

Occupational Pensions

The Occupational Pension Schemes (Cross-border Activities) Regulations 2005

Government Response to Consultation

November 2005

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The Occupational Pension Schemes (Cross-border Activities) Regulations 2005: Government Response to Consultation

Chapter one: Introduction

1. On 13 May 2003 the European Council of Ministers adopted Directive 2003/41/EC on the Activities and Supervision of Institutions for Occupational Retirement Provision (commonly known as the 'IORP' or 'Occupational Pensions Directive'). This Directive provides a framework for the operation of and supervision of occupational pension schemes. Member States were required to have transposed the provisions of the Directive into national law before 23 September 2005. However, given the complexity of this particular issue, the UK has decided that it is necessary to delay the full implementation for a short time to ensure that the legislation is fit for purpose. We anticipate, therefore, that this legislation will come into effect towards the end of 2005.

2. The adoption of this Directive is an important element of the Financial Services Action Plan and represents a first step towards a single market for occupational retirement provision. To this end, the Directive allows occupational pension schemes established in one EU Member State to be sponsored by employers in other Member States. Pension schemes operating in this way are said to be engaged in "cross-border activity".

3. There are two main scenarios where it is envisaged that "cross-border activity" will take place. Firstly the "Multi-national Model", where a multi-national operating in a number of EU States through subsidiary companies may wish to consolidate its pension arrangement in one Member State and, secondly, the model where an employer in one Member State wishes to site their pension scheme in another Member State for commercial reasons.

4. In drafting the cross-border Regulations, our intention is to support schemes wishing to operate cross-border and we hope therefore to strike the appropriate balance between: implementation of the Directive's legal requirements; protection for those who are contributing to a scheme based in another Member State; and regulating in a proportionate way. To this end, a public consultation exercise was held over the period 4 August 2005 to 30 September 2005.

5. As part of this process, a consultation paper was produced and made widely available. In addition, several meetings were held with representatives from within the Pensions industry to discuss pertinent issues and seek opinions.

6. In all, 54 written responses to the Government's consultation paper were received, the overwhelming majority of which were from organisations with a direct interest in the Regulations. A list of these respondents is reproduced at Annex A. The Government would like to thank all those who took the time to contribute to the consultation process.

7 The purpose of this paper is to summarise the views received and the Government's response to them. This paper replicates the structure of the original consultation paper, considering each of the regulations in turn together with the relevant questions posed. It gives a brief description of the Government's original proposal for implementation, accompanied by a relevant selection of responses and a summary of any further action the Government proposes to take in light of the responses. A further section has also been provided to deal with supplementary questions posed by respondents.

8. The Government accepts that this is a complex and new area for many schemes and advisors. Therefore, the Government and the Pensions Regulator will work with schemes and advisors to operate the requirements of these Regulations in a pragmatic and proportionate way.

Summary of Responses and the Government's Response

Chapter two: Regulations 2 and 3 - Definitions

Question 1: Do these definitions enable us to clearly identify when Cross-border activity, relevant to occupational pension schemes, takes place?

Original view

Definition of European employer

2.1 In defining "European Employer", we considered the definition provided by the Directive (article 6 (c)), which refers to a "sponsoring undertaking"- as being "*any undertaking or other body.....which acts as an employer ...and which pays contributions into an institution for occupational retirement provision.*" Our view was that there were two key factors which determined whether a potential employer falls within the definition. Firstly, the sponsoring employer should have some form of fixed establishment in a given Member State; secondly, the location of its employees. This seemed logical as the employees would acquire rights in accordance with occupational pensions legislation in the Member State where they are located. This also had the benefit of differentiating between what might be the registered office of a company (lacking the presence of those employees) and a branch in another Member State, where the employees would be based.

Definition of "host Member State"

2.2 The Directive defines "host Member State" as meaning "*the Member State whose social and labour law relevant to the field of occupational pension schemes is applicable to the relationship between the sponsoring undertaking (i.e. employer) and members.*" We therefore linked our definition of "host Member State" to the Member State in which the European employer has employees who would be subject to the social and labour law of that Member State.

Definition of “seconded worker”

2.3 This definition ensures that schemes with seconded workers who are posted from the UK to other Member States for short periods, with the intention that they return to the same employer, are not unintentionally caught by the scope of the Directive. The time period of 12 months mirrored the 12 month period specified in the Mobile Workers Directive

Responses

2.4 There were some differing views on the suggested definitions:

Definition of European employer

“An issue that has caused us a lot of concern relates to the definition of “European employer”. As the draft regulations stand, a person who employs “qualifying persons” seems automatically to be a “European employer”, irrespective of whether those qualifying persons are actually members of a pension scheme.” (*Hewitt, Bacon and Woodrow*)

“The fact that an employer, who participates in and contributes to a scheme, also happens to employ persons who are located overseas but who are not members of the scheme would appear to be irrelevant to the funding of the scheme or to other pensions issues.” (*Lovells*)

Definition of “host Member State”

The definition of “host Member State” allows the host Member State to be any country where the relevant employee's activities are significant enough to be subject to local labour and social laws. One can therefore envisage a situation where an employee is subject to the social and labour laws of several jurisdictions in which they are active, although they are still working mainly in the UK. In these circumstances, presumably, they should not be subject to the regulations. (*Association of Pension Lawyers*)

Definition of “seconded worker”

“We believe that the regulations go beyond what is required under the EU Pensions Directive..... We suggest, therefore, that the regulations are amended, perhaps by a tightening of the definitions of “qualifying person” or “seconded worker” and “European employer” respectively so that the cross-border funding requirements only apply to schemes with members who truly are employees of companies in other Member States and not to the majority of the UK's defined benefit schemes. “(*Lane, Clark and Peacock*)

“Our main issue with the draft regulations relates to the restricted scope of the definition of ‘seconded worker’ to those employees seconded for a maximum of 12 months. As secondments tend in

practice to be for periods of 2 to 3 years, we believe that the current draft will mean that seconded workers will be seen to be excluded from UK pension schemes as employers will not be prepared to go through the authorisation process or amend their scheme to allow for the social and labour laws of other EU states.” (*Standard Life*)

“We are also concerned that the retrospective nature of the regulations given that they would apply to any new secondments after 22 September, even though at this time we do not know what the requirements are. We would have even greater concern if the regulations apply to existing secondees, particularly if a future move from one non-UK EU Member State to another would be classed as post 22 September 2005 event.” (*Unilever*)

Government response to comments

Definition of “European employer”

2.5 The Government has made an amendment to the definition of “European employer” to ensure that the “European employer” must be making or propose to make contributions in respect of “qualifying persons”. This will ensure that schemes do not become Cross-border schemes just by virtue of having employees in another Member State. The employer must be “making or propose to make contributions” in respect of those employees before this is possible.

Definition of “host Member State”

2.6 In a situation where an employee worked part of the time in the UK and spent some time in other EU Member States, whilst there is no single determining factor in deciding which social and labour law would apply to a mobile worker, a key element would be whether that person was usually based in the UK or working in another Member State on a term of secondment (which is dealt with in the next paragraph). If that person usually worked in the UK, but was seconded for a period up to 5 years after the regulations come into force, they would not be deemed to be working for a “European employer”, nor be treated as being based in a host Member State as the UK’s social and labour law would still be deemed to apply. The Government see no reason to change the definition of “host Member State”.

Definition of “seconded worker”

2.7 The Government has revised the definition of “seconded worker” in response to the concerns of the pensions industry. The revised definition of “seconded worker” will allow anyone seconded prior to the Regulations coming into force, to be able to remain on secondment for the duration of that secondment, without becoming a qualifying person, so that such a person will not be caught by the Cross-border Regulations. Secondments taken after the Regulations come into force will be able to run for a period of 5 years before an employee would be treated as being located in another EU Member State

and become subject to the Cross-border Regulations. We have also ensured that workers who are posted on secondment but who will be working on a local contract do not become subject to the Regulations, by only requiring that their contract prior to going on secondment was with a UK employer (which the previous definition did not do). In order to fall within the definition of “seconded worker”, the person will also have to expect at the time the posting starts to return to the United Kingdom to work for his original employer, or expect to retire at the conclusion of the posting.

Chapter three: Regulations 4, 5, 6 and 7 - Applications for General Authorisation to accept Contributions from European Employers

Question 2: Is there any other information we should require schemes to produce at the general authorisation stage? Is there anything we have requested which is inappropriate?

Question 3: Do the arrangements for existing Cross-border schemes to show they are “fully funded” seem reasonable?

Question 4: What data/information exists about the form, membership and funding of existing Anglo-Irish schemes?

Original view

3.0 The different information requirements for different categories of scheme is due to the Directive’s additional requirement that schemes must be “fully funded” at all times (article 16(3)). We interpreted this as being able to meet the statutory funding objective under part 3 of the 2004 Pensions Act and tested by an annual valuation (not the triennial approach which domestic schemes may adopt). Therefore, for example, cross-border money purchase schemes would not be required to provide actuarial valuations whilst defined benefit (DB) schemes would. Similarly new DB schemes without members would be authorised and given a two year period to provide an actuarial valuation, as having no assets or members, valuations would be meaningless; whereas existing domestic DB schemes wishing to become Cross-border schemes would first have to provide a valuation confirming that they are fully funded before authorisation is given.

3.1 Any DB schemes already operating Cross-border and wishing to continue to do so would be required to provide actuarial valuations confirming that they meet the statutory funding objective requirement. We realised that these schemes may have only just produced a valuation under the old legislation and could not reasonably be expected to embark on another in such a short period of time. We therefore proposed, through the regulations and the subsequent commencement order, to introduce a procedure whereby these schemes could be authorised on production of their last valuation under the previous Minimum Funding Requirement (MFR) Regulations and then given a maximum time period of one year to reach their next effective valuation date under the new legislation, and a further year to produce the

valuation with reference to that date and bring funding up to the appropriate level. Schemes would then have to produce annual valuations.

Anglo-Irish Schemes

3.2 We needed to examine whether any of these schemes should fall under cross-border arrangements. Although we understood that there were around 90 of these schemes, we sought to establish more information about their form, membership and funding arrangements. Discussions were taking place with the European Commission to determine whether, and, if so, how the requirements of article 20 of the directive should actually apply to these schemes.

Responses

3.3 Whilst the issue of general information requirements did not appear to be of great concern, there was considerable comment on the method by which schemes should show that they were “fully-funded”. Three schemes provided details of their Anglo-Irish scheme and comments were also provided in this respect from several schemes.

Funding Requirements

Can we sectionalise Cross-border elements from domestic ones?

“Fully funded is a very onerous requirement. It is not necessary under the Directive for the whole scheme to be fully funded. Therefore, it would seem appropriate that the cross-border element were sectionalised to allow it only to be fully funded.”
(Association of Consulting Actuaries)

“It also appears to us that where more than one employer contributing to a segregated multi employer scheme is a European Employer, then there will have to be individual sections for each employer. We cannot see the purpose of this and suggest instead that schemes be permitted to segregate into two sections – a section with the authority to run on a Cross-border basis and one without.” *(Mercer Human Resource Consulting)*

The Statutory Funding Objective should be sufficient for cross-border schemes to meet Article 16 (3)

“In our view the statutory funding objective (SFO) and the proposed recovery plans (defined in section 226 Pensions Act 2004) that will be put in place where the SFO has not been met – should be sufficient to meet the requirements of article 16 of the directive.” *(CBI)*

Regulation 8 (3) – where statutory funding objective not met- period to secure “full-funding” should be extended

“Reg 8(3): Given that valuations often take 12 months to complete, this is a very short period in which to secure the funding position of the scheme. We would suggest that the period be 12 months from the date the valuation is signed off.” (*Barclays*)

Anglo-Irish Schemes

Transitional arrangements

“Schemes are required to demonstrate that they have complied with and provided copies of documentation relating to scheme specific funding. Given the timetable for bringing Part 3 of the Pensions Act 2004 into force, there should presumably be some transitional provisions for these requirements.” (*Association of Pensions Lawyers*)

“We would prefer that the period over which existing Cross-border schemes have to become ‘fully funded’ is extended to five years following the publication of the revised regulations, rather than ending in September 2007.” (*Mercer Human Resource Consulting*)

“If these schemes are deemed to be Cross-border, we believe that they should be allowed an extended transitional period to cease cross-border activities or to elect to become “Cross-border schemes” (*Hewitt, Bacon and Woodrow*)

Possible exemption for Anglo-Irish schemes

“The trustees and the sponsoring employer are very keen that the scheme is not deemed a Cross-border scheme for the purpose of regs. The impact on funding would be significant and disproportionate to the very small number of Scheme members who are based in the Republic of Ireland.” (*Boehringer Ingelheim* - 12 Active members, 14 deferred pensioners, 2 pensioners)

“We suggest that Anglo-Irish schemes should be exempt from the requirements of article 20 of the EU directive.” (*Towers Perrin*)

Exemption for charities/allowing a percentage of affected members to fall outside the Cross-border regs

“There are a number of ways in which the impact of these regulations can be softened while still achieving the primary objective: Provide a blanket exception for pension schemes sponsored by charities; Introducing a *de minimis* rule based on the percentage of members affected. E.g. 10% of active members; exempting schemes with UK and Irish members set up under the “split approval” tax regime prior to

1994. “(Royal National Lifeboat Institution – active members 1106, deferred members 361, pensioners and dependants 768)

Government response to comments

Funding Requirements

Can we sectionalise Cross-border elements from domestic ones?

3.4 There is a material difference between the requirements of article 16(3) and articles 16 (1) and 16 (2) of the Directive. Article 16 (3) of the Directive requires that in the event of Cross-border activity, the whole of a scheme is fully-funded, whereas articles 16(1) and 16(2) refer purely to domestic schemes. Hence we cannot permit schemes to sectionalise parts relevant to European members from parts relevant to UK members.

Statutory Funding Objective should be sufficient to meet Article 16

3.5 The statutory funding objective (section 226 PA2004) will allow schemes a recovery period (which may run several years). Article 16 (3), on the other hand, requires that in the event of Cross-border activity, schemes are “fully-funded” at all times (see para 3.4). Hence, if a scheme was in recovery for several years, it could not be considered to be fully-funded at all times. Hence we cannot agree with this proposal.

Regulation 8 (3) – where statutory funding objective not met- period to secure “full-funding” should be extended

3.6 We agree that the period in which a scheme is required to resecure “full-funding” is too short and in view of this we have extended the period by which a scheme must secure full-funding from 12 months to 24 months from the effective date of the last valuation. This will have at least the same effect as the respondent’s request. This corresponds to the requirements for Cross-border schemes as defined in paragraph 6 of Schedule 2 of the Scheme Funding Regulations 2005.

Anglo-Irish Schemes

Transitional arrangements

3.7 There are some transitional arrangements already built in to the regulations for existing Cross-border schemes, who for now will only be required to produce their most recent valuation under the minimum funding requirements. The period within which these schemes will then be required to meet the statutory funding objective has also been lengthened to 22 September 2008.

N.B: Transitional arrangements will, however, not be in place for any existing domestic schemes wishing to become Cross-border schemes. These schemes will be required to show that they are “fully-funded” before they can

be authorized to operate Cross-border (Article 16 (3) IORP directive refers). They will be entering into this process on a voluntary basis, and for this reason will not benefit from transitional arrangements.

3.8 Any Cross-border schemes who wish to revert to being a domestic scheme will be given until 22 September 2008 to secure the current and future rights of those members based in Ireland which they accrued whilst in employment there.

3.9 Anglo-Irish schemes will be given a 3 month period in which to elect to become Cross-border schemes and make applications for authorisation and approval. We consider 3 months to be a sufficient time to gather the appropriate information required by the Regulator. The Regulator will in addition ensure that any existing Cross-border schemes are given adequate support and information to guide them through the process. Schemes can continue to operate during the whole authorisation and approval period up to 29 August 2006.

Possible exemption for Anglo-Irish schemes

3.10 As an update to the information supplied in our consultation paper, we can inform you that, following discussions with the European Commission to determine how Anglo-Irish schemes should be treated in terms of the Directive, exempting these schemes from the regulations is not a possibility. However, the Government and the Pensions Regulator are keen to work with these schemes that believe they may fall under this provision, to examine how the requirements may impact on them.

Exemption for charities/allowing a percentage of affected members to fall outside the Cross-border regs

3.11 Unfortunately, the Directive does not allow any exemption for charities, hence this is not possible. It also does not allow us to adopt a *de minimis* rule based on the percentage of members affected.

Chapter four: Regulation 9, 10, 11 and 12 - Approval in relation to a particular European Employer

Question 5: Does the information requested for schemes seeking approval (Schedule 1, para 6) seem reasonable and appropriate? Is there anything else we should request? If so, please state why.

Original view

4.0 The proposed Regulations (regulations 9, 10 and 11) detailed the information required in each of the cases mentioned at the approval stage, and the draft regulation 12 set out the conditions which must be met before an approval could be given. Much of this information would confirm or update the information requested at the authorisation stage (unless the two processes run in parallel). The additional information was based on a list proposed by

Member States at the CEIOPS¹ working group where the UK is represented by an official from the Pensions Regulator. The list would enable the Pensions Regulator, when considering approval of a specific arrangement between an employer and a scheme, to make an informed decision as to whether the administrative structure of the scheme is compatible with the operations being proposed in another Member State – in accordance with article 20 (4) of the directive.

Responses

4.1 There was little response on this issue other than:

“The three month period for applying for approval in relation to cross-border activity seems very short. We would suggest that the Regulator be permitted to extend this. “
(*Association of Pension Lawyers*)

Government response to comments

4.2 The information required does not greatly exceed that which schemes should already have readily available. The Regulator will additionally be providing support (in the form of flow-charts) and advice for these schemes, and it is hoped that pre-populated forms will also be made available. The Government therefore consider the 3 month time period to be sufficient.

Chapter five: Regulation 14 - Modification of Pension Legislation in relation to European Members of Cross-border Schemes

Question 6: We are in the process of creating a list of the legislation which should be excluded for the reasons given in regulation 14. The draft suggests areas of Pensions law to be included. We would be grateful for suggestions as to what should be included in the list.

Original view

5.0 A situation could arise where a UK scheme becomes a Cross-border one and has, for example, members based in another Member State (European members) as well as UK members. The European members will be subject to the relevant legal requirements of that Member State and the intention of this regulation is that those European members should not be under the dual requirements of both the Member State in which they are based and UK law. In these cases, although the scheme is a UK scheme, we need to exclude certain requirements under UK pensions legislation which would otherwise apply to European members in the same way as they do to UK members. The draft regulation sought to achieve this by providing a list of appropriate legislation which should be excluded.

¹ The Committee of European Insurance and Occupational Pensions Supervisors

Responses

5.1 There were 3 helpful responses to this question:

“We would suggest that requirements for membership of pension schemes to be voluntary and the new three month vesting provisions under the Pensions Act 2004 should not apply to this group of people.”
(*Association of Pension Lawyers*)

“We note that it is not proposed that preservation legislation should apply to EU employees. We would suggest that section 264 PA2004 should be similarly disapplied.” (*Barclays*)

“We would also include clause 111 (Additional Voluntary Contributions) of Pensions Act 1993.” (*Association of Consulting Actuaries*)

Government response to comments

5.2 In the UK, the requirement for membership of pension schemes to be voluntary is dealt with by employment law. In a case where a UK based scheme is being sponsored by a European employer, this legislation could not be imposed on the European employer. The European employer would therefore still be governed by that Member State’s legislation on membership of occupational pension schemes.

5.3 The Government has now included section 264 PA 2004 (three month vesting provisions) (new sections PSA 1993 -101AA to 101AI) in this list. We have not included legislation relating to additional voluntary contributions as this is due to be repealed in April 2006.

5.4 The Government also discussed with the Pensions Ombudsman whether the right to approach the Pensions Ombudsman should be restricted to UK members. We agreed that, as UK schemes are UK regulated and UK enforceable, European members should have the right to approach the Pensions Ombudsman. We have therefore not included this legislation in our list, i.e. we have extended the right to approach the Pensions Ombudsman to European members of UK based schemes.

Chapter six: Regulation 15 – Ring-fencing of Assets

Question 7: Does the approach to ring-fencing seem reasonable? Should we consider any other options for ring-fencing?

Original view

6.0 The suggested circumstances for issuing a ring-fencing notice (Regulation 15) were fairly straightforward; where a scheme’s assets might be misused or misappropriated or where there is a material threat to the interests of the members. We gave the Regulator the option of two forms of ring-fencing. The first option allowed for an accounts based division of the assets

and liabilities of a scheme attributable to the European employer to whom the ring-fencing notice is given; the second option involved the actual physical separation of assets attributable to a specific European employer.

Responses

6.1 There were two responses on this issue:

“We believe that the best course of action would be to require notional ring-fencing in most cases.” (*Association of British Insurers*)

“I think there may be a problem with the wording of this part of the regulations. Once a ring-fencing order has been issued, the scheme would then become a “segregated multi-employer scheme” by the definition in the regulations. At this point, from Regulation 2(3), the Regulation 15 and the ring-fencing would no longer apply to the scheme as a whole, but only to the sections individually. Perhaps the regulations could be re-worded to be clearer?” (*Barnett-Waddingham*)

Government response to comments

6.2 Looking at the request for “notional ringfencing in the majority of cases”, the decision to ring-fence will be at the discretion of the Pensions Regulator, and whilst we agree that, where possible, notional ring-fencing would be the preferred option, we must still allow for the possibility of physical ringfencing in cases where funds have been either severely misused or misappropriated.

6.3 With regard to the wording of “ring-fencing” regulation, as the Pensions Regulator would be carrying out this task the Government believes that this anomaly would not arise and the definition of “segregated multi-employer scheme” would not apply where the Regulator has carried out ring-fencing.

Chapter seven: Regulation 16 - Functions of the Regulator in relation to institutions administered in other Member States

Question 8: Does the suggested list of social and labour law provide sufficient member protection? Do we need to add anything to this list?

Original view

7.0 Where a scheme based in another Member State intends to operate in the UK, article 20 (5) of the directive requires the Regulator to provide the competent authority of that Member State with details of the requirements of UK pensions legislation with which the scheme must comply. Section 293 (PA 2004) sets out the procedure the Pensions Regulator must follow in relation to these schemes and provides for regulations to set out the relevant requirements of pensions legislation for such schemes.

7.1. In considering which provisions of UK pensions legislation schemes based in other Member States should comply with (Regulation 16) we took account of the IORP Directive's interpretation of social and labour law which is referred to in recital 37. We sought to ensure that UK members, when the scheme is based outside the UK, were offered a similar level of protection as those members of schemes based in the UK, for example, the option to approach the Pensions Ombudsman and to have their pension rights indexed. The protection afforded to UK schemes by the Pensions Protection Fund (PPF), however, does not apply to schemes established outside the UK and was therefore not included in the list.

Responses

7.2 Three responses requested clarification and inclusion of certain legislation.

"We note that it is not clear the extent to which Cross-border schemes will relate to the PPF." (*Unilever UK*)

"The list seems appropriate but we would suggest that the Regulations should clarify that these protections do not apply to pre-enactment benefits." (*Association of Pension Lawyers*)

"We would also include clause 111 (Additional Voluntary Contributions-AVCs) of Pensions Act 1993" (*Association of Consulting Actuaries*)

Government response to comments

7.3 In our consultation we stated that UK members of cross-border schemes based outside the UK will not be afforded the protection of the PPF (PPF regulations exclude these schemes from membership). We have, however, not excluded this legislation for European members of UK based schemes (regulation 14), who will be able to benefit from the Pensions Protection Fund.

7.4 The only members who could benefit from pre-enactment benefits would be members of existing Cross-border schemes. These are Anglo-Irish schemes. Until now, all members of Irish pensions schemes have benefited from such things as UK indexation of pensions rights, we therefore intend to ensure that these pre-enactment benefits are preserved for members of these schemes.

7.5 As previously mentioned, AVCs will be revoked from April 2006, hence this legislation has not been included in our list.

7.6 We also discussed with the Pensions Ombudsman whether UK members of schemes based elsewhere in the EU should have the right to approach the Pensions Ombudsman. We agreed, that given the approach we have adopted in paragraph 5.4, (where the UK scheme with European members is regulated by the UK Regulator), any disputes involving a scheme

based elsewhere in the EU should be dealt with by the administration in that Member State as any determinations made in relation to complaints by Cross-border scheme members would be enforceable through the legal framework of the Member State where the scheme is based. Hence we have not included this legislation in our list. This is a change to the approach described in our consultation paper.

Chapter eight – Other issues raised

8.0 There were a number of other issues raised by respondents which were not specifically mentioned in the consultation document. This chapter deals with those queries:

Issue Raised

8.1 “What is the effect of the Directive if the Regulations are not in force by 23 September 2005?” (*Eversheds*)

Government response

8.2 Until the regulations come into force, the Directive will not impact directly on UK schemes. The Government has informed the European Commission that the delay is simply to ensure the efficient implementation of the Directive.

Issue Raised

8.3 (i) One of our schemes' entire active membership is located in Gibraltar and we are unclear of the status of Gibraltar vis-a-vis the UK for the purposes of the draft regulations.
(ii) We have a number of deferred members and pensioners who were formerly employed in EU Member State countries where we no longer employ any active members. Currently, no cross-border contributions will be made once the regulations have come into force. We would like to ensure that these individuals/countries are not caught under the regulations. (*both Barclays Bank*)

Government response

8.4 (i) For the purposes of the Cross-border regulations, and in considering whether Cross-border activity takes place, Gibraltar will not be treated as a separate Member State.
(ii) The purpose of the Regulations is to enable schemes to be authorised to receive contributions from European employers. Where contributions have ceased and there are no qualifying persons (that is, active members based in other EU Member States), the Regulations will not impact on these schemes.

Issue Raised

- 8.5 (i) “The definition of “survivor” would appear to need to have an explicit reference to civil partners.”
(ii) It is not apparent with the amended definition of “occupational pension scheme” as amended by section 239 of PA 2004, self employed persons would be eligible to participate in an occupational pension scheme. If that it is the case, the references to qualifying self-employed persons are superfluous. (*both Lane, Clark and Peacock*)

Government response

- 8.6 (i) The definition of “ the survivor” has now been changed to include surviving civil partners of members.
(ii) In order to comply with the requirements of the IORP Directive, the definition of Occupational Pensions Scheme is compatible, in the Government’s view, with being applied to the self-employed, therefore these Regulations need to retain these references.

Issue Raised

- 8.7 The definition of ‘segregated multi employer scheme’ must be improved. The difficulty is with part (b) of the definition, which requires that ‘a specified proportion of the assets of the scheme is attributable to each section of the scheme’. Unless the proportion of contributions paid to each section of the scheme is always the same and each section follows identical investment strategies, this cannot be achieved. We suggest instead that part (b) is replaced with:

(b) The assets of the scheme attributable to each section cannot be used for the purpose of any other section. (*Mercer*)

Government response

- 8.8 We have maintained consistency with the definition in the draft scheme funding Regulations and (b) of the definition now refers to “a specified part or proportion of the assets.....”. We see no need to move from that consistent approach.

Issue Raised

- 8.9 “We would welcome clarification as to how these draft regulations are intended to apply in respect of section 615 schemes.”
(*Society of Pension Consultants*)

Government response

8.10 The Government is keen to work with the pensions industry to further explore the impact on section 615 schemes. We will do this during the course of the first few months when these Regulations are in force.

Issue Raised

8.11 “At this stage, it is not clear how many schemes will actually move to Dublin. Much will depend on the approach taken by the UK’s Pensions Regulator with regard to cross-border schemes. If the UK’s Pensions Regulator helps schemes understand UK and non-UK rules, they will be more likely to keep their location in the UK. With this in mind, we recommend that The Pensions Regulator invests heavily in such guidance and information activity and that it develops its bilateral and multilateral links with other EU pension regulators.”
(*Association of British Insurers*)

Government response

8.12 The Government recognise this issue and consequently, DWP will be working closely with the Pensions Regulator in the coming months to ensure that schemes are well informed regarding UK rules and non-UK rules relevant to Cross-border pension schemes.

Issue Raised

8.13 “Schemes must be able to revert to domestic status when accruals in other Member States cease.” (*CBI*)

“There appears to be no provision for a scheme to cease to be a Cross-border scheme.” (*The Actuarial Profession*)

Government response

8.14 The Government has amended regulations 8 and 13 (revocation of general authorisation; and revocation of approval) so that schemes may revert to domestic status where there are no members or survivors of members within a scheme with existing or future rights to benefits (accrued whilst a European member) under the scheme rules.

Chapter nine: Conclusion

9.0 The comments received have proved valuable in further shaping the development of the Cross-border Regulations and once again the Government offers thanks to all those who participated in the process. Views have either helped to firm up solutions to issues and problems, or helped

highlight areas of potential difficulty. One other response perhaps summarises what are the key concerns for schemes coming from the implementation of the Regulations.

9.1 “Your definition of a scheme “carrying on cross-border activity” looks at the state of the scheme on 22 September 2005. As these UK regulations – and the Statutory Funding Objective regulations – are being delayed, could this date be put back also, to give schemes a chance to study the regulations before being caught by them?”
(Barnett-Waddingham)

Government response

9.2 The Government is aware that there may be schemes concerned that they will be unintentionally caught by these Regulations. These will be schemes with seconded workers and existing Anglo-Irish schemes. For the purposes of implementing the Cross-border parts of the Directive, the UK is governed by the Directive’s requirements in article 22 which require Member States to have implemented the Directive by 23 September 2005. We have explained to the European Commission that the reason we have exceeded this date is to ensure correct implementation, but, we can not delay implementation further to allow schemes to study the Regulations.

9.3 As explained in paragraph 2.7, schemes with seconded workers will be allowed a 5 year period of secondment begun after the Regulations come into force before their schemes are affected by Cross-border regulations. Secondments started before the Regulations come into force will be allowed for the duration of that secondment without the scheme being affected.

9.4 Anglo-Irish schemes will be allowed 3 months from the time the Regulations come into force to apply to be authorised and approved to receive contributions as Cross-border schemes; and until 22 September 2008 to meet the directive’s “fully-funded” requirements.

9.5 We therefore believe that the amendments we have made to the Regulations (in response to the comments we have received) in respect of seconded workers and Anglo-Irish schemes will ensure that schemes are not unintentionally caught by the Directive; and will allow any schemes that may be affected in the future sufficient time to take appropriate action.

9.6 Finally, as we have mentioned earlier in this response, we will be working with the Pensions Regulator to ensure that any schemes wishing to become new Cross-border schemes will be provided with adequate support and information over the coming months. Both the Government and the Regulator intend to adopt a pragmatic and proportionate approach to this issue.

List of Respondent Organisations

3i
Actuarial Profession
ADM
Allianzcornhill
Association of British Insurers
Association of Consulting Actuaries
Association of Pension Lawyers
Aviva
Barnett-Waddington
Barclays bank
Bayer CropScience
BOC
Boehringer
British Telecom
Cadbury Schweppes
CBI
Church of England
Electricity Supply Pension Scheme
Eversheds
Ford Motors
Freshfields Bruckhaus Deringer
Grosvenor Estate
Hapag-Lloyd
HBOS
HMRC
Hewitt Bacon & Woodrow
Imperial Tobacco
Instron
Interserve Plc
Jaguar (Coventry)
Landrover (HR)
Lane, Clarke & Peacock
Law Society of Scotland
Lloyds TSB
Lovells
Mayer, Brown, Rowe and Maw LLP
Mercer Human Resource Consulting
NASUWT

National Association of Pension Funds
O2
PPG industries(UK)Ltd
Pricewaterhousecoopers
Rexam Plc
Royal Liver
Royal National Lifeboat Institution
Sacker & Partners
Society of Pension Consultants
Standard Life
Royal Bank of Scotland
Tesco
Tower Perrin
Unilever
Universities Superannuation Scheme Ltd
Watson Wyatt