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REPORT ON OUTSOURCING BY IORPs

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List of abbreviations

AT	Austria
BE	Belgium
BG	Bulgaria
CZ	Czech Republic
DE	Germany
DK	Denmark
ES	Spain
FI	Finland
FR	France
HU	Hungary
IE	Ireland
IT (CPF)	Italy, Contractual Pension Funds
IT (OPF)	Italy, Open Pensions Funds
LI	Liechtenstein
LT (PA)	Lithuania, Pension associations
LT (LAC)	Lithuania, Life Assurance Company
LU (CAA)	Luxembourg, Commissariat aux assurances
LU (CSSF)	Luxembourg, Commission de Surveillance du Secteur Financier
LV	Latvia
MT	Malta
NL	Netherlands
NO	Norway
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
UK	United Kingdom

I. Introduction

According to Article 2 (2) of the CEIOPS' Articles of Association, the purpose of CEIOPS is to advise the European Commission on policy issues regarding insurance and occupational pension funds supervision and to offer its members a forum for co-operation and exchange of information about supervised institutions. This purpose is to be achieved by *inter alia* serving as a platform for exchange of experience and co-operation of the Member States on issues of interest and compilation of reports on questions of mutual and general interest.

In line with the Articles of Association, the tasks of CEIOPS include: the development of a common understanding of the IORP Directive among Member States and the carrying out of preparatory work in the light of the objectives of CEIOPS when dealing with the issues related to pension funds supervision. In order to perform its tasks, CEIOPS is required to analyse the current status of the pension savings institutions in relation to the relevant EU legislation.

CEIOPS has therefore decided to undertake a close examination of specific national rules regarding outsourcing by the Institutions for Occupational Retirement Provisions ("IORPs").

I.1. Legal background

Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (hereafter referred to as "the Directive") recognises the possibility for IORPs to transfer some or all of their activities to a 3rd party service providers. In several provisions of the Directive the transfer of activities by the IORPs to a 3rd party is explicitly referred to as "outsourcing".

Apart from allowing the IORPs to outsource their activities, the Directive explicitly requires the Member States to give their Competent authorities necessary powers for effective supervision in case of outsourcing. The various references included in the Directive in this regard are as follows:

Recital 25: *"Where an institution for occupational retirement provision has transferred functions of material importance such as investment management, information technology or accounting to other companies (outsourcing), it should be possible for the rights to information and powers of intervention to be enlarged so as to cover these outsourced functions in order to check whether those activities are carried out in accordance with the supervisory rules."*

Article 9 (4): *"A Member State may permit or require institutions located in its territory to entrust management of these institutions, in whole or in part, to other entities operating on behalf of those institutions."*

Article 13: *"Each Member State shall ensure that the Competent authorities, in respect of any institution located in its territory, have the necessary powers and means:*

...

- (a) *to supervise relationships between the institution and other companies or between institutions, when institutions transfer functions to those other companies or institutions (outsourcing), influencing the financial situation of the institution or being in a material way relevant for effective supervision;"*

Article 13: *"Each Member State shall ensure that the Competent authorities, in respect of any institution located in its territory, have the necessary powers and means:*

...

- (b) *to carry out on-site inspections at the institution's premises and, where appropriate, on outsourced functions to check if activities are carried out in accordance with the supervisory rules."*

Article 19 (1): *"Member States shall not restrict institutions from appointing, for the management of the investment portfolio, investment managers established in another Member State and duly authorised for this activity, in accordance with Directives 85/611/EEC, 93/22/EEC, 2000/12/EC and 2002/83/EC, as well as those referred to in Article 2(1) of this Directive."*

Article 19 (2): *"Member States shall not restrict institutions from appointing, for the custody of their assets, custodians established in another Member State and duly authorised in accordance with Directive 93/22/EEC or Directive 2000/12/EC, or accepted as a depository for the purposes of Directive 85/611/EEC.*

The provision referred to in this paragraph shall not prevent the home Member State from making the appointment of a depository or a custodian compulsory."

1.2. Objective and methodology of the survey

The topic of outsourcing has been given certain importance by supervisory authorities in the financial services field as can be seen from the various standards and guidelines issued on this area:

- Committee of European Banking Supervisors (CEBS), *Guidelines on outsourcing* (14 December 2006)
- The Joint Forum – Basel Committee on Banking Supervision (BCBS), International Organization of Securities Commissions (IOSCO), International Association of Insurance Supervisors (IAIS), *Outsourcing in Financial Services*, February 2005
- International Organisation of Securities Commissions (IOSCO), *Principles on Outsourcing of Financial Services for Market Intermediaries*, February 2005

None of the above standards and guidelines, however, covers directly the area of occupational pensions. It is so despite the fact that the outsourcing is a big issue also in the occupational pensions industry.

The main aim of this project is to map the various approaches to the issue of outsourcing in different CEIOPS member and observer countries (hereafter referred to also as 'Member States' or 'countries'). The mapping exercise is carried out in the light of the relevant provisions of the Directive.

Accordingly, the objectives of this survey are as follows:

- to identify how the legislation of Member States treats the different functions of IORPs in terms of the possibility to transfer these functions to 3rd party service providers;
- to determine the approach to outsourcing and analyse what requirements are applied or intended to be applied (if any) by Member States in terms of the Directive;
- to analyse the requirements applied by the national laws of Member States beyond the Directive, as an issue of mutual and general interest;
- to find out whether the current regulation of outsourcing in the Directive causes any obstacles to the common market or requires any clarification from the European Commission.

In order to achieve the objectives outlined above, the survey collected information on how Member States have implemented the relevant provisions of the Directive concerning the transfer of functions of the IORPs activities to a 3rd party service providers.

In order to gather information necessary for achieving objectives of the survey, a questionnaire covering above mentioned aspects of outsourcing was prepared. The questionnaire as well as this Report was drafted by a special outsourcing workstream sub-group of the CEIOPS' Occupational Pensions Committee comprised of:

- Slovakia (Peter Pénzeš)
- Latvia (Ieva Ose)
- Malta (Marianne Scicluna)
- Romania (Adina Dragomir, Simona Dascalu)

I.3.Responding countries

On 3 March 2008, the questionnaire was sent to all 29 CEIOPS members and observers. Replies from 26 countries were received. Some of the respondents provided information on more than one IORP type. Therefore, the total number of institutions covered in this Report amounts to 29. The responding countries include: Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, France,

Germany, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania (information regarding Pension associations as well as Life assurance companies were used for this report), Luxembourg (both Competent authorities in this country - Commissariat aux assurances (CAA) and Commission de Surveillance du Secteur Financier (CSSF) - provided information), Malta, Netherlands, Norway, Romania, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and United Kingdom.

Following the discussion on the preliminary results of the March 2008 survey by CEIOPS members and observers at their meeting in Bratislava on 15 May 2008, it was decided that a brief follow-up questionnaire should be circulated to gather more information on certain aspects of outsourcing. At the same time, participants were asked to revise their original answers and provide necessary corrections. On 20 May 2008 the follow-up questionnaire was sent to CEIOPS members and observers. A total of 24 responses were received from the following countries: Austria, Belgium, Bulgaria, Czech Republic, Denmark, France, Germany, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, The Netherlands, Norway, Poland, Portugal, Slovenia, Slovakia, Spain, Sweden and United Kingdom.

Responding countries often included some remarks, comments or made certain qualifications when answering the questions in the survey. These are reproduced in this Report only when necessary in order to explain some of the findings. Otherwise, this Report is limited to providing an overview of main results.

II. Outline of findings

II.1. Brief characteristics of IORPs

This section of the survey aimed to get an overview of the main characteristics of voluntary occupational pension systems in the surveyed countries.

Respondents were asked to supply information on the proportion of different **types of plans** provided by IORPs established in their jurisdiction (i.e. home state IORPs). The answers received show, that there is an equal spread between DB and DC countries. Except for in the case of 3 'old Member States', DC schemes prevail in 'new EU member states'. To note that four countries were not able to provide the required data due to the fact that they do not have any operational IORPs yet. In one case it was not possible to determine what type of plans prevails, since there is one DC protected and one DB plan provided by IORPs established in this country. One must also note that the categorisation into 'mostly DB' or 'mostly DC' is based on different criteria (mostly number of members or amount of assets) depending on the data supplied by each country.

A large majority of countries (22) require their IORPs **to obtain a licence** before they can start operating. For the purpose of this report, obtaining a licence entails a formal procedure by which Competent authority grants permission for operation to an IORP. It includes a range of actions, involving the assessment of compliance with specific requirements prior to granting permission to operate (e.g. checking whether proposed members of IORP's bodies meet fit and proper requirements, founders have enough resources and are eligible to establish IORP). Mere registration by Competent authority does not qualify as obtaining

the licence. Few respondents (4) indicated that IORPs need to get a licence only prior to carrying out cross border activities. In one country, IORPs are represented by pension foundations and friendly societies. In this country friendly societies are required to obtain a licence at their establishment, while pension foundations must register with the Competent authority only when engaged in cross-border activities and the number of their members exceeds 100.

The Czech Republic noted that while foreign IORPs can operate on its territory in accordance with the Directive, it is not possible to set up an IORP in the Czech Republic. Therefore the Czech Republic was not able to supply relevant information necessary for this report.

Countries were also asked to indicate whether their home state IORPs have a **legal personality**. Based on the data provided together with information contained in Appendix 3 of the Budapest Protocol it was found that in the majority of cases (17) IORPs possess legal personality. Exceptions apply with regard to 3 countries where IORPs are set-up under trust (in which case the trustees have the legal responsibility for the proper running of the pension scheme) and 4 countries where IORPs are set up as contractual based pool of assets managed by external bodies. In 5 countries there are two or more types of IORPs falling under the Directive. In some cases all of these types possess the legal personality, in other cases one of these types of IORPs has a legal personality, while the other is not vested with legal personality. One respondent noted that their voluntary pension funds have a form of a civil society with no legal personality.

II.2. General approach to outsourcing

The possibility for IORPs to outsource is expressly provided for in Article 9 (4) of the Directive. However, the Directive does not provide any specific list of functions that are permitted to be carried out externally or prohibited from being outsourced by the IORP. The extent of outsourcing by the IORP is thus left at the discretion of each country. Accordingly, this part of the survey sought to clarify where the different countries draw the line between functions considered to be 'core activities' of an IORP and all other activities that may (transferable functions) or must (compulsory transferred functions) be carried out by a 3rd party service provider.

The survey revealed that while there are certain similarities, respondents have different views as to what they each consider a core or a transferable (voluntary or compulsory) activity of an IORP. Based on the survey the following general observations can be made in this regard from the responses received.

All respondents consider 'overall decision making' and 'bearing end responsibility (being liable)' as a **core function** of the IORP. The majority of countries (with the exception of 4 countries) also consider the 'setting of the overall asset management strategy' as a core IORP function.

As there are two or more types of IORPs operating in some of the responding countries that are in most cases subject to different legislative requirements the following figures represent the number of IORPs' types (maximum 29) rather than number of countries (maximum 26). The survey showed that IORPs are **most often allowed to outsource** IT services (27), collection of contributions from both employers as well as employees (24), administration of customers' contracts (24), providing information (advising) to members and beneficiaries (24), claims administration (23), record keeping (23), investment management (22) and performance measurement (21). The majority of respondents also indicated that their national legislation provides for the possibility to outsource valuation of assets and liabilities (20), preparation of financial statements for plan sponsor (20), auditing of processes/reconciliations (20), insurance (biometric risks) (19), transfer of pension rights (19), payment of annuities (18), advising plan sponsors (18), payment of lump sums and program withdrawals (17) and reporting (16). One respondent specifically indicated that auditing of processes can be transferred, while reconciliation is considered a core function. Similarly under the legislation of this country and one other country, premium setting cannot be carried out by an entity other than an IORP while actuarial calculations are allowed to be provided for the IORP by a 3rd party.

However, it is important to note that at the same time some of the above functions are considered as core functions in certain other countries, for example: IT services (1), giving advice to plan sponsor (2), advising members and beneficiaries (3), investment management (3), collection of contributions from employees (4), claim administration (4), collection of contributions from employers (5), preparation of financial statements for plan sponsor (4), payment of annuities (6), valuation of assets and liabilities (6), transfer of pension rights (7), auditing of processes reconciliations (4), insurance (biometric risks) (7).

Custody of assets is a transferable function but in more than half of the cases (17) this function is required to be compulsory outsourced to a 3rd party service provider and in the rest of the cases (12) the transfer of such a function to a 3rd party service provider is allowed. It is also interesting to note that the respondents were split in their consideration as to whether compliance and compliance reporting is a core function (12) or whether this is a transferable function (15). The same applies in the case of 'reporting' (13 – core, 16-transferable).

The survey results also show that there are only a very limited number of functions required by national law to be carried out externally. Custody (17) serves as best example of these **mandatory transferred functions**. These are then followed by investment management (4), auditing of processes/reconciliations (3), payment of annuities (4), valuation of assets and liabilities (3), premium setting / actuarial calculations (2), compliance and compliance reporting (2) and performance measurement (1).

Two main different approaches to outsourcing may be identified from the above findings: on one hand, there is small number of countries (3) whose legislation prevents IORPs from outsourcing the majority of their activities to 3rd party service providers. On the other hand, there is quite a large number of cases (12) in which the national regulation requires only limited number of activities (3 – 5) to be carried out by IORPs themselves and all the rest can be outsourced.

Overview of the outsourcing practices in the surveyed countries

	AT	BE	BG	CZ	DE	DK	ES	FI	FR	HU	IE	IT 1**	IT 2**	LI	LT (PA)	LT (L40)	LU (CSRF)	LU (GIA)	LV	MT	NL	NO	PL	PT	RO	SI	SK	SE	SE2	UK
A) Overall decision making	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
B) Bearing end responsibility (being liable)	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
C) Asset management - including:																														
1. investment management	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
2. setting the overall asset management strategy	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
3. custody	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
4. valuation of assets and liabilities	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
5. performance measurement	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
D) Administration - including:																														
1. collection of contributions from employers	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
2. collection of contributions from employees	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
3. preparation of fin. statements for plan sponsor	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
4. compliance & compliance reporting	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
5. customers' contracts administration	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
6. auditing of processes / reconciliations	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
7. information to members and beneficiaries	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
8. record keeping	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
9. reporting	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
10. claim administration	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
11. transfer of pension rights	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
12. information technology	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
13. any other admin. activities (please specify):																				*										
E) Payment of benefits – lump sums/progr. withdr.	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
F) Payment of benefits - annuities	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
G) Insurance (biometric risks)	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
H) Risk management	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
I) Premium setting, actuarial calculations	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
J) Advise to plan sponsor (advisory role)	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
K) Advise to members/beneficiaries	■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
L) Other (please specify):																			*											

No IORP can be set-up in the Czech republic

Legend: ■ core functions ■ transferable functions ■ compulsory transferred functions ■ not available / no functions of IORP

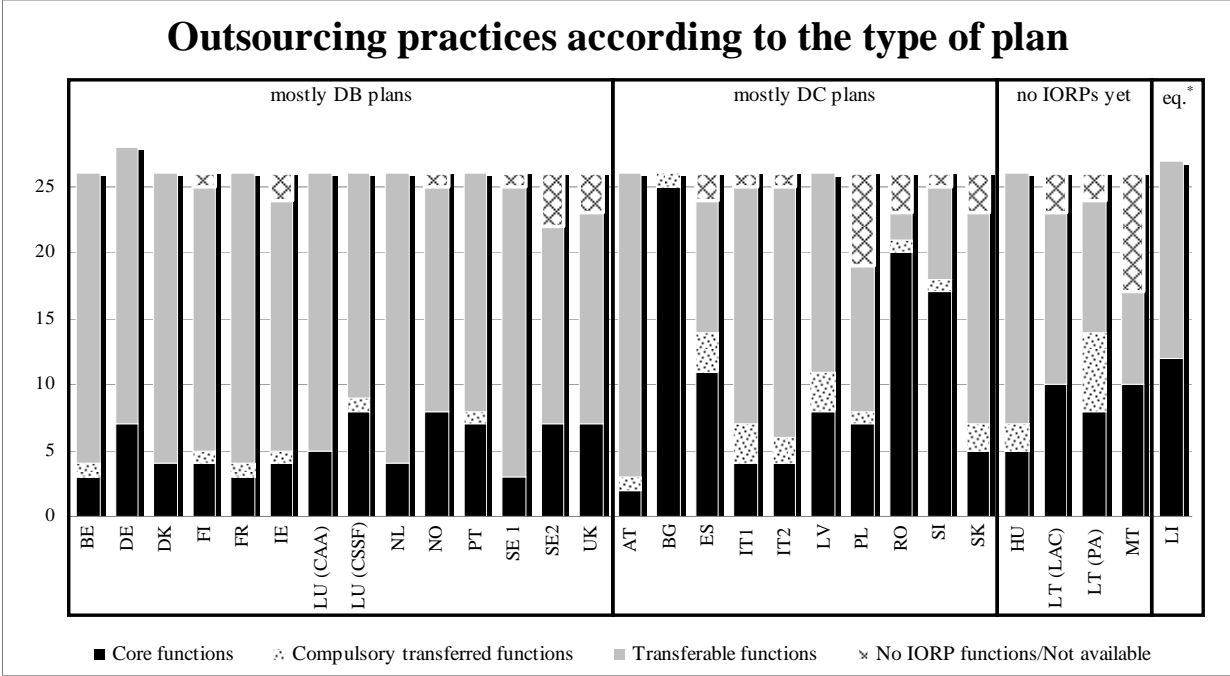
NB: Multiple answers are provided for countries where there are two or more types of IORPs each falling under different regulatory regime.

Comments:

* Malta specified the following other administrative activities (item D 13) that are core IORP functions under their national legislation - a) monitoring and ensuring that payments due to the scheme are effected on due date and in a timely manner b) ensuring that all income and disbursements are applied and effected in accordance with the IORP documents, c) take action in case where payments due to the IORP are not received on due date. Furthermore, Malta identified the following other IORP activities (item I) that are core functions under their national legislation: ensuring compliance with statutory and other obligations and in accordance with IORP’s documents, ensuring documentation is in line with applicable requirements, etc.

** Italy: column 1 is related to contractual pension funds while column 2 is related to open pension funds and pre-existing pension funds. Annuities have to be paid by insurance companies authorized to operate by competent authorities; contractual and open pension funds may directly pay annuities if they receive the authorization by Covip (actually no pension fund has requested any authorization yet).

Furthermore it can be concluded, that in case of DB plans, the number of core functions tends to be almost 100% lower than in case of DC plans. Results show that the same holds for compulsory transferred functions. However, one must bear in mind that in average there are only very few compulsory transferred functions in both types of plans. On the contrary, number of transferable functions tends to be almost 50% higher in DB plans. One country with exceptionally high proportion of core functions has not been taken into account for the purpose of the above considerations.



* eq. – in this case there is one DC and one DB plan in operation, therefore it is not possible to determine what type of plans prevails

NB: Countries are categorised as mostly DB or DC according to the different criteria (volume of assets, number of plans or members) depending on the data they supplied.

Finally, note has to be taken of the fact that not all of the IORP functions mentioned in this section are provided for in the national legislation of each CEIOPS member or observer – some are mentioned specifically and some functions are not catered for.

II.3. Supervision of service providers and powers of Competent authorities vis-à-vis service providers

As shown above, a wide range of an IORP's functions are allowed to be outsourced. Some of the outsourced functions are required by national legislation to be exercised by entities that are subject to prudential supervision, others can be carried out by entities falling outside the category of supervised institutions. In the first case, the IORP and the 3rd party service provider are under the prudential supervision of an authority which does not necessarily have to be the same for both of these institutions. In the latter case a 3rd party service provider might be unsupervised; however, the IORP retains full responsibility for the outsourced functions and its Competent authority is vested with some powers vis-à-vis the service provider. This issue is dealt with in more details below.

In particular, the survey revealed that functions related to asset management (investment management, custody, performance measurement) are most often required by national legislation to be carried out by entities that have special licences and are under prudential supervision. In one third of the cases (10) the same holds for payment of benefits (lump sums, program withdrawals or annuities). In all of these cases the 3rd party service providers are usually banks, asset managers or life insurance companies. Other transferable functions such as administration (including especially collection of contributions from both employers and employees, preparation of financial statements for plan sponsor, compliance and compliance reporting, auditing of processes) or advising the plan sponsor, members and beneficiaries are not required to be performed by licensed and supervised entities under the domestic legislation in most of the responding countries. These functions can be also transferred to the institutions which are not covered by the specific legislative and supervisory framework.

A large majority of respondents (24) indicated that an IORP's Competent authority in their country is able to obtain any data and/or reports necessary to fulfil supervisory functions from the 3rd party service provider via the IORP. This is catered for in the national legislation and/or in the outsourcing agreements concluded between IORPs and 3rd party service providers (see section II.6). Most of the Competent authorities (19) also have the power to require the 3rd party service provider itself to supply data and/or reports. Competent authorities in most of the cases are empowered to carry-out on-site inspections at the premises of service providers (21). If any breach of law by a service provider is discovered, Competent authorities in several cases (7) are allowed to impose the same variety of sanctions (with few exceptions) as on the IORP.

Where, in the same country, the 3rd party service provider is supervised by a supervisory authority different from the IORP's Competent authority, only three

countries are specifically allowed to ask the other supervisor to carry out a joint on-site inspection on the service provider, while one of them is allowed to ask the other supervisor to carry out an on-site inspection on the service provider. In 2 countries, the IORP's Competent authority is allowed only to inform the other supervisor of its reservations against the conduct of the service provider. Six respondents commented that no formal relationship would necessarily exist between the IORP supervisor and the other supervisor. However, one should bear in mind that the ultimate responsibility for outsourced functions rests always with IORP (see section II.7). Therefore the Competent authority may request the IORP to solve any problems that could arise in relation to the outsourced functions.

Finally, the survey revealed that most of the Competent authorities (17) do not assess 3rd party service providers from the perspective of concentration risk, i.e. whether 3rd parties do not provide their services for too many IORPs. One respondent clearly indicated that this assessment is an element in its supervision of IORPs and one other Competent authority noted that it considers this aspect in the process of authorisation of a new IORP or a change of a 3rd party service provider.

II.4. Limitations on outsourced activities

As mentioned in the Section II.2, in each country there are core IORP functions that are not allowed to be transferred to a 3rd party service provider. This part of survey, however, aims at exploring also other possible limitations on outsourcing of activities by IORPs. Please note that information in this section refers to the majority of an IORPs functions. Regulation with respect to some of the functions may differ.

While 4 countries commented that they do not impose any obligations on the IORP outsourcing any of its functions, the rest of the respondents (18) do impose certain obligations on IORPs in this regard. The most common outsourcing conditions that are applied on the IORP are as follows:

- to ensure that the outsourced function is carried out at a proper standard (19),
- to ensure that integrity to its own systems and controls is not prejudiced (16),
- to have procedures in place to assess the performance of the service provider on an on-going basis (18),
- to take proper steps to verify that the entity which will carry out the outsourced function is competent and financially sound (15).

The above obligations are followed closely by the obligation on the IORP:

- to satisfy the Competent authority if and when required that it has taken all reasonable steps to ensure that confidentiality will be protected on an on-going basis under the outsourcing contract (14)

- to satisfy the Competent authority if and when required that the service provider is committed for the term of the contract to devote appropriate resources to provide the indicated functions (12)
- to have contingency plans in place to enable the IORP to set up new arrangements quickly if the contract for outsourcing is suddenly terminated or if the service provider fails (10)

In some states the IORP is also subject to certain other country specific obligations.

In almost half of the cases (14) it is allowed for an IORP to transfer some of its activities to another IORP, while in the remaining cases (10) this is not possible. One respondent stated that this issue is not explicitly catered for in its national legislation, while in another 2 cases this issue is not considered relevant / applicable since the pension scheme and the IORP are the same given the trust system. From the explanatory comments provided by Belgium and Romania it seems that in these countries IORPs must primarily carry out its own activities and only secondarily serve as a 3rd party service provider for other IORPs.

In a few countries legislative limitations on the outsourcing of certain functions to certain service providers are justified predominantly by the desire to eliminate potential conflicts of interest. These limitations seek to prevent the concentration of namely the following functions in the hands of one 3rd party service provider:

- independence is required between the asset management and custody service provider,
- custodian must be independent from the insurance IORP,
- employees involved in trading and risk assessment may not participate in the performance of activities and internal control, calculations of results, risk management, preparation of management reporting.

The survey also found, that in general, the Competent authorities do not have powers to develop rules preventing conflicts of interest beyond those stipulated in national primary legislation. However, the national legislation vests these Authorities with some discretion in regard to outsourcing enabling them to impose limitations on an ad-hoc basis. This includes the power of Competent authorities to prevent the transfer of IORP functions to the 3rd party service provider in order to:

- prevent conflicts of interest or any potential restriction of professional independence,
- protect the interests of members and beneficiaries,
- protect the custodian from being hindered in exercising its duties,
- protect the Competent authority from being prevented or hindered in exercising effective supervision over IORPs.

Furthermore, 8 Competent authorities indicated that their national legal framework allows them to order an IORP to outsource some of its activities. Such measure is, however, allowed only on an individual basis and serves as a sanction/remedy mechanism.

The survey also examined possible geographic limitations of outsourcing. It revealed that more than one third of the respondents require the custodian to be located in the EU/EEA. Furthermore, three countries indicated that asset management can be outsourced only to an EEA based investment manager.

II.5. Main Administration of the IORP

The survey also sought to establish how Member States have addressed the issue of where the administration of an IORP is located following the definition of Home Member State in Article 6 of the Directive which states that the Home State is the EU country where the IORP has its main administration. Please note that information in this section refers to the majority of an IORP's functions in each country. Regulation with respect to some (minority) of the functions may differ.

The survey found that different countries have addressed this in different ways and it is not clear in all cases what 'local presence' requirements are required of IORPs in different Member States:

- 9 countries stated that the home state is where the IORP is registered or has its registered office or its main administration. One of these countries specified that board meetings must be held at the registered office;
- 2 countries require that the head office of the IORP and/or its central headquarters are located in the home state for the IORP to be deemed as being administered in that state;
- 5 countries require that the administration or asset manager is located in the respective jurisdiction;
- 2 countries deal with this on a case by case basis. One of these countries elaborated that the decisive criteria would be that the Competent authority can continue to carry out adequate supervision, having easy access to records and management;

II.6. Mechanism of outsourcing

Please note that information in this section refers to the majority of an IORP's functions in each country. Regulation with respect to some (minority) of the functions may differ.

The respondents are nearly split in their approach to the procedure that must be undertaken by IORP before the actual transfer of functions occurs. In 14 cases, the outsourcing of IORP's functions is subject to approval by the Competent authority or notification (priori or ex-post) to it and in 9 cases, no approval of the Competent authority is required regarding the transfer of an IORP's function.

In the former scenario, more than half of the countries (8 out of 14) require IORP to get a prior approval before the actual transfer of functions can happen. However, in two countries this applies only with respect to the transfer of certain functions, such as custody and asset management. For the transfer of other functions, these two countries require an ex-post notification. In three cases ex-post notification suffices and one state requires prior notification, however, only when outsourcing to a custodian.

The rest of the respondents (9) indicated that no such notification or approval procedure must be followed in their countries. However, some of these respondents pointed out, that there are certain other requirements with a similar effect.

Subcontracting of the transferred activity by the 3rd party service provider (chain outsourcing) is allowed in slightly less than a half of the cases (12). Moreover, there are several cases (9) where the national primary law is silent on this issue and the chain outsourcing is allowed in practice subject to certain conditions, such as ensuring that the Competent authority shall have the right to obtain information it might need from the subcontractee or that the IORP still has the necessary powers to issue instructions and obtain information from the subcontractee.

Four respondents indicated that chain outsourcing is not allowed under their national legislation. In a further two cases this issue is not expressly regulated by law. In these cases, respective Competent authorities do not allow IORPs' 3rd party service providers to enter into subcontracting agreements. One of these cases indicated that this approach is justified by other provisions of its prudential law regulating the overall design of the IORPs. Only five countries allowing subcontracting of the transferred activity indicated that this arrangement is subject to a prior an ex-post notification. In one case prior approval is required. In all other cases no formal approval by Competent authority or notification to it is required.

A majority of the respondents (17) indicated that their legislation or Competent authority requires IORPs to have a legally enforceable document for any outsourced activity. Outsourcing arrangements are mostly based on a contract concluded between the IORP and a 3rd party service provider. A written form of the contract is required in most of surveyed countries (20). Relevant national legislation provides also for the minimum content of such outsourcing contract. In 13 countries the respective law or binding instrument issued by the Competent authority prescribes requirements on exit provisions, 10 countries have minimum data protection requirements set in the law and 4 countries impose explicit or implicit costs ceilings. There are many other issues that the national laws in the respective countries require to be included in this type of contract, such as:

- confidentiality clause,

- information duty of the 3rd party service provider, its cooperation with auditor and Competent authority,
- possibility for Competent authority to carry out on-site inspections at the premises of 3rd party service provider,
- requirement to keep all books in IORP's home country,
- requirements to safeguard continuity,
- governance rules,
- obligation to inform the IORP in case of problems,
- necessary powers for the IORP to issue instructions and obtain information,
- rules on remuneration/compensation,
- limitation with respect to duration of outsourcing contract,
- the applicable law,
- jurisdiction clause.

Four countries indicated their legislation and Competent authority do not impose any requirements in regard to the outsourcing contract.

II.7. Responsibility for outsourced functions

All respondent countries indicated that under their national legal framework the IORP still remains ultimately responsible for a function which it has outsourced to a 3rd party service provider. The same holds true for trustees in case of pension trusts as well as for compulsory outsourced functions. Only one country indicated that in case of compulsory outsourcing the responsibility for transferred functions is with the service provider.

Since all the respondents have indicated that IORP retains its responsibility for functions outsourced to the 3rd party service providers, no case may arise where a Competent authority is unable to obtain any information necessary for fulfilment of its supervisory duties either from service provider or the IORP itself. Thus it can be concluded that all Competent authorities have the necessary powers and means to check whether outsourced activities are carried out in accordance with the supervisory rules.

II.8. Providing information to members and beneficiaries with respect to outsourcing

Please note that information in this section refer to the majority of an IORP's functions in each country. Regulation with respect to some (minority) of the functions may differ.

Most countries (18) responded that their IORPs are not required by the national legislation to provide any information to members and beneficiaries in relation to outsourcing of activities. In few countries (4) the IORP must inform members ex-

post on the functions carried out externally. In three countries this information must be given in advance but only with respect to certain functions of the IORP.

II.9. Cross border outsourcing

None of the respondents have in place any specific rules with regard to cross-border outsourcing other than have already been discussed in connection with geographic limitations of this activity (see section II. 4 of this Report). One country noted that the Competent authority is allowed to conclude collaboration agreements with other authorities with respect to implementing the rules applicable to IORPs.

III. Conclusions

The survey revealed that all Member states allow IORPs established within their jurisdiction to outsource some of their functions to 3rd party service providers. Despite certain similarities, Member States have different views to a majority of issues in the regulation of outsourcing. Thus only general observations can be made in this respect:

1. In all countries, IORPs retain final responsibility for any outsourced functions. The majority of countries consider 'overall decision making' and 'bearing end responsibility (being liable)' along with the 'setting of the overall asset management strategy' as a core function of the IORP. However, countries differ in their consideration of what other activities are considered as core or transferable.
2. While many of the IORP functions are considered by various countries as transferable (e.g. IT, investment management, payment of annuities etc.), there is no single common approach among Member States in this respect. A function considered transferable by one country can be considered core in another country. Such a different approach could be caused by the inherent differences between different pension schemes. The Report analysed existing differences between DB and DC plans and revealed that in case of the former more functions are allowed to be transferred than in the latter case. Nevertheless the deeper rationale for different approaches existing in different Member States was not analysed.
3. All countries considered custody of assets as a transferable function. However, approaches differ considerably as to whether such activity is compulsory outsourced to a 3rd party service provider or transfer is voluntary.
4. Divergence was also revealed as to the type of service providers to whom functions can be outsourced. Some countries require certain functions – mostly those directly related to the IORP's core activities - to be outsourced to the entities established under specific legal framework and being supervised by Competent authorities within this framework (supervised entities) while other functions (mostly overall functions which are not directly related to the IORP core activities) can be carried out by undertakings which do not fall under specific prudential supervision.
5. Competent authorities have different powers over the service provider to whom the function is outsourced. Most of them, however, have a power to carry out on-site inspections in 3rd party service providers and obtain all necessary reports directly from them. Moreover, the ultimate responsibility for outsourced functions is borne by the IORPs in all Member States. Consequently, IORPs have to manage all possible problems arising from outsourced functions and provide all the requested information to their Competent authorities. Thus it can be concluded, that all Competent

authorities have the necessary powers and means to check whether outsourced activities are carried out in accordance with the supervisory rules as required under Article 13 (d) of the Directive.

6. Almost all countries require outsourcing to be subject to a written agreement. Requirements regarding contents of this written agreement vary amongst Member States. Approximately a half of the countries make the validity of outsourcing agreement subject to the prior approval of the Competent authority or notification to it, while the rest prescribes no such requirement.
7. The majority of countries impose various obligations on the IORP with respect to the outsourced function and the service provider that is appointed to carry out the function in question. However, obligations imposed vary between these countries.
8. In only a half of the countries it is possible for an IORP to outsource some of its functions to another IORP. Chain outsourcing is allowed in large majority of countries.
9. Geographic limitations on outsourcing seem to apply namely in the area of custody and also to a more limited extent in the area of asset management. In both cases outsourcing is quite often possible only to the 3rd party service providers located in the EEA.
10. The issue of the location of the administration of the IORP seems to be addressed differently across Member States.

Pursuant to Article 13 (b) of the Directive each Member State shall ensure that the Competent authorities have the necessary powers and means to supervise *relationships* between an IORP based in its territory and a 3rd party service provider. Information with regard to many different aspects of outsourcing that was supplied for the purpose of this report indicates that none of the Member states is in violation of this obligation. It needs to be pointed out, however that for this purpose, the Directive is not very clear in as to what exactly should be considered as *relationships* between IORPs and 3rd party service providers.

It can be concluded that there is a wide range of legislative and supervisory approaches among the Member States regarding outsourcing. This project has completed a fact finding exercise and has not analysed the rationale for different approaches taken by Member States.

Albeit the analysis shows that there are differences in what is considered to be a core or transferable function of an IORP, whether it should be transferred voluntarily or mandatorily, whether these functions have to be performed by

specific type of service provider and points out differences in supervisory approaches toward 3rd party service providers, these do not seem to represent any obstacles for the functioning of the common market in this area. No immediate actions from CEIOPS or the European Commission are required.