Comments Template on EIOPA-CP-11/006 Response to Call for Advice on the review of Directive 2003/41/EC: second consultation		**Deadline 02.01.2012 18:00 CET**
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The question numbers below correspond to Consultation Paper No. 06 (EIOPA-CP-11/006).

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Question	**Comment**	
General comment	1. This document sets out the comments of Sacker & Partners LLP. Sackers is a firm of solicitors, based in London, UK, specialising in pensions law. We act for in excess of 800 pension schemes, including household names and a number of FTSE-100 clients. The views expressed in Sackers' response to this Consultation have been collated following discussions with a sub-group of the firm's solicitors. 2. In the UK, pension funds are not regulatory own funds (as defined in Article 17 of the Directive). Instead, many UK occupational pension funds are set up under trust. As such, they do not have their own legal personality (in contrast to pension funds established in other some other Member States), but instead act through their trustees. 3. UK pension funds already operate in a highly regulated environment. The Pensions Act 2004 imposes strict funding requirements on schemes and gives significant supervisory and enforcement powers to the UK Pensions Regulator. There are also detailed rules relating to the tax treatment of pensions, operated by HM Revenue & Customs. 4. We recognise that EIOPA has been given a narrow remit by the EU Commission (notably, they have asked how funding requirements should be further harmonised, not whether they should be), with very specific questions to consider. However, as the consultation notes[1], "there are vast differences in the nature, scale and complexity of IORPs among individual Member States as well as within the same Member State." We agree with the comment that "since the occupational pension landscape is very heterogeneous, there might be cases where the proportionality principle will need to be construed and applied more broadly than under the Solvency II regime".[2] We therefore urge EIOPA to make it clear in its response to the Commission that it will not be appropriate to apply the Solvency II principles to occupational pension schemes in the EU. Given that there is no standard approach in the provision of occupational pensions across the EU, it is illogical to attempt to apply a narrower framework to all Member States, than exists currently in the IORP Directive.[3] Our answers to specific questions explain our reasoning in more detail.	

[1] At paragraph 18.3.5
[2] Ibid.
[3] Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision

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	5. Given the length of the consultation document (and the time available to respond to such a lengthy consultation document), we have focused on those questions most relevant to our practice and which will have a direct impact for our clients. We have not repeated the comments made in reply to the first part of this consultation (in August 2011) but those points still stand.	
1.	**CfA 1: Scope of the IORP Directive** *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?* We believe that the current scope of the IORP Directive should not be extended, for example, to German book reserve schemes.	
2.	*Are there any other options that should be considered? Please provide details including where possible in respect of impact.* We believe there are very strong arguments for excluding all occupational schemes which are supported by an employer from the scope of the Directive (for example, UK style sponsor backed IORPs as well as German book reserve schemes). With this type of arrangement, the obligation to pay pension benefits remains with the employer, unlike the position for insurance arrangements, where the insured has a contract with the provider. In attempting to harmonise the regime for pensions across the EU and impose Solvency II requirements to occupational pensions, the Commission has assumed that there should be a level playing field between insurance companies and pension schemes. This is not the case because the two are meeting very different objectives. Unlike insurance companies, sponsor backed IORPS do not operate by way of business. Instead, they exist to provide the benefits offered as part of an employer's remuneration package and have ongoing support from the employer, whereas an insurance company takes a one-off premium for providing an annuity.	
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5.	**CfA 2: Definition of cross-border activity** *Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?* The proposed amendment to Articles 6(c) and (j) would mean that many UK IORPs would be deemed to be cross-border, despite both the IORP and its members being located in the same Member State, simply because an entity in another Member State has a financial obligation to that IORP. These amendments are unnecessary and would have a negative impact for a number of reasons, including the ability of IORPs to improve the security of members' benefits through the use of parent company guarantees and on the competitiveness of companies from other Member States who wish to operate in the UK by way of a branch. We explain our reasoning in more detail below. **Companies operating in the UK through a branch** A number of companies operate in the UK by way of a branch, which has no separate legal identity. This practice is common amongst foreign banks which, for regulatory reasons, need their operations to be conducted by the same legal entity in every country. If the proposed changes were made, IORPs attached to such companies would become cross-border IORPs by virtue of having a sponsoring entity in a Host Member State, even though both the members and the IORP are in the Home Member State. By way of example: An Italian bank conducts its operations in the UK through a branch. As the branch has no separate legal identity, the employees who live and work in the UK for that branch are technically employed by the Italian bank. Under the proposed amendments, the IORP would become a cross-border scheme because although the IORP and the members are located in the Home Member State, the sponsoring undertaking (i.e. the entity which is obliged to pay contributions) is located in a Host Member State. Consequently, companies that operate in the UK by way of a branch would be put at a competitive disadvantage compared with UK companies - because their UK IORPs would be subject to the more onerous requirements imposed on cross-border IORPs, whereas IORPs of their UK competitors would not be. This makes it less likely that such branches would offer pension provision to their employees. Taking the above example, the Italian bank operating in the UK and providing benefits in a UK IORPs to its UK employees would have its IORP categorised as cross-border and would be subject to more onerous requirements than a UK bank operating in the UK and providing benefits in a UK IORPS to its	

UK employees.

IORPS with parent company guarantees

Many UK pension schemes have parent company guarantees in place which are designed to take effect if another company defaults on its obligations to the IORP. Under the proposed amendments, if the company giving the guarantee is in a different Member State to the IORP and the members, giving such a guarantee would make the IORP a cross-border scheme as a result of the existence of the parent company's legally binding obligation to fund the pension scheme in the event that a funding shortfall arises.

By way of example:

A UK company has established an IORP in the UK for its UK employees. The IORP's trustees have concerns about the financial status of the UK company and so the company's French parent company gives a guarantee that will take effect in the event that the UK company fails to make the necessary contributions. Under the proposed definitions, the IORP would be categorised as a cross-border scheme because it would effectively be a sponsoring undertaking in a Host Member State, despite the fact that both the members and the IORP are in the Home Member State.

The effect of this is to create an artifical distinction between IORPs whose members are in the same Member State as the IORP, dependent upon whether or not a company in another Member State has a financial obligation to the IORP. Schemes which are categorised as cross-border are subject to more onerous funding requirements, which can have a significant financial impact on sponsoring undertakings. For some employers, it will no longer be financially viable for the company to continue operating the IORP. And the resulting withdrawal of pension provision will be detrimental to employees who rely on it to fund their retirement. A further likely result of the proposed changes is that overseas parent companies will no longer prepared to put in place financial guarantees for UK IORPs, on the basis that doing so would make the IORP cross-border and result in a heavier financial burden. This is clearly contrary to the aim of providing greater security for members' benefits. It may also have a detrimental impact on the UK's pension compensation scheme, the Pension Protection Fund, as a result of the lack of support from overseas parent companies in future.

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12.	**CfA8: Quantitative requirements** *What is the view of the stakeholders on the holistic balance sheet proposal? Do stakeholders think that the distinction between Article 17(1) IORPs. 17(3) IORPs and sponsor-backed IORPS should be retained or removed?* We do not believe that the Holistic Balance Sheet (HBS) is necessary, as extending the Solvency II requirements to IORPS is inappropriate. In the UK, the Pensions Act 2004 (which implements the existing IORP Directive) sets high standards for the funding of DB schemes, as well as governance requirements and protection for members. In addition, the UK Pensions Regulator has significant and wide-ranging powers to ensure that these standards are met. A factor which EIOPA and the Commission need to bear in mind is the distinction between pension providers that operate by way of business (such as insurance companies) and occupational pension schemes which are set up purely for the purpose of providing retirement benefits as an element of the employer's remuneration package. In the UK, the latter operate on a 'not for profit' basis, they are generally for the use of a single employer or group of companies and have ongoing support from the employer (unlike insurance companies, which take a one-off premium for providing an annuity). Such pension schemes are not competitors of the insurance industry. The Holistic Balance Sheet (HBS) proposal is unnecessarily complex and the full proposal is unclear. For example, EIOPA's draft advice does not include concrete proposals for measuring either the employer covenant or the level of support to be attributed to pension protection schemes. In the absence of any proposed method for valuing employer covenant (a significant element of the HBS for IORPs), it is not possible to comment in detail on the proposed implementation of the HBS. The last decade has seen significant decline in defined benefit (DB) pension provision due to	

	increasingly stringent regulation and high costs. From the information provided, it appears likely the introduction of the HBS would signal the end of DB pension provision in the UK. The proposed introduction of the HBS approach represents a real risk that employers will abandon the idea of funded schemes (both DB and DC) if the solvency or minimum capital requirements are applied. The downgrading of pension benefits is a likely consequence of such increased regulation and cost - effectively the opposite result to the outcome of member protection that the Commission is seeking to achieve. We appreciate that EIOPA has been asked by the Commission *how* funding requirements should be further harmonised, not whether they should be. However, the proposals take insufficient account of robust mechanisms and member protections which already exist in Member States such as the UK. We are of the view that EIOPA should not recommend the HBS approach to the Commission, particularly given the absence of any impact assessment. Proper modelling will be required before EIOPA can fully assess whether the HBS approach can operate in practice.	
13.	**CfA5: Valuation of assets, liabilities and technical provisions**	
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33.	*What is the stakeholders' view on the analysis regarding sponsor support? Do stakeholders agree with EIOPA that IORPs should value all forms of sponsor support as an asset and take account of their risk-mitigating effect in the calculation of the solvency capital requirement?* It is not possible to fully analyse or comment on the HBS proposal when no methodology for valuing the employer covenant has been put forward at this stage.	
34.	**CfA6: Security Mechanisms**	
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46.	*Do stakeholders agree that it should be specified in the IORP Directive what constitutes a recovery plan as introduced by Article 142 of Solvency II? How should the contents differ from those of insurance companies?* Given the long-term nature of IORPs and the predictability of the benefits payable from them, it is reasonable for such schemes to use relatively long recovery plans, while ensuring that the IORP's liabilities can be met as they fall due. As noted above, IORPS are very different entities to insurance companies, whose liabilities can be much more short-term and/or unpredictable. In our view, national regulators should retain the power and flexibility to oversee recovery plans based on their assessment of the risk to scheme members and the scheme sponsor.	
47.	**Investment rules** *Do stakeholders believe that the prudent person principle is a sufficient basis for the investment of IORPs or is additional provision needed?* The "Prudent Person" principle set out in the IORP Directive provides a sensible Europe-wide framework, which is flexible enough to be applied to the different frameworks which exist in Member States. In our view, the proposed amendments are unlikely to result in the strengthening of protection for IORP members.	
48.	*Do stakeholders feel that Member States should have the option to impose limitations on investments in addition to those set out in the IORP Directive? What about host member states?* We agree that the current text of the Directive, and the prudent person principle, provide adequate protection.	
49.	*To what extent do stakeholders believe the investment provisions of the Directive should differ between defined benefit and defined contribution pensions?* In our view, there is no need to differentiate between DB and DC pensions. The prudent person principle continues to be the primary focus.	
50.	*Do stakeholders agree with the analysis of the options (including the pros and cons) as laid out in this advice? Are there any other impacts that should be considered?*	

	As noted in response to question 49 above, the prudent person principle is fundamental to ensuring security for IORP members.	
51.	*What is stakeholders' view of the current prohibition on borrowing in Article 18(2)?* We do not see any reason to change Article 18(2), which permits Member States to authorise borrowing for liquidity purposes and on a short-term basis only.	
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65.	**Fit and proper** *Do stakeholders agree the introduction of the same fit and proper requirements for IORPS as were introduced for insurance and reinsurance undertakings in article 42(1) of the Solvency II Framework Directive?* Article 42 of the Solvency II Framework Directive sets out the fit and proper requirements "for persons who effectively run the undertaking or have other key functions", which includes professional qualifications. We recognise the fact that persons who effectively run the IROP or have key functions can have a major impact on the activities of the IORP and consequently on members' interests and therefore	

need to be fit to do so. However, we would reiterate the comments made in response to EIOPA's first consultation on this subject.

Although UK pension scheme trustees are not required to gain professional qualifications before joining a pension scheme trustee board, there is a legal requirement in the UK (under the Pensions Act 2004) for trustees of occupational pension schemes 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. To help trustees achieve this standard, the UK Pensions Regulator requires trustees to undertake its "Trustee Toolkit" (a free e-learning programme designed to help trustees meet the requirements for trustee knowledge and understanding, introduced by the Pensions Act 2004), "unless they can find an alternative learning programme which covers all the items in the scope guidance at a level relevant for them and within the timescale allowed."[4]

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.

In the UK, there is currently strong support for member involvement in pension scheme management. The result for many schemes is diversity and balance on trustee boards, with all individuals subject to a minimum standard, but without a requirement any individual to become an "expert" (unless they hold themselves out to be). Member trustees can be an invaluable resource, as they potentially have a level of knowledge and understanding of both the history of scheme and the employer's covenant that a professional trustee may struggle to emulate.

In our view, the existing requirements work well to ensure a minimum standard among those who "effectively run" occupational pension schemes. Additional requirements, such as the introduction of professional qualifications, are likely to result in fewer members taking on the role of pension scheme trustee.

Given the different nature of trust based occupational pension schemes and insurance companies, it is, in our view, unnecessary to create a level playing field with insurance companies in the context of qualifications for those who effectively run such pension schemes.

[4] The Pensions Regulator: Code of Practice No.7 – Trustee Knowledge and Understanding (at paragraph 46)

	In the event that such provisions are applied, trustees would require a period of grace to allow them to meet any new test.	
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