 2 is preferable?</p> <p>7.1 See the points made in the response to general comments at Section B above.</p> <p>7.2 In our view, a clearer definition is preferable to a more ambiguous one, so option 2 would be preferable.</p>	
8.	<p><u>Comments on Call for Advice 2: Definition of cross border activity²³</u>: Even with defining the sponsoring undertaking, 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>8.1 See the points made in the response to general comments at Section B above.</p> <p>8.2 Another significant disincentive for cross border schemes, in addition to those listed above has been the existing complex and time consuming process of obtaining and reviewing details of the relevant local regulation from local regulators. As such, it is our strong view that further regulation in this area is inadvisable in order to limit this effect. In particular, it is not possible to legislate in advance for any conflict between local legislation – pension legislation in the UK alone relates to over 20 statutes and over 1,000 sets of current regulation and the assessment of conflicts would be impossible. However, if major issues were to arise in the future, these could be dealt with on an ongoing basis.</p>	
9.	<p><u>Comments on Call for Advice 4: Prudential regulation and social and labour laws²⁴</u>: Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?</p>	

²¹ See the EIOPA Draft Response, Section 7.

²² See the EIOPA Draft Response, Section 7.

²³ See the EIOPA Draft Response, Section 7.

²⁴ See the EIOPA Draft Response, Section 8.

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	<p>9.1 See the points made in the response to general comments at Section B above.</p> <p>9.2 The options presented, to do nothing, or to define the scope of prudential regulation, seem complete and we agree with the analysis.</p>	
10.	<p><u>Comments on Call for Advice 4: Prudential regulation and social and labour laws²⁵: Are there any other options that should be considered?</u></p> <p>See answer to question 9 above.</p>	
11.	<p><u>Comments on Call for Advice 4: Prudential regulation and social and labour laws²⁶: Do you agree with EIOPA that option 2 is preferable?</u></p> <p>11.1 See the points made in the response to general comments at Section B above.</p> <p>11.2 We do not agree that option 2 is preferable. There may be a case for clarifying which areas fall within SLL (and hence the responsibility of the host state) as long as it is clear that additional SLL is not imposed on any state.</p> <p>11.3 However, this maybe better looked at on a case by case basis rather than including a new article in the Directive which describes the scope of prudential regulation (partly because it will be challenging to identify the requirements which are of a real prudential nature).</p>	
12.	<p><u>Comments on Call for Advice 4: Prudential regulation and social and labour laws²⁷: 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?</u></p> <p>12.1 See the points made in the response to general comments at Section B above.</p> <p>12.2 If the scope were to be defined, as the relationship between occupational and state provided retirement benefits varies in each member state, there will always be inconsistencies between each country's prudential regulation and its SLL. Where there are overlaps, in the case of cross border schemes, it would be helpful if there were procedures that clarified whether the Home or Host member state's provision must be met.</p>	

²⁵ See the EIOPA Draft Response, Section 8.

²⁶ See the EIOPA Draft Response, Section 8.

²⁷ See the EIOPA Draft Response, Section 8.

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13.	<p>Comments on Call For Advice 13: General governance requirements²⁸: 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?</p> <p>13.1 <u>General</u> See the points made in the response to general comments at Section B above.</p> <p>13.2 <u>Governance requirements based on Solvency II</u></p> <p>13.2.1 IORPs are not insurance companies and are not operated within the UK for profit.</p> <p>13.2.2 While it is correct to say that insurance companies carry on business, in general, it could not be said in the UK that an IORP is carrying on the business of pension provision in the conventional sense if it is not being operated with a view to profit.</p> <p>13.2.3 We believe that before any changes are made, there should be an estimate of the number of person hours required to perform the governance functions in order to implement the governance provisions along with the cost per person hour for performing those governance functions and a clear analysis of the problems with the existing system they are intended to address.</p> <p>13.2.4 We would also ask that the assumptions and basis of any such calculation be widely published so that they can be subject to critical scrutiny and challenge.</p> <p>13.2.5 Within the UK there is some history in compliance cost analyses consistently under-estimating the true cost of compliance with a new regulatory or legislative requirement.</p> <p>13.3 <u>Proposal on remuneration policy</u></p> <p>13.3.1 This is another example of trying to fit a round peg into a square hole by seeking to apply Solvency II principles to IORPs. We would suggest that substantially all IORPs in the UK do not employ staff. Instead they use the staff from the sponsoring employer.</p> <p>13.3.2 In other words, this is another case of not looking at where the predominance of IORPs are within the member states and how they are organised and structured when coming up with a proposal for additional regulation.</p> <p>13.3.3 No positive case has been made for regulation in this area. We noted, in particular, the proviso in Section 10.3.20 where EIOPA comments:</p>	

²⁸ See the EIOPA Draft Response, Section 10

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	<i>“provided the special characteristics in the IORP do not make such policy irrelevant.”</i>	
14.	<p>Comments on Call For Advice 14: Fit and proper²⁹: 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>14.1 See the points made in the response to general comments at Section B above.</p> <p>14.2 We do not consider that the introduction of the fit and proper person test will have a sufficiently positive effect to justify the widespread disruption and administrative burden on UK IORPS that would result from introducing the test. We welcome the suggestion that persons connected to an IORP should be fit and proper but submit that a thorough regulatory system is already in place in the UK regarding the qualifications and suitability of persons who run or who have other key functions in connection with an IORP. Our main concerns are as follows:</p> <p>14.3 Introducing a fit and proper person test for trustees of UK IORPS will prejudice a sponsoring employer's nomination and appointment of trustees. The "fit" limb of the fit and proper test, as drafted, would place a managerial burden on an employer and individual trustees to ensure that professional qualifications are attained by all incumbent and prospective trustees. The "proper" limb would also be redundant in the UK as the provisions of trust law in the UK impose onerous fiduciary duties on trustees to act in a proper manner.</p> <p>14.4 There would also be additional costs for the IORP to bear to assist the trustees in attaining professional qualifications and whilst these would probably be borne by an employer, it would still represent funds being diverted from members' benefits. At its extreme, employers may become less willing to run and maintain trust based retirement provision in the UK, which would have far-reaching and negative consequences for pension provision in the UK.</p> <p>14.5 The Pensions Regulator already requires trustees to be trained and provides materials to trustees to ensure that they are competent in administering an IORP in the form of training and publishing guidance. There are further statutory obligations for trustees to delegate various functions to properly authorised persons.</p> <p>14.6 There are already extensive statutory obligations for external investment managers appointed by UK IORPS to have the appropriate knowledge and experience for managing the investments of an IORP. External investment managers must be authorised by the Financial Services Authority to carry out their investments functions. As such they are already within the extensive regulatory framework of the Financial Services and Markets Act 2000 and so would more than satisfy both the "fit" and "proper" limbs of the proposed test. Similarly, legal and actuarial advisers to UK IORPS are subject to their respective industry regulators and statutory obligations.</p>	

²⁹ See the EIOPA Draft Response, Section 11.

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	<p>14.7 We acknowledge that there are varying standards of regulatory provision with regards to the standards adopted by member states and that a uniform requirement could raise standards in certain member states. However, we do not feel that a "one size fits all" approach is appropriate.</p> <p>14.8 If the IORP directive is amended we would request that the UK be permitted to derogate from the amendment as the UK regulatory regime already addresses the proposed amendments. If EIOPA were not minded to grant this concession, we would request that member states are given flexibility to determine whether or not a sufficient legal and regulatory environment already exists which applies the same standards as those proposed. This would be particularly relevant for jurisdictions that can show clear precedents that individuals have, and continue to, operate in accordance with regulatory standards equivalent to the proposed amendments.</p>	
15.	<p>Comments on Call For Advice 17: Internal control system³⁰: 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?</p> <p>15.1 See the points made in the response to general comments at Section B above.</p> <p>15.2 In relation to internal controls (as with other areas of the IORP Directive) we strongly recommend against creating additional regulatory burdens on IORPs. We agree entirely with the statement made in your consultation document (paragraph 12.3.14) that "big differences ... exist between IORPs as regards form, size, pension schemes, risk level and complexity of activities" across the EU and so any requirements included in the IORP Directive must recognise that diversity and allow each member state to apply more specific requirements (where appropriate) which recognise the manner in which IORPs operate within that member state.</p> <p>15.3 We see no significant difficulty with the IORP Directive continuing to include the current general principle for IORPs to be required to have sound administrative and accounting procedures and adequate internal control mechanisms in place. In addition, we see no significant difficulty with the addition of a new compliance function, provided however that all of the points made in your consultation document are accepted in full by the European Commission (paragraphs 12.3.8 to 12.3.17). Critical to this is the proposal put forward by EIOPA (paragraph 12.3.15) that each IORP should be responsible for defining a consistent and adequate solution with regard to carrying out the compliance function which should be proportionate to the IORP in question.</p> <p>15.4 Without full recognition of the diversity between IORPs within the EU, a compliance function could easily become a significant regulatory burden which achieves nothing other than the complete abandonment of occupational pension provision within the United Kingdom.</p>	

³⁰ See the EIOPA Draft Response, Section 12.

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	15.5 In summary, therefore, we support fully the draft EIOPA advice as set out in paragraph 12.4 of the consultation document.	
16.	<p>Comments on Call For Advice 18: Internal audit³¹: 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>16.1 See the points made in the response to general comments at Section B above.</p> <p>16.2 We do not consider that the introduction of an internal audit function in the UK will have a sufficiently positive impact upon members/beneficiaries of UK IORPs to warrant the additional cost burden associated with carrying out the function.</p> <p>16.3 UK legislation requires trustees and managers of most UK IORPs to put in place:</p> <ul style="list-style-type: none"> (a) arrangements and procedures to be followed in the administration and management of the scheme, (b) systems and arrangements for monitoring that administration and management, and (c) arrangements and procedures to be followed for the safe custody and security of the assets of the scheme <p>which are adequate for the purpose of securing that the UK IORP is administered and managed in accordance with its own rules and other legal requirements. The UK supervisory authority has issued a Code of Practice which encourages trustees and managers to consider the effectiveness of those arrangements, procedures and systems. It is not clear to us that a separate internal audit function in addition to the existing UK requirements would offer additional benefits to members/beneficiaries of IORPs in the UK.</p> <p>16.4 However, if an internal audit function were to be introduced we agree that the principles must be implemented in a reasonable and proportionate manner. In particular, we welcome the principle that it would be the responsibility of each IORP to define its own approach to the internal audit function. This is essential because the size and complexity of IORPs in the UK varies so widely that we do not consider it would be possible to define an internal audit function that would be appropriate for all IORPs.</p> <p>16.5 We also welcome the principle that the internal audit function could be assigned to an internal member of staff. However, in the UK, this is likely to benefit only the biggest IORPs who have the capacity to carry out the administration and management of the IORP in-house rather than outsource these functions, to a third party administrator for example. The vast majority of IORPs in the UK are operated under trust with only a limited number of individuals appointed as</p>	

³¹ See the EIOPA Draft Response, Section 13.

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16.6	<p>trustees. It is unlikely that these IORPs will have an internal member of staff available to carry out the internal audit function. This would mean appointing an independent third party to carry out that function.</p> <p>Carrying out an internal audit will inevitably result in additional costs for IORPs. This will particularly be the case where it is necessary to appoint external auditors to carry out the function. As noted above, this will be the case for the vast majority of UK IORPs. However, even where an internal member of staff can be identified to carry out the audit function, there will be an additional cost associated with increased management time. Although we agree that costs are likely to be borne by sponsoring employers (particularly of DB schemes), those funds are being diverted away from providing members' benefits. This risk is greater in relation to DC schemes where, for example, the costs associated with the internal audit function could be included in an annual management charge levied on members' accounts.</p>	
17.	<p>Comments on Call For Advice 12: Supervision of outsourced functions and activities³²: 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>17.1 See the points made in the response to general comments at Section B above.</p> <p>17.2 Most pension schemes in the UK are set up under trust. By law, trustees have a duty to supervise those to whom acts are delegated (including outsourcing). Trustees must take account of the interests of the IORP beneficiaries, so need to be mindful of this when outsourcing work. Trustees are not required to notify the UK supervisory authority, the Pensions Regulator, when they do this. The Pensions Regulator does though have a number of legislative powers in this respect (e.g. can require reports from an IORP, can issue improvement notices requiring specific action within a certain time, has power to inspect premises in certain circumstances).</p>	

³² See the EIOPA Draft Response, Section 14.

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18.	<p>Comments on Call For Advice 20: Outsourcing³³: 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>18.1 See the points made in the response to general comments at Section B above.</p> <p>18.2 See answer to question 17 above.</p> <p>18.3 We wish to comment on paragraph 3(c) of paragraph 15.4: "supervisory authorities remain sighted of the outsourcing and are able to monitor the compliance". If by this, EIOPA has in mind the sort of powers the UK regulator has (described briefly above - see answer to question 17 above), we consider this to be satisfactory. What we would not however wish to see is a compulsory notification to the supervisory authority each and every time the IORP decides to outsource any piece of work. This could potentially include a vast number of tasks (investment management, including changes to managers, custodian, administration and accountancy functions, IT functions, actuarial and legal functions, covenant reviews of sponsors and so on). It would be impractical and disproportionately increases the bureaucracy on IORPs to impose this notification requirement. For this reason we would favour Option 1 of the two stated.</p>	

³³ See the EIOPA Draft Response, Section 15.

APPENDIX 1

Total investment in pension funds in 2006 (In millions of USD)

	Country	Pension funds (autonomous)**	% size of investment in pension funds in the EU (from data available)
1	Austria	15,611	0.45
2	Belgium	16,769	0.48
3	Bulgaria*	-	0.00
4	Cyprus*	-	0.00
5	Czech Republic	6,462	0.19
6	Denmark	89,570	2.57
7	Estonia*	-	0.00
8	Finland	149,497	4.28
9	France	25,094	0.72
10	Germany	122,764	3.52
11	Greece	23	0.00
12	Hungary	10,978	0.31
13	Ireland	110,093	3.15
14	Italy	55,681	1.60
15	Latvia*	-	0.00
16	Lithuania*	-	0.00
17	Luxembourg*	-	0.00
18	Malta*	-	0.00
19	Netherlands	860,877	24.67
20	Poland	37,964	1.09
21	Portugal	26,581	0.76
22	Romania*	-	0.00
23	Slovak Republic	1,537	0.04
24	Slovenia*	-	0.00
25	Spain	92,527	2.65
26	Sweden	36,397	1.04
27	United Kingdom	1,831,290	52.48
	Total	3,489,716	100

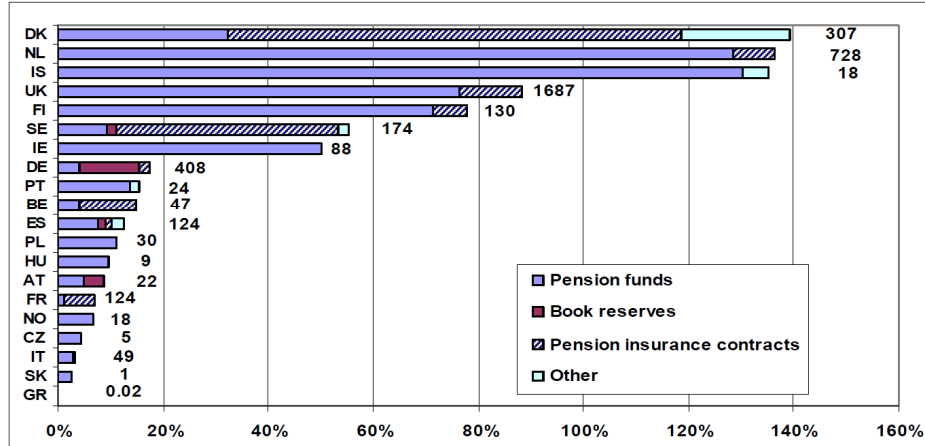
* Figures are unavailable for these EU member countries

** For the purposes of this table we assume that all autonomous pension funds are IORPs, which may not necessarily be correct.

Adapted table from Source: Pension Markets in Focus: November 2007, Issue 4 - © OECD 2007

APPENDIX B

Graph 1 Financing vehicles used in funded pension arrangements across OECD countries in Europe (2006) – Total investments in % of GDP and in € bn



Source: OECD, Pension Market in Europe

(Source of Graph 1 and 3: CEIOPS 31 March 2008 Survey on fully funded, technical provisions and security mechanisms in the European occupational pension sector.

https://eiopa.europa.eu/fileadmin/tx_dam/files/publications/submissionstotheec/ReportonFundSecMech.pdf

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