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The President,  
European Commission,  
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B-1049 Brussels,  
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9 July 2014

*Dear President Barroso,*

**8633/14: Proposal for a Directive of the European Parliament and of the Council on the activities and supervision of institutions for occupational retirement provision (recast)**

We write with respect to the above proposal, which we consider does not comply with the principle of subsidiarity, for the reasons we set out below. This letter is sent in pursuance of the Commission's political dialogue with national parliaments.

*Commission's failure to comply with procedural requirements*

By virtue of Article 5 of Protocol (No 2) (the Subsidiarity Protocol) "any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality". The requirement for the detailed statement to be contained within the draft legislative act indicates that it should be contained in the Commission's explanatory memorandum, which forms part of the draft legislative act and which is translated into all official languages of the EU, thus allowing it to be appraised for compliance with subsidiarity (and proportionality) in all Member States of the EU, in conformity with Article 5 of the Subsidiarity Protocol. This is to be contrasted with the Commission's impact assessment, which is not contained within a draft legislative act, and which is not translated into all the official languages of the EU. Commission impact assessments are published in one of the working languages of the EU, nearly always English.

The presumption in Article 5 of the Treaty on European Union is that decisions should be taken as closely as possible to the EU citizen. Any departure from this presumption should be justified with sufficient detail and clarity so that EU citizens and national legislators can understand the qualitative and quantitative reasons leading to a conclusion that "a Union objective can be better achieved at Union level", as required by Article 5 of the Subsidiarity Protocol. The onus rests on the EU institution which proposes the legislation to satisfy these requirements.

The extent of the Commission's justification for compliance with subsidiarity in the explanatory memorandum is limited to one paragraph, which we cite below. This falls

manifestly short of the detail required by Article 5 of the Subsidiarity Protocol; in particular there is no qualitative and quantitative substantiation of the necessity for action at EU level.

We believe that this omission is a failure on behalf of the Commission to comply with essential procedural requirements in Article 5 of the Subsidiarity Protocol.

*Non-compliance of the proposal with the principle of subsidiarity.*

Against a backdrop of demographic change (it is estimated that the number of people aged 60 and over increases by around two million each year, as the number of people of working age continues to fall),<sup>1</sup> slow economic growth, budget deficits, financial instability and low employment, concerns about the long-term sustainability of pensions have risen up the political agenda. The Commission argues that it is therefore “more urgent than ever to develop and put in place comprehensive strategies to adapt pension systems to changing economic and demographic circumstances”.<sup>2</sup>

Institutions for Occupational Retirement Provision, or IORPs, are collective schemes which manage financial assets on behalf of employers in order to provide retirement benefits for their employees. There are around 125,000 such schemes operating within the EU managing assets of around £2 trillion (€2.5 trillion) for around 75 million beneficiaries. The vast majority of these schemes are located in just four Member States: Germany, Ireland, the Netherlands and the United Kingdom.

The Commission gives the following justifications for EU legislation in its explanatory memorandum to the proposal.

“EU level action in this field adds value because action by Member States alone will not: (i) remove obstacles to cross-border activities of IORPs; (ii) ensure a higher EU-wide minimum level of consumer protection; (iii) lead to scale economies, risk diversification and innovation inherent to cross-border activity; (iv) avoid regulatory arbitrage between financial services sectors; (v) avoid regulatory arbitrage between Member States; and (vi) take into account the interests of cross-border workers.”<sup>3</sup>

In order for these objectives to justify legislation at EU level the Commission must provide evidence a) that the problems exist and b) that they cannot be addressed sufficiently by Member States acting individually. We consider the Commission has failed to provide the necessary evidence on both limbs: it has neither demonstrated that the small number of Member States which have significant occupational pension schemes are unable to address the problems raised by the Commission on their own; nor that the problems have significant cross-border consequences that merit legislation at a supra-national level.

In the summary of the impact assessment the Commission says “although present IORPs are important financing vehicles for retirement in a few Member States, there is potential, looking forward, for further expansion.”<sup>4</sup> The same could be said of many areas of public policy—they have potential, going forward, for further expansion. It is not, however, evidence that the legislative objectives will concern any more than four Member States. In addition, the evidence shows that there is minimal demand for cross-border provision of occupational pensions: the Commission’s own studies indicate that in 2012 there were only

<sup>1</sup> Document 6751/12, Pensions White Paper, page 2

<sup>2</sup> Document 6751/12, Pensions White Paper, page 3

<sup>3</sup> Page 6 of the Commission’s proposal.

<sup>4</sup> 8633/14 ADDI REV I, page 4.

84 cross-border occupational pension schemes, representing 0.1 per cent of the total number of pension schemes with more than 100 members.

There is a similar lack of evidence to support further rules to improve governance and risk management of IORPs. The Commission recognises that “direct failures of IORPs are rarely observed”, but says they do fail indirectly, “and there are several indicators that these failures are caused by shortcomings in governance and risk management practices of IORPs”.<sup>5</sup> These indicators are not substantiated by specific evidence. The UK Government considers that there is a risk that the introduction of such rules will increase the administrative costs of providing occupational pensions, hitting pensioner incomes without providing any clear benefits to scheme members or to the wider economy.

In addition, the organisation of national pension schemes remains a Member State responsibility—the different national approaches to the regulation of occupational pension schemes reflect the diverse nature of social practices and labour laws across Member States. Despite a statement in the Explanatory Memorandum to the contrary, the Commission’s approach would undermine this national prerogative, in breach of the principle of subsidiarity.

#### *Impact Assessment*

We note that our concerns are reflected in two negative Opinions of the Commission’s 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 Directorate-General. In principle, a positive Opinion from the Board is needed before a proposal can be put forward for Commission decision, although this is not an obligation. The Board concluded as follows in its second Opinion:

“The report still needs to be significantly improved in a number of important respects. First, the problem definition should better demonstrate the existence of the stated problems, in particular, those related to specific problems 2 and 3 (i.e. governance and risk management weaknesses and disclosures ineffectiveness) by substantiating them with evidence. Moreover, considering the low proportion of cross-border IORPs, the report should better explain why Member States cannot address specific problems 2, 3 and 4 (i.e. insufficient supervisory powers) on their own, and explain why EU action is necessary now. The presentation and analysis of the options should be streamlined by identifying alternative options. The report should also better demonstrate the effectiveness of the planned measures, notably the standard Pension Benefit Statement, and critically assess the proportionality of the retained measures, such as the harmonisation of supervisory powers, given that only 0.01 per cent of IORPs are cross-border.

Given the nature of these concerns, the LAB requests DG MARKT to resubmit a revised version of the LA report on which it will issue a new opinion.”

We were surprised to note that the impact assessment was not submitted a third time to the Board before the IORP proposal was adopted by the Commission. We would be grateful to know why the Commission decided to proceed with the proposal, given that its own Impact Assessment Board questioned the fundamental premise for action at EU level.

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<sup>5</sup> As above, page 3.

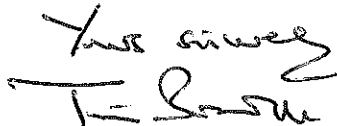
### *Reasoned Opinion deadline*

Because of the prorogation of Parliament on 14 May 2014, the House of Lords was unable to issue a Reasoned Opinion within the eight-week deadline. The lack of time reinforces the point that we made in our report on *The Role of National Parliaments in the European Union* (9th Report, Session 2013-14, HL Paper 151) that the time limit within which national parliaments can issue a Reasoned Opinion should be extended, to 12 or 16 weeks. If such a time limit applied, we could have issued a Reasoned Opinion in this case.

### *Conclusion*

In summary, we consider this proposal to be such a significant breach of the principle of subsidiarity that if it is adopted as currently drafted, we are minded to recommend to the House of Lords to consider a legal challenge under Article 8 of Protocol No 2 to the EU Treaties.

We look forward to your response.

A handwritten signature in black ink, appearing to read 'Lord Boswell', written in a cursive style.

Lord Boswell  
Chairman of the European Union Committee