	Comments Template on EIOPA-CP-11/001 Draft response to Call for Advice on the review of Directive 2003/41/EC *Scope, cross-border activity, prudential regulation and governance*	**Deadline** **15.08.2011** **18:00 CET**
Company name:	**European Federation for Retirement Provision** Contact: Ms. Chris VERHAEGEN, Secretary General Koningsstraat 97 – 1000 Brussels – Tel. + 32 2 289 14 14 www.efrp.eu – efrp@efrp.eu	
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	Please follow the instructions for filling in the template: ⇨ Do **not** change the numbering in column \34Reference\34. ⇨ Please fill in your comment in the relevant row. If you have no comment on a paragraph, keep the row empty. ⇨ Our IT tool does not allow processing of comments which do not refer to the specific paragraph numbers below. ○ 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. **Please send the completed template to *firstconsultationiorpcfa@eiopa.europa.eu*, in MSWord Format, (our IT tool does not allow processing of any other formats).** The paragraph numbers below correspond to Consultation Paper No. 01 (EIOPA-CP-11/01).	
Reference	**Comment**	

	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
General Comment	**Inadequate consultation time** • The EFRP fully understands the constraints within which EIOPA must deliver its advice, but it finds the consultation period too short (5 weeks). • EIOPA should give all stakeholders, including also those at national level, the opportunity to analyse and comment on the questions that have been raised in connection with a key piece of legislation for IORPs. **Need for a policy debate and a pensions classification** • A horizontal and high-level policy debate on the internal market for occupational pension provision is needed. It should give attention to the overall pension systems across the EU and make a clear distinction between the different types of delivery mechanisms that exist in the Member States, as called for by many respondents to the 2010 Green Paper. • Before reviewing the IORP Directive, the Commission should develop a pension classification or a common terminology for pensions. This will improve the understanding of national pension systems. The EFRP is willing to work with the EC and EIOPA to contribute to a pension matrix. **\34Uneven playing field\34** • The Commission\39s aim to tackle the \34unlevel playing field\34 for IORPs and create a fully harmonised \34playing field\34 is, at this stage, premature, extremely difficult to achieve and an unconvincing justification for the IORP review. It fails to take into account the very diverse national systems of occupational pension provision as well as the different degrees of reliance on such occupational schemes. • An overambitious approach to harmonisation risks being counterproductive for the sector and the beneficiaries, and ultimately is likely to serve only large commercial operators aiming to deliver \34pensions\34 as products.	

- Higher coverage of occupational schemes will not be achieved by heavy-handed and harmonised regulation. Rather, a flexible reference framework for **work related** pensions is needed. National authorities and institutions can then fully embrace the opportunities offered by the IORP Directive.
- The spirit of the \34smart regulation\34 initiative, aimed at simplifying and reducing the regulatory burden for SMEs, should be applied to IORPs, the majority of which can be seen as similar to SMEs.

The \34supply\34 of occupational pensions, \34cost efficiency\34 and \34further efficiency gains\34

- The creation of an environment allowing \34efficiency gains\34 (CfA 1.5) should not lead to the imposition of further efficiency constraints onto small pension institutions or undue pressure to merge so as to create larger institutions.
- The \34supply and cost efficiency\39\39 (CfA 1.3) of occupational pension provision could be severely jeopardised if pension institutions face new burdensome compliance requirements or excessive quantitative rules. Sponsoring companies could feel inclined to refrain from offering supplementary pensions at all.

The cross-border IORP market: little cross-border activity

- The lack of cross-border activity of IORPs is due to a demand, in practice limited to large multinationals able to bear the upfront costs. This is due to cultural reasons (language barriers, undocumented systemic differences), insufficient information on scope and details of SLL and tax hurdles as well as limited cooperation between supervisors.
- EIOPA in July 2011 has reported an increase of cross-border pension provision of 8% over the past year. If such progress is being achieved, one could wonder whether there is a real case for reviewing the IORP Directive argued by a need for harmonisation to improve cross-border IORPs.

Level 2 regulation

- Level 2 regulation should be avoided as much as possible, because of the practical problems involved in designing measures for a hugely diverse IORP landscape and because of the lack of political oversight.
- Social partners, many Member States and IORPs want to see Level 1 principles implemented at national level so that they can be tailored to the specificities of the national pension system.

IORP Directive as starting point

- EFRP regrets that the Call for Advice has taken Solvency II as a starting point for the review of the IORP Directive.
- We would recommend for each article of the IORP Directive to assess whether it needs to be modified to take into account the developments in prudential regulation since 2003 while also framing this analysis in the current economic environment (a need for economic growth and stability on financial markets).
- We have to bring to EIOPA\39s attention that the EFRP Membership strongly opposes the idea to make the Solvency II quantitative requirements mutatis mutandis applicable to IORPs. The current IORP regime is seen as sufficient. Changing the rules modelled on Solvency II would imply a drastic change in the investment behaviour of IORPs which will further impair economic growth. EFRP hopes that EIOPA will bring this general yet serious impact to the attention of the Commission and take this point into account in its own further work on the Call for Advice.

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1.	**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?** The EFRP agrees that the scope of the IORP Directive should be widened if the public policy objective to develop more workplace provided pension is to be implemented. In our view, this is even a necessity having regard to the precarious state of public finances in a number of EU Member States and the ageing of the European population. We agree that the landscape has changed since the adoption of the IORP Directive in 2003, one of the major developments being the enlargement with Central and Eastern European Member States in 2004 and 2007. Those Member States, after carrying out systemic pension reform, introduced mandatory funded DC schemes managed by private financial institutions. Those individual accounts are fuelled by contributions that during pre-reform period where paid into the social security PAYG schemes. Since those contributions, after reform, are split and part of it is channelled towards the newly established pension management companies, the reform has not generated additional funding or savings, either from employers or from employees\39 side. This makes that those pension systems have a different structure from those that are mainstream in the EU-15. This fact has to be acknowledged and requires an EU level agreement on how to classify those reformed pension systems compared to the EU-15. Additionally, those Member States in the CEE region deserve acknowledgment of this reform in the assessment of their government debt level as well as under the excessive deficit procedure since otherwise they will continue to argue that those assets are part of their statutory and central social security system and hence part of government assets.	

	The EFRP considers that the political level (Council and European Parliament) should decide whether or not to extend the scope of the IORP Directive to the mandatory funded pension schemes in Central and Eastern European countries. In order to allow them to take an informed decision, the EFRP calls upon EIOPA / European Commission to prepare an **EU taxonomy** to describe in a comparative manner the different pension systems found in the member states. EFRP believes that the concept of \34occupational\34 does not sit well with the mandatory funded pension systems found in the CEEC. These mandatory funded pension schemes look more like \34personal pension plan\34 and correspond to the definition used by the OECD. The mandatory element is not relevant in this respect. The access to these pension schemes is linked to the contribution status to the social security PAYG system. There is no intervention or top-up contribution from the employers. Individuals are responsible themselves for selecting the scheme and the institution from a number of providers Contrary to occupational schemes, employers, labour unions or other third parties are thus not involved in this process. The EFRP also believes that there is a risk that governments in the CEEC might shift back their 2nd pillar pension assets to the PAYG system, if their mandatory systems would be brought under the IORP Directive, without considering the fundamental systemic differences between the occupational systems and the mandatory 2nd pillar systems. Such measures would drastically decrease the coverage of funded pension provision in Europe and would by no means counterbalance a potential positive effective of the IORP directive i.e. scaling down the current investment restrictions of the pension funds in the CEEC. We do hope that Hungary will not acquire the \34first mover\34 status and will remain an isolated and most regrettable initiative.	

	The EFRP agrees with EIOPA and the Commission that unfunded schemes (inter alia book reserves and PAYG schemes) should not be brought under the scope of the IORP Directive. The EFRP agrees with EIOPA that the exclusion of social security schemes is not applied consistently across the EU (EIOPA draft response 6.3.5.). We fully subscribe to EIOPA\39s suggestion to the Commission to examine the consistency of the application of Regulation 883/2004 (6.3.15.). We also agree that the dividing line between the 1st, 2nd and 3rd pillar is not always clear and amendments to clarify the current exclusions could enhance a consistent application, as EIOPA suggests in paragraph 6.3.7 of its draft response of 8 July 2011. EIOPA\39s draft response does not go that far to suggest the Commission to undertake work to establish the dividing lines between the 3 pillars of pension provision. EFRP however sees enormous merit in this and urges EIOPA to formulate such a request or suggestion in its final response to the European Commission.	
2.	**ARE THERE ANY OTHER OPTIONS THAT SHOULD BE CONSIDERED? PLEASE PROVIDE DETAILS INCLUDING WHERE POSSIBLE IN RESPECT OF IMPACT.** The options proposed by EIOPA explore the right questions on \34scope\34. **Option 2** seems to be a straightforward and workable proposal. The EFRP could also support **option 4** by substituting \34at their own risk\34 because this wording may create confusion, since article 17(1) of the current Directive already explicitly mentions risk \34biometric risk\34 and \34the type of risk… in respect of the total range of	

schemes operated\34.

The EFRP would therefore propose an **option 6** to avoid any semantic confusion and replace \34at their own risk\34 with **34not guaranteed by the State**\34.

Option 5 should be dismissed because the distinction between workplace pension provision and individual private savings risks getting totally lost. Once again, a clear distinction between pension pillars would help to determine the scope of the IORP directive better.

3. **WHICH OPTION IS PREFERABLE ?**

The EFRP prefers **option 2** or our own proposal **option 6** which is an amended version of option 4 (see above).

Option 1 –	
Positive impacts	**Negative Impacts**
• Status quo and thus no difficult political debate expected on scope.	• We agree with EIOPA that the current framework does not entirely suit the different models found in the Central and Eastern European Member States nor other mandatory funded schemes in EU-15.

Option 2 –	
Positive impacts	**Negative Impacts**
• **EFRP is supportive of this option**. It would increase in consistency in the application of the IORP Directive, since all funded work-related schemes would be covered. • This option recognises the specific nature of occupational pension systems across all Member States, whether they are voluntary or mandatory, DB, DC or hybrid.	

Options 3, 4(i) and 5(i)	
Positive impacts	**Negative Impacts**
	• These options give Member States discretion to determine the scope. These options would maintain the uneven application of the IORP

	Directive across Member States, which should be reduced. These three options should be rejected.

Option 4	
Positive impacts	**Negative Impacts**
• This option would lead to more consistency in the application of the IORP Directive, since all funded work-based or work-related schemes would be covered.	• The phrase \34at your own risk\34 risks creating confusion in an IORP environment as article 17(1) of the Directive already deals with \34risks… in respect of the total range of schemes operated\34. The EFRP would therefore strongly suggest modifying the wording of \34at your own risk with \34not guaranteed by the State\34. However, this approach risks opening up highly politicised discussions.

Option 5	
Positive impacts	**Negative Impacts**
	• This option would eliminate the specific character of work-based pensions by mixing occupational or work-based pensions with individual pension provision. It means that 2nd pillar regulation would be mixed up with third pillar regulation, which should be avoided because in most Member States there are different rules (tax wise, prudential oversight, market regulation) for work-related pensions and individual private pensions which are basically savings. An essential reason for differentiating between 2nd and 3rd pillar pensions is that each of those pillars pursues different policy objectives. Moreover, it fails to acknowledge the fact that occupational pensions are backed up – or, at least facilitated\32\45\32by a sponsor (employer), that in some cases a collective bargaining agreement is at

		the basis of this, and that a number of adjustment mechanisms exist. To the EFRP, the IORP framework has always been an \34institution-oriented\34 framework\59 this option 5 seems to propose a \34product-oriented\34 framework. • EIOPA correctly notes the possible interference with the PRIPS project.

4.	**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)?** A number of elements can be considered to distinguish a social security scheme from an employment-related scheme. Inspiration can be taken from two competition law judgments, *Poucet & Pistre* (C-159/91 and C-160/91), and *Albany* (C-67/96). The ECJ judgment and the Advocate General\39s Opinion in the insurance case of *Commission v Belgium* (C-206/98) also offers useful guidance. In *Albany*, the ECJ held that entities managing supplementary funded pension schemes, which pursue a social objective, are engaged in an \34economic activity\34, making them subject to the EU internal market competition rules. According to the Court, this also holds true when	

participation in the schemes is compulsory for a group of employees by virtue of a collective bargaining agreement. This case could be construed as saying that the internal market rules on IORPs apply to entities managing mandatory funded schemes: they are engaged in economic activity to provide pensions that are supplementary to the traditional \34first pillar\34. It also supports the idea that compulsory participation in itself is not the determining criterion for qualifying a scheme as \34social security\34.

This outcome should be contrasted with the judgment in *Poucet & Pistre*, where the ECJ held that \34organizations involved in the management of the public social security system fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of contributions\34 (par 18).

These social security schemes are administered by entities considered \34agents\34 of social security authorities under control of Ministries and are not \34undertakings\34 in the meaning of EU competition law. The funds \34cannot influence the amount of the contributions, the use of assets and the fixing of the level of benefits\34 (par 15), as these are all fixed by law. There is no autonomous \34economic activity\34, and these social security funds therefore fall outside the scope of EU internal market rules.

From the above cases, it appears that **a very important factor in determining whether an undertaking should be subject to EU internal market law or not, is autonomous market behaviour or autonomous economic activity,** and the ability to use the assets in ways it sees fit and influence the ultimate level of benefits.

Providers of mandatory funded accounts are not agents of social security authorities yet are

privately established and managed undertakings, competing on a domestic mandatory pensions market. They engage in autonomous market behaviour. The social insurance infrastructure is used for channelling the contributions to the various providers for reasons of systemic efficiency of those mandatory 2nd pillar pension institutions. They have the ability to use their assets in ways they see fit and their activities influence the ultimate benefit level. They can or have to propose different investment portfolios and strategies, various general conditions. In the mandatory funded DC schemes, members not only have a choice between providers and the possibility to switch providers, but as it occurs\32\45\32also have the freedom to choose between investment portfolios with different risk profiles.

In addition, financial institutions managing mandatory DC schemes charge fees to their members. Social security schemes would either be for free or set a fee that is fixed by law, rather than set the freely-determined (though capped) flat-rate management fees charged by pension management companies.

Finally, in *Commission v Belgium*, the Advocate General suggested that solidarity schemes should be excluded from the internal market, but that insurance schemes which are not monopolies or (semi-public) institutions and apply the \34logic of capitalisation\34, while determining their own rates and engaging in the insurance business at their own risk, should be covered by internal market rules (the non-life Insurance Directive, in this case). The ECJ, in an implicit reference to *Poucet & Pistre*, held that the internal market logic applied because the insurance undertaking pursued an economic activity covered by the Directive. It stated that insurance companies providing compulsory accident at work insurance policies at their own risk and with a view to making a profit are within the scope of the non-life insurance directive (92/49 EC), whereas those that do not operate at their own risk are outside the scope of the directive on the basis of the \34solidarity principle\34, because they engage in the provision of compulsory

social security schemes.

In conclusion, an institution cannot be considered as a social security institution if it is:

- an autonomous economic actor (\61 no State agent)
- free to determine general conditions of service provision
- free to set fee levels (though these may be capped by law)
- providing benefits which are linked to contributions paid
- able to influence the use of assets and the fixing of the level of benefits.
- not entirely *non profit*

5. **DO STAKEHOLDERS AGREE WITH THE ANALYSIS OF THE OPTIONS (INCLUDING THE POSITIVE AND NEGATIVE IMPACTS) AS LAID OUT IN THIS ADVICE?** — **Public**

Option 1 – retain the IORP Directive unchanged	
Positive impacts	**Negative Impacts**
• EFRP agrees that the current legal environment may not be perfect, but it is adequate for some cross-border activity to take place. The lack of take-up is not due to flawed IORP Dir. but mainly due to the lack of economic demand because of upfront costs. Lukewarm cooperation between prudential supervisors and other host	• EFRP does not see any worsening of the current situation by leaving the wording unchanged.

state agencies, insufficient communication of scope and details of Social and Labour Law, undocumented outlay of comparable schemes, discriminatory tax hurdles and cultural barriers contribute to hamper cross-border activity of pension institutions. • EFRP agrees that a reason for this lack of demand is that pension arrangements must operate as part of each host Member State\39s Social and Labour Law in respect of occupational pensions – including tax measures. These areas are particularly complex for cross-border IORPs\59 such complexity reduces the attractiveness for sponsors. • EFRP agrees that sponsors already benefit from the single market through the ability to pool assets.	

Option 2 – Amend the wording of the IORP Directive to reflect the position that cross border activity arises only when the sponsor and the IORP are located in two different Member States	
Positive impacts	**Negative Impacts**

	• EFRP agrees with the proposed definition. It would have the advantage of clarifying the legal framework for cross-border activity. • A clear demarcation between SLL and prudential regulation is seen as a positive effect. Under the economic governance process, Member States are already in a process that may impinge on their competences in SLL (e.g. pensionable age, salary indexation, labour market flexibility requirements).	• EFRP strongly disagrees with the assumption that \34there are really two types of cross-border activity[…] one based on social welfare and protecting the member and the other based on promoting the free market and the employer (EIOPA-CP-11/001, section 7.3.19). IORPs always pursue the two purposes jointly: even when expanding into cross-border activity for economic reasons from the sponsoring undertaking side, IORPs want to ensure effective benefit delivery to scheme members in the host Member State. Therefore, it was accepted that the Social and Labour Law relevant to occupational pensions in the Host State would apply in cross-border activity while relying on Home State supervision on the IORP. The role of the –home\32\45\32prudential supervision is to maximise the possibility that the benefits promised will be delivered taking into account the required flexibility for delivery according to the relevant Social and Labour Law.	

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6.	**ARE THERE ANY OTHER OPTIONS THAT SHOULD BE CONSIDERED ?** EFRP considers that **the proposed definition responds to the need of clarity** in setting the legal framework for cross-border activity of IORPs. Yet, we stress that **the proposed definition may not encompass DC schemes entirely**, as in DC schemes the relation between the sponsor and the IORP may be mediated by the trust. Therefore, **we suggest amending Article 6 (c) as follows**: • 6 (c) \34sponsoring undertaking\34 means any undertaking or body, regardless of whether it includes or consists of one or more legal or natural persons, which acts as employer or in a self-employed capacity or any combination thereof and which has a direct agreement with either the institution or the members and pays contributions into or supports an institution for occupational retirement provision. For 6 (j) \34host member state\34 means the Member State where the sponsoring undertaking is located\34, we agree with EIOPA\39s suggestion. We also call for sufficient flexibility to deal with the situation of expats. In many cases these persons remain in the home state pension scheme, yet their contribution is paid – for a limited number of years\32\45\32by a sponsoring undertaking situated in a Member State different from the Member State where the IORP itself is located. Such a situation should in our opinion not give rise to cross-border activity. In order to avoid \39pension gaps\39 these persons often continue to be a member of the \34home state\34 scheme although they work in another Member State. They can be posted or not. In the latter case their social security conditions will	**Public**

	be those of the Member State in which they work. However, as to their supplementary employment conditions – which are not statutory in the \39host\39 member state – they should be able to remain a full scheme member of the \34home state\34 scheme. This translates into the need to foresee the possibility for IORPs to receive contributions from a sponsoring company across border (they may be an affiliated company or a subsidiary) for members whose occupational pension scheme is under home state rules. This means that such an IORP is not in cross-border provision of services.	
7.	**DO YOU AGREE WITH EIOPA THAT OPTION 2 IS PREFERABLE?** EFRP agrees with EIOPA that option 2 is preferable.	**Public**
8.	**EVEN WITH DEFINING THE SPONSORING UNDERTAKING, PROBLEMS OF OVERLAPPING OR CONTRADICTING REGULATION BETWEEN MEMBER STATES COULD EMERGE. SHOULD THE REVISED DIRECTIVE NCLUDE 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 ?** EFRP agrees that in case the IORP, the sponsoring undertaking and the members/beneficiaries are located in three different Member States, a situation may arise where the pension scheme of the members/beneficiaries would be submitted to the social and labour law of a \34third\34 Member State. In this case, the prudential supervisor of this –third- Member State, i.e. the Member State in which they are under employment contract, would not have any competence	**Public**

over the cross-border IORP.

Yet, EFRP would like to recall **that this is only one of the possible situations of overlapping or contradicting regulation between Member States which are not envisaged by the Directive**. These situations are very limited in number and much differentiated. We consider that the legal wording in the IORP Directive cannot encompass all possible situations\59 nonetheless, **incomplete definition shall not be a reason to stop cross-border activity**, as this would be against the spirit of the Directive 2003/41/EC. Therefore, we suggest that setting practicable conditions for cross-border activity of IORPs, in cases which are not entirely regulated by the IORP Directive, shall be brought under a **cooperation process within the institutional framework of the European System of Financial Supervision**.

In the envisaged case, such as in similar situations, **we could support a notification procedure** to the EIOPA affiliated supervisory authority of the \34third\34 Member State, whose social and labour law is applicable to the pension scheme.

Nonetheless, **the principle of Home State control should stand** and the **Home supervisor only should be entitled to act** on the IORP engaged in cross-border provision of services. The Host State supervisor, and consequently also any \34third\34 Member State supervisor, is an actor of \34last resort\34 if and when the Home supervisor does not take appropriate action.

EFRP would like to recall that **participation to any envisaged procedure aiming at clarification of cross-border situations shall be restricted to prudential supervisory authorities in the framework of the European System of Financial Supervision** (i.e. these procedures shall be inaccessible to any other national authority, although they may be holding competences in social and labour law at national level) in order to stop increasing complexity and

	even confusion that are disincentives for any IORP activity.	
9.	**DO STAKEHOLDERS AGREE WITH THE ANALYSIS OF THE OPTIONS (INCLUDING THE POSITIVE AND NEGATIVE IMPACTS) AS LAID OUT IN THIS ADVICE?** A **remark on the explanatory text** preceding the policy options: in paragraph 8.3.1. it is argued that there is a high level of diversity of prudential regulation across Member States, because there is a wide variety in the scope of SLL across Member States. The EFRP believes that this line of reasoning is flawed, because prudential regulation has been the subject of some degree of harmonisation at European level. The variety in prudential rules is therefore smaller than SLL, which remains the competence of the Member States. EFRP broadly agrees with the positive and negative impacts of **option 1**. The EFRP wishes to progress in this area, and this can be achieved through the elaboration of some principles to better describe prudential regulation and SLL. Member States should be closely associated to discussions, as the attempts to achieve a better delineation of prudential regulation and SLL is a delicate and political exercise. EFRP partially agrees with the positive and negative impacts of **option 2**, since it seems to suggest that cross-border provision of services by IORPs is almost impossible to achieve because objectives are seen as conflicting. In EFRP\39s view, this is not the case. On the **positive impacts of option 2,** EFRP agrees on the principle that prudential regulation is	**Public**

	administered by the Home Member State (8.3.5). However, we would not engage in further investigation. On the **negative impacts of option 2**, EFRP considers that prudential regulation and SLL should mutually exclude each other. Rules should not be seen as a tertium genus. If this idea is accepted, great confusion would be created, and this would be to the detriment of clarity that is sought by IORPs and the authorities in this field. Once again, we do not see the clear distinction between SLL and prudential supervision as a negative impact.	
10.	**ARE THERE ANY OTHER OPTIONS THAT SHOULD BE CONSIDERED?** Yes. EFRP suggests not drawing up a list of components to describe the scope of prudential regulation, because such a list would, unhelpfully, set in stone any distinction between prudential regulation and SLL relevant to occupational pensions. It may be difficult to reach agreement on any list of items and even more difficult to agree on the definition and content of each item. One approach would be to define \34prudential regulation\34 as those sets of rules that arrange or ensure that the pension promise or employment benefit is likely to be delivered. The \34production\34 and \34delivery\34 of the pension benefits, i.e. the establishment, functioning and the winding-up of the entities that deliver the benefits, fall under prudential rules. The EFRP would call for Member States to be closely associated to the elaboration of any definitions or descriptions.	**Public**
11.	**DO YOU AGREE WITH EIOPA THAT OPTION 2 IS PREFERABLE?**	**Public**

	Yes.	
12.	**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?** This is a difficult issue. The EFRP could support settlement procedures between Home State supervisors and any \34third\34 Member State if and when problematic situations arise. Individual disputes should be solved by using the Budapest Protocol. It is important that these procedures occur within the framework of EIOPA and the ESFS (see above, question 8) and keep fully intact the principle of Home State control. We would not support colleges of supervisors as used in insurance supervision. In EFRP\39s view, where any conflicts of interpretation arise over what constitutes prudential regulation or SLL, these could be solved by EIOPA or, ultimately, the European Court of Justice.	**Public**
13.	**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 GOVERNANCE REQUIREMENTS?** EFRP agrees that **general governance principles, as included in Directive 2009/138/EC,**	**Public**

could be transposed into the IORP Directive, once amended as foreseen in EIOPA advice.

We assume that the introduction of these general governance requirements, as included in Directive 2009/138/EC and amended as suggested in EIOPA advice, should not encounter major implementation difficulties, as these principles **already apply to IORPs for a large part**.

As stated by EIOPA (section 10.3.4), IORPs differ widely across Member States as well as within Member States. On the basis of such diversity, it shall be avoided that governance requirements impose burdensome requirements on IORPs: \34A new supervisory system for IORPs shall not undermine the supply or the cost efficiency of occupational retirement provision in the EU\34.

Therefore, it shall be first assed how to insert **governance principles into the IORP Dir: a proportionality check should be made at Level 1. This first proportionality test at Level 1 is not clearly called for by EIOPA and EFRP requests this to be introduced in EIOPA\39s recommendations.**

Secondly, further detailing at Level 2 should occur (sect 10.3.5). This broad application of proportionality at L2 should allow IORPs falling within the scope of the revised Directive to choose to implement alternative measures meeting the general principles on governance.

EFRP would rather view **34proportionality\34 based on two criteria** (section 10.3.6)**: nature and scale**. Complexity seems inappropriate since IORPs tend to be engaged in one single activity: the provision of retirement benefits in the context of the workplace. We would not support any regime requiring general rules while proportionality would be assessed on an individual basis\59 such approach may derive from section 10.3.7. EFRP agrees on the existence of a risk of derailing into overly burdensome procedures if requirements as under Solvency II (ex art. 41.3) were imposed on IORPs (section 10.3.10).

We would underline the importance of the principle recalled by EIOPA in section 10.3.14: the responsibility for good governance stays with the IORP and cannot – and should not – be

transferred to the supervisor.

As to 10.3.17: there is evidence that participation of members or their representatives impacts on the governance of IORPs\59 one of the most evident effects is a higher level of transparency to members.

Remuneration policy

As recalled in the EIOPA advice, IORPs largely differ from other financial institutions, as some functions are fulfilled on a voluntary, unpaid basis (section 10.3.19). In other cases, IORPs have no staff or they employ staff form the sponsor and the remuneration of this staff is linked to the employer\39s pay policy. Therefore, we would recommend that the Level 1 principle on remuneration policy shall be limited to the enunciation of the principle and we would **suggest dismissing the idea of Level 2 measures** further detailing the sound remuneration principle. The provision of details on remuneration policy in Level 2 measures would add an unnecessary and inappropriate level of regulation, which would not be able to capture the wide variety of arrangements on remuneration of people performing certain functions in IORPs.

Impact

Depending on the amount of paper work and management time that certain requirements may generate, we foresee a significant increase of burdensome procedures that do not bring any benefit to beneficiaries. In this respect, we do not agree with EIOPA\39s view in 10.3.22 and urge for attention to section 10.3.23 that we support.

14.	**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?** EFRP **would like to point out that current wording in IORP Dir. (art. 9.1 (b)) already sets out this principle. We consider it as appropriate** and do not see any need to change it. The requirement has been implemented in each Member State according to the legal structure(s) IORPs can take and the professional standards at national level. While the integrity requirement should apply to each of the persons who effectively run the IORP, it could be made clear that the professional qualifications required can be carried by those persons who run the IORP taken as a college or group. This should allow current practice to continue whereby smaller IORPs rely on external advisors having the required professional qualification. This should also ensure that members can nominate their own trustees or other type of representatives which is a specific aspect of IORPs. We believe that the requirement of \34fit and proper\34 should remain restricted to the persons who effectively run the IORP. If a – likely, large – IORP has appointed specific persons to perform specific functions, they should also comply the \34fit and proper\34 requirement. There is an acute need for **proportionality** while considering each of the single aspects of this matter in L1. The provision of fit and proper requirements in the text of the reviewed IORP Directive, without foreseeing alternative arrangements made by IORPs, may represent a disproportionate burden on small and proximate IORPs. As stated by EIOPA, \34in some IORPs,	**Public**

	full segregation of duties may be considered unreasonable and disproportionate. Therefore, IORPs in these cases **may make other arrangements** to ensure that conflicts of interests are avoided or effectively managed\34 (section 11.3.13). **Proximity** is not mentioned when **transposing this principle into detailed Level 2 measures,** although this principle deserves serious consideration since it is relevant for governance. It goes without saying that transposing proximity into detailed L2 measures will require very detailed information on IORP management structures across Member States. Therefore, we would recommend not to work out Level 2 regulation and rather keep the Level 1 principle to be implemented at Member State level. Furthermore, **proximity** of the IORP shall be taken into account as a criterion ensuring control by members/beneficiaries on persons managing or holding key functions in IORPs. In cases where member/beneficiaries have direct access to these persons, constant exchanges with them as well as the possibility to verify the outcome of their work on a regular basis, detailed fit and proper requirements may be scaled down accordingly. Since fit and proper requirements are already present in the IORP Directive we do no foresee major implementation difficulties provided there be no Level 2 harmonising regulation.	
15.	**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?**	**Public**

The proposed requirement to introduce a compliance function would be a new requirement for IORPs. EFRP is opposed to introduce a compliance function as a separate function because it would severely impact the cost-effectiveness of an IORP, even if EIOPA explains (see. 12.3.16, c) that under the proportionality rule, IORPs should be allowed to implement alternative measures.

Furthermore, in many IORPs scheme members are represented in the governance structure of the IORPs which is a compliance check by itself. Scheme members and their representatives will press on the IORP\39s management to ensure that the IORP is compliant with the laws, regulations and administrative provisions as well as with the relevant social and labour law.

Internal control system

The IORP Directive already contains the general requirement for IORPs to have an internal control system (article 14(1)).

As pointed out (section 12.3.7) correctly by EIOPA:

- the implementation of an internal control system for an IORP managing a DB scheme would be different from an IORP managing a DC scheme, and
- the internal control system should be appropriate to the situation of the IORP.

Therefore, EFRP would recommend keeping the principle in Level 1 without seeking further detailed implementation of Level 2 since harmonization is not possible at this point in time.

Compliance function

As stated above, EFRP is opposed to the idea to introduce a separate compliance function in the

	revised IORP Directive. If EIOPA were to pursue with its intention to recommend the inclusion of a separate compliance function in the revised IORP Directive, EFRP is of the opinion that the compliance function is best carried out according to the proposed option c (see 12.3.16) where the **compliance function could be carried out by the administrative, management or supervisory body of the IORP which would discuss the issue once a year**. The discussion would then be noted in the minutes of that IORP body. Both option a (to assign the compliance function to a person) and option b (to assign the compliance function to a third party) would significantly increase the costs of the IORP. EFRP has also concerns about the EIOPA\39s (section 12.3.11) idea that a compliance officer should have the possibility to inform the supervisory authorities \34on its own initiative\34. We believe that as a general principle, staff of an IORP (where there are any staff) are responsible to the managing board of the IORP and that the managing board of the IORP is responsible to the supervisory authority.	
16.	**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 AN INTERNAL AUDIT FUNCTION?** EFRP disagrees with EIOPA that the introduction of an internal audit function in the revised IORP Directive would be beneficial (see Section 13.3.1) and would advise against transposing Art. 43 of Directive 2009/138 into IORP II.	**Public**

The requirement of setting up and running an internal audit function will significantly increase the costs without a corresponding increase of the benefit security for the scheme members.

IORPs are already subject (article 10 of the IORP Directive) to the requirement to have their annual accounts and annuals reports approved by authorised persons (\61 external auditor). An external auditor performs his/her task impartially and objectively and he/she is also not involved in the management of the IORP. An external auditor has the right to express his/her findings and recommendations freely. External audit reports can be accessed by the supervisory authorities who can check how the recommendations of the external auditor are addressed by the IORP.

If EIOPA would pursue with its intention to recommend including the requirement of an internal audit function in the revised IORP Directive, EFRP is of the opinion that the internal audit function is best achieved by **allowing the IORP itself to decide how to meet the general principle of an internal audit function,** for example by:

- assigning it to a person\59
- assigning it to a third party\59
- implementing alternative measures\59

Such **flexibility is needed** to ensure that the measures are appropriate to the situation of the IORP.
A Level 1 principle should be sufficient. We do not see any added value of setting detailed rules for an internal audit function in Level 2 measures. Harmonised rules in this area, even if the proportionality principle is taken into account, will significantly impact the cost-effectiveness of an IORP without any material increase of the benefit security for the scheme members.

17.	**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 REVISED OUTSOURCING PRINCIPLES?** EFRP would propose to include in the revised IORP Directive the principle that the IORP remains responsible for the outsourced activities. The consequence of this principle is that the supervisor first contact point is the IORP and not the different service providers which perform activities for the IORP. In this concept, the IORP will ensure that the supervisory authorities have all the necessary information on the outsourced activities in order to fulfil supervisory functions. EFRP would like to see the revised IORP Directive forbid member states to introduce geographical limitations for outsourcing. In some situations it might be needed, for example for investments, to have service providers located in non-EEA countries. **Role of the supervisory authority** We do not believe there is any added value of having a Level 1 principle to empower the supervisory authority of the IORP to carry out themselves on site inspections at the premises of the service provider in case that service provider is located in another member state. Therefore we oppose the idea to use Article 38(2) of Directive 2009/138/EC in the revised IORP Directive. We would focus more on due diligence to be performed by the IORP while selecting a service	**Public**

provider.

Instead, EFRP would encourage EIOPA members to work out a collaboration agreement to deal with on-site inspection when service providers and IORPs are located in different member states across the EU and EEA (see 14.3.4). Outside the EEA reliance is given to due diligence within the IORP and its responsibility for the sound management of the institution. As such, we don\39t agree with the procedure envisaged under 14.3.8. (contractual agreement with prior notification).

EFRP believes that outsourced activities can only be subject to **ex-post notification**. It is the task of the Board of the IORP to run the IORP and to judge the added value of outsourcing.

Additional rules on CHAIN OUTSOURCING will not increase the level of security of the scheme members. Again, we consider it is the task and responsibility of the IORP to negotiate and control the outsourcing deals, including the impact of chain outsourcing in the agreement. Hence, EFRP disagrees with EIOPA\39s proposal to introduce additional rules on chain outsourcing (14.4.5) and on the location of the main administration (14.4.6)

More than insurance companies, IORPs rely on external advice and expertise. One could think there is thus a need for supervision of those service providers. However, it is relevant to note that most – if not all – of those providers are regulated and supervised by either a financial services supervisor (asset managers, insurers, mutual funds) or a professional or sectoral body (e.g. actuarial profession, accountants, auditors) that are requiring fit and proper persons to effectively run those business.

Location of the main administration

	EFRP would recommend using the concept of the CRD Directive to clarify the definition of the home member state. The home member state would then be defined as the state where the IORP was authorised or registered. We do not see any benefits that the revised IORP Directive would stipulate that the main administration need to be located in the home member state. We agree that \34place of main administration\34 refers to a place where the main strategic decisions of the IORPs executive body are made.	
18.	**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 REVISED OUTSOURCING PRINCIPLES?** EFRP agrees with EIOPA that the current principles on outsourcing in the IORP Directive have to be maintained in the revised IORP Directive (section 15.4.1). There is a clear trend in the sector that IORPs outsource more and more activities. This is mainly due to the fact that an IORP cannot be required to have all the technical skills and abilities needed to run an IORP (section 15.4.2). We 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 L2 measures (section 15.4.2). EFRP would warn against too many prescriptive rules on the selection process and ongoing monitoring of the outsourced activities. We do not see any beneficial effect of having Level 2	**Public**

measures stipulating the minimum content of an outsourcing agreement. Every outsourcing agreement is different and imposing a harmonised framework is unworkable.

Role of the supervisory authority

EFRP strongly support **option 1** to deal with the role of the supervisory authority in case of outsourced activities.
However, we believe that it is sufficient that \34Member States must ensure that supervisory authorities have the necessary powers at any time to request information on outsourced functions and activities\34.
We do **not like to see the introduction of a new member states option** where the \34member state may decide to provide that IORPs shall, in a timely manner, inform or notify the supervisory authorities on the outsourcing of critical or important function or activities as well as any subsequent changes with respect to those functions or activities\34. In general Member States options create legal complexities for cross-border providers which should be minimized having regard to the objective of intensifying cross-border activity.

EFRP fails to see any valid reason to distinguish in the Level 1 framework Directive between IORPs that are registered or IORPs that are authorised, as proposed in **option 2**. As stated above, in our opinion a Level 1 principle that \34member states must ensure that supervisory authorities have the necessary powers at any time to request information on outsourced functions and activities\34 should be accepted as sufficient.