

Implementation of the European Union Directive on
Institutions for Occupational Retirement Provision (IORP)

The drive towards pan-European pension funds The Belgian Solution: Organisation for Financing Pensions (OFP)



Linklaters



With pan-European pension funds on our doorstep and the likely introduction of Global pension funds, we feel it is useful to shed some light on the regulatory developments which have occurred in Belgium with respect to hosting such vehicles.

The objective of the European Union Directive 2003/41/EC on “Institutions for Occupational Retirement Provision” (IORP) is to allow pension funds to benefit from the Internal Market principles of free movement of capital and free provision of services. Belgium has developed a complete, flexible and comprehensive regulatory framework for a new type of pension vehicle under the name “Organisation for Financing Pensions”(OFP).

This report benefits from the combined expertise of Linklaters, one of the world’s leading law firms with outstanding corporate, finance and specialist practices and of Watson Wyatt, a global consulting firm focused on human capital and financial management.

Linklaters explains the corporate characteristics, the tax status and the main legislation including regulations applicable to the OFP.

Watson Wyatt sets out the prudential rules and supervision as well as the corporate governance, social and labour aspects of the OFP. It elaborates on the suitability of the OFP structure as a platform for pan-European including the potential likelihood of Global pension funds.

This reference report intends to outline the OFP as a new pension vehicle and the services expected from a professional Asset Servicing provider such as BNY Mellon.

We sincerely thank the experts at Linklaters and Watson Wyatt for their contributions to this paper and trust it proves valuable reading and reference to plan sponsors tasked with evaluating the set up of a pan-European pension fund.

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1. Introduction: Drive towards pan-European Pension Funds (*Linklaters*)

The changing regulatory and fiscal landscape for pension funds within the European Union (“EU”) is creating a momentum towards the establishment of pan-European private pension funds.

The main drivers of this development are EU Directive 2003/41 on private pension funds¹ and the re-invigorated actions of the European Commission to ensure that all EU Member States effectively lift any remaining tax obstacles against the use of pan-European pension funds.

This development is not aimed at achieving full harmonisation of private pension plans and their funding across the EU. On the contrary, the content of private extra-legal pension plans e.g. with regard to the level of the pension premiums and of the pension benefits, the fiscal limitations on the tax deductibility of pension premiums, the form of employee involvement in pension plans (consultation or co-decision procedures), etc. remain subject to the national legislations and practices of the individual Member States.

There remain substantial differences in the treatment of private pension plans among Member States. This means that a variety of “national” pension plans will continue to exist within the EU.

Multinational groups are now looking for a suitable location for their pan-European pension funds

In the past, multinational enterprises operating employee pension plans in several Member States had to set up a national pension fund for each national pension plan (for the simple reason that typically pension premiums paid to a non-domestic pension plan would not be tax deductible). The result was a fragmentation of the group’s pension assets over separate pension funds, which formed an obstacle to achieving an optimal consolidated financial return on the invested assets. Within multinationals, this fragmentation could be partially solved by the setting-up of joint investment structures above the national pension funds (“pooling of assets”). Such pooling of assets was usually rather complex and seldom achieved full fiscal optimisation (see Figure 1).

The current EU initiatives are aimed at enabling the use of one single pension fund entity to operate several national pension plans. Each national pension plan operated by the single pension fund maintains its own characteristics and if required each national pension plan can be ring-fenced within the pension fund. However, since the pension assets of the various pension plans involved are held and owned by one single entity, a perfect pooling of assets is automatically achieved (see Figure 2).

In essence two measures are deployed to achieve this aim:

- (i) EU Directive 2003/41² has created the regulatory framework for the operation of pan-European pension funds. Under the Directive it suffices for a pension fund to obtain its recognition as a private pension fund from the supervisory authority of the Member State where it is located (the “home country”) to be allowed to operate pension plans throughout the EU. Although each Member State has the freedom to provide its own national labour or social legislation for rules to be observed by national pension plans, the pan-European pension fund is still subject to the prudential rules of its home country, which will amongst others determine the required minimum level of funding from the sponsoring undertakings. The occupational pension plans administered by the institution for occupational retirement provision will, from their part, be governed by the social and labour laws of the host country in which they are located.

Figure 1: Multinational Pension Fund Pooling

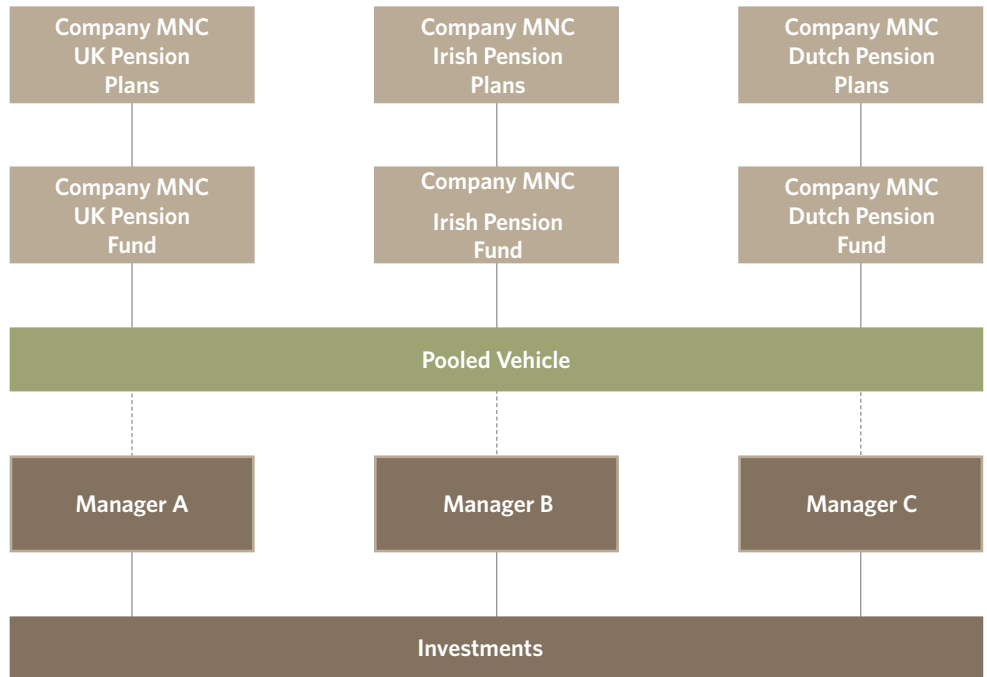
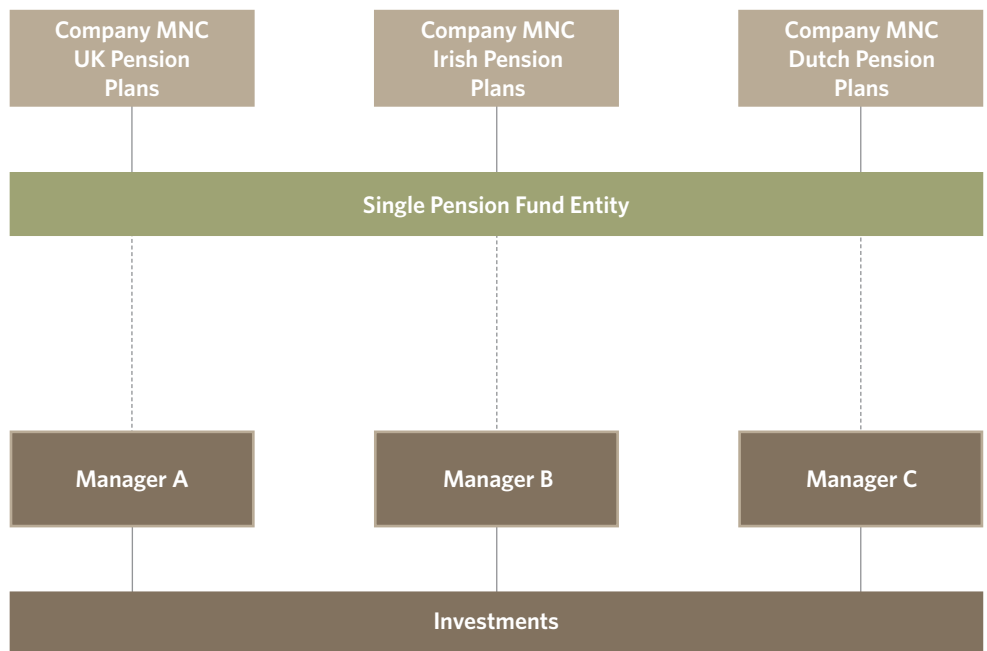


Figure 2: Multinational Pension Pooling with one single Pension Fund Entity



All Member States should have complied with EU Directive 2003/41 from 23 September 2005.

- (ii) The necessary fiscal framework for operating pan-European pension funds has been achieved by the EU Commission through prohibiting Member States from maintaining fiscal obstacles to using a pension fund established in another Member State³. The EU Commission has managed, on the basis of the fundamental principles of EU law, to oblige Member States to allow the tax deductibility of pension premiums paid into a qualified pension fund of another Member State in the same way as if they were paid into a domestic pension fund. On the same basis a transfer of existing reserves from a domestic pension fund to a qualified pension fund of another Member State should be tax-free.

As a result of the above developments, multinational groups are now looking for a suitable location for their pan-European pension funds. The main criteria taken into account are the regulatory and the fiscal status available to such pension funds. This has spurred on competition amongst Member States in offering a competitive regulatory and fiscal status for pan-European pension funds.

In 2006⁴ Belgium introduced a comprehensive, modern and flexible regulatory and optimal fiscal framework for a new type of pension fund, the OFP (Organisation for Financing Pensions). Such OFP benefits from a highly competitive fiscal and regulatory status for operating as a pan-European or even wider pension fund.

2. The Corporate Characteristics of an OFP (Linklaters)

2.1 Dedicated legal entity

Legislation passed on 27 October 2006⁵ introduced the OFP, a new form of legal entity specifically designed for private pension funds. This legislation can be downloaded from the Belgian supervisory authorities' website for financial services in Dutch, French and English⁶.

An OFP has a full separate legal personality. It is, however, not subject to the ordinary Belgian company law rules applying to Belgian commercial companies or other legal entities. Its company law status is governed by the legislation of 27 October 2006 which provides for a very flexible structural and operational regime. This makes an OFP ideally suitable to operate as a pan-European pension fund.

An OFP must have a minimum requirement of, the following two corporate bodies:

(i) The general assembly

The general assembly has the highest level of authority within the OFP.

It appoints and dismisses the directors and the auditors of the OFP and, approves its annual accounts. It can also be granted broad additional powers through the OFP's bylaws.

The sponsoring undertakings whose pension plans are operated by the OFP are to be members of the general assembly with full voting rights. Additionally, the pension beneficiaries (i.e. the employees), or their representatives can also be made members (either voting or non-voting) although this is not an obligation. Should employees become members of the general assembly they will participate in the overall supervision of the entire OFP. This of course is usually not intended. An OFP therefore, offers alternative opportunities to organise a structural involvement of employees 'per country', i.e. limited to the (ring-fenced) national pension plan in which they participate (see section 7.2).

Belgian law provides for a very flexible structural and operational regime, which makes an OFP ideally suitable to operate as a pan-European pension fund

(ii) The board of directors

The board of directors has general responsibility for the operational activities of the OFP. It also holds the general powers of representation towards third parties including the option to delegate its powers. It additionally supervises the other operational bodies of the OFP, if any.

The members of the board need to have the appropriate professional qualifications.

The bylaws of the OFP can provide additional operational bodies or social committees to which certain powers can be delegated. A large degree of flexibility is left with regard to the setting-up and functioning of social committees. This can be very useful for organising the structural involvement of employees in consultation or co-decision procedures with regard to one or several national pension plans operated by the OFP, if this is desired. This allows accommodating agreed or imposed employee involvements under the group's existing national pension plans whilst avoiding such involvement being extended beyond the (ring-fenced) pension plans concerned (see section 7.2).

2.2 Authorisation of the Belgian supervisory authority for financial services

- An OFP can simply be set up by passing resolutions adopting appropriate bylaws
- Prior to operating as a pension fund an OFP must obtain authorisation from CBFA (Banking, Finance and Insurance Commission); the Belgian supervisory authority for financial services. Information on the request form can be downloaded from the CBFA's website in Dutch, French and English⁷

The CBFA has a period of three months after receiving the complete notification file⁸ to grant or refuse the authorisation.

- Moreover, an OFP authorised in Belgium that intends to carry out cross-border activity (i.e., to accept sponsorship from a sponsoring undertaking established in a Member State of the European Economic Area ("EEA") other than Belgium or in a State that is not a member of the EEA) must notify the CBFA of its intention to do so. Notification of a cross-border activity or an activity in a non-EEA State may be submitted at the same time as the aforementioned authorisation to start operating as a pension fund

Detailed information on the notification file to be submitted is laid down in the CBFA's Circular CPP-2007-1-LIORP, which can be downloaded from the CBFA's website in Dutch, French and English⁹.

The CBFA has a period of three months after receiving the complete notification file to examine the OFP's proposed cross-border or activity in a non-EEA State. As regards cross-border activities, if the CBFA has no objection to the OFP's proposal, it shall, within three months of receiving the complete notification file, forward it to the competent authorities in the host Member State and inform the OFP that this has been done. Within two months of forwarding the file, the CBFA shall forward the information it has received from the competent authorities of the host Member State¹⁰ to the OFP Institution.

As soon as the OFP has received such information or, in the absence of such information, after the expiry of the aforementioned period of two months from forwarding the file, the OFP may begin its activity in the host Member State, but must at all times comply with the applicable legal provisions.

As regards activities in a non-EEA State, the CBFA shall notify the OFP of its decision by registered letter at the latest within three months of receiving the complete file. The OFP may begin its activity in the country in question as soon as it has been informed by the CBFA that the latter has no objection to its proposal and, in the absence of decision by the CBFA, by the end of the aforementioned period of three months.

2.3 New legal entity

All Institutions for Retirement Provisions (IRP) set up in the future will have to adopt the legal body of an OFP. An OFP can be set up as a new legal entity, i.e. without pre-existence of a pension fund. The former legal entities, (the not-for-profit entities such as an ASBL/VZW or the Mutual Insurance Association) will no longer be allowed.

2.4 Conversion of existing Belgian pension fund

All existing Belgian pension funds normally in the form of a not-for-profit entity form (such as an ASBL/VZW or a mutual insurance association) will have to convert into an OFP, which has become the exclusive legal form for an IRP. They can do so, tax free, before 2 January 2012¹¹.

3. Tax Status of an OFP (*Linklaters*)

3.1 Corporate tax exemption in Belgium

In the past, private pension funds did not benefit from full corporate tax exemption in Belgium. This was in contrast to the corporate tax exemption available to other investment entities such as the SICAV (Belgian open-ended investment company).

While an OFP is formally subject to corporate tax, its tax base is limited to certain items such as disallowed expenses and not at an arm's length shifting of profits to the OFP¹². Normally, an OFP can avoid becoming taxable on such items.

An OFP can obtain a full (and reimbursable) tax credit for any Belgian withholding tax applied on dividends and interest earned⁷.

The OFP benefits from a highly competitive fiscal and regulatory status for operating as a pan-European or even wider pension fund

Thus, an OFP benefits in Belgium from a full corporate tax exemption on dividends, interest, capital gains and other earnings from its invested assets. This brings Belgium into line with the other most competitive European countries traditionally used by pension funds.

There is no credit or refund in Belgium for foreign withholding taxes on dividends or interest earned¹³. The focus of an OFP's investment tax planning will therefore be on avoiding or reducing foreign source tax. In this regard, several European countries provide for general tax exemptions for pension funds or may be required to grant exemptions on the basis of the case law developed by the European Court of justice on the free movement of capital¹⁴. Foreign tax exemptions or reductions may also be available on the basis of a tax treaty (see section 3.2).

3.2 Tax treaty benefits and the new US–Belgian tax treaty

Since OFPs constitute separate legal entities and are formally subject to Belgian corporate tax, they can generally, by themselves, benefit from Belgium's attractive tax treaty network¹⁵. In this regard, OFPs should at least give entitlement to the same treaty treatment applicable to ordinary Belgian SICAVs. Since only a few Belgian tax treaties provide for 'limitation on benefits'-clauses, there is generally no need to determine whether the members or pension beneficiaries of the OFP would themselves be eligible to the treaty benefits.

Belgium's new tax treaty with the US¹⁶ is of particular relevance in this regard. This treaty opens up the opportunity for Belgian OFPs to benefit from a zero-rated US dividend withholding tax on dividends from their investments in US equity. This again, would make Belgium remarkably attractive compared to other Member States.

A Belgian OFP with a majority of Belgian and/or US pension beneficiaries qualifies automatically for this zero-rated US dividend withholding tax. In order for a pan-European OFP (with a majority of its pension beneficiaries resident in the EU but outside Belgium) to pass the specific LOB (Limitation on Benefits) test provided by the new treaty with the US, the OFP needs to apply for and receive a "Declaration" to that effect from the relevant US competent authority¹⁷. The US competent authority has not yet decided whether it is willing to grant a "Declaration" to such pan-European pension funds.

3.3 Exemption from Belgium's annual 0.17% wealth tax and other UCITS taxes

Another fiscal handicap of the past was the subjection of private pension funds established in Belgium to an annual 0.17% tax on the value of its assets. OFPs are fully exempted from this tax¹⁸.

An OFP is also not subject to Belgium's 0.08% or 0.01% taxes imposed on UCITS¹⁹.

3.4 New Value Added Tax (VAT) exemption

In the past, VAT was generally due on management and other fees charged to a Belgian pension fund. Since the pension fund itself is an exempt VAT taxpayer, it could not recover such VAT. A VAT exemption has now been introduced for management services rendered to OFPs²⁰. This allows an OFP to subcontract to Belgian or foreign²¹ pension fund management providers without attracting VAT on their fees billed to the OFP.

This VAT exemption applies to both the financial management and the administrative management of an OFP (to be interpreted in line with case law of the European Court of Justice²²). In this regard, the Belgian VAT administration has issued a circular letter on 17 June 2008 with detailed guidance on the categories of services that are covered by the VAT exemption. The circular letter distinguishes between services relating to "financial management", which generally are within the scope of the exemption, and services relating to "administrative management", which may be exempt if, viewed broadly, they form a distinct whole, and are specific to, and essential for, the management of an OFP. The circular letter also confirms that services relating to "physical and technical management" are usually not covered by the exemption.

Only a few European countries have introduced a VAT exemption on pension fund management services. This VAT exemption gives Belgium a competitive advantage over countries (such as the Netherlands) that do not have an exemption and where VAT on outsourced management services may constitute a significant cost for the pension fund entity.

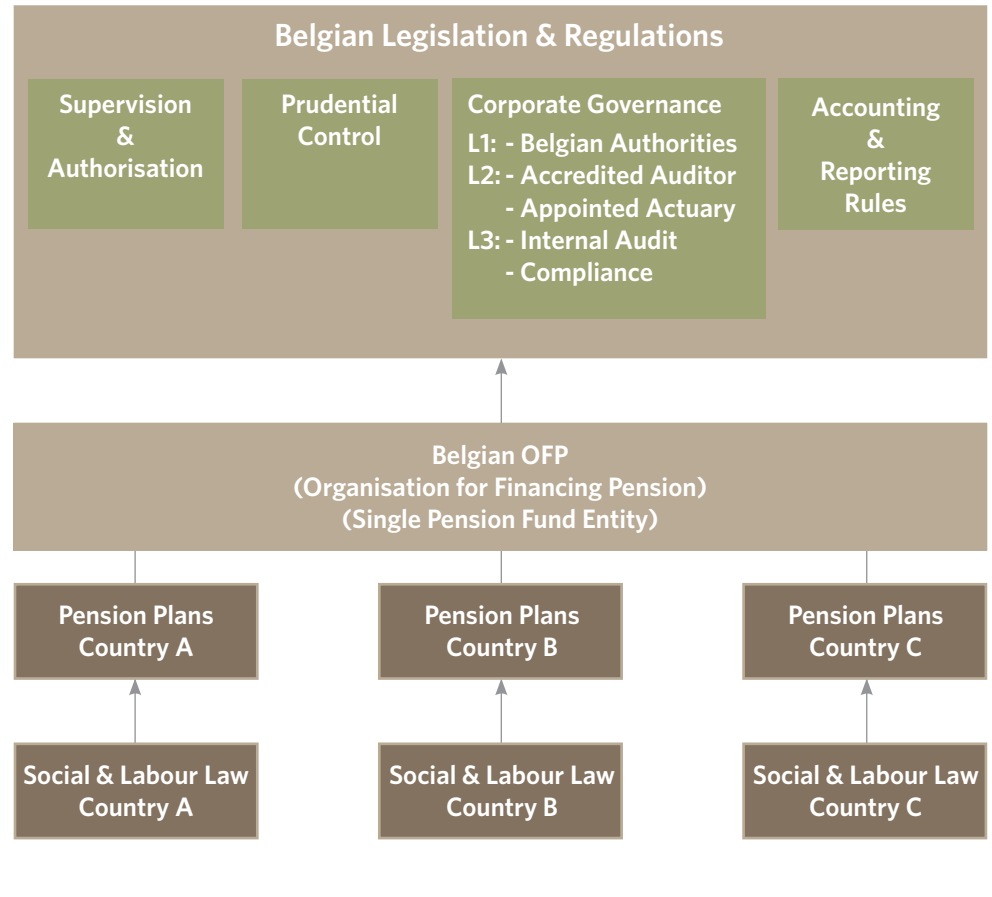
3.5 Tax-free exit from Belgium

It may be noted that Belgian tax law does not prohibit an exit or repatriation of a pension fund from Belgium to abroad. Indeed, since an OFP is anyway not taxable on capital gains or other earnings from its investment assets, a transfer of the OFP's reserves and assets to abroad is not taxable.

The Belgian Income Tax Code also specifies that a transfer of pension reserves which were funded by pension premiums for which a tax deduction was claimed in Belgium does not trigger taxation in the hands of the beneficiaries (nor in the hands of the OFP) if the transfer is made to a similar pension fund within the EEA²³.

4. Main Legislation & Regulations

Figure 3: Important Legislations & Regulations Governing a Belgian OFP



5. Prudential Rules & Supervision (Watson Wyatt)

Apart from the favourable new tax treatment previously summarised, Belgium now also offers a highly flexible and modern prudential supervision regime for pension funds²⁴.

A major change in the prudential framework regards the disappearance of the notion of minimum funding. In the past, the technical reserves were subject to a minimum level, being the maximum of the vested reserves according to the pension rules and the present value of accumulated benefits at a discount rate of 6% and mortality tables provided by Belgian legislation²⁵. As long as this minimum was attained, no further justification of economic and demographic assumptions were needed.

Based on the EU Directive 2003/41, institutions operating occupational pension schemes that provide cover against biometric risks and benefits or guarantee either an investment performance or a given level of benefits must establish sufficient technical provisions in relation to the whole of these schemes. Besides technical provisions, the law obliges to constitute a solvency margin in relation to the whole of its activities and in proportion to its liabilities.

The methodology and assumptions for the valuation of the technical provisions shall be chosen prudently, taking into account the relevant rules of the home Member state, having regard to the main characteristics of the group of members and the pension schemes.

The method for the calculation of the technical provisions will be part of the financing plan.

As, no formal guidelines have been issued by the supervisory authorities, the appointed actuary, who has to advise on the financing plan, the reinsurance and the amount of technical provisions, has a substantial responsibility.

Belgium now also offers a highly flexible and modern prudential supervision regime for pension funds

In order to guarantee the durability of the liabilities, prudent, motivated and a coherent set of choices will have to be made regarding:

- The elements of the funding plan
- The test of continuity
- The investment policy, described in the statement of investment principles

5.1 The elements of the funding plan

The funding plan sets out the way in which contributions are determined and technical provisions will be calculated. The methods used for calculating technical provisions will remain unchanged, unless modification is justified. The sponsoring companies will commit themselves to comply with the funding plan and to pay regularly contributions.

The discount rate used for calculating technical provisions will be based on the expected return of assets and future investment yields and/or bonds interest rates. Biometric tables will be based on the main characteristics of the members groups and on expected changes in the relevant risks.

The actuary will have to verify whether the level of assets is sufficient in the long and short run. The short term barometer are the vested reserves, determined in the pension rules taking into account the legal prescriptions.

5.2 The test of continuity

The long term barometer is based on a test of continuity, aiming at guaranteeing the durability and limiting the risk of under funding in the long run. The test can be performed on stochastic (Asset Liability Management (ALM)) and/or deterministic elements, depending on size of the OFP, the investment policy, etc and will consider a settlement period of the vested reserves. In case the OFP has opted for a deterministic analysis, some stress-testing will need to take place.

Liabilities will evolve with the rights that are unconditionally promised, in accordance with the prudent assumptions of the funding plan. Assets shall evolve in accordance with the prudent principles of the statement of investment principles and the funding plan. They must be sufficient, based on a prudent level of probability, to cover the technical provisions resulting from the continuity test, increased by the solvency margin and the debts of the OFP. Settlement in going concern is also allowed.

5.3 The investment policy

Covering assets must belong to the following investment categories²⁶:

- The financial instruments traded on regulated markets²⁷
- Reserves established by the IORP with an insurance company authorised by the competent authority of a Member state
- Loans accompanied by sufficient guarantees
- Real estate, rights on real estates, and real estate certificates
- Re-insurers' share of the technical provisions, in accordance with the conditions imposed by the CBFA
- Endowments yet to be collected in which, the due date has since lapsed by a maximum of one month
- Uncontested tax liabilities
- Deposits in current accounts or term deposits held with the National Bank of Belgium or with a credit institution authorised by the CBFA or by the competent authority of the state in which the credit institution has its registered office
- Accrued interest and rent on covering assets, provided they are not already included in the value of the corresponding assets

Investment in the sponsoring undertaking shall be no more than 5% of the portfolio as a whole and, when the sponsoring undertaking belongs to a group, investment in the undertakings belonging to the same group as the sponsoring undertaking shall not be more than 10% of the portfolio²⁸.

Belgium has used its authority provided by article 18, 1, f) of the European Directive in Article 37 of the Royal Decree executing the Law of 27 October 2006, which states that the restrictions mentioned in the previous paragraph shall not be apply to investment in bonds issued by a governmental institution.

Covering assets shall be located within the EEA²⁹. They may be denominated in:

- Euro or currency convertible without restriction into euro
- In the currency of the liabilities

In case assets appear to be insufficient, or in case the requirements regarding the composition of technical provisions and solvability margin are no longer fulfilled, the institution must submit a recovery plan to the supervisory authorities for approval.

Furthermore, the supervisory authorities can impose measures in order to anticipate a possible shortfall of the solvency margin, the technical provisions or assets.

The new prudential regulations are characterised by a high level of flexibility. In case the institution administers the pension schemes of different sponsoring companies, the management agreement will determine the level of solidarity between them. The management agreement can take into account the fundamental differences in the nature of pension schemes for the valuation of technical provisions. It can further make arrangements to install ring-fencing between the pension schemes in case of differences in the funding level or asset allocation. This will appear to be very useful, e.g. in case of cross-border activities.

The statement of investment principles must, at least, contain weighing methods applied to investment risks, risk management procedures, and strategic asset allocation based on the nature and the duration of the liabilities. The statement shall be reviewed at least every three years and immediately after important changes to investment policy.

6. Corporate Governance (*Watson Wyatt*)

New provisions regarding corporate governance are embedded in the legislation of 27 October 2006³⁰, which are based on an OECD³¹ directive of 28 April 2005.

The corporate governance framework has been developed around 11 basic principles. In conformity with the 'prudent person' rule, these principles were based on a more qualitative than quantitative approach. In relation to these principles, the supervisory authorities have issued a circular CPP-2007-2-WIBP,³² bringing together all relevant clauses regarding corporate governance and a note containing best practices and recommendations regarding corporate governance³³.

The OFP's sector is very heterogeneous. In consequence, these principles should be applied on a reasonable and proportional basis. Each OFP should develop a coherent and adequate policy adapted to its activities, taking into account the volume, nature and complexity of these activities and, therefore its risk profile.

The 11 principles are:

1. The management structure

The government structure should be aligned to its activities. Operational tasks must be allocated in a transparent manner and there must be a clear distinction between operational and supervisory tasks.

An OFP has one or more operational bodies, responsible for its own management. One of which is the board of directors. When the board of directors transfers the execution of the general policy to those operational bodies (e.g. an investment committee), it continues to supervise these operational bodies.

The corporate governance framework has been developed around 11 basic principles that should be applied on a reasonable and proportional basis

2. The bodies of an OFP

The composition, competences and responsibilities of each body of the OFP are well-defined (Figure 4 outlines the legal structure of an OFP). First of all there is the general assembly, which has the most extended authority to execute or ratify the acts of the OFP.

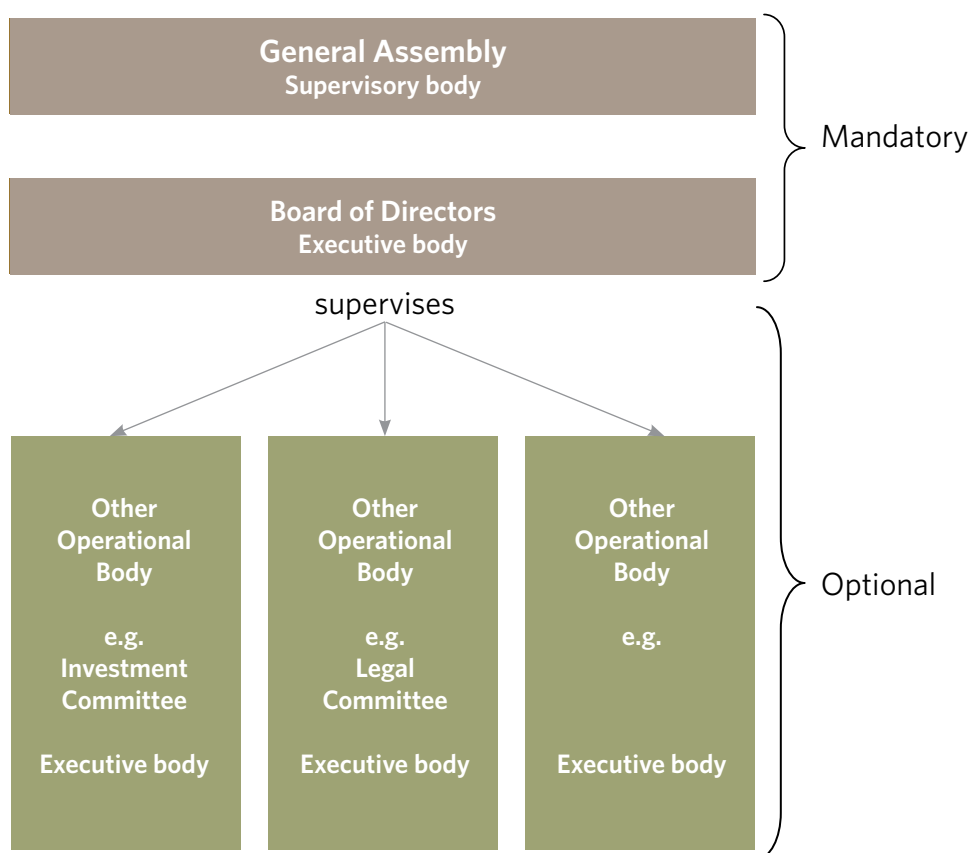
The board of directors is responsible for the execution of all actions needed or useful for the realisation of the social objective of the OFP, except those that have been dedicated to the general assembly by law or through the bye-laws.

Besides the board of directors, other operational bodies execute the government policy of the OFP based on delegation and under the supervision of the board of directors (e.g. an investment committee, an internal audit committee, a complaint management committee, a risk committee, etc).

3. Internal control

Within the scope of its supervisory task, the board of directors ensures that the OFP has appropriate internal control. Internal control involves a complete set of required measures to ensure that the conduct of business takes place in a prudent and regulated way, that the means are used in an economic and efficient manner and that risks are sufficiently identified and managed in order to protect the assets. Furthermore, the technical, financial and management

Figure 4: Legal structure of an OFP



information, must be integral and reliable. The legal and regulatory framework as well as the policy and internal prescriptions of the OFP must be fulfilled.

4. Compliance function

The authorised operational body develops an integrity policy. The compliance officer is an independent person, aiming at investigating and developing compliance rules in relation to the integrity of the OFP activity.

5. Business continuity

The board of directors develops a business continuity policy to allow for the activities and services to continue without interruption, in case of serious, unplanned disruption (i.e. acts of war, terrorism, dreadful diseases, etc).

6. Internal audit

The internal auditor is an independent person, who aims at investigating and judging the appropriateness, efficiency and effectiveness of internal control. He has the authority to inform the president of the board of directors, the compliance officer, the external auditor and the appointed actuary. He assists operational bodies in executing their responsibilities and can provide them with analyses, evaluations, recommendations, advice and information regarding the investigated activities.

7. Outsourcing policy

The OFP establishes an outsourcing policy, submitted for approval of the board of directors, and identifying the conditions of outsourcing. Outsourcing can have reference to administrative and financial functions (such as accounting, asset liability management, etc) as well as to specialised tasks (internal audit, compliance, etc).

8. External auditor

The external auditor assists the supervisory authority in verifying whether the OFP has taken the appropriate measures for the administrative and accounting purposes as well as for internal control. The external auditor certifies the technical provisions and reports on the annual accounts, judging the financial status and management of the OFP.

9. The appointed actuary

The appointed actuary advises the OFP on the funding plan, the reinsurance of risks and the amount of technical provisions. He also informs the managers of the OFP and the supervisory authorities about any decision he is aware of that infringes the applicable legislation or regulation.

10. Internal circulation of Information

The OFP makes sure that appropriate management information systems have been set up so that the communication between the persons and entities involved in the management runs smoothly and that relevant and correct communication is provided.

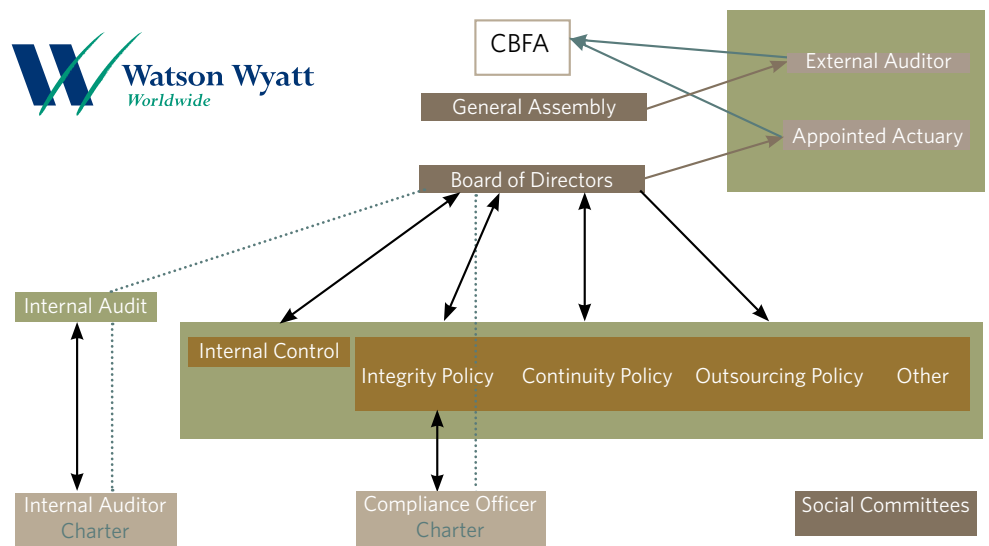
11. External information

The OFP provides the relevant information to members, beneficiaries, supervisory authorities and, work councils, health and safety committees, required by legal or contractual conditions.

According to the circular, these principles must be implemented in a reasonable and proportional manner and according to the principle “comply or explain”.

The objective of corporate governance is to make sure that OFPs are able to administer and execute pension schemes and to guarantee that fiduciary and biometric liabilities stipulated in the pension schemes are performed. It is a whole of principles that aim at creating OFPs that are a safe source for the funding of pension payments.

Figure 5: Corporate Governance



7. A Suitable Structure for pan-European Pension Funds (Watson Wyatt)

7.1 More than asset pooling

A pan-European pension fund goes further than mere asset pooling. Figure 1 displays the structure of Multinational Pension Fund Pooling. Under the pooled assets subsists a structure of different legal entities in various countries, subject to different supervisory authorities. The principle of cross border activities is absent. The contributions are collected through the different pension funds and are pooled on a supra pension fund level, aiming at producing economies of scale. However, assets are still separately owned by the different pension funds each of them subject to a different national tax regime, which can be more or less favourable.

In that respect, the Irish CCF and Luxemburg FCP are to be considered as asset pooling vehicles rather than as pan-European pension funds. They have been set up as a contractual arrangement between investors for the purpose of pooling the assets of the separate underlying pension institutions established in different countries. Their principle characteristic is that they are explicitly dealt with as tax transparent vehicles by their national legislation³⁴.

7.2 A suitable structure for pan-European pension funds

A pan-European pension fund adopts a structure as shown by Figure 2. Contributions paid by contributing companies established in different countries are collected by one single legal entity established in the home state, which governs pension schemes from one or several host countries and, as such, executes cross border activities.

Belgium's occupational pension structure is very suitable for a pan-European pension fund. Although not unique in Europe, the Belgian system is based on a twin (but separate) entity structure – the “fund” or “institution” at one level and the “plan” or “rules” on another. This contrasts with the single entity “scheme” (e.g. the UK).

This structure makes a difference. The European Directive permits each Member State to specify which of its social and labour law requirements, relating to occupational pension provision, have to be applied if its citizens are to be covered in a pension arrangement established in one of the other Member States.

Research has revealed inconsistency between Member States in matters such as:

- (a) what actually constitutes cross-border activity
- (b) what is meant by “defined contribution” business, and
- (c) what should or should not be included as social and labour law.

Some of these inconsistencies are likely to be either short-lived or trivial. Others could be far more serious. For example, Belgium requires defined contribution plans to have a minimum investment guarantee applied to participants subject to Belgian social and labour legislation. In some countries, such as the UK, any such guarantee would render the arrangement a defined benefit plan – a categorisation that brings with it many additional requirements.

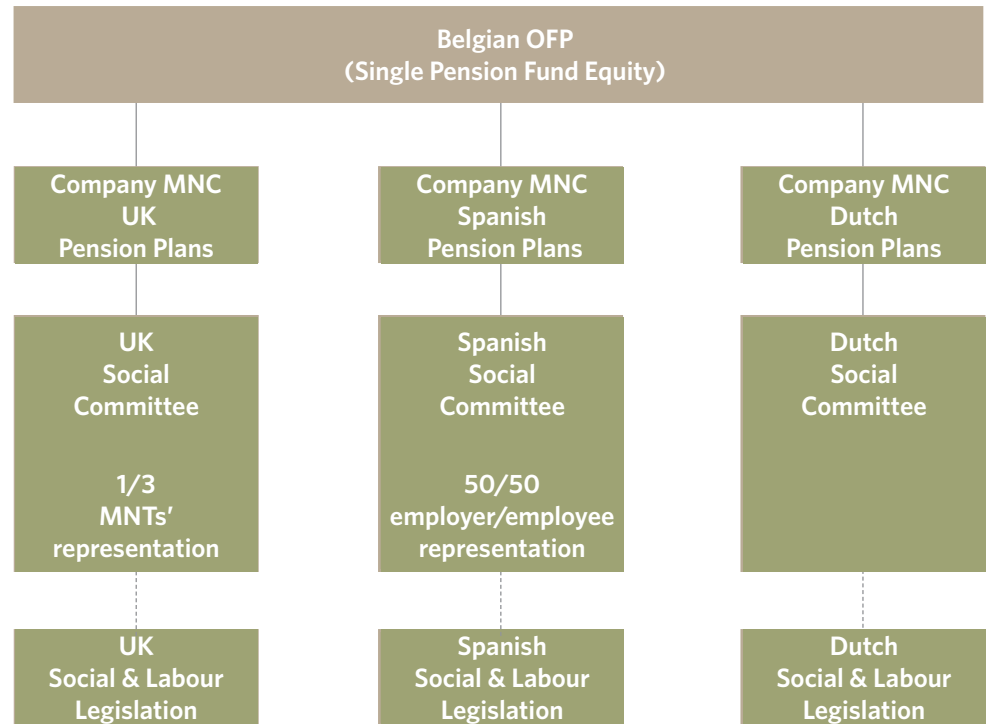
Moreover, a country operating a single entity structure (no separation between the pension institution and the plan), would not easily lend itself to accommodating certain requirements specified by some.

To illustrate the point, a Spanish plan, in order to be a qualified (tax-privileged) pension plan, has to have a management committee comprising 50/50 employer/employee representation. This does not sit comfortably with the Member Nominated Trustee (MNT) provisions applying to an

occupational pension established in the UK. For example, the MNT participation requirement is generally limited to one-third of the trustee board. A higher proportion would need the employer's approval. Moreover, it is far from clear that a MNT appointed from the pensioner constituency would meet the Spanish requirement for being an employee representative. At best, the Spanish members would have to participate in the MNT process (requiring communication in Spanish), as well as meeting the management committee requirements – at worst, it could make the proposition of including a Spanish 'section' untenable.

A twin-entity structure is more advantageous in that aspect. In brief, the social and labour laws need only apply at 'plan' level. Therefore, in the above example a social committee (meeting the 50/50 requirement) can be established to oversee the operation of the plan, leaving the OFP free to operate in accordance with the Belgian requirements relating to its governance, accounting, annual reports, funding/valuations and investment. For its part, in the Belgian implementation of the IORP directive, the social and labour laws are separate from the legislation governing the operation of the OFP.

Figure 6: Concept of Twin-Entity Structure



8. Social & Labour Aspects (*Watson Wyatt*)

An OFP established in Belgium is subject to the Belgian supervisory legislation, and as such, has to comply with the dispositions of the Law of 27 October 2006 and its Royal Decrees regarding the accounting rules, ring-fencing, annual reports, reporting to CBFA, the level of technical provisions and, corporate governance principles amongst others.

The Belgian supervisory law provides the possibility of setting up social committees

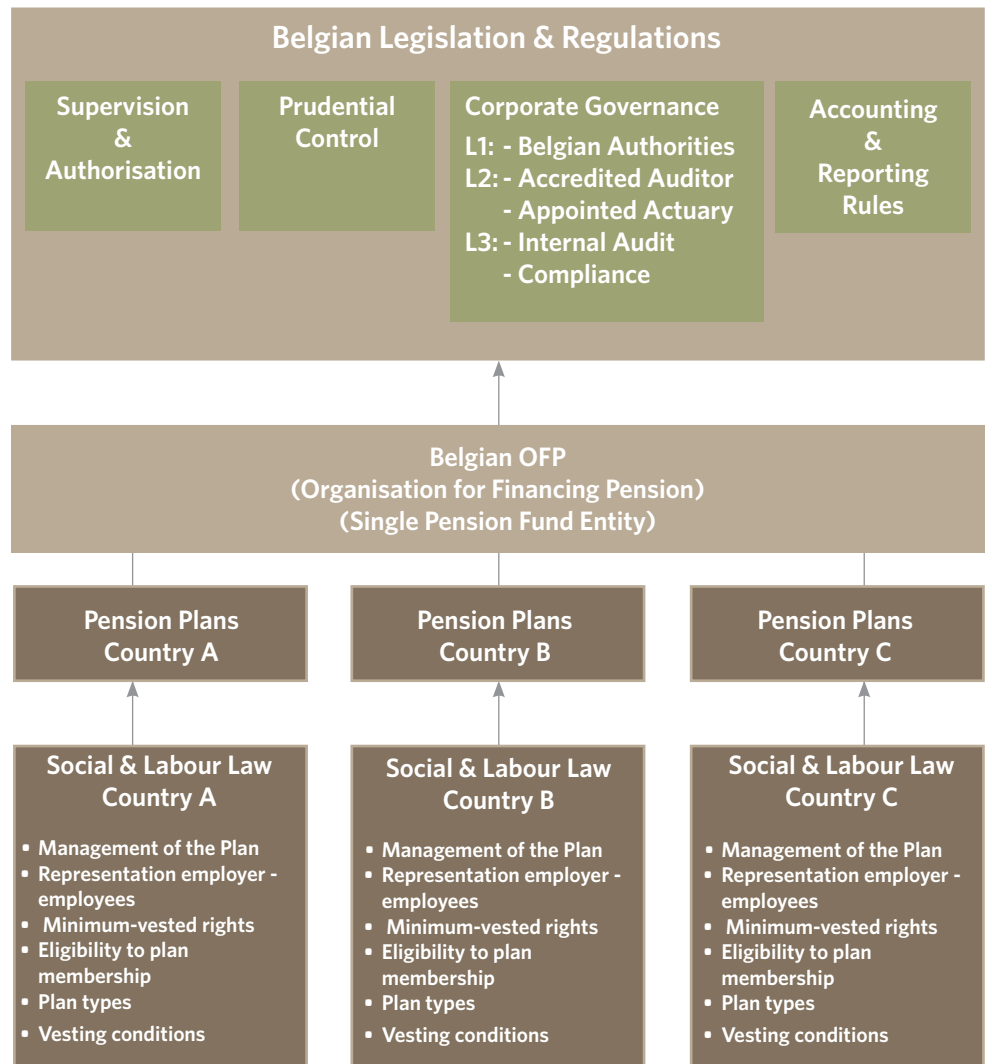
On the other hand, the Belgian supervisory law provides the possibility of setting up social committees. Social committees are not operational bodies of an OFP, but they can be installed in order to make sure that the different social and labour legislation, applicable to the foreign pension schemes governed by the OFP, can be respected.

The twin-entity structure, the areas of responsibility of the OFP and of the social committees as well as the applicable legislations can be presented as illustrated in Figure 7.

The OFP, besides being used to host DB plans, are likely to be used as a vehicle to host pan-European DC plans serving one or various corporations across different Member states

Besides the OFP being used to host defined benefit (DB) plans, they are also likely to host pan-European defined contribution (DC) plans serving one or various corporations across different Member States. New plans set up are more often of a DC-type and are, in general, less complex than DB schemes. There is a trend for existing defined benefit schemes to be converted into DC-schemes, due to ageing population, the volatility in pension cost, etc. A general DC-framework applicable to all the entities of a corporation that have joined the scheme can be set-up. The general framework contains an outline of a common pension plan (e.g. level of premium rates, the different categories, etc). In addition to the general framework, local social and labour conditions will apply to each of the local sections. These social and labour conditions can have reference to the way the plan is managed, the minimum return (as is the case for participants in DC plans applicable to employees subject to Belgian social and labour legislation), vesting conditions, etc. Centralising schemes under one umbrella pension institution will reduce costs associated with the creation and maintenance of various pension funds. The pooling of assets will also be beneficial for employees having access to a wider range of investment options. It remains to be seen to what extent the centralisation of the pension plan administration would be possible and lead to cost savings as other factors, such as cultural differences, the proximity of the service provider, etc can also play a substantial role thwarting too extreme centralisation of the administration.

Figure 7: Social Committees



9. Important Legislation and Regulations³⁵ (*Linklaters*)

- Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (IORP)
- Law of 27 October 2006 on the activities and supervision of institutions for occupational retirement provision
- Royal Decree of 12 January 2007 on the prudential control of institutions for occupational retirement provision
- Royal Decree of 21 December 2006 modifying the Royal Decree of 26 June 2003 on the publicity of acts and exhibits of non profit organisations, international non profit organisations and foundations
- Royal Decree of 19 April 1991 regarding the annual accounts of private welfare institutions subject to the legal framework on the supervision of insurance companies
- Royal Decree of 5 June 2007 on the annual accounts of the institutions for occupational retirement provision
- Regulation of 21 February 2006 of the CBFA on the regulation regarding authorisation of auditors and audit companies, authorised by Ministerial Decree of 19 April 2006
- Memorandum on the procurement or extension of an authorisation or extension of authorisation by an institution for occupational retirement provision governed by Belgian law
- Circular CPP-2007-1-LIORP to institutions for occupational retirement provision. Notification by an institution for occupational retirement provision governed by Belgian law of a cross-border activity or of an activity in a State that is not a member of the EEA

10. BNY Mellon Capabilities

10.1 Introduction

BNY Mellon offers clients a broad spectrum of global products, technology and service to help enhance the management, administration and oversight of their investment process. BNY Mellon gives its clients the tools and information needed to make better decisions throughout the entire investment process. As a leading global provider of asset servicing, BNY Mellon invests in the success of its clients by focusing on efficiency and performance throughout the process and offering sophisticated risk management solutions. Clients can be confident that through our proactive and consultative partnership approach we will be able to serve all their needs.

BNY Mellon has more than \$23³⁶ trillion in assets under custody and administration and it has a specific focus on the Pension Fund sector and has built a dedicated service team within its organisation to service this sector. BNY Mellon currently services over 2,000 pension plans globally and over 400 across Europe.

BNY Mellon understands the cost, risk and efficiency benefits that can accrue through the different possibilities of pooling of assets drawn from single or multiple jurisdictions. BNY Mellon offers solutions with an unmatched degree of granularity in terms of accounting for pooled assets. We also provide our clients with the highest level of transparency in the industry.

By pooling their assets in a collective investment vehicle (Figure 1) or in a single entity fund like a Belgian OFP (Figure 2), sponsors of pan-European pension provisions can benefit from lower asset management, transaction, and other related expenses than in cases where the assets remained segregated.

10.2 BNY Mellon service solutions

BNY Mellon offers a wide range of products and value added services which help OFP's meet their challenges.

10.2.1 Overview

Global Custody

- Sub-custodian Network
- Settlement
- Corporate Actions
- Income Collection
- Tax reclamation
- Proxy Voting Services
- Cash Management
- Foreign Exchange

Accounting

- Fully integrated, global accounting system
- High speed real-time processing
- Sophisticated general ledger
- Pooled fund administration
- Key & Comprehensive Reporting

Securities Lending

On-line Information Delivery

Performance & Risk Analytics

- Performance Measurement
- Performance Attribution
- Risk and Analytics
- Compliance Monitoring

Other Value-Added Services

- Collateral Management
- Transition Management
- Derivative Product

10.2.2 Global Custody

(i) Sub-custodian Network

- Network of sub-custodians extending to 105 markets worldwide
- Continuous review of network to ensure it evolves to meet clients' investment goals and global investment programmes
- Dedicated, regional network management team monitoring local economic, political, regulatory, and industry-related developments. Clients apprised through NetInfo® daily news service
- Network selection based on a variety of criteria, such as compliance with worldwide regulatory requirements, competitive pricing, general market reputation, SWIFT message capabilities, securities lending support, credit ratings, overall banking relationship with BNY Mellon, and ability to consistently meet our clients' needs
- Selected sub-custodians must meet a set of stringent performance standards, which are re-examined during quarterly reviews and frequent on-site visits, ensuring clients are uniformly provided with the best provider in each market
- Rigorous ongoing monitoring of network credit and operational risk issues by separate risk departments

(ii) Instructions & Settlement

- Settlement of securities trades in 105 markets
- Emphasis placed on Straight Through Processing (STP) throughout the trade process. Monitoring and ad hoc help to improve STP available
- SWIFT is BNY Mellon preferred method of trade communication but authenticated trade instructions also accepted via a variety of methods
- Proactive approach to settlement: Real-time trade instructions processing and reporting upon their receipt, identification, management and reporting of issues during the pre-matching and matching processes in order to ensure proper settlement, real time settlement confirmation, proactive fail monitoring
- Contractual settlement offered in 65 markets

(iii) Corporate Actions

- BNY Mellon recognises that risk is inherent in corporate action processing and flow of information between the investment manager and the issuer or registrar of the securities
- Well controlled and proceduralised environment to mitigate risk
- Automated notification of mandatory or voluntary corporate actions and processing of resulting transactions
- Significant automation of corporate actions processing through our proprietary platform thanks to recent market developments over the last years. Namely, adoption of SWIFT standards creating a highly structured format for corporate action messages

(iv) Income Collection

- BNY Mellon offers contractual income crediting policy in 54 markets
- Proactive approach in monitoring and claiming income that is due

- Income collection information received from vendors through an automated interface directly to the BNY Mellon custody management system
- Automatic accruals of interest and dividend income on ex-date for each individual security
- Income payments are pre-advised in the several possible ways

(v) Tax Reclamation

- Proactive approach to claiming tax refunds
- Completion of documents as required in every market where relief at source is possible. Where relief at source is not available, accrual and submission of reclaims in every market possible and within required timeframes
- Tax reclaim system for logging, recording accounting and reporting of all tax receivables

(vi) Proxy Voting Services

- BNY Mellon supports pension sponsors' corporate governance strategies via proxy voting
- The proxy voting service is offered in over 70 countries worldwide
- Market information on local proxy voting practices
- Provision of a timely and easily accessible web-based global proxy voting service streamlining the process of notification and voting with electronic communications. This leaves the crucial decision to our clients on how we vote
- Consolidated status reporting allowing institutional clients to control their proxy voting choices
- Support of standing instructions, the ability to vote identically across multiple accounts with the same holding, and the ability to vote entire holdings or a specific numbers of shares
- Support of involvement of independent specialists for research and other services
- Support of consolidated voting and reporting across custodians

(vii) Cash Management

- Safety and performance of top quality funds from BNY Mellon and selected third parties delivered via fully automated sweep
- Flexibility of separately managed cash investments tailored to OFP objectives for investments, taxation or other needs delivered via sweep
- Safety of BNY Mellon balance sheet with competitive rates of interest paid on balances
- Treasury experts available to consult and tailor cash management services to optimally address OFP needs
- SWIFT availability supporting all messages important to cash management
- End to end cash management reporting - intraday availability and forecasting; reconciliation and investigations; drill down; and ad hoc query
- Latest possible cash deadlines to optimise OFP ability to manage cash positions
- References available from satisfied clients for whom we have tailored our cash management services to their needs

(viii) Foreign Exchange

BNY Mellon is a premier foreign exchange provider making markets and carrying positions in over 100 currencies, through:

- Nine global trading centres (New York, Boston, Pittsburgh, London, Brussels, Seoul, Taipei, Tokyo and Hong Kong)
- 24-hours market coverage (via the trading centres or the Internet)
- Particular expertise and support in emerging market currencies (with clear understanding of regulatory requirements and operational conventions for settlement, as well as access to local market liquidity through our sub-custody network)

BNY Mellon offers a comprehensive array of innovative services:

- Standing instruction services: automated capture of all types of custody-related foreign exchange (from trade instructions to income, corporate actions, etc. with flexible capture and execution features) including automated trade confirmation processing
- Direct dealing with our foreign exchange professionals
- e-commerce pre-trade order management, trade execution products offering trade automation and real-time FX rates (iFX Manager, iFX Express, also participant on leading multi-bank portals, FXall and FX Connect) and post-trade allocation and messaging (iConfirm) allowing on-line trade confirmation, maintenance of standing settlement instructions and mark-to-market reporting
- Full SWIFT capabilities
- Multi-currency payments capabilities through iDeal Forex
- Global Mass Payments services to support small-value, cross-border payments, such as pension disbursements
- Capital Flow Analysis: quantitative and qualitative research analytics tool that allows clients to chart cross-border investment flows against currencies and global market indices of their choice (thanks to the bank's \$23 trillion in custody assets under custody and administration)
- Awarded #1 ranking in 24 categories in Global Investor magazine's 2008 Foreign exchange Survey

10.2.3 Securities Lending

As one of the world's largest securities lending agents, BNY Mellon offers outstanding opportunities to lend all equity and fixed income asset classes in all major markets. We work closely with our clients to deliver a customised securities lending programme that is aligned with their risk/reward appetite. The benefits of working with BNY Mellon include:

- BNY Mellon's indemnification is backed by a powerful parent organisation
- 24-hour trading capability delivered via desks in London, New York, Pittsburgh and Hong Kong
- Flexible approach to trading that maximises clients' revenue within predefined parameters
- Rigorous collateral management within clients' specified guidelines
- Counterparty risk management

- Stringent compliance with all relevant local and international regulations relating to securities lending
- Full reporting of all aspects of the securities lending programme delivered to clients' desktop

10.2.4 Performance & Risk Analytics

BNY Mellon adds significant value to its clients' investment process by providing timely, high-quality performance measurement and investment analysis. BNY Mellon analytics are used by more than 3,600 institutional investors in 44 countries, representing \$9.6 trillion in assets under measurement. The services are based on industry leading methodologies, providing a reliable framework for viewing and reporting on the status of strategies, performance, portfolio structure, and risk exposures.

(i) Performance Measurement

- Performance comparison against indexes, benchmarks or peers
- Comprehensive range of historic risk measures, including standard deviation, tracking error and information ratio
- Alternative investments supported
- Timely and accurate data delivered via a variety of reports and analytical tools
- Returns calculated consistent with generally accepted industry standards, such as the CFA Institute's Global Investment Performance Standards (GIPS) guidelines

(ii) Performance Attribution

It is important to understand how a return was achieved and, in particular, which investment decisions had the greatest impact. Our attribution services help clients highlight and quantify the sources of portfolio returns.

- Total Fund Attribution
- Equity/Multi Asset Class Attribution
- Multi-Factor/Fixed Income Attribution

(iii) Risk & Analytics

To complement information on returns, clients may need other tools to evaluate a fund's structure and risk exposures, articulate differences in investment styles or oversee a portfolio's investment compliance guidelines.

- Profile Reports
 - Determine the structure and critical style characteristics of a portfolio or composite of portfolios
- Ex-Ante Risk Analysis
 - Risk associated to a particular investment mandate or asset class in portfolio
 - A portfolio's risk change (how and why) over the last measurement period

(iv) Compliance Monitoring

- Flexibility to set-up rules to cover specified investment guidelines
- Daily, monthly or quarterly monitoring of investment guidelines, alerting on any breaches when exceeded

- Concentration exposure limits - security, currency, market cap, duration, prohibited stocks
- Scheduled reporting capability to run at a particular time

10.2.5 Accounting

BNY Mellon provides clients with a complete investment accounting solution, from period end accounting and reporting to regulatory and financial reporting. We work in partnership with each client to tailor a solution to meet their unique accounting needs. We offer a range of accounting services including:

(i) Fully integrated, global accounting system

- Supports a diverse domestic and international client base
- Real-time transaction processing
- Ability to handle any security type, including direct investments and derivatives
- Fully integrated with our custody and performance and analytics systems

(ii) High speed real-time processing

- Instantaneous transaction posting
- Increases accuracy and timeliness

(iii) Sophisticated general ledger

- Accommodates client-specific chart of accounts
- Handles derivative and other hybrid instruments

(iv) Key reporting

- Produces both scheme-specific and regulatory reporting

(v) Flexibility

- Multi-vendor pricing platform
- Supports daily, weekly, monthly, ad-hoc etc
- Accommodates client-directed data sources
- Supports up to five currencies simultaneously

(vi) Pooled fund administration

An OFP can take two primary forms on fund accounting. This reflects the different ways in which an OFP can be structured when the form and requirements of the underlying pension plans are considered. The factors that influence the choice of the OFP structure include:

- Whether the pension plans are from a single jurisdiction/sponsor or from multiple jurisdictions/sponsors
- Whether the pension plans are DC or DB

The overriding nature and form of the OFP as an umbrella pension vehicle is the same in both of the structures detailed below. What does differ is the way in which the assets of the participating pension plans are combined for reporting/management purposes whilst supporting the required segregation of the ownership.

Structure 1: 'Fund of Funds'

Where there is the requirement to maintain a high degree of segregation the OFP is established as a fund of funds structure with sub-funds representing the combined assets of the participating pension plans. Individual sub-funds may have different fund managers enabling a multi-manager structure to be utilised. Ownership is established through the unitisation of the sub-funds.

Structure 2: 'Asset Pools'

Alternatively, and where appropriate, the combined assets of the participating pensions plans may be held in asset pools below the OFP. These pools are established to facilitate the fund management approach. Ownership is established by the use of 'look through' functionality.

BNY Mellon are able to support the fund accounting and reporting for both of the above structures via our integrated accounting system.

(vii) Comprehensive Reporting

- Provides detailed and fully audited statements
- Individual account and consolidated reporting
- Flexible formats and delivery methods

10.2.6 On-line Information Delivery

Workbench is the BNY Mellon internet-based information delivery product for its institutional clients and their investment managers

- Award winning cash reporting and instruction platform in 11 languages including French, Spanish, Italian, German, and Dutch
- Real-time custody reporting (including cash management, transactions, corporate actions, reference data, news), accounting and performance, analytical and compliance reporting at the click of a mouse
- Accessibility via a single sign-on process and from anywhere around the world, 24 hours a day, seven days a week
- Use of the most advanced on-line security measures to ensure privacy and security
- Up to the minute market commentary
- Real-time query to any aspects of the investment process
- Possibility to choose from a menu of pre-defined daily and monthly reports available in both hard and soft copies

10.2.7 Other Value-Added Services

(i) Collateral Management

Tri-party collateral management can be introduced to most collateral transactions, where "the collateral manager" takes on the operational duties in a transaction. These services are frequently used in repo and securities lending where non cash collateral is used. The operational duties like custody, verification of eligibility, ensuring sufficiency throughout transaction, effecting substitutions and margin calls, reporting to both parties is outsourced to a professional third party. The trading relationship between the parties remains.

It is little known that BNY Mellon manage in excess of \$1.7 trillion of collateral on a daily basis, and is by far the largest tri-party collateral manager in the market. BNY Mellon stands behind a large number of the collateralised transactions in the market.

- The service consists of outsourcing of the operational duties enabling the trading parties to focus on the underlying trade while managing the collateral by giving BNY Mellon the guidelines they wish to be followed on their behalf
- Coverage of Asian/European and American time zones offering services to local firms and international firms
- Support of most asset classes ranging from national bonds to equity convertibles and whole loans
- Pioneer in usage of equity as collateral where the tax risk associated with dividend payments of equities and other assets is managed
- Provision of fully automated:
 - Verification in selection of collateral
 - Screening of the collateral to enforce diversification and credit quality
 - Control of adequacy and liquidity in accordance to the trading parties guidelines
- Infrastructure providing true economies of scale to facilitate:
 - Extensive data warehousing
 - Auto-substitution
 - Auto-allocation and optimisation technology
 - Same day web reporting

(ii) Transition Management

BNY Mellon offers transition management services, via its brokerage and technology affiliate BNY ConvergEx Group, designed to assist clients in rebalancing asset allocations, entering into a new investment strategy, or liquidating an existing portfolio. The risk-controlled, proven process seeks to minimise total transition costs, including market impact and opportunity costs

(iii) Derivative Products

BNY Mellon's Derivatives Group offers clients a full range of USD over-the-counter ("OTC") interest rate and equity swap and option based solutions, structured to meet specific client requirements. In addition, BNY Mellon offers over-the-counter FX options in all G7 currencies plus selected emerging markets.

11. Footnotes

- ¹ Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provisions, Official Journal, L 235/10 of 23 September 2003.
- ² See footnote 1.
- ³ See http://ec.europa.eu/taxation_customs/taxation/personal_tax/pensions/index_en.htm
- ⁴ The Law of 27 October 2006 introduced the new company law regime of an OFP and also renewed the regulatory rules on pension funds. The Law of 27 December 2006 introduced a new fiscal regime for OFPs.
- ⁵ Dutch, French and English language versions of the law are available on the website of the Banking, Finance and Insurance Commission (www.cbfa.be) (see section “Important legislation and regulations”).
- ⁶ See http://www.cbfa.be/bpv/wg/pdf/law_27-10-2006_eng.pdf
- ⁷ http://www.cbfa.be/eng/bpv/circ/pdf/2007-05_memorandum.pdf. The following documents must among others be included in the request file: the bylaws, the financing plan, the statement of investment principles (SIP), a description of the pension plans which the OFP intends to administer, the management agreement, if any (the management agreement is concluded between the OFP and its members sponsoring undertakings determining its terms and conditions of operation and the rules of its functioning. If these rules are defined in the bylaws, the law does not impose the conclusion of a management agreement) and the information regarding the sponsoring undertakings and the members of the operational bodies.
- ⁸ The latest nine months as from the request.
- ⁹ http://www.cbfa.be/eng/bpv/circ/pdf/cpp_2007_1_wibp_lirp.pdf. This Circular takes into consideration the rules of collaboration among the competent authorities of the EEA Member States laid down in the Budapest Protocol of February 2006 (Protocol relating to the collaboration of the relevant competent authorities of the Member States of the European Union in particular in the application of the Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (IORPs) operating cross-border), developed within CEIOPS (Committee of European Insurance and Occupational Pensions Supervisors) in application of EU Directive 2003/41. The aforesaid notification shall be accompanied by a file containing among others the following information: the name of the host Member State (in case of cross-border activity) or the name of the State in which the activity is to be carried out (in case of activity in a non-EEA State), the name of the sponsoring undertaking and the main characteristics of the pension scheme to be managed on behalf of the sponsoring undertaking.
- ¹⁰ This information relates to the social and labour legislation relevant to the management of the pension scheme on behalf of the sponsoring undertaking, the information requirements and the rules governing the investment of covering assets.
- ¹¹ However, because of the better tax status reserved to OFP's, various existing Belgian pension funds have already converted into an OFP before the end of July 2007.
- ¹² Arts. 179 and 185bis of the Belgian Income Tax Code (“ITC”). An OFP is also taxable on so-called “secret commissions” at the rate of 309%. An OFP can avoid such taxation simply by complying with Belgium's ordinary fiscal reporting formalities.
- ¹³ Art. 185bis, §2 ITC.
- ¹⁴ EU Member States which exempt domestic pension funds from income taxation either apply no withholding tax on interest and dividends received by such domestic pension funds or reimburse any withholding tax levied at source. Foreign pension funds, however, will often be subject to withholding tax with no right to claim a reimbursement. To the extent that these foreign pension funds are exempt from income tax in their home country, they will normally not obtain a foreign tax credit. Consequently, the foreign withholding tax constitutes a final tax and clearly dissuades cross-border investments. It is difficult to see how such a restriction on the free movement of capital can be justified by the (source) member State concerned (see also the ruling of the European Court of Justice of 14 December 2006 in Denkvit, case 170/05). In this regard, the European Commission has initiated infringement proceedings against several Member States who maintain such restrictive withholding taxes on outbound dividends to foreign pension funds. In particular, the European Commission has sent letters of formal notice (the first step of the infringement procedure) to the Czech Republic, Denmark, Lithuania, the Netherlands, Poland, Slovenia and Sweden on 7 May 2007, to Finland and Italy on 23 July 2007, to Austria on 23 November 2007 and to Germany and Estonia on 31 January 2008. In addition, the European Commission has sent reasoned opinions (the second step in the infringement procedure) to Spain and Portugal on 6 May 2008 and to the Czech Republic and Italy on 26 June 2008. Moreover, the European Commission has indicated that ongoing investigations of national tax systems may result in proceedings against other member states.
- ¹⁵ Belgium has signed tax treaties with more than 85 countries, covering the world's major business centres as well as many developing countries, and continuous to expand its network.

- ¹⁶ The new treaty applies as from 1 January 2008 except for payments of interest, dividends and royalties in respect of which it applies as from 1 February 2008.
- ¹⁷ US–Belgian tax treaty, Art. 21 (7).
- ¹⁸ Art. 149, 5° Code of Succession Duties.
- ¹⁹ Art 161 ff. of the Code of Miscellaneous Duties and Taxes.
- ²⁰ New art. 44, §3, 11° VAT Code.
- ²¹ Management services rendered by EU service providers will normally be subject to the Belgian VAT regime meaning that the Belgian VAT exemption applies. Management services rendered by non-EU service providers will not be subject to the VAT regime (but may be subject to similar indirect taxes in their home country).
- ²² ECJ, Case C-169/04, Abbey National, 4 May 2006.
- ²³ Art. 364ter ITC.
- ²⁴ Law of 27 October 2006 on the activities and supervision of Institutions for Occupational Retirement provision
- ²⁵ Previous RD of 7 May 2000, removed by the RD of 12 January 2007 executing the law on the activities and supervision of institutions for occupational retirement provision.
- ²⁶ Article 27 of the Royal Decree executing the Law of 27 October 2006 on the supervision of institutions of occupational retirement provision.
- ²⁷ Referred to in article 2, 1° of the Law of 2 August 2002 on the supervision of the financial sector and financial services
- ²⁸ According to article 91, §1, 6° of the Law of 27 October 2006 and in accordance with article 18, 1, f) of the European Directive 2003/41/EG of 3 June 2003.
- ²⁹ Derogations are allowed. Movable assets located outside the European Economic Area are accepted, provided that the National Bank of Belgium, a credit institution or an investment firm governed by the law of a member state and authorised to carry out the activity of a depository attests that it holds these covering assets for the account of the IORP through an establishment within the European Economic Area, at a credit institution or an investment firm established outside the European Economic Area the authorisation of which the CBFA deems equivalent to its own.
- ³⁰ www.cbfa.be
- ³¹ Organisation for Economical Corporation and Development.
- ³³ Note CPP-2007-2-WIBP regarding the prudential expectations of the Commission for Banking, Financing and Insurances, www.cbfa.be.
- ³⁴ The pension pooling vehicle is considered as tax transparent when the tax authorities of the pension fund investor's domicile and the tax authorities where investments are located agree to apply treaty benefits as if the pension pooling vehicle did not exist. Tax transparency must be acknowledged by the tax authorities of the pension fund's home jurisdiction as well as by the tax authorities of investment countries.
- ³⁵ All the text mentioned in this section are available on www.cbfa.be. The main texts are available in French, Dutch and English.
- ³⁶ Assets under custody as at 30 June 2008.

12. About Us

12.1 Linklaters

Linklaters is one of the world's leading law firms with outstanding corporate, finance and specialist practices. It has over 5,000 staff, of whom around 2,000 are lawyers and 520 are partners. Linklaters operates from 31 offices in 23 countries.

The European pensions group has specialists combining expertise in litigation, pensions law and regulation across Europe and beyond. Where Linklaters does not have offices it will work with a preferred legal adviser network. Linklaters keeps in contact regularly with these partner firms and, through using such a trusted network, it is able to assure clients that Linklaters has complete control of the quality of work.

The Pensions group uses specialist skills to advise trustees, employers, asset managers, investment banks and private equity houses on the structuring, formation, taxation and regulation of all types of investment funds. It has extensive knowledge and understanding of different investment products and strategies, and an in-depth understanding of alternative investment vehicles, liability driven investments and structured investment products.

Linklaters also plays an active role in monitoring and lobbying on pensions law issues in Europe.

12.2 Watson Wyatt

Watson Wyatt is a global consulting firm focused on human capital and financial management. Watson Wyatt specialises in four areas: employee benefits, human capital strategies, eHR and insurance & financial services. This translates into unique perspectives and forward-thinking solutions. Watson Wyatt combines human capital and financial expertise to deliver business solutions that drive shareholder value. Watson Wyatt's office in Brussels provides a specialist range of consulting advice whilst providing access to its global resources and knowledge. With professionals in 105 offices around the world, Watson Wyatt can implement solutions virtually anywhere on the map. Watson Wyatt presence is not just far reaching – it is also the deepest in its business.

Benefits consulting includes actuarial services, valuations, fund design work, defined contribution and defined benefit consulting, communications, financial education, healthcare brokerage and risk management, advice on mergers and acquisitions.

Investment consulting provides advice on governance and regulatory issues, asset allocation strategies, selection and evaluation of managers as well as asset liability studies.

Benefits Administration Solutions provides a full package of administration services for clients who wish to outsource this function.

Watson Wyatt Human Capital consultants advise on broader remuneration issues, executive compensation, HR strategy, flex, recruitment and retention.

Watson Wyatt Insurance and Financial Services consultants advise insurance companies on product design, claims reserving and premium setting, as well as merger and acquisitions activity.

Watson Wyatt International team works on cross-border transactions, providing specialist expertise on such areas as expatriate and international pensions, global share plans, accounting for pensions and multinational pooling.

12.3 BNY Mellon

The Bank of New York Mellon – Brussels Branch is a Belgium based branch office of The Bank of New York Mellon (BNY Mellon), a global financial services company focused on helping clients manage and service their financial assets, currently operating in 34 countries and serving more than 100 markets. The company is a leading provider of financial services for institutions and corporations providing superior asset management and wealth management, asset servicing, issuer services, clearing services and treasury services through a worldwide client-focused team. The company has more than \$23 trillion in assets under custody and administration, more than \$1.1 trillion in assets under management and services \$11 trillion in outstanding debt (the above figures are indicative only as of 30 June 2008). Additional information is available at bnymellon.com.

The Bank of New York Mellon – Brussels Branch is located at 46 Rue Montoyerstraat, B-1000 Brussels, Belgium. The Bank of New York Mellon is a banking corporation organised under the laws of the State of New York with head office at One Wall Street, New York, NY 10286, USA.

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