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date of receipt: 10 June 2014  
To: President of the Council of the European Union

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Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the activities and supervision of institutions for occupational retirement provision (recast) [doc. 8633/14 EF 129 ECOFIN 361 SURE 14 SOC 260 COM(2014) 167 final]  
*- Opinion <sup>1</sup> on the application of the Principles of Subsidiarity and Proportionality*

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Delegations will find attached the above mentioned opinion.

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Encl.:

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<sup>1</sup> Translation(s) may be available in the Interparliamentary EU information exchange site IPEX at the following address: <http://www.ipex.eu/IPEXL-WEB/search.do>



## European Scrutiny Committee

House of Commons 7 Millbank London SW1P 3JA

Tel (020) 7219 5465/3292 Fax (020) 7219 2509 Email [escom@parliament.uk](mailto:escom@parliament.uk) Website [www.parliament.uk/escom](http://www.parliament.uk/escom)

From: Mr William Cash MP

4 June 2014

President Herman Van Rompuy  
EU Council  
Rue de la Loi 175  
B-1048 Brussels  
BELGIUM

SECRETARIAT GÉNÉRAL DU CONSEIL DE L'UNION EUROPÉENNE	
SGE14/06163	
Reçu le	10-06-2014
DEST. PRINC.	M. CLOOS
DEST. COPISTES	M. PILLATH
	M. SEEUWS

*Dear Mr Van Rompuy*

### **Proposal for a Directive on the activities and supervision of institutions for occupational retirement provision (recast) — COM (2014) 167**

1. The European Scrutiny Committee of the UK House of Commons, which I chair, has considered the Commission's proposal for a Directive on the activities and supervision of institutions for occupational retirement provision. The proposal is in the form of a recast of Directive 2003/41, but in reality it would create a significantly higher level of harmonisation and introduce substantial new provisions.
2. The Committee has formed the view that this proposal fails to meet the requirements of subsidiarity. It would have recommended to the House of Commons that a reasoned opinion should be issued. However due to the fact that the House of Commons did not sit between 15 May and 3 June it would not have been possible for it to consider such recommendation before the 30 May deadline. We are therefore pursuing our objections to the proposal by way of political dialogue.
3. The reasons for our subsidiarity objections are as follows.
4. As stated in the Commission's explanatory memorandum, the general objective of this proposal is to facilitate the development of occupational retirement savings, making them safer and more sustainable; and to reinforce the role of occupational retirement funds as institutional investors in the EU's real economy. To achieve this four specific objectives are identified:

- (1) The removal of remaining prudential barriers for cross-border IORPs (institutions for occupational retirement provisions).
- (2) The achievement of good governance and risk management.
- (3) The provision of clear and relevant information to members and beneficiaries.
- (4) The provision of the necessary tools for supervisors to enable them to effectively supervise IORPs.

5. The point of departure for consideration of subsidiarity is that the onus of proving that the subsidiarity principle has been met rests with the Commission. The Commission's explanatory memorandum which, in the Committee's view, should contain the subsidiarity justification is particularly poor in this respect. It comprises an assertion of EU added value and statement that the proposal does not call into question the prerogative of member States for the organisation of their pension systems.

6. As the Committee has made clear in its earlier reasoned opinions, it does not consider it appropriate for the Commission to rely on its impact assessment for the subsidiarity justification required by Article 5 of Protocol 2<sup>1</sup> as this is not available in all language versions.

7. However, even accepting recourse to the impact assessment, the Committee notes the reservations of the Commission's own Impact Assessment Board. This Board carries out a central quality control and support function working under the authority of the Commission President, independent of the policy making department. In principle, a positive opinion is needed from the Board for an initiative to be tabled for adoption by the Commission. The Commission's explanatory memorandum records that this Board provided a negative opinion on the Commission's Impact Assessment<sup>2</sup> including in relation to the subsidiarity justification. Whilst the Commission indicate that they have subsequently re-written parts of the Impact Assessment, including on subsidiarity, there is no indication that there has been a re-assessment.<sup>3</sup> Our understanding is that this impact assessment has

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<sup>1</sup> On the application of the principles of subsidiarity and proportionality.

<sup>2</sup> Report of 6 November 2013.

<sup>3</sup> Section 2.1.2 of the Commission's Impact Assessment. The Impact Assessment Board's own website does not record any positive opinion on this proposal: [http://ec.europa.eu/smart-regulation/impact/fia\\_carried\\_out/cia\\_2014\\_en.htm#empl](http://ec.europa.eu/smart-regulation/impact/fia_carried_out/cia_2014_en.htm#empl)

not, in fact, re-submitted to the Board and has not received a positive opinion from it.

8. As the Commission acknowledges,<sup>4</sup> Member States retain full responsibility for the organisation of their pension systems, including occupational pensions. Therefore occupational pensions can quite properly be organised in different ways to suit the diverse nature of the social and labour laws across the Member States. That this is so is evidenced by the very diverse role that occupational pensions play in overall pension provision. The overwhelming majority of IORPs and funds under management are located in just four Member States, Germany, Ireland, the Netherlands and the United Kingdom.

9. In its impact assessment the Commission includes a table<sup>5</sup> showing, for each Member State the share of occupational and statutory funded pensions in total gross theoretical replacement rates in 2006 and 2046. From this it can be deduced that these two types of pension form a relatively low proportion of overall pension provision across 16 Member States for whom data was available.<sup>6</sup>

10. The Commission asserts that there is potential for expansion of occupational pensions in other Member States given the pressures on state schemes. However, based on this same table, both these types of pensions are still projected to form significantly less than 50% of pension provision as far into the future as 2046.

11. From this general context the Committee concludes that the effectiveness of EU action in achieving its general objective is limited because –

- (a) there is legitimate diversity between Member States as to how they organise their pension systems, including the organisation of occupational pensions, which is likely to persist; and
- (b) occupational pension schemes will remain, for a significant number of years, the concern of just a few Member States.

<sup>4</sup> Section 3 Executive Summary of Impact Assessment

<sup>5</sup> Fig 2.

<sup>6</sup> In 2006 these forms of pensions formed over 50% of the share only in the Netherlands and Ireland. In 10 Member States it was nil.

12. Turning to the specific objectives set out in the explanatory memorandum; in relation to the first (removal of remaining prudential barriers for cross-border IORPs), it is notable that there is at present little demand for cross-border provision of occupational pensions. The Commission indicates that in June 2012 there were only 84 cross-border IORPs representing only 0.1% of the total of those with more than 100 members. It assesses the potential for cross-border expansion by reference to the fact that about 10% of life assurance business is cross-border. Life assurance is, however much broader in its purposes than occupational pensions and less tied to the diverse organisation of national pension provision.

13. That cross-border expansion of occupational pension provision is possible at present is demonstrated by the fact that several Member States have adopted legislation aimed at positioning themselves as locations of choice for cross-border IORPs.<sup>7</sup> The Commission cites the examples, at Annex E of its impact assessment, to support the proposition that establishing cross-border IORPs can be a burdensome task and projects are therefore often abandoned. However the Impact Assessment Board has indicated<sup>8</sup> that the anecdotal evidence provided in this Annex is confusing and sometimes illustrates obstacles to the establishment of cross-border IORPs that are not relevant (e.g. language barriers).

14. The remaining specific objectives (good governance and risk management, clear and relevant information, the necessary tools for supervisors) aim at improvement of the management and operation of IORPs whether or not they are involved in cross-border provision. In fact, as indicated above there is at present very little cross-border dimension and limited scope for expansion.

15. However Member States, particularly those few with significant IORPs, can effectively regulate occupational IORPs. That is the case in the UK, which has a strong system of regulation underpinned by a compensation scheme in the event of a sponsoring employer's insolvency leading to a shortfall in a scheme's funds. In fact pension deficits have been considerably reduced. Indeed, it is in Member States' interest to achieve this given the importance of a sustainable occupational pensions system both to national treasuries and their own citizens.

<sup>7</sup> Section 1 of the Commission's explanatory memorandum.

<sup>8</sup> There is no indication in section 2.1.2 of the Commission's Impact Assessment that this Annex has been revised.

16. The evidence put forward by the Commission to support greater regulation does not, in the opinion of the Committee, outweigh the extra administrative costs involved in the proposal. For the UK these have been estimated at by the National Association of Pension Funds as comprising a one-off adjustment of £328 million and ongoing additional costs of around £7.5 million a year. The Commission's estimate is that employers will face a one-off cost to adjust to the new regime in the order of €22 per member/beneficiary and a higher recurrent administrative burden of €0.27 to €0.80 per member/beneficiary per year; with defined contribution schemes facing additional costs of €2 to €3 per member per year to reflect the costs of the depository. The Committee regards the estimated potential benefits to employees of €55 to €140 as uncertain, at best.

17. The Commission's impact assessment<sup>9</sup> seeks to define problems with occupational pension schemes and their causes. The Committee does not accept that these matters provide adequate justification for EU action. We have the following comments on specific issues raised:

- The fact that some IORPs have failed is not surprising given the financial crisis they have passed through. Even so, the UK deficit, for example, has been considerably reduced. In any event the trend away from defined benefit to defined contribution schemes reduces the overall risk attaching to occupational pension schemes.
- Variations in returns can be attributed as much to differences in investment rules and policies as bad governance.
- The fact that some pensions have been cut and the fact that there is a diversity in the level of charges are not, in themselves, evidence of poor information. It is not surprising that the Impact Assessment Board concluded that "it is currently difficult to see why a standardised pension benefit statement would be more effective than personalised information providing clear and relevant information." In the Committee's view this is still the case. The one concrete example cited by the Commission in respect of the Irish market is tentative in indicating that the evidence "suggests" that the impact of pension charges is not "necessarily" understood by the saver.

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<sup>9</sup> Section 3.3.

- A general lack of understanding by individuals of their financial situation and a lack of pension provision does not translate directly into a need for further regulation of IORPs.

18. In its impact assessment, the Commission also assesses EU added value by six criteria that overwhelmingly relate to the cross-border dimension<sup>10</sup>. However EU added value relating to the cross-border dimension of occupational pensions is limited for the reasons already stated. One area of added value which is not primarily linked to the cross-border dimension of occupational pension schemes is the need to avoid regulatory arbitrage between financial services sectors. However this matter is directly connected to the diverse role played by occupational pensions in different Member States and therefore a matter of Member States responsibility. The fact that the Commission perceives a gap between the regulation of occupational pension schemes and micro-prudential regulations of other sectors is not in itself justification for micro-prudential regulation of occupational pension schemes.

19. Finally the Committee is of the view that the objective of reinforcing the role of IORPs as institutional investors in the EU's real economy is tangential at best to the fundamental objective of facilitating the development of occupational retirement savings and as such does not justify EU level action.

20. The European Scrutiny Committee therefore considers that the objectives of this proposal, both general and specific, can be sufficiently achieved by the Member States; and that EU action is not required because of the scale or effects of the proposed action.

*Yusuf,*  
*Buller*

**CHAIRMAN**

<sup>10</sup> These are to — (i) remove obstacles to cross-border activities; (ii) ensure a higher EU-wide minimum level of consumer protection; (iii) take into account positive externalities arising from scale economies, risk diversification and innovation inherent to cross-border activity; (iv) avoid regulatory arbitrage between financial services sectors; (v) avoid regulatory arbitrage between MSs; and (vi) take into account interests of cross-border workers.