

Comments Template on EIOPA-CP-11/001 Draft response to Call for Advice on the review of Directive 2003/41/EC <i>Scope, cross-border activity, prudential regulation and governance</i>		Deadline 15.08.2011 18:00 CET
Company name:	<p>Towers Watson 21 Tothill Street London SW1H 9LL</p> <p><i>Contact:</i> <i>Dave Roberts</i></p> <p>dave.roberts@towerswatson.com</p> <p>Towers Watson is a global professional services company with operations in many European countries. From these various operations, we provide services to many of the managers and sponsors of the largest pension funds in Europe. This response is written from a UK perspective.</p>	
Disclosure of comments:	<p>EIOPA will make all comments available on its website, except where respondents specifically request that their comments remain confidential.</p> <p>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.</p>	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. 		

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- o If your comment refers to parts of a question, please indicate this in the comment itself.

Please send the completed template to firstconsultationiorpcf@eiopa.europa.eu, in MSWord Format, (our IT tool does not allow processing of any other formats).

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

Reference	Comment
General Comment	<p>Towers Watson believes that the Commission’s aspired timescale for reviewing the IORP Directive is unnecessarily short and, consequently, ill-judged. Indeed, we believe that, ultimately, a rushed review could harm rather than support workplace pension provision throughout the EU. Our comments are intended to be constructive rather than obstructive, as we support much of the Commission’s objectives, including that Solvency II could be considered to be a reasonable starting point – but no more - for the risk-based supervision elements underpinning a new IORP Directive. However, we object fundamentally to the suggestion that the solution is to follow blindly (Solvency II) principles that have yet to be finalised, let alone, tested in practice.</p> <p>The Commission’s legal power to make or review an IORP Directive was initially to create, and to now develop, a single market. In this regard, the Commission suggests that an absence of widespread cross-border pension institutions evidences failure of the existing Directive. This conclusion is unsubstantiated and in our opinion incorrect. We acknowledge that it is possible to further facilitate a single market by any reasonable non-obstructive measure (this will always be the case), but there is no evidence of current significant demand for cross-border provision, nor that demand would be prompted by greater harmonisation of the supervisory regime for pension funds. Unlike the financial crisis affecting banks and sovereign institutions, which demands urgent action, there is no urgency here; the existing pensions institutions’ frameworks have not contributed substantially to the financial crisis and any changes, or harmonisation, must be considered properly before being</p>

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	<p>introduced. Comparability should not be an objective that overrides other considerations. Moreover, the scope of any such comparability needs to be clear.</p> <p>Given that full implementation of Solvency II is being delayed until 1 January 2014, we believe that EIOPA should press the EC for an extension of the deadline for responding to its Call for Advice. This would allow time for EIOPA (which is currently also grappling with ongoing amendments to the Solvency II Directive) and all stakeholders to consider issues more thoroughly. As has been called for since the first murmurings of the IORP Review, and has long since been promised by Commission officials, a full impact assessment - both qualitative and quantitative - is also essential.</p> <p>Finally, we question just how level a playing field the Commission is trying to create and the rationale for the existing exclusions within the IORP. EIOPA was not asked to comment on these, but has nonetheless chosen to do so in relation to the exemption for social security schemes. In our opinion, if EIOPA is to comment on any of these (a principle which we support) it should consider all of them.</p>	
1.	<p>SCOPE</p> <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 EIOPA's analysis of the options, but question why EIOPA suggests that only some of the existing exemptions should be revisited. If the Commission wishes to review the existing Directive, with the aim of creating a level playing field, all of the current exemptions should be reconsidered. This might necessitate an extension to the response timescales, but as stated already, we do not believe that the review is time critical.</p>	

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2.	<p>Are there any other options that should be considered? Please provide details including where possible in respect of impact.</p> <p>See response to question 1.</p>	
3.	<p>Which option is preferable?</p> <p>If a level playing field is the desired outcome, then the existing exemptions should be reviewed before determining the full range of options.</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) No 883/2004 and (EEC) No 987/2009 (see Art. 3)?</p> <p>We understand that DG Employment, Social Affairs and Inclusion is currently reviewing the interpretation and application of Regulation 883/2004. Its views should be considered before opining on this.</p>	
5.	<p>DEFINITION OF CROSS-BORDER ACTIVITY</p> <p>Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?</p>	

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	<p>The EC's instruction as to outcome constrains EIOPA here. We agree EIOPA's analysis of the impacts, including that the possible solution (paragraph 7.3.24) to ensuring comparable levels of protection for all members 're-complicates' matters. However, while allowing the authorities of a third country to take measures against an IORP might reassure third country members that their interests are being protected, given that those interests would constitute the designated social and labour law (SLL) of the Host Member State and the prudential regulations of the Home State (i.e. not their own 'third' country) it is unclear whether this would be anything more than a presentational benefit.</p> <p>We believe that the social welfare/member protection element of cross-border provision is equally important to the promotion of the free market and simplicity. Moreover, we believe that an appropriate definition of cross-border activity is linked to the issue of determining the scope of social and labour law and that both issues need more analysis. See also response to question 6.</p> <p>We are also of the view that the proposed amendment to Article 6(c) is unclear. Specifically, it is not clear what a "direct agreement" means; a direct agreement to do what? In addition, EIOPA will have to clarify – possibly through a new definition – what it means by "support" of an IORP. Having spoken with EIOPA, we believe that we understand the intent, but elaboration is needed.</p>	
6.	<p>Are there any other options that should be considered?</p> <p>Not if EIOPA is to remain true to the Commission's instruction on outcome. However, we do not believe that it is appropriate for the Commission to decide this without consultation, nor that options should be determined or considered before there has been a resolution to differentiating between prudential requirements and social and labour law. See answer to question 9.</p>	
7.	<p>Do you agree with EIOPA that option 2 is preferable?</p>	

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	No, we believe that this issue should be considered further alongside that of SLL v prudential requirements	
8.	<p>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>Yes, although we are not convinced that this should be extended to the third countries – see answer to question 5.</p>	
9.	<p>PRUDENTIAL REGULATION AND SOCIAL AND LABOUR LAW</p> <p>Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?</p> <p>Although this section is primarily concerned with cross-border activity, its ultimate impact could be far greater as it seeks to tease out the divide between National powers and those of the European Commission (EC) in relation to pensions issues. Once determined, this could give greater scope for the EC to intervene in what might naturally be considered purely domestic matters.</p> <p>We are concerned that some stakeholders might be unaware of this and, consequently, will not have given this section the attention that it requires.</p>	

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We agree EIOPA's broad analysis, but believe that the extent to which Member States consider defining prudential regulation as an indirect limitation on their competence over SLL may be underestimated. If, as is acknowledged, Member States choose to determine certain 'prudential matters' as SLL, the change envisaged will have been futile and may lead to greater confusion than exists currently.

We do not believe that the options considered would be of sufficient benefit to make them worthwhile and consider that instead, despite the inherent difficulties, endeavours should be made to define SLL.

To achieve this, we would support an approach such as that identified in the University of Leuven's 2006 paper "The development of a legal matrix on the meaning of "national social and labour legislation" in directive 2003/41/EC with regard to five member states".

Within this paper, the author suggests (paragraph 482) an "Objective approach", defining this as follows

" The objective approach looks at common grounds for the notion of "social and labour law" with respect to occupational pensions. In the objective approach there is a combination of:

- developed national matrices filled in by the Member States using the same criteria;
- a common ground of six pillars on the basis of which it is possible to analyse the different national matrices.

This combination allows a comparative analysis of the notion "social and labour law" that is *separate* from the national qualification in the subjective approach. Ultimately the development of a common

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	<p>social policy for occupational pensions can be envisaged in this way.”</p> <p>We support EIOPA’s suggestion in paragraph 8.3.6 that some requirements on the home member state should be investigated to establish the real nature of the requirement i.e. prudential or not. However, unless a more fundamental review of prudential and SLL is undertaken, this would seem likely to fail on the basis that it would be considered an indirect limitation on member states’ competence.</p>	
10.	<p>Are there any other options that should be considered?</p> <p>As with the response to question 6, we think that there might well be other options, but we think it necessary for a dedicated group to be established to consider this in far greater detail. This would appear consistent with EIOPA’s suggestion in paragraph 8.3.6.</p>	
11.	<p>Do you agree with EIOPA that option 2 is preferable?</p> <p>No, we believe that unless a proper solution can be found, leaving the IORP unchanged appears preferable from today’s point of view.</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 procedure 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>We believe that a different approach is necessary – see response to question 9.</p>	

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13.	<p>GENERAL GOVERNANCE REQUIREMENTS</p> <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 proposed general governance requirements?</p> <p>We agree with EIOPA’s assessment and consider the proposals reasonable. In particular, we welcome EIOPA’s strong guidance that the heterogeneity of pension systems throughout the EEA is recognised and that any measures implemented are proportionate. Whilst consistency of supervision, built on a common foundation of regulatory principles is <i>prima facie</i> attractive, changes from the existing arrangements will involve further costs. Ultimately in many instances these increased costs will have to be met (indirectly) by European citizens – members/participants of these pension arrangements.</p> <p>A serious assessment of the cost to members – for example through expected increase in ‘charges’ for members of defined contribution arrangements - should be carried out. We know from the excellent work carried out by the OECD and, most recently, in EIOPA’s own report on Risks Related to DC Pension Plan Members that costs represent a significant risk to citizens’ retirement outcomes.</p>	
14.	<p>FIT AND PROPER</p> <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 support the principle that the management of IORPs should be undertaken by fit and proper persons – it would be perverse to argue against this. However, please refer also to our response to</p>	

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	<p>question 13. A similar principle applies here, although we expect that, within the UK (and other mature pensions markets), less change would flow from the fit and proper requirements and hence there should be lower additional costs for consumers.</p> <p>Again, as with all Governance matters being considered by EIOPA and the Commission, proportionality is key. EIOPA has identified that there are in excess of 140,000 IORPs in the EU, compared with around 7,000 insurers. This should illustrate to decision makers that whilst some of the principles of Solvency II for insurers might be appropriate, some significant change in application to pension funds is essential.</p>	
15.	<p>INTERNAL CONTROL SYSTEM</p> <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 a compliance function?</p> <p>Again, in the UK, this should represent little change, beyond formalising what is already good practice, at least for larger pension schemes.</p>	
16.	<p>INTERNAL AUDIT</p> <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>	

	Please see our response to question 15.	
17.	<p>SUPERVISION OF OUTSOURCED FUNCTIONS AND ACTIVITIES</p> <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>Please see our response to question 15.</p>	
18.	<p>OUTSOURCING</p> <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>We agree that the fundamental principle must be that the overall responsibility for the running of the IORP remains with the IORP itself and cannot be transferred to a provider of outsourced services. We welcome EIOPA's recognition that pension funds differ from insurers by, in many cases, outsourcing so many of the critical and important functions and activities.</p>	