

<b>Comments Template on EIOPA-CP-11/001</b> <b>Draft response to Call for Advice on the review of Directive 2003/41/EC</b> <i>Scope, cross-border activity, prudential regulation and governance</i>		<b>Deadline</b> <b>15.08.2011</b> <b>18:00 CET</b>
Company name:	<b>Sacker &amp; Partners LLP (Solicitors, United Kingdom) <a href="http://www.sackers.com">www.sackers.com</a></b>	
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"> <li>⇒ <u>Do not change the numbering</u> in column "Reference".</li> <li>⇒ 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>.</li> <li>⇒ 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"> <li>○ 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.</li> <li>○ If your comment refers to parts of a question, please indicate this in the comment itself.</li> </ul> </li> </ul> <p><b>Please send the completed template to <a href="mailto:firstconsultationiorpca@eiopa.europa.eu">firstconsultationiorpca@eiopa.europa.eu</a>, in <u>MSWord Format</u>, (our IT tool does not allow processing of any other formats).</b></p>		

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

Reference	Comment
General Comment	<p>We welcome this review of the IORP Directive and the opportunity to provide input.</p> <p>We also appreciate the need for clarity, particularly where aspects of the Directive have been interpreted differently by different Member States.</p> <p>However, in conducting the review, it is necessary to take account of:</p> <ul style="list-style-type: none"> <li>• the current framework in place for IORPs in each Member State, to ensure that any amendments to the Directive or new measures which are introduced remain proportionate for the types of pension vehicle used; and</li> <li>• existing protections, for example in terms of governance and internal controls, so that unnecessary cost and complexity can be avoided.</li> </ul> <p>Our overall impression is that the measures put forward by EIOPA seek to introduce a level playing field between insurance providers and IORPs. Despite noting the need for proportionality, this approach fails to take full account of the existing frameworks and protections already in place and, as we outline below, in many cases appears to introduce an unduly onerous burden for IORPs in the UK.</p>

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	<b>CfA1: Scope of the IORP Directive</b>	
1.	<b>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?</b>  No comment.	
2.	<b>Are there any other options that should be considered? Please provide details including where possible in respect of impact.</b>  No comment.	
3.	<b>Which option is preferable?</b>  No comment.	
4.	<b>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)?</b>  No comment.	
	<b><u>CfA2: Definition of cross-border activity</u></b>	
5.	<b>Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?</b>  We welcome the move to ensure that interpretation as to what constitutes cross-border activity is consistent across the EU.	

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	<p>We note, however, that the Commission has specifically asked for "advice on how the wording of the IORP Directive needs to be amended in order to clarify that cross-border activity only arises when the sponsoring undertaking and the IORP are located in two different Member States".</p> <p>As noted in both the Call for Advice (CfA) and EIOPA's draft response, there are varying interpretations of cross-border activity applied currently across the EU. Amending the Directive to clarify that cross-border activity only arises when the sponsoring undertaking and the IORP are located in two different Member States would affect arrangements already in place, such as those in the UK, which use the nationality of social and labour law as the decisive criterion.</p> <p><b><i>Sponsoring undertaking in a different Member state to the IORP and its members</i></b></p> <p>We are concerned that amending the definitions of "sponsoring undertaking" and "host Member State" in the way suggested in paragraph 7.4 of the consultation could result in an IORP being categorised as undertaking cross-border activities, even where the IORP and its members are located in the same Member State.</p> <p>The following example illustrates our concern:</p> <p>An Italian Bank operates a London branch. As is typical of overseas banks and many insurance companies operating in the United Kingdom, the Bank's London branch is not a separate legal entity, and the London based employees are employed by the Italian Bank. The Bank has established a UK pension fund for its London based employees. The Italian Bank is the sponsoring undertaking.</p> <p>The IORP's home member state is considered to be the UK.</p> <p>The UK currently uses the nationality of the applicable social and labour law as the decisive criterion, considering an activity to be cross-border if the applicable social and labour law originates from a Member State other than the UK. Consequently, at present, because the employees are working in London, UK social and labour law applies to the employees and the Scheme is not a cross-border</p>	

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	<p>scheme.</p> <p>If the definition of "host member state" is changed as proposed so that the "host member state" means the Member State where the sponsoring undertaking is located, then the host member state would be Italy, being the Member State in which the sponsoring undertaking is located. This would result in a UK IORP, whose members are UK based, being classified as carrying out cross-border activity solely by virtue of the location of the sponsoring undertaking.</p> <p>In addition, in a situation such as that set out above, it is common for UK employees to be seconded for limited periods to another Member State. Therefore we do not believe it would be appropriate to simply provide an exemption where all employees are permanently in the home member state. Any exemption would need, in our opinion, to reflect that employees may be seconded to different member states for limited periods. In such a situation, the UK's social and labour laws continue to apply to the member, despite his or her temporary secondment to another Member State, so at present the UK would not interpret his membership of the IORP as cross-border activity.</p> <p><b><i>Parent company guarantees</i></b></p> <p>It is not uncommon for a UK IORP to have the benefit of a financial guarantee from an entity in another Member State, which would become payable in certain circumstances. At present this would not, under the UK's interpretation, constitute cross-border activity because the UK's social and labour laws apply to the members of the IORP.</p> <p>It is not clear whether the proposed changes would result in the entity providing the guarantee being categorised as a sponsoring employer, hence making the IORP cross-border.</p> <p>This arises from some potential uncertainty in the interpretation of the drafting. Is it intended for the proposed definition of a sponsoring undertaking to mean that there must be a direct arrangement in place and either contributions and/or support for an IORP, or does it mean that there must either be a direct arrangement in place, and/or contributions and/or support for an IORP.</p>	

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6.	<b>Are there any other options that should be considered?</b>  Please see our response to Question 5 above.	
7.	<b>Do you agree with EIOPA that option 2 is preferable?</b>  Please see our response to Question 5 above.	
8.	<b>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?</b>  No comment.	
<u><b>CfA4: Prudential regulation and social and labour law</b></u>		
9.	<b>Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?</b>  We agree that clarity as to what constitutes prudential regulation and what are social and labour laws (SLL) would be welcome and we generally support EIOPA's proposal to determine the scope of prudential regulation.  However, the UK's SLL provisions are already both extensive and comprehensive. Amendment of the Directive to prescribe relevant SLL could give rise to unnecessary complication and expense if Member States are required to introduce new national laws as a result.	

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10.	<b>Are there any other options that should be considered?</b>  No comment.	
11.	<b>Do you agree with EIOPA that option 2 is preferable?</b>  Please see our response to Question 9 above.	
12.	<b>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?</b>  It would be helpful to have a facility in the Directive for determining matters of conflict arising for cross-border schemes as a result of differences in the prudential and SLL provisions between home and host countries.	
<b><u>CfA13: General Governance Requirements</u></b>		
13.	<b>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?</b>  As noted in the consultation (at paragraph 10.3.4), "there are vast differences in the nature, scale and complexity of IORPs among individual Member States as well as within the same Member State".  A distinction should be made between pension providers operating by way of business and pension schemes which are set up purely for the purpose of providing retirement benefits, as an element of the employer's remuneration package.	

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	<p>While the former are established akin to insurance companies, the latter operate on a not for profit basis and are generally for the use of a single employer or group of companies. Such schemes are not set up to be competitors to the insurance industry. By way of analogy, a similar comparison could be drawn between a national or international medical insurance company (such as BUPA) and a small charity which has been set up to provide health services.</p> <p>There is a real risk that if governance requirements are increased, employers will increasingly move away from trust-based pension arrangements in favour of contractual schemes. Given the increased use of defined contribution (DC) arrangements for providing occupational pension benefits in the UK, the governance burden would shift from trustees and employers to providers and insurers, making it difficult for those employers who want a quality pension arrangement for their employees over which they retain ultimate control. Increased governance can also have a negative impact on members, to the extent that additional complexity is likely to lead to increased charges, which are ultimately met by members.</p> <p>Given the above, we agree that a proportionate approach to the regulation of governance is required. However, it is difficult to define, quantify and apply a proportionate approach to the governance of those IORPs which are deliberately set up in a different way to insurance-style companies. In our view, the general proportionality clause proposed in the consultation is too vague to be useful and, given the disparity of pension vehicles in the EU, we consider that it will be difficult to find a suitable definition to cover all such arrangements.</p> <p>We therefore favour an approach that allows national regulators to determine the scope of governance applicable to their local pension arrangements.</p>	

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	<b><u>CfA14: Fit and proper</u></b>	
14.	<p><b>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?</b></p> <p>We note that the proposals are based on existing financial services legislation. In our view, the application of similar rules to persons involved in running occupational pension schemes are likely to be unduly onerous.</p> <p>In the UK there is currently strong support for member involvement in pension scheme management. For schemes set up under trust, there is a requirement for one third of the trustee board to be made up of member representatives (subject to limited exceptions). In our experience, schemes often find it difficult to encourage members to come forward for this role. This is due, in no small part, to the substantial legislative and regulatory burdens which already apply to the role.</p> <p>The imposition of more onerous requirements, thereby increasing complexity and cost, is likely to result in even fewer members taking on the role of pension scheme trustee, thereby pushing pension scheme management further towards professional independent trustees. For schemes, this would mean losing valuable history and knowledge of the scheme, a perspective that professional trustees are unlikely to be able to emulate to the same degree. It should also be noted that, at the current time, there is still relatively limited take-up for the UK Pension Regulator's panel of approved independent trustees.</p> <p>It appears that the intention behind EIOPA's proposal is to create a level playing field between pension and insurance vehicles. But this fails to take account of the fundamentally different nature of these entities - in this regard we refer to our response to Question 13 above. While we agree that members need protection, in the UK there are already comprehensive systems in place (through legislation and regulation) which ensure adequate governance for IORPs.</p>	

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	<p>By way of example, there is a legal requirement (under the Pensions Act 2004) for trustees of an occupational pension scheme to have appropriate knowledge and understanding of the law relating to pensions and trusts, the principles relating to the funding of occupational pension schemes (for DB schemes) and the investment of the assets of such schemes. In addition, where the UK Pensions Regulator becomes aware of circumstances which could cause it to have concerns as to whether a trustee was a 'fit and proper person' to be a trustee of a pension scheme, it can consider the matter and decide whether or not to issue an order prohibiting that individual from acting as a trustee. The Pensions Regulator also has power to issue improvement notices.</p>	
	<p><b><u>CfA17: Internal control system</u></b></p>	
15.	<p><b>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?</b></p> <p>The proposed principles are sensible, to the extent that they apply to large, industry wide entities which provide retirement benefits. However, for the vast majority of schemes in the UK which generally outsource administration to a professional, third party provider of administration services, the proposals are excessive.</p>	
	<p><b><u>CfA18: Internal audit</u></b></p>	
16.	<p><b>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?</b></p> <p>As for Question 15 above, the proposed principles are sensible, to the extent that they apply to large, industry wide entities which provide retirement benefits. However, again for the vast majority of schemes, EIOPA's proposals are likely to create additional (and unnecessary) burdens for schemes which are already comprehensively regulated.</p>	

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	<u><b>CfA12: Supervision of outsourced functions and activities</b></u>	
17.	<p><b>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?</b></p> <p>The proposals relating to the outsourcing of functions and activities are sensible measures for protecting those running pension schemes.</p> <p>It should be noted, however, that in practice it may not always be possible to agree with a non-EEA service provider (for example, administration or payroll services) that they will allow access to a Member State's supervisory authority. A principles-based approach to regulation would therefore be most appropriate here.</p>	
	<u><b>CFA18: Supervision of outsourced functions and activities</b></u>	
18.	<p><b>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?</b></p> <p>The proposed requirements for notification to supervisory authorities in relation to the outsourcing of certain functions appear unduly onerous.</p> <p>In the UK, pension scheme trustees may, for example, choose to delegate responsibility for administration. However, they retain ultimate accountability. Given the obligations on trustees in terms of monitoring and compliance under existing governance and internal control requirements, in our view, it is unnecessary to impose additional reporting requirements.</p>	