	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:	Ius Laboris.	
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

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- ⇨ Do **not** change the numbering in column "Reference".
- ⇨ Please fill in your comment in the relevant row. If you have no comment on a question, keep the row empty.
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  - 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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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 question numbers below correspond to Consultation Paper No. 01 (EIOPA-CP-11/01).

Reference	**Comment**	
General Comment	Ius laboris is an alliance of leading Human Resource law practitioners. We have more than 2,500 lawyers providing local Human Resource law expertise. Many of these are based in the European Union, and some of these specialise in pensions law. Our response to the Draft Respsonse to Call for Advice on the review of Directive 2003/41/EC is made after having taken soundings from many of our pension law practitioners throughout the EU.	
1.	Ius Laboris agrees with the analysis of the options as laid down in this advice. Extending the IORP	

	Directive to non-occupational pension schemes would have such an impact in several member states that it would slow down the entire process of review of the IORP Directive (which, in view of need for the further promotion of cross-border activities, is urgent). This is particularly the case in certain European countries, whose occupational pension schemes framework requires further development. This can be compared with non-occupational pension schemes, which have been used by the vast majority of pension scheme members over many years, due to a more comprehensive and stable legislative framework. Moreover, Ius Laboris is of the opinion that occupational pension schemes and non-occupational pension schemes are fundamentally different in nature and should thus be covered by different regulatory frameworks.	
2.	We do not see any other options that should be considered.	
3.	Ius Laboris has a preference for option 2 with a clear definition of what is to be understood by "occupational pension scheme". In addition, Ius laboris agrees that the Commission should the consistency in of the application of regulation 883/2004.	
4.	In our view, all employment-related pension schemes that are funded directly or indirectly through employer's and/or employee contributions and that supplement a basic social security pension should be considered as occupational pension plans, regardless as to whether they are mandatory or voluntary. A clear distinction between volunatry employment-related pension schemes and other, compulsory schemes must be made, by presenting fully and explicitly all the main characteristics of each scheme. Hence, compulsory employment-related pension scheme should not be considered as a social security scheme covered by Regulations EEC N° 883/2004 and EEC N° 987/2009.	
5.	Ius Laboris is of the opinion that the difficulties mentioned in 7.3.20 (and subsequent paragraphs) prevent a simple definition of Host Member State as proposed under option 2.	
6.	In our experience, it is common for the Sponsoring Undertaking and the Employer to be in different member states. Moreover, in our view sponsorship from outside the European Economic Area (e.g. from a US parent company) should also be allowed. Therefore, we propose the following definitions (taking into account the position of the European Commission that cross-border activity only arises when the sponsor and the IORP are located in two different Member States) : Home Member State : means the Member State in which the institution has its registered office and its main administration or, if it does not have a registered office, its main administration.	

	Host Member State : means the Member State whose social and labour law relevant to the field of occupational pension schemes is applicable to the relationship between the undertaking or any other body, regardless of whether it includes or consists of one or more legal or natural persons, which acts as an employer or in a self-employed capacity, and the members. Sponsoring Undertaking : means any undertaking or body (including a branch or subsidiary), regardless of whether it includes or consists of one or more legal or natural persons, which has a direct agreement with either the institution or the members and pays contributions into and/or supports the institution for occupational retirement provision. Cross-border activity : means the situation whereby an institution established in a Home Member State accepts sponsorship from a Sponsoring Undertaking located in another state, to manage a pension scheme subject to a Host Member State's social and labour law relevant to the field of occupational pension schemes. The abovementioned definitions are more suitable. If implemented by all Member States, this would help avoid the situation where member states reach different and contradictory conclusions in relation tocross–border activities. Article 20 of the IORP Directive should be adapted accordingly, providing for a notification procedure between the Home and the Host Member State (as it currently does) and providing for notification to the competent authorities of the state where the Sponsoring Undertaking is located, should that not be the Host Member State.	
7.	We propose an alternative. See our answer to question 6.	
8.	Yes, in any event, as all Member states should implement their national regulations in accordance with the IORP Directive, any provision for settling problmes between the Home and Host member states needs to be based on common principles that can apply not only to all pension models, but also to problems of overlapping or contradicting regulation etc.	
9.	Yes. Ius Laboris is of the opinion that both governance and organisation of the IORP should also be considered as prudential regulation. It is also crucial to be noted that what might be considered as	

	prudential law does not mean that it cannot be included in the internal social and labor law of a Member state.	
10.	We propose that Host Member States should be asked to provide a comprehensive summary of the applicable social and labour provisions (instead of just a copy of the applicable legislation). Ius Laboris points out that the collection of all summaries from each host Member state would be very helpful, as they could be used as a comparative overview of law. This would certainly lead to the best possible comprehension and protection of the employee's insurance rights and obligations.	
11.	Yes.	
12.	Yes.	
13.	Ius Laboris agrees with the introduction of similar governance requirements for IORPS as for insurance and reinsurance undertakings as provided for in article 41 of the Solvency II Framework Directive, subject to the amendments proposed by EIOPA. We also agree that there should be no difference in the framework for defined benefit (DB) and defined contribution (DC) Schemes, given the proportionality principle that should generally apply. Ius Laboris agrees with the stated likely positive impact of the governance requirements in relation to the protection of members' and beneficiaries' benefits. It also believes that sound governance requirements will have a positive impact on the general management of pension schemes, including an appropriate investment policy. Ius Laboris agrees with EIOPA that some of the governance requirements risk being too burdensome for small or less complex IORPS. Care should be taken to prevent small IORPS winding-up as a result of onerous governance requirements. Therefore, a clear and unambiguous confirmation of the proportionality principle in the revised IORP Directive is of the utmost importance. In addition, Ius Laboris agrees that the obligation and responsibility for implementing governance requirements rests with the IORP and cannot be transferred to the supervisory authority of the IORP. Finally, Members States should indeed be required to equip supervisory authorities with the means, methods and powers, that are necessary for verifying the system of governance and evaluating emerging risks identified by IORPs which may potentially impact on their financial security.	
14.	Ius Laboris agrees with the introduction of 'fit and proper' requirements, both for the persons who run the IORP and for the persons who perform a key function within the IORP. However, Ius Laboris	

	is of the opinion that article 42 of the Solvency II Framework Directive cannot be directly applied to IORPs. Ius Laboris would like to stress that if the IORP is run by a body which acts jointly, the fit and proper test should be applied to the body as a whole and not to each individual member. Ius Laboris agrees that the fit and proper requirements should apply at all times, and it agrees with the proposed procedures and ongoing controls to be set up by the supervisory authority as well as with the competences to be given to the supervisory authority in that respect. It must be added that the procedure and the control of the fit and proper requirements lies with the supervisory authority of the Home Member State. However, it is clear that the general responsibility of the IORP to ensure that the persons who effectively run the IORP and have other key functions in relation to it, should not be transferred to the supervisory authority. Some guidance should be given as to what is to be understood by "key function" (eg. whether this includes the compliance function or not) in order to have a uniform application throughout Europe. Moreover, given the important differences between IORPs in Europe, proportionality in the fit and proper requirements should be expressly provided for in the revised Directive. Finally, it is important that there would be a mutual recognition between Member States of their proofs of good repute. More specifically, Ius Laboris agrees that it would be helpful to establish what constitutes sufficient evidence for a Member State to assess the good repute of nationals from another Member State, as well as the proof of evidence that would be accepted by another Member State, as this will help facilitate the cross-border activities of IORPs. Positive impacts : the better an IORP is run, the better the interests of members and beneficiaries are protected. Negative impacts : the requirements should not be too strict for small or less complex IORPs. Therefore, it is important to provide for the proportionality principle in the fit and proper test (see above). Moreover, the fit and proper test should not be used to prevent persons from one Member State from performing functions or managing an IORP established in another Member State. Therefore, mutual recognition of proofs of good repute is necessary.	
15.	Ius Laboris fully agrees that a regular assessment of compliance is part of an effective internal control system. It also stresses the need to provide for flexibility in the way in which the compliance function is carried out (for example, whether by a compliance officer, by a member of a body of the IORP, by an external service provider, by a regular review of the compliance etc..). Undoubtedly, the discretion of IORP to outsource the function constitutes a flexible option, which might permit the	

	most efficient compliance and internal control system. Ius Laboris is of the opinion that if the IORP fulfils the compliance function by appointing a compliance officer, the latter should not be required to inform the supervisory authority, of its own initiative in relation to compliance issues. It should be the responsibility of the compliance officer to inform the IORP of those issues and to assist the IORP in resolving those issues. The compliance function should not be considered as a sort of whistle blowing function towards the supervisory authority. This may jeopardize the relationship between the IORP and the compliance officer which should be based on mutual confidence. However, this should not prevent the supervisory authority from asking for information regarding an IORP's compliance directly from the responsible body of the IORP. Positive impacts : the better an IORP is run, the better the interests of members and beneficiaries are protected. Negative impacts : the requirement for a separate compliance function may be too burdensome for small or less complex IORPs. Therefore it is of the utmost importance to provide for sufficient flexibility in the performance of the compliance function.	
16.	Ius Laboris agrees with the principles proposed by EIOPA. The comments above, in relation to the internal control system, could be implemented in this schedule mutatis mutandis. In addition, Ius Laboris fully agrees with the suggestion that the principles of internal audit must take account of the heterogeneous nature of the IORP sector. Positive impacts : the better an IORP is run, the better the interests of members and beneficiaries are protected. Negative impacts : the requirement of an internal audit function may be too burdensome for small or less complex IORPs. Therefore it is of the utmost importance to provide for sufficient flexibility in the performance of the internal audit function.	
17.	Ius Laboris agrees with the principles proposed by EIOPA. In particular, the amendment of IORP Directive should include more details on what the "necessary powers and means" are. In this way, the Member states will be required to allow their supervisory authorities to supervise the relationship	

	between IORP and service provider. It should, however, be noted that there is possible negative impact - especially for small IORPs - of having to provide a clause in the agreement with an external service provider located outside the E.E.A. which would allow the supervisory authority of the Home Member State to perform on-site inspections at the external service provider. Important service providers located outside the E.E.A. might not be willing to insert such a clause in their service agreement, making it impossible, in practice, for the IORP to call upon their services. This should therefore be avoided. The competent supervisory authority should be the supervisory authority of the Home Member State. Ius Laboris proposes to define the term "main administration" used in the definition of Home Member State as where the IORP has been registered and/or authorized.	
18.	Ius Laboris agrees with the principles proposed by EIOPA. Outsourcing should be an option, for critical or important functions. In addition, Ius Laboris agrees with EIOPA regarding the type of Outsourcing. More specifically, it must be undertaken in such a way that: (a) the quality of the system of governance remains intact and (b) there is no undue increase in operational risk. These terms should be clarified. Regarding the role of the supervisory authority, Ius Laboris clearly prefers option 1. Ius Laboris is of the opinion that a prior notification of the outsourcing to the supervisory authority should not be imposed by the revised Directive, not even for IORPs that are authorized. It should be left to the discretion of the national legislation whether a notification of the outsourcing is required, and if so, whether such a notification should be made prior to the outsourcing or could also be a posteriori (eg by means of the annual reporting to the supervisory authority).	