

Pensions

Consultation on Draft Regulations

**The Occupational and Personal
Pension Schemes
(EEA States)
Regulations 2007**

July 2007

IMPLEMENTATION OF THE EXTENSION OF THE PROVISIONS OF THE EU OCCUPATIONAL PENSIONS DIRECTIVE 2003/41 TO THE EEA MEMBER STATES: CONSULTATION ON REGULATIONS REQUIRED TO EXTEND CERTAIN UK PENSIONS LEGISLATION TO THE EEA STATES

Introduction

1. The [Occupational Pensions Directive 2003/41/EC](#) (otherwise known as the Institution for Occupational Retirement Pension or IORP Directive) was incorporated into the European Economic Area (EEA) Agreement by decision of the EEA Joint Committee on 7 July 2006, entering into force in Norway, Iceland and Liechtenstein on 12 April 2007. The Directive has been in effect in EU States since 23 September 2005.
2. The IORP Directive provides a framework for the operation and supervision of occupational pension schemes in the EU. The effect of its extension to the EEA States is that certain UK pensions legislation which implemented the Directive, i.e. the Pensions Act 2004 and other associated Regulations will need to be amended so that their application takes account of the fact that the IORP Directive now applies in the EEA States. The attached draft Regulations seek to amend the appropriate UK legislation
3. The purpose of this paper is to summarise these draft regulations and to seek your views. **In drafting these regulations, our intention is simply to ensure that the existing legislation which introduced the provisions of IORP is extended to the EEA States, rather than to introduce any significant policy changes to these areas.**
4. The adoption of EU legislation by EEA States requires that EU Member States are obliged under EU rules to take account of this change and amend their own legislation. It is therefore our intention that these regulations should come into force within the minimum time period possible, allowing of course for the necessary consultation and parliamentary procedures to take place.

Why Ministers have decided this is a limited consultation

5. Because of the technical nature of this document, Ministers have decided that it is not appropriate to publish it under the provisions of the Cabinet Office Code of Practice on consultation. It does, however, apply best practice from the Code.

How to respond

6. The consultation period begins on **31 July** and will run until **24 September**. Please ensure that your response reaches us by that date. If you would like further copies of this consultation document it can be found at: <http://www.dwp.gov.uk/consultations/2007/>
7. Please send consultation responses to:

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Email responses can be sent to: eeax.borders@dwp.gsi.gov.uk

8. When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of a larger organisation please make clear whom the organisation represents, and where applicable, how the views of members were assembled.

Whom this consultation document has been sent to

9. A list of those consulted is attached. If you have any suggestions of others who may wish to be involved in this process, please contact us.

How responses will be handled

10. Because of the Freedom of Information Act (2000), all information contained in your response, including personal information may be subject to publication or disclosure. By providing personal information for the purposes of the public consultation exercise, it is understood that you consent to its disclosure and publication. If this is not the case, you should limit any personal information which is provided, or remove it completely. If you want the information in your response to the consultation be kept confidential, you should explain why as part of your response, although we cannot guarantee to do this. We cannot guarantee confidentiality even if your IT system claims it automatically. The contact point to discuss is Richard Jordan (details at paragraph 7). More information about the Freedom of Information Act can be found on the website of the Department for Constitutional Affairs - <http://www.dca.gov.uk/foi/guidance/exguide/index.htm>.

Impact Assessment

11. The extension of the IORP Directive to the EEA States will potentially impact on any UK schemes that are currently being sponsored solely by employers based in Norway, Iceland and Liechtenstein with members who are subject to the social and labour law of one of those States. However, at this stage, as we are unaware of any EEA employers sponsoring UK schemes, an Impact Assessment has not been carried out. Responses to this consultation will help us to assess if there will be any impact on occupational pension schemes.

Summary of responses

12. We will aim to publish a summary of responses, including the next steps by early October at: <http://www.dwp.gov.uk/consultations/2007/>
Paper copies will be available on request.

How well have we consulted?

13. **DWP values feedback on how well it consults. If you have any comments on the process of this consultation (as opposed to the issues raised), please contact the DWP Consultation co-ordinator. Please also make any suggestions as to how the process of consultation could be improved further. Please contact:**

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Background

14. The IORP Directive, which provides a framework for the operation and supervision of EU based occupational pension schemes, came into effect in EU Member States on 23 September 2005. The provisions of the Directive were implemented in the UK through the Pensions Act 2004 and associated regulations. On 7 July 2006 the Directive became part of the EEA Agreement, but did not enter into force in the EEA states until 12 April 2007. The UK is now obliged to extend its implementation of the IORP Directive to the EEA States.

15. The legislation requiring amendment relates mostly to the provisions enabling cross-border activity (the area of cross-border activity will be extended to include the EEA States – paragraphs 11 and 20 refer), although there is some legislation affecting either schemes or members based outside the EU which will need to be amended so that it will relate only to either schemes or members located outside the EEA. The following summary of the draft regulations provides more detail.

The Draft Occupational and Personal Pension Schemes (EEA States) Regulations 2007

Regulation 1 – Citation and Commencement

16. This is a general regulation about the citation and commencement of the Regulations.

Regulation 2 – Amendment of Pensions Legislation in Schedule

17. This regulation provides detail of the wording within the appropriate legislation, listed in the Schedule, which needs to be amended in order that account is taken of the extension of the IORP Directive to the EEA States.

Regulations 3- 5 – Amendment of other Pensions Legislation

18. These regulations provide detail of the wording within the other legislation, listed in regulations 3 to 5, which needs to be amended in order that account is taken of the extension of the IORP Directive to the EEA States.

Regulation 3 Amendment of the Pensions Act 1995

Section 49 (8A) (c)(other responsibilities of trustees, employers, etc)

19. This legislation requires the trustees of a scheme to keep any money held by them in a separate account kept by them with a deposit taker. Deposit taker is defined as the Bank of England or the Central Bank of a Member State other than the UK.

20. Article 19 of the IORP Directive prevents Member States from restricting occupational pension schemes from appointing for the custody of assets either a custodian or depositary established in another Member State. As these provisions now apply to the EEA States, so this legislation must be extended to include the EEA States.

Regulation 4 Amendment of the Pensions Act 2004

(a) & (b) Section 253 (1) and (6)- Non-European scheme to be trust with UK-resident trustee; Section 254(1) Representative of non-European Scheme to be treated as trustee

21. It is currently a requirement of any scheme which is not subject to the provisions of the IORP Directive, i.e. a non-European scheme, that they must be established under irrevocable trust and that a trustee (or nominee) of the scheme must be resident in the UK. As the IORP provisions have now been extended to the EEA states, this requirement will now only apply to schemes that have their main administration outside the EEA States as opposed to formerly outside the EU Member States.

(c-i) Amendments to sections 287,289-291, and 293-295 - Cross-border Activities within the European Union

22. These amendments are required to take account of the fact that the adoption of the IORP Directive by the EEA States has enabled schemes in the UK to be sponsored by employers based in the EEA States (to enter into cross-border activity) and for schemes based in the EEA States to be sponsored by employers based in the UK.(As determined by sections 287-295 of the Pensions Act 2004 and the “Occupational Pension Schemes (Cross-border Activities) Regulations 2005 (SI 2005/3381)”(The Cross-border Regulations)).

We are aware that the extension of IORP to the EEA States will potentially impact on any UK based schemes who are currently being sponsored solely by employers located in Norway, Iceland or Liechtenstein and whose pension scheme members are subject to the social and labour law of an EEA State. This would also include any UK based employers with members working under contract in another EEA State, who are subject to the social and labour laws of that EEA State, and who fit the definition of “qualifying person” and do not fit the definition of “seconded worker” as provided by Regulation 2 of the Cross-border Regulations 2005. These schemes will need to comply with those regulations.

We would appreciate details of any schemes being sponsored in this way. When considering whether your scheme is sponsored in such a manner, special attention should be given to the definitions of “European employer”; “qualifying person” and “seconded worker” provided in the Cross-border Regulations. Richard Jordan (details at paragraph 7) can provide further advice if required.

Regulation 5 Amendment of the Occupational Pension Schemes (Cross-border Activities) Regulations 2005 (SI 2005/3381)

23. These amendments extend the scope of cross-border activity to employers within the EEA States. Please refer to paragraph 22.

Schedule – Amendment of Pensions Legislation

24. The Schedule lists the legislation which needs to be amended on account of the extension of the IORP Directive to the EEA States. In each case the amendment ensures that the provision, which is a requirement of the IORP Directive, is extended in its application to the EEA States. In each case, the policy intention of the legislation does not change, only the extent of its application. The amendments can be explained as follows:

Amendments to the Pension Schemes Act 1993

Paragraph 1 (a): section 1(1) - Definition of “occupational pension scheme”

25. When the cross-border provisions of the IORP Directive (Article 20) were implemented through the 2004 Pensions Act, the definition of “occupational pension scheme” provided in section 1(1) of the Pensions Scheme Act (PSA) 1993 was amended so that an occupational pension scheme would be required to have its main administration either in the UK or outside the EU member states. This was because any schemes based in EU States other than the UK became “European pensions institutions” (section 293(8) Pensions Act 2004 refers) and, under the IORP Directive, came under the supervisory control of the Member State in which they were based. As a consequence of the fact that the Directive now has effect in the EEA States, it has therefore become necessary to amend the wording of section 1(1) of the PSA 1993 so that the definition of “occupational pension scheme” applies only to schemes based in the UK or outside the EEA States. Schemes based in Norway, Iceland or Liechtenstein will therefore become “European pensions institutions”.

Paragraph 1 (b): section 19 (4)(a)(i) (discharge of liability where guaranteed minimum pensions secured by insurance policies or annuity contracts)

26. This is a measure for ensuring the member gets his contracted-out benefits. Where a scheme is contracted-out it has a liability to pay a certain level of benefit to the member. It can discharge that liability in a number of ways (most obviously by paying the pension itself). However, we allow the scheme to discharge liability by buying the individual member an annuity from an insurance company. To ensure the pension is paid we define the sort of insurance company that can be involved.

27. Currently the insurance company must be located in the UK or another EU Member State. Given that the IORP Directive is primarily an internal market measure in the field of financial services and that Article 19 of that Directive prevents restrictions on the appointment of investment managers, custodians and depositaries in another Member State, as the EEA States are now part of this framework, it is necessary that the location of the insurance company should no longer be limited to the EU Member States and should now be extended to include the EEA States.

Paragraph 1 (c): section 32A (2)(a)(i) (discharge of protected rights on winding up: insurance policies)

28. This legislation requires that where a scheme is being wound up, a member’s rights may be protected by taking out an insurance policy. The insurer with whom the policy is taken out must currently be carrying out long term insurance business in the UK or another Member State. We have extended the area in which the insurer may be carrying out long term insurance business to the EEA States for the same reasons given in paragraph 27.

Amendments to Regulations

Paragraph 2: The Occupational Pension Schemes (Contracting-out) Regulations 1996 (definition of overseas scheme) (SI1996/1172) Regulation 1(2)

29. The Occupational Pension Schemes (Contracting out) Regulations 1996 defines an “overseas scheme” as one that is outside the UK or outside one of the member states.

30. To ensure parity between the security of the contracted-out rights in a UK-based scheme and one based overseas, we have in the past required overseas schemes to meet additional conditions before they can contract-out, as, by definition, they were not subject to our regulatory regime.

31. Schemes based in the member states are now covered by a similar regulatory regime (IORP). Therefore, the extra rules no longer had to be applied to these schemes. The definition was accordingly, amended. Through the adoption of the IORP Directive by the EEA States, these states will also have a similar regulatory regime and, if a scheme based in one of those countries fails to pay the contracted-out benefit, the Regulator in that country will be able to enforce the necessary rules.

Paragraph 3: The Protected Rights (Transfer Payment) Regulations 1996 (definition of overseas scheme) (SI 1996/1461) Regulation 1(2) & Paragraph 4: The Contracting-out (Transfer and Transfer Payment) Regulations 1996 (definition of overseas scheme) (SI 1996/1462) Regulation 1(2)

32. These regulations have always allowed the transfer of contracted-out rights to occupational pension schemes which are administered wholly or partly outside the United Kingdom, subject to certain conditions being met.

33. As a consequence of the definition of "occupational pension scheme" that came into effect on 23 September 2005, and to maintain the policy that transfers could take place outside the UK, the definition of "overseas scheme" was changed so that it means either an occupational pension scheme with its main administration outside the member States, or a European pensions institution (as defined in section 239(8) of the Pensions Act 2004), which is what occupational pension schemes in the Member States are now known as.

34. As a result of the further change to the definition of occupational pension scheme to take account of the EEA states, it is necessary to change the definition of "overseas scheme".

Paragraph 5: The Pensions Schemes (Categories) Regulations 2005 (SI 2005/2401) Regulation 2(2)

35. As we explained in paragraph 25, as a consequence of the fact that the Directive now has effect in the EEA States, it has therefore become

necessary to amend the definition of “occupational pension scheme” so that it applies only to schemes based in the UK or outside the EEA States.

Paragraph 6: The Occupational Pensions Schemes (Scheme Funding) Regulations 2005 (SI 2005/3377) Regulation 17(1)(d); and Schedule 2, para 4 (2) and (3)

36. These amendments take account of four scenarios where the adoption of the IORP Directive by the EEA States require changes to the scheme funding provisions:

37. In the first scenario, the scheme is based in the UK, different sections of the scheme apply to members in employment in the member states and to members in employment outside the member states, and the assets attributable to each section can not be used for the purposes of any other section. In the second scenario, the scheme has its main administration in the UK, it applies to members in employment in the member states and to members in employment outside the member states and part of the scheme is or was treated as a separate scheme under section 611(3) of the Income and Corporation Taxes Act 1988. In these cases, the part of the scheme applicable to members employed outside the member states is not required to comply with Part 3 of the Pensions Act 2004. The amendment ensures that the part of the scheme applicable to members employed outside the EEA is not required to comply with Part 3 of the Pensions Act 2004.

38. In the third scenario, the scheme is based outside the member states, different sections of the scheme apply to members in employment in the UK and to members in employment outside the UK, and the assets attributable to each section can not be used for the purposes of any other section. In the fourth scenario, the scheme has its main administration outside the member states, it applies to members in employment in the UK and outside the UK and part of the scheme is or was treated as a separate scheme under section 611(3) of the Income and Corporation Taxes Act 1988. In these cases, the part of the scheme applicable to members employed outside the UK is not required to comply with Part 3 of the Pensions Act 2004. The amendment ensures that this exemption will now apply to schemes based outside the EEA States.

Paragraph 7: The Occupational Pensions Schemes (Regulatory Own Funds) Regulations 2005 (SI 2005/3380) Regulation 10(8) & Regulation 15 (1)(d)(i)

39. These Regulations make a requirement that where a scheme, rather than the employer, covers any risks linked to death, disability or longevity, guarantees any investment performance, or guarantees to provide defined benefits, the scheme must, in their scheme funding calculations, contain an additional “buffer” no less than the minimum required under regulation 4 of those Regulations. The Regulations implement article 17 of the IORP Directive.

40. The current Regulations provide that, where the first two scenarios described in paragraph 36 above apply, the part of the scheme which applies to members in employment outside the member states is exempted from the requirement to hold a “buffer” within the scheme’s funding. On account of the adoption of the IORP Directive by the EEA states, this exemption will be amended so that it applies to cases where the part of the scheme applies to members in employment outside the EEA states.

*Paragraph 8: The Occupational and Personal Pensions Schemes
(Consultation by Employers and Miscellaneous Amendment) Regulations
2006 (excluded employers: occupational pension schemes) (SI 2006/349)
Regulation 4(1)(e)*

41. Article 11(2)(b) of the IORP Directive requires that members and beneficiaries should receive any relevant information regarding changes to the pension scheme rules. Regulation 4(1)(e) of SI 2006/349 currently excludes employers in relation to unregistered occupational pension schemes based outside the member states from the requirement to consult affected members on changes to the scheme in question. On account of the EEA's adoption of IORP, this legislation will be amended so that only employers in relation to unregistered schemes based outside the EEA will be excluded from the member consultation requirement.

List of those consulted

Association of British Insurers
Association of Consulting Actuaries
Association of Pension Lawyers
Confederation of British Industry
Construction Company
Engineering Employers Federation
Faculty and Institute of Actuaries
HMRC
Investment Managers' Association
Institute of Chartered Accountants
National Association of Pension Funds
National Pensions Convention
Pensions Management Institute
Pensions Ombudsman
Policy and Legislation Division DSD Northern Ireland
Slaughter and May
Scottish Executive

Society of Pension Consultants

The Pensions Advisory Service

The Pensions Regulator

Trades Union Congress

National Assembly for Wales

STATUTORY INSTRUMENTS

2007 No.

PENSIONS

**The Occupational and Personal Pension Schemes (EEA States)
Regulations 2007**

<i>Made</i>	- - - -	2007
<i>Laid before Parliament</i>		2007
<i>Coming into force</i>	- -	2007

The Secretary of State for Work and Pensions, being a Minister designated⁽¹⁾ for the purposes of section 2(2) of the European Communities Act 1972⁽²⁾, in relation to personal and occupational pensions, in exercise of the powers conferred by section 2(2) of that Act, makes the following Regulations.

Citation and commencement

1. These Regulations may be cited as the Occupational and Personal Pension Schemes (EEA States) Regulations 2007 and shall come into force on [.... 2007].

Amendment of pensions legislation

2. In the provisions of pensions legislation specified in the Schedule to these Regulations—
- (a) for “member State” or “Member State” substitute “EEA State”; and
 - (b) for “member States” substitute “EEA States”.

Amendment of the Pensions Act 1995

3. In section 49(8A)(c) of the Pensions Act 1995⁽³⁾(other responsibilities of trustees, employers, etc.) for “a member state” substitute “an EEA State”.

Amendment of the Pensions Act 2004

4. In the Pensions Act 2004⁽⁴⁾—
- (a) in section 253(1) and (6) (non-European scheme to be trust with UK-resident trustee) for “the member States” substitute “the EEA States”;
 - (b) in section 254(1) (representative of non-European scheme to be treated as trustee) for “the member States” substitute “the EEA States”;

(1) See the European Communities (Designation) (No. 7) Order 2004 (S.I. 2004/3328).
(2) 1972 c.68.
(3) 1995 c.26. Section 49(8A) was inserted by S.I 2001/3649.
(4) 2004 c.35.

- (c) in section 287(6) (occupational pension scheme receiving contributions from European employer)—
 - (i) for ““host member State”” substitute ““host EEA State””;
 - (ii) for “a member State” substitute “an EEA State”;
- (d) in section 289(1)(c) and (2)(a)(i) (approval in relation to particular European employer) for “host member State” substitute “host EEA State”;
- (e) in section 290(1)(a) and (b) and (2)(b) (notification of legal requirements of host member State outside United Kingdom) for “host member State” substitute “host EEA State”;
- (f) in section 291(1) (duty of trustees or managers to act consistently with law of host member State) for “host member State” substitute “host EEA State”;
- (g) in section 293 (functions of Regulator in relation to institutions administered in other member States)—
 - (i) in paragraph (1) for “host member State” substitute “host EEA State”;
 - (ii) in paragraph (2) for “another member State” substitute “another EEA State”;
 - (iii) in paragraph (4)(b) for “the member State” substitute “the EEA State”;
 - (iv) in paragraph (8) for “a member State” substitute “an EEA State”;
- (h) in section 294(1) (stopping disposal of assets of institutions administered in other member States)—
 - (i) for “a member State” substitute “an EEA State”;
 - (ii) for “that member State” substitute “that EEA State”;
- (i) in section 295 (interpretation of Part 7)—
 - (i) for “a member State” in both places substitute “an EEA State”;
 - (ii) for “host member State” substitute “host EEA State”.

Amendment of the Occupational Pension Schemes (Cross-border Activities) Regulations 2005

5.—(1) The Occupational Pension Schemes (Cross-border Activities) Regulations 2005(5) shall be amended in accordance with the provisions of this regulation.

(2) In regulation 2(1) (interpretation)—

- (a) for ““host member State”” substitute ““host EEA State””;
- (b) in the definition of “qualifying person”—
 - (i) for “a member State” in both places substitute “an EEA State”;
 - (ii) for “that member State” substitute “that EEA State”;
- (c) in the definition of “qualifying self-employed person”—
 - (i) for “a member State” substitute “an EEA State”;
 - (ii) for “that member State” in both places substitute “that EEA State”;
- (d) in the definition of “seconded worker” for “a member State” substitute “an EEA State”.

(3) In regulation 3 (meaning of “European employer” and “host member State” in Part 7 of the Pensions Act 2004)—

- (a) in paragraph (1)—
 - (i) for “host member State” substitute “host EEA State”;
 - (ii) for “that member State” in both places substitute “that EEA State”;
- (b) in paragraph (5)—
 - (i) for ““host member State”” substitute ““host EEA State””;

(5) S.I. 2005/3381, the relevant amending instrument is S.I. 2007/814.

