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**OPINION of the EIOPA Occupational
Pensions Stakeholder Group regarding
EIOPA Draft Advice to European
Commission on the review of Directive
2003/41/EC**

(EIOPA-CP-11/006, 25 October 2011)

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Introduction and legal basis:

In April 2011 the European Commission asked EIOPA for advice by mid-December 2011 and later extended to mid-February 2012 on the EU-wide legislative framework for IORPs. Overall, this was an extremely demanding deadline for advice on the European legislative framework for the entire occupational pensions sector and it also imposed demands on those who wished to respond to consultation.

Advice is sought by the Commission on the scope of the IORP directive, on certain cross-border aspects and on three other areas. Firstly, what quantitative requirements should apply to IORPs and how should these be measured. Secondly, what should be the qualitative requirements, particularly in respect of the governance of IORPs and their supervision. Thirdly, what information should be provided in respect of IORPs to members and beneficiaries, and to supervisory authorities.

This includes advice on the extent to which the legislative framework for IORPs should be similar to that for other financial institutions and products, in particular the Solvency II framework for insurance and also the UCITS IV Key Investor Information Document.

The EIOPA Occupational Pensions Stakeholder Group's competence to deliver an opinion towards the EIOPA Draft Advice on the IORP directive revision is based on Article 37 of the EIOPA Regulation (1094/2010/EC) .

The Advice EIOPA is to deliver to the European Commission will have a strong contribution to future regulatory/legislative developments relevant for EU wide legislative framework for IORPs.

The EIOPA Occupational Pensions Stakeholder Group has had four meetings throughout 2011 to discuss the EIOPA Advice to the Commission with regard to the IORP directive revision. Written input from the members of the EIOPA Occupational Pensions Stakeholder Group was also dealt with and duly taken into account over the past five months.

General observations regarding EIOPA draft Advice:

- The OPSG would like to point out that the Stakeholders and EIOPA cannot deliver thorough and comprehensive input to the process due to the inadequate time scale.
- The primary objective of IORP Review should be to improve the security and sustainability of occupational pensions schemes across the EU taking account of their particular nature and to balance this with the need for efficient management – ensuring effective member outcomes in DC schemes – to allow sponsoring undertakings to continue providing them.
- Quantitative impact studies & qualitative impact assessments at every stage of the legislative process of revising the IORP Directive are needed to avoid unintended adverse consequences
- The OPSG would like to emphasize the Solvency II Directive should not be the starting point of any modification of the IORP Directive. Instead and in line with EC Call for Advice, the OPSG would like to advocate developing a supervisory regime sui generis, taking the IORP Directive as the starting point, yet accepting the risk-based approach for supervision and management

- The sui generis approach seems appropriate since there exist essential differences between IORPs and insurance companies:
 - IORPs – mostly – are not-for-profit institutions – they don't have to remunerate shareholders.
 - They have a social dimension providing occupational pension schemes that match the 1st pillar pensions which on their own prove to be inadequate to secure old age income.
 - Occupational schemes provide a wider coverage especially through collective agreements, as opposed to individual voluntary solutions. Such industry-wide pension schemes tend to be administered by IORPs
 - Other IORPs have no or very few members of staff and the sponsor(s) rely on corporate personnel to manage the scheme There is evidence that IORPs are characterized by great efficiency and by low internal costs, in particular due to the fact that almost all the employees in a given company or sector are covered. In view of the sustainability and affordability of occupational schemes, these characteristics should not be put at risk.
 - IORPs are funding vehicles where the interests of the scheme's board/management are broadly aligned with the scheme members and beneficiaries. There is generally no conflict over the pursuit of a profit by the scheme at the expense of its members and beneficiaries.
 - The governance structure of IORPs is characterized by the involvement of social partners, the role of trustees (and/or persons carrying out similar fiduciary responsibilities) and the backing of the employer.
 - Solidarity is often a further core element of occupational pension schemes. Members' contributions are mostly calculated regardless of the age, gender and specific occupational risks. A further element of solidarity is the compulsory participation that prevents participants from leaving the scheme as is the case with individual and voluntary solutions. Other solidarity elements are for example, that pension rights are acquired even during periods with no contributions, such as times of sickness, maternity leave etc.
 - IORPs have got specific inbuilt security mechanisms that ensure the benefit security of pension schemes. Some pension schemes allow contributions and main benefit parameters to be modified by the employers and the employees' representatives. For DB- and hybrid DB/DC schemes, in at least some Member States, employers have the ultimate responsibility for fulfilling the pension promise. A very important aspect is the long term investment perspective of IORPs since they administer solely pensions. Therefore, long-term developments are more important than the short term distortions which have to be considered under the Solvency II regime.

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Specific observations regarding EIOPA draft Advice:

The OPSG is of the opinion that the EIOPA proposed Advice needs to be amended on a number of issues whereas others find agreement amongst the OPSG. Specific comments are set out below.

CfA EC n° 1: Scope of the IORP Directive

1. ¹Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice? Are there any other impacts that should be considered?

The consultation paper identifies a range of options for changing the scope of the IORP Directive. These options range from keeping the scope unchanged to extending the scope to all forms of pension schemes.

One rationale behind the review of the scope of the IORP Directive is that the landscape of occupational pensions has changed in at least two important respects:

1. the growth of DC pensions
2. and the advent of funded pension schemes in the Central and Eastern European member states.

These developments have led to the result that there are supplementary funded pension schemes and corresponding institutions which are not covered by the current scope of the IORP Directive, thus raising the issue of inconsistent supervision as well as the issue of beneficiary / member protection.

However, these changes do not automatically mean that a review of the scope of the IORP Directive is required as a matter of urgency.

The OPSG supports EIOPA's remark (section 4.3.11) that the dividing line between 1st, 2nd and 3rd pillar is not always clear. This finding of EIOPA calls for clarification of the different pillars which could contribute to a more consistent application of both Reg. 883/2004 and IORP Directive. The OPSG strongly supports EIOPA's suggestion for clarification.

As EIOPA points, out the structuring in pillars involves policy choices (4.2.12) and therefore the OPSG recommends initiating such a broad policy debate at EU level with Member States and other stakeholders. This should also help to determine the level of harmonisation desirable – or not - in pensions legislation across the EU.

The OPSG would like EIOPA to advise the Commission to sequence its policy-making. The first task – and one that should be completed before any changes to the scope of the IORP Directive are initiated – is for the Commission to initiate the review of Regulation 883/2004, to better understand social security pension schemes and define the institutions that run or manage those social security schemes. The OPSG notes that private institutions delivering social security schemes under Reg. 883/2004 and Reg. 987/2009 could be under the scope of the reviewed

¹ Numbers refer to EIOPA consultation document – questions put to stakeholders at the end of each section.

IORP Dir. provided this Directive is adapted as suggested in EIOPA's draft advice under par. 4.3.15.

Against this background, if the Commission aims at a high degree of harmonisation, the scope of the IORP Directive will necessarily be defined within a narrow range and will lose its "European" character. In contrast, a wider scope of the IORP Directive would require a low degree of harmonisation but could have the advantage of a better structuring of the pension systems across the EU and a consistent application of EU regulation in the relevant area. Aiming at a high degree of harmonisation while simultaneously extending the scope would strongly harm the further development of occupational and work place pension schemes in all member states.

OPSG Conclusion:

The OPSG agrees with the analysis made by EIOPA. The review of Regulation 883/2004 should be finished before any changes to the scope of the IORP Directive are initiated. Furthermore, a policy debate is needed in order

1. to clarify the dividing lines between 1st, 2nd and 3rd pillar with regard to several aspects (e.g. membership, governance, control, tax, organisation, funding, benefit design, etc.) as a pre-requisite to the debate on the scope and,
2. to determine an optimal mix between the level of harmonisation sought in the revised IORP Dir. and the scope. In fact, there is no need for harmonisation if very few states are impacted by this Directive.

2. Are there any other options that should be considered? Please provide details including where possible in respect of impact.

EIOPA has considered the most relevant options. The OPSG advocates that occupational and work place pensions (2nd pillar) should remain under a distinct regulatory framework vis a vis individual pensions (3rd pillar) that are contracted without any interference or support from the employer. Hence, the IORP Directive should not cover the individual, contractual based pension arrangements. Group personal pensions, however, with employer involvement should be under the scope of the reviewed IORP Dir.

The implication of including private forms of retirement savings in the Directive is that the distinction between occupational pension provisions and individual private savings will be abandoned. Individual savers, acting alone and without the benefit of a social partner at their side, require different regulatory treatment than employees who also benefit from labour law provisions.

At this point in time, the OPSG would oppose option 3 under which the IORP Directive may be applicable to all types of pension schemes that do not fall under any EU prudential regulation. EIOPA's draft advice rightly point out the issues at stake.

3. Which option is preferable?

As stated under point 1, additional discussion is needed as to whether a review of the scope of the IORP Directive is necessarily required.

However, the option proposed by EIOPA (4.5. Advice, 1st bullet) rightly frames the "scope" issue. The proposed option is a workable proposal for the immediate future. However, OPSG also notes that private institutions managing schemes under the scope of the Reg. 883/2004 and Reg.

987/2009 could be as institutions under the scope of the reviewed IORP Directive. Pension institutions delivering DC schemes – referred as pillar 1bis in EIOPA's advice – could be brought under the scope of the IORP Dir. implying that this Dir. be restructured to take into account the specificities of those DC schemes and the pension system for which they are designed.

4. Are there occupational pension schemes currently falling outside the scope of the Directive, without being explicitly excluded? Are there border line cases that may need further attention?

The OPSG is not aware of any occupational pension schemes - in the meaning that the employer has a role in the establishment or/and the funding of the scheme – that do not fall in the scope of the IORP Directive, except for certain group personal pension schemes (see above).

The OPSG supports EIOPA's draft recommendation to the Commission (re. last paragraph under "other advice") to "consider the nature of the member protection in pension schemes falling outside the current scope (...) and take legislative initiative if it concludes that the protection offered by national or EU frameworks is not adequate".

CfA EC n° 2: Definition of cross-border activity

5. Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?

The OPSG welcomes the view that a more precise definition of cross-border activity is helpful to reduce or even to avoid any potential conflicting views between national supervisors and that this course of action could enhance cross-border activity of IORPs.

However, the OPSG would like to highlight that the current definition of cross-border activity is not the reason for the limited prevalence of IORPs' cross-border activity.

EIOPA has identified real barriers to cross-border pensions in sections 5.3.3; 5.3.4; 5.3.5 and 5.3.6. From an OPSG point of view, such barriers lie in the lack of detailed and comprehensive information on host state social and labour law relevant to occupational pensions. Tax as well continues to be seen as a hurdle for cross-border provision of services.

In addition, it should be noted that cross-border activity requires "full funding of pension liabilities at all times" and that this requirement imposes more onerous and inflexible funding than the funding rules in some member states which do allow for a temporary underfunding provided a recovery plan is put into place. As a consequence, going cross border is definitely not an attractive option for all those pension schemes in respect of which temporary underfunding is acceptable under domestic legislation.

Furthermore, the limited number of cross-border schemes may reflect the fact that at this point of development of occupational schemes the corresponding pensions institutions have a purely domestic focus.

In light of the request of the Commission on how to amend the wording of the IORP Directive in order to clarify that cross-border activity only arises when the sponsoring undertaking and the IORP are located in two different member states, the OPSG generally agrees with the analysis as set forward by EIOPA.

Against this background, the OPSG would agree with EIOPA's proposal for a definition of the **sponsoring undertaking** except for the implied obligation to fund the pension scheme in the event of a funding shortfall arises (re. 5.3.13 and advice under 5.5.). The obligation to fund the shortfall is a feature normally embedded in a sponsor's covenant typical for defined benefit schemes (DB) but not in defined contribution schemes (DC). Since the reviewed IORP Directive is likely to include also occupational DC schemes, it is recommended to keep the definition of sponsoring undertaking neutral as to the type of scheme administered.

Even if EIOPA wants to stick to the option requested by the Commission to clarify that cross border activity arises only when the sponsoring undertaking and the IORP are located in two different members, the OPSG would recommend investigating a **different option** where the **Host State** is defined as that whose SLL is applicable to the scheme. Since the logic of the IORP Dir. is that the prudential legislation is harmonized to a certain level while the SLL is to be respected for the benefit design, it seems reasonable that the Host Supervisor is the competent authority of the Member State whose SLL is to be applied to the scheme.

The OPSG holds the view there should be a single Home Supervisor and one single Host Supervisor per Member State into which there is a cross border activity. It is possible then for an IORP to have to deal with multiple Host Supervisors but only one per Host Member State. The option proposed by EIOPA's draft response (re. 5.5. Advice, 6(j)) to amend Art. 20 is not supported by the OPSG. This proposal enhances complexities of a cross-border activity regime where it implies that for cross border activity between 2 Member States there could be 3 competent authorities involved bringing along – as rightly outlined by EIOPA – additional procedural steps. If one of the objectives of reviewing the IORP is to further cross border activity, the procedures to do so should be simplified and be made reliable and predictable to the largest possible extent.

CfA EC n° 3: Ring fencing

6. What is the view of stakeholders on the proposed principles of ring-fencing? Are the principles responding to the concerns expressed in the CfA?
7. How to stakeholders evaluate the positive and negative impacts of the introduction of the proposed principles of ring-fencing?
8. What is the view of stakeholders on making ring-fencing obligatory in case of cross-border activity? Should the Member State be obliged to introduce such rules or only in the cases where investment rules are not compatible?
9. What is the view of stakeholders on the introduction of privilege rules? Should the Member State be obliged to introduce such rules? If not, why not? If yes, why?

In a fully harmonized regime, ring-fencing of the assets and/or liabilities relating to different Member States in a cross border context would be unnecessary. In the absence of full harmonisation, Article 16.3 of the Directive permits the home Member State to require ring fencing in order to deal with underfunding, and Article 18.7 permits host Member States to require ring fencing to ensure that investment rules of the host state are complied with in respect of the assets applicable to that state.

EIOPA points out the difference between:

1. administrative ring fencing, which is primarily for the purpose of operating the IORP on an on-going basis i.e. for determination of contribution rates specific to each Member State, granting of indexation etc., and
2. patrimony protection rules which require a full legal separation of assets and liabilities so that in a stress situation e.g. winding-up, the assets of one section cannot be used to meet liabilities in a another section. The OPSG agrees that it is important that there is clarity around the type of ring-fencing which applies in each situation.

The OPSG presumes that the "proposed principles of ring fencing" are the remarks contained in paragraphs 5 to 11 of the blue box. The OPSG is in agreement with these remarks and with the impacts of the options set out.

The OPSG does not consider that ring-fencing should be obligatory in cases of cross border activity, and hence supports Option 1 with the home Member State having the power to decide if it must be applied. The OPSG supports the proposal for mandatory administrative ring fencing and patrimony protection measures in cases where additional investment rules are imposed by the host member State. The OPSG also supports the mandatory inclusion of privilege rules to protect the assets of an IORP on liquidation from other creditors i.e. Option 1

CfA EC n° 4: Prudential regulation and social and labour law (SLL)

10. Do stakeholders agree with the analysis of the options as laid out in this advice, including preference for option 2?

11. How would you assess the impact of option 2?

The OPSG basically endorse option 2 and agrees with the EIOPA's analysis, since we believe that a clearer distinction between prudential regulation and social and labour law is needed in order to clarify the Home member state's and Host member state's responsibilities in case of cross-border activity. We also agree that the requirements of the IORP Directive listed under 7.2.4 should be in the EU prudential regulation framework.

However, we emphasize that the pension promises are primarily defined by the SLL and not by prudential regulation. Pension design, method of financing pension benefits as well as supervision are strongly correlated and build an interacting system. Changing or redesigning prudential regulation could have a negative impact on SLL, and even impinge on MS competence on SLL, thereby leading to overregulation and consequently to additional costs of occupational pensions.

For example, an integral part of the benefit design is the method of financing the pension promise, which in turn is based on a certain discount rate and biometric tables. Changes in prudential regulation affecting these parameters could have a severe impact on the financing of occupational pension provision. To the extent that this may influence the benefit promise, which mostly is regulated by SLL, it may be regarded as an infringement of a member state's competence.

Against this background, EU level prudential regulations for cross-border activity must be designed so as to leave the possibility to supervisors to take into account the Host member state's SLL in their supervisory requirements.

In the context of EIOPA's statement in paragraph 7.3.3 that some areas of prudential regulation might eventually also be considered as SLL, the OPSG thinks that EU level prudential regulation for cross-border activities should accept parameters of national SLL and should be flexible enough to be implemented by MS with regard to their own SLL. This should be clearly set in the future IORP Directive text (Level 1).

The OPSG thinks that prudential regulation and SLL must mutually exclude each other.

Quantitative requirements

12. What is the view of the stakeholders on the holistic balance sheet proposal? Do stakeholders think that the distinction between Article 17(1) IORPs, 17(3) IORPs and sponsor-backed IORPs should be retained or removed?

In its draft answer to the CfA, EIOPA gives much weight to the holistic balance sheet. The main reason stems from the CfA, which asks EIOPA to consider "The possibility to restate the value of assets in the IORP and liabilities of the sponsoring undertakings into a single balance sheet, including the possibility to recognise sponsor covenants and claims in pension protection schemes as an asset similar to reinsurance". The EIOPA reply makes clear that EIOPA considers that it could be possible, but does not state whether it is the most appropriate or practical supervisory instrument.

The OPSG is happy that the European Commission and EIOPA recognise that the steering instruments should be accounted for in the supervisory framework and that capital buffers are not the only security mechanism of IORPs. For instance the sponsor covenant and security mechanisms, like the option to increase (future) contributions or to apply benefits adjustment mechanisms, are assets that lower upfront solvency capital requirements.

EIOPA states that an holistic balance sheet (HBS) approach would enable the supervisors to adopt the same framework for IORPs covered by the various forms of support as mentioned in article 17 of the IORP Directive (e.g. no sponsor support or where sponsor bears some or all of the risk). Although it is important that members understand the security of their benefits, the HBS should not be targeted to members, since it is far too complex and in many cases will not improve the insights of members.

The OPSG considers that it may be helpful to adopt an holistic framework, but does not think that the term "holistic balance sheet" is appropriate as:

1. it is not a balance sheet in an accounting sense, and does not comply with IFRS, and the term "balance sheet" may be used inappropriately e.g. as a measure of a contingent liability in the sponsor's corporate accounts;
2. this implies that all of the elements can be quantified precisely, whereas the value assigned to some of the components needs quite some judgement and is likely to be subjective and approximate, and might perhaps be better understood by considering a range of outcomes rather than a single discounted value of future cash flows.

The OPSG strongly believes that both an impact assessment and a quantitative impact study (QIS) are needed before at level 1 it can be decided that an holistic framework should be adopted. With no clear insight into the possible consequences, not even by EIOPA itself, no sensible decision on principles can and should be made. We are therefore happy that EIOPA is to do a QIS and we are looking forward to discussing both the way the QIS will be conducted and the outcomes with EIOPA. Important in this impact analysis and QIS are the macro consequences on the economy as well as on the pension sector. To give one possible example: the current IORP Directive leaves room for calculating the technical provision based on a bond discount rate (i.e. a matching approach or “risk-free”) or using “expected return on assets” (i.e. a budgeting approach). The shift from discounting based on expected return to risk-free would lead to a substantial increase of the technical provision in some Member States. The macro consequence would be a possibly substantial increase in pension contributions, which could lead to lower accrual of new benefits, no indexation or cutting benefits. This in turn could lead to a slowdown in consumption which will have an effect on the broader economy. For companies, the need to commit additional capital to support pension provision will mean a reduction in investment in their business, leading to a slowdown in economic growth and development. A further consequence of the proposed approach could be a reduction in the investment of pension funds in equity or growth assets, which could have a significant negative impact on capital markets.

When looking at the security of pension benefits, the OPSG suggests that this will be done using a holistic approach as put forward by the European Commission in its Green Paper on pensions (please note that the term ‘holistic approach’ explicitly does not refer to the holistic balance sheet or the holistic framework mentioned above). Supervision should strike a balance between affordability, adequacy and level of security, whereas a focus on security only could lead to more secure, but also lower and more expensive pensions. As mentioned earlier, both an impact assessment and QIS are needed before one can conclude whether or not such a balance has been struck by the proposals put forward by EIOPA. If this is unclear, we foresee the risk of piling prudence on prudence, an approach also not intended by EIOPA to our understanding.

A revised IORP Directive and accompanying supervisory framework should be flexible enough to support and accommodate future developments and innovation of pension systems and pension schemes. We see and foresee a broad spectrum of pension schemes, between the ends of the spectrum of hard DB benefits and individual DC benefits. All sorts of hybrid pensions are being developed and most likely will emerge in the future; the revised Directive should be forward looking in that respect.

The OPSG considers that the level of security of the pension promise is part of the pension deal and should be left to Member States and to social partners offering pensions via an IORP. The warranted security and level of benefits is dependent on many factors, including first pillar, state pensions, tax and Social and Labour Law. Therefore, no harmonisation of the security of benefits is either wanted or needed. The difference in security of benefits should be mirrored in the valuation of the benefits. A guaranteed pension of € 1.000 in 10 years time (with many security mechanisms in place) is of greater value to the member than a € 1.000 benefit which is less secure, with the assets backing it being invested in more risky investments and if there are no safety valves. This could be reflected in the discount rate (being either “risk-free” or expected equity return). The nature and riskiness of the benefits should be reflected in the discount rate used for discounting the future cash flows to establish the technical provisions.

Recovery periods in case of underfunding or in case of insufficient (contingent) assets to comply with the solvency requirements should recognise the nature of pensions being different from insurance. The recovery periods should be long enough – years are far more appropriate than months – and should be flexible. During the last crises many supervisors of IORPs have granted extensions of recovery periods to prevent too severe pressure on contributions and benefits with an ultimate goal to stabilise the impact on the economy and society and on the financial sector. Experience with risk based supervision in some countries clearly indicates that supervisory flexibility is of utmost importance for sustainability of the pension system.

To conclude our general remarks with regard to CfA 5 and 6, we want to make clear that the OPSG fully agrees with EIOPA that good communication and transparency is necessary. This should be well balanced with security and prudential supervision. The Groupe Consultatif (2010) mentioned that communication and transparency seem to be the areas with most room for improvement in the supervision of pension funds.² The OPSG wants to emphasise once again that proportionality is of utmost importance to prevent the net impact of supervision on the benefits being negative due to too high costs or pressure to adjust the benefits.

² Groupe Consultatif (2010), “Security in occupational pensions”, Report of working party, May 2010

CfA EC n° 5: Valuation of assets, liabilities and technical provisions

13. Do stakeholders agree that assets of IORPs should be valued on a market-consistent basis?
14. What is the stakeholders' view on the two options regarding the starting principle for valuing liabilities? Do stakeholders agree that such a principle for IORPs should contain no reference to transfer value?
15. Do stakeholders agree that the own credit standing of IORPs should not be taken into account when valuing liabilities?
16. What is the stakeholders' view on inserting a recital in the IORP Directive saying that supervisory valuation standards should, to the extent appropriate, be compatible with accounting standards?
17. Do stakeholders agree with the EIOPA view to adopt Articles 76(1), (4) and (5) with appropriate amendments into a revised IORP Directive? What is the stakeholders' view on the two proposed options regarding Article 76(3)?
18. What is the stakeholders' view on the three options regarding the inclusion and calculation of a risk margin as introduced by Article 77?
19. Do stakeholders agree with the proposed conditions defining in what cases IORPs should take into account future accruals or not when establishing technical provisions?
20. Do stakeholders agree that the best estimate of IORPs should be calculated gross without deduction of amount recoverable from reinsurance contracts and special purpose vehicles?
21. What is the stakeholders' view on the two options presented regarding the interest rate used to establish technical provisions (including the positive and negative impacts)?
22. Do stakeholders agree that expenses incurred by the IORP in servicing accrued pension right should be taken into account in technical provisions as introduced by Article 78 of Solvency II?
23. Do the stakeholders agree with the analysis regarding the inclusion of unconditional, conditional and discretionary benefits in technical provisions as introduced by Article 78 of Solvency II? Do stakeholders find that discretionary benefits should be included in the best estimate of technical provisions? Is the Solvency II article on surplus funds useful for IORPs in this respect?
24. Do stakeholders agree with EIOPA's view of introducing Article 79 of Solvency II with appropriate amendments into a revised IORP Directive regarding allowances for financial guarantees and contractual options when establishing technical provisions?
25. Do stakeholders agree that it would be useful to introduce Article 80 of Solvency II with appropriate amendments into a revised IORP Directive regarding appropriate segmentation of risk groups when calculating technical provisions?
26. What is the view of stakeholders on the two options regarding recoverables from reinsurance contracts and special purpose vehicles as introduced by Article 81 of Solvency II?

- 27. Do stakeholders agree that it would be useful to introduce Article 82 of Solvency II with appropriate amendments into a revised IORP Directive regarding the availability of data and the use of approximations in the calculation of technical provisions?**
- 28. Do stakeholders believe that it would be useful to introduce Article 83 of Solvency II with appropriate amendments into a revised IORP Directive regarding the need for assumptions to calculate technical provisions to be regularly compared against experience and adjustments made when appropriate?**
- 29. Do stakeholders agree that it would be useful to introduce Article 84 of Solvency II with appropriate amendments into a revised IORP Directive regarding the need for IORPs to demonstrate to the supervisor on request the appropriateness of the level of technical provisions?**
- 30. Do stakeholders agree that it would be useful to introduce Article 85 of Solvency II with appropriate amendments into a revised IORP Directive regarding powers of the supervisor to require IORPs to raise the amount of technical provisions corresponding to supervisory law?**
- 31. Do stakeholders agree that a new IORP Directive should allow for the Commission to adopt level 2 implementing measures regarding the calculation of technical provisions as introduced by Article 86 of Solvency II?**
- 32. Do stakeholders agree that individual Member States should not be permitted to set additional rules in relation to the calculation of technical provisions as currently allowed under Article 15(5) of the IORP Directive?**
- 33. What is the stakeholders' view on the analysis regarding sponsor support? Do stakeholders agree with EIOPA that IORPs should value all forms of sponsor support as an asset and take account of their risk mitigating effect in the calculation of the solvency capital requirement?**

The OPSG is of the opinion that a set of common principles should apply at EU level but that the responsibility for setting the detailed rules for calculating the technical provisions should remain at Member State level. Since IORPs provide pensions subject to Social and Labour Law, detailed valuation rules should be left to Member States, since Member States decide upon the security level of the benefits. These security levels vary widely across Europe, since pensions offered by IORPs are based on a wide dispersion of state pensions (first pillar) and fiscal treatments. Harmonisation cannot be achieved without simultaneously harmonising Social and Labour Law and first pillar pensions, a step that is as so far considered undesirable by most or all European parties.

Since the nature of pension benefits is quite different across Europe, harmonisation of the discount rate is also not warranted. The nature and riskiness of the benefits should be reflected in the discount rate used for discounting the liabilities using different discount rates for different benefits. For guaranteed benefits a 'risk-free' discount rate seems justified, but for risky benefits, the discount rate should reflect this riskiness. The nature of pension benefits and IORPs make the concept of transfer value not logical for IORPs. In case of severe and sustained underfunding, the IORP may have the ability to cut the benefits and does not have to transfer them to a third party, as is the case for insurance companies.

The valuation of assets and liabilities should be market consistent, which is not the same as market valuation. We consider that smoothing would help to avoid extreme volatility and consequential pro-cyclical behaviour, which is not necessary given the long term nature of pensions. We consider that 'risk-free' should not necessarily imply using unadjusted market risk-free interest rates, but should take into account modifications to risk-free interest rates like modifications proposed under Solvency II, bearing in mind the longer duration and lower liquidity requirements of pensions³. Since the nature of pension benefits is different to insurance benefits, further adjustment to pure market valuation is justified. We agree with the principle 'same risk, same capital'; yet the risk in pensions is different, hence a different valuation should be used. The OPSG agrees that pure discretionary benefits should not be included in the technical provisions.

Uncertainty in assumptions in calculating the technical provisions – for example the uncertainty of the longevity trend – should not be reflected in the technical provisions, but in the capital requirements. We recognise that special assumptions are necessary for valuing the conditional benefits. These make the valuation more complex and possibly less reliable (also see remarks below; shortcomings of the holistic balance sheet).

The OPSG would like to make two smaller remarks related to valuation. The first is that no own credit standing should be used for valuing the liabilities. The second is that harmonisation with accounting rules should not be leading (see also remarks on the holistic balance sheet).

CfA EC n° 6: Security mechanisms

- 34. Do the stakeholders agree that Articles 87-99 of Solvency II on own funds should be applied to IORPs? What amendments, other than the ones suggested by EIOPA, should be made?**
- 35. Do stakeholders agree that subordinated loans from employers to the IORP should be explicitly allowed in a revised IORP Directive?**
- 36. What is the stakeholders' view on the analysis whether to introduce or not a uniform security level for IORPs across Europe? Do the stakeholders agree with EIOPA's decision not to recommend a specific probability? If not, what specific probability should be imposed upon IORPs?**
- 37. Do the stakeholders agree that the confidence level should apply to a one-year time horizon?**
- 38. What is the stakeholders' view on applying the Solvency II-rules for calculating the solvency capital requirement (SCR) to IORPs, taking into account their specific security and benefit adjustment mechanisms?**
- 39. Do the stakeholders believe that IORPs should assess the SCR on an annual or three-yearly basis?**

³ Like liquidity premium, countercyclical premium and ultimate forward rate.

40. What is the stakeholders' view on imposing a minimum capital requirement (MCR) upon IORPs? What adjustments to the Solvency II rules are needed regarding the structure and frequency of the calculation?
41. What is the stakeholders' view on the analysis regarding pension protection schemes? If included in the holistic balance sheet, should pension protection schemes be taken into account by reducing the sponsor's insolvency risk or by valuing it as a separate asset?
42. Do stakeholders agree that capital requirements for operational risk should be applied to DC schemes where investment risk is borne by plan members? Should these capital requirements be uniform or tailored to the actual risk profile? Do stakeholders find it sensible to distinguish between DC and other schemes in the area of operational risk?
43. What is the stakeholders' view on the analysis regarding the duties of IORPs and the powers of supervisors in the case of deteriorating financial conditions as introduced by Article 136 and 141 of Solvency II?
44. What is the stakeholders' view on the analysis regarding the submission of recovery plans and the length of recovery periods as introduced by Articles 138 and 139 of Solvency II? Should the recovery periods – with regard to the SCR and possibly the MCR – for IORPs be flexible, fixed or a combination of both? What would be the reasons – if any – to allow IORPs longer recovery periods than prescribed by Solvency II?
45. Do stakeholders agree that the IORP Directive should be extended with stipulations introduced by Article 137 and 140 allowing supervisors to prohibit the free disposal of assets when IORPs do not comply with the capital requirements or the rules for establishing technical provisions?
46. Do stakeholders agree that it should be specified in the IORP Directive what constitutes a recovery plan as introduced by Article 142 of Solvency II? How should the contents differ from those of insurance companies?

The OPSG considers that the concept of a holistic balance sheet approach is intellectually attractive and we are happy that EIOPA recognises that the steering instruments should be recognised in the supervisory framework. However, we think that the concept should be researched more in depth and developed further before one can decide whether it can and should play a role in European supervision of IORPs. The concept is too difficult to implement as the primary European supervisory instrument, certainly with the current status of knowledge. The calculations needed for a holistic balance sheet are complex, especially with conditional elements. For small and medium sized pension funds, the supervisory costs would be disproportionate relative to the value of the benefits if they need to calculate the balance sheet on a regular basis. Conversely, for very strong companies, it may be clear that the value of the sponsor covenant will be far in excess of that needed to meet the IORP capital requirements, and hence the need for complex calculation should be avoided in those cases.

The OPSG accepts that a **holistic framework** would enable supervisors to handle all kind of various steering instruments and align them (using market consistent valuation) and suggests that IORPs should be allowed to use the holistic framework as an internal model. The option to use it as an internal model should be expected to provide improved risk management, better understanding of the steering instruments and their impact by all stakeholders, leading to better informed decision making and supervision.

The OPSG also sees many shortcomings in the HBS. The first is that the objective is not clear. If and when this is not set out clearly, any discussion on the HBS seems premature. The second is that the impact is unclear, as mentioned earlier. Without proper impact assessment and QIS, it is unclear what the consequences of the HBS will be. The third is that a HBS preferably needs a complete pension deal, which means that all measures that the IORP will take should be clear ex-ante, in all situations. Next to the fact that a pension deal never can be complete for all (unforeseeable) situations, this also will imply that social partners and trustees will have less freedom in steering the IORP versus the current situation. The HBS will breach the discretionary freedom they currently have and they have to abandon the option to decide (discretionary) on the appropriate measures in the event of a crisis. The fourth is that the calculations are too complex (see below for more explanation). The fifth is that it will lead to pseudo security. The HBS brings back supervision to a couple of numbers, each based on a set of assumptions. The few numbers in the balance sheet can give the impression of full understanding of the benefits and the steering instruments, not recognising all uncertainty around these. The sixth and final is that it is disproportionate, implying severe supervisory costs and span of control by trustees at the (possible) expense of the benefits.

The difficulties in calculation the OPSG sees are:

- The HBS requires using complex valuation techniques, like option models and ALM Monte Carlo simulations, to be able to calculate the value of contingent assets and liabilities;
- Markets are incomplete;
 - There is no (developed) market for (ultra) long dated liabilities. This is already an issue for guaranteed benefits with maturities of 30 years and over, also using other forms of supervision than the HBS.
 - There is no market for longer dated options, needed for the valuation of contingent assets and liabilities.
- Pension schemes are incomplete – and thus not all the cash flows of the (contingent) assets and liabilities are known – and it is therefore not possible to calculate the present value of (contingent) assets and liabilities;
- It is unclear what to do with discretionary benefits;
- An assessment is needed of sponsor risk to be able to calculate the value of contingent assets like future contributions and sponsor covenant.

Conclusion

The OPSG thinks that the holistic balance sheet – the OPSG would prefer ‘holistic framework’ – is intellectually attractive, but there are too many open issues to conclude whether it should be applicable to IORPs. An impact assessment and quantitative impact study are needed before any decision can and should be taken at level 1. Next, that it is too early to tell whether a holistic framework would have added value, the concept is also very complicated and would possibly be too prudent. Currently and with the knowledge of today the holistic framework is not considered suited for supervision of IORPs.

The OPSG is of the opinion that a set of common principles should apply at EU level for both the holistic framework and for the valuation of assets and liabilities, but that the responsibility for setting the detailed rules for calculating these should remain at Member State level. Discount rates should be market consistent, but be adapted for the long term nature of pensions by applying modifications, the volatility should be smoothed and the recovery periods should be flexible and sufficiently long.

CfA EC n° 7: Investment Rules

- 47. Do stakeholders believe that the prudent person principle is a sufficient basis for the investment of IORPs or is additional provision needed?**
- 48. Do stakeholders feel that Member States should have the option to impose limitations on investments in addition to those set out in the IORP Directive? What about host member states?**
- 49. To what extent do stakeholders believe the investment provisions of the Directive should differ between defined benefit and defined contribution pensions?**
- 50. Do stakeholders agree with the analysis of the options (including the pros and cons) as laid out in this advice? Are there any other impacts that should be considered?**
- 51. What is stakeholders' view of the current prohibition on borrowing in Article 18(2)?**

The OPSG has discussed three questions:

- Is a prudent person principle sufficient?
- Do MS need an option for quantitative restrictions?
- Should there be a difference between DB, DC and hybrid schemes?

The OPSG has come to the conclusion that the prudent person principle⁴ is generally sufficient and should therefore remain the basic principle in a revised IORP Directive.

With regard to quantitative restrictions to be embedded in the investment rules applicable to the IORPs, the OPSG has noted the following:

- At international level (OECD) there still exist quite a few quantitative restrictions, primarily on asset allocation and exposure to foreign currencies; and also with regard to “guidance” for the development of “young markets”
- Quantitative restrictions do not sit well with the prudent person principle; quantitative restriction on self-investment is accepted.

⁴ The preamble of the regulation 28 of the South Africa Pension Funds Act gives a good guidance on the definition of the prudent principle: “A fund has a fiduciary duty to act in the best interest of its members whose benefits depend on the responsible management of fund assets. This duty supports the adoption of a responsible investment approach to deploying capital into markets that will earn adequate risk adjusted returns suitable for the fund’s specific member profile, liquidity needs and liabilities. Prudent investing should give appropriate consideration to any factor which may materially affect the sustainable long-term performance of a fund’s assets, including factors of an environmental, social and governance character. This concept applies across all assets and categories of assets and should promote the interests of a fund in a stable and transparent environment.”

- Quantitative restrictions have a cost in terms of performance of the pension funds and stifle innovation and competition.
- Removing quantitative restrictions on investments needs to be done simultaneously with solid governance and risk management requirements – allowing national specificity – and qualitative supervision.
- Quantitative restrictions, if left as a MS competence, may stifle some more the already reduced number of cross-border IORPs and deserve being removed except for “self-investment”
- Question was raised whether the ‘duty of loyalty’ should be written into the IORP Dir. and reference was made to Australia (i.e. DC environment).
- Related to quantitative restrictions for **DC schemes**; the OPSG notes that while quantitative restrictions per se are not desirable, experience has shown that default investment options for DC schemes could be useful (they seem to pool the majority of pension fund members that are not clearly focusing a specific risk profile in their investment choice).

In general, the OPSG supports the differentiation between DB and DC schemes for investment rules, yet keeping in mind that the liabilities of the scheme should be the starting point for developing the investment policy and the consequential supervision of the fund. The OPSG supports option 2, 1st bullet point in relation to the inclusion in the revised IORP Directive of suitably amended text from Art. 132 (2), 1st subpar. of the Solvency II Directive.

Whether MS should have an option for quantitative restrictions depends in the end on a political evaluation. But MS should use that option in a prudent and consistent way.

With regard to Article 18(2), the OPSG believes that **subordinated loans** should be exempted from the prohibition of borrowing.

CfA EC n° 8: Objectives & pro-cyclical

52. What is the stakeholders’ view on the analysis regarding the objective of supervision and the measures to avoid pro-cyclical behaviour?

The OPSG does not agree with the analysis regarding the **objective of supervision**. The Solvency II Directive’s main objective (Article 27) is to strengthen consumer protection achieving a balance between the commercial interests of insurance or financial service providers and individual consumer interests in the absence of a third party guarantor or lender of last resort.

Occupational Pensions and IORPs are sponsored by an employer or an industry branch and their stakeholders’ interests are aligned. Their beneficiaries are protected by a web of interacting security mechanisms in social and labour law. Having regard to this fact, the objective as set out in Solvency II is not relevant.

We believe that it is essential to continue in this regard with the concept of IORP I. Taking inspiration from Recital 7 of the current IORP Directive, we would redefine the objective for supervision of IORPs in IORP II as follows:

“... to achieve the main objective of IORP supervision, namely both to clear the way for a sound development of occupational pension schemes provided by IORPs and to protect members and beneficiaries.”

In addition we propose to define the purpose of the IORP II Directive as:

“This Directive supports the establishment and operation of IORPs, facilitates their efficient management and administration and supports the protection of members and beneficiaries.”

With respect to **pro-cyclical behaviour**, the OPSG agrees with the EIOPA assertion that IORPs are different from banks and insurance companies due to the longer term duration of their liabilities. Accordingly it is not necessary to have a harmonised approach to pro-cyclicality between all financial institutions.

As discussed in the response to CfA 5, the discount rate can provide some counter-cyclical effect by

- Taking into account liquidity premium for the valuation of guaranteed pension liabilities
- Including countercyclical premium as foreseen in Solvency II

Experience with risk based supervision for IORPs clearly indicates that supervisory flexibility is of utmost importance for sustainability, and that long (and flexible) recovery periods should be permitted. Hence the OPSG supports the proposal to include a provision for a Pillar II dampener.

The OPSG agrees that the possible inclusion of an equity dampener (Pillar 1), not necessarily modelled on Solvency II, needs further analysis, particularly as this relies on the presumption of mean reversion.

CfA EC n° 9: General principles of supervision, scope & transparency & Accountability

53. Do stakeholders agree with the principle that the material elements of the Solvency II requirements in respect of the general principles of supervision, and in relation to transparency and accountability should also apply to IORPs?

54. Has EIOPA identified correctly those issues – need to enhance benefit security, differences between IORP and insurance supervision, and diversity of IORPs - where there should be differences between insurers and IORPs on supervision and transparency and accountability?

The OPSG basically supports the adoption of the material elements of the Solvency II requirements in respect of the general principles of supervision, and in relation to transparency and accountability.

However, there are major concerns about the need to revise the IORP Directive in respect of these general principles. We agree with EIOPA’s conclusion (14.3.8) that “in the context of the supervision of IORPs, it is possible that the goals of Articles 29 and 31 of the Solvency II Directive may be best achieved by means other than revisions to the IORP Directive.” In line with EIOPA, we believe that the focus of the Directive should be on the supervision of IORPs, rather than on the objectives and operations of supervisory authorities.

Furthermore, the OPSG would also back EIOPA's concerns on the costs and usefulness of implementing additional disclosure requirements (e.g. on a common format as required in Article 31).

We agree that the need to enhance benefit security, differences between IORP and insurance supervision and diversity of IORP also require a different treatment of insurers and IORPs.

Besides the differences described by EIOPA, we would also point to the following specialities of IORPs that further justify different treatment:

- Major differences in the governance structure between IORPs and insurance companies: the involvement of social partners, the role of trustees (and/or persons carrying out similar fiduciary responsibilities) and the backing of the employer where IORPs are concerned
- IORPs are not-for-profit social institutions and often have no or very few members of staff, and no shareholders. Consequently, there is therefore no incentive to increase "business" or "profits", or to "diversify" activities, which is different from many (though not all) insurance companies.

CfA EC n° 10: General supervisory powers

55. Do stakeholders agree with the recommendation that supervisory authorities should have broadly the same powers to require IORPs to conduct stress tests as it has in respect of insurers?

56. Do stakeholders agree with reinforcing the sanctions regime for IORPs?

57. Should knowledge of the imposition of penalties be public or restricted?

58. Should host states be able to impose sanctions on IORPs without going through the home state?

The OPSG understands the possible benefits of EU-wide stress tests, since many supervisory authorities already conduct stress tests on a national level.

Stress tests allow improving knowledge of the risks by supervisors, IORPs and their stakeholders. This provides an effective basis for supervisors and IORPs to take proactive measures.

Against this background, we believe that Art. 34.4 of the Solvency II Directive provides a good basis for developing necessary tools to test the financial situation of IORPs.

As already laid down in CfA EC n° 9 the OPSG would also back EIOPA's concerns on the costs arising from additional administrative burdens.

On the one hand, the OPSG agrees with EIOPA that effective administrative sanctions are part of a good governance of the supervisory authority (15.3.10). On the other hand, the OPSG is concerned about reinforcing the sanction regime for IORPs and the resulting costs for IORPs and beneficiaries. We believe that further analysis is needed here.

In terms of publishing of penalties imposed the OPSG records different opinions. On the one hand, the OPSG does recognize that the publishing of penalties imposed could positively contribute to a better transparency for beneficiaries. On the other hand, a number of OPSG

members are concerned that publishing of penalties imposed could have major negative impacts not only on the IORPs themselves but also on the sponsoring undertaking, thereby counterproductively affecting the business of the sponsoring undertaking and consequently the sponsor covenant.

However, the OPSG can recommend that penalties would be made public as a matter of transparency.

The OPSG supports EIOPA's proposal for further analysis to identify if there is a case for a harmonised approach.

We believe that IORPs should have one single Home supervisor in the home state. The host member state's competent authority should thereby supervise the activities of the IORP via cooperation with the Home supervisor.

CfA EC n° 11: Supervisory review processes & capital add-ons

59. What is the view of stakeholders on whether the requirements for the supervisory review process for insurers should also apply to IORPs?

60. What is the view of stakeholders on whether the requirements for capital add-ons for insurers should also apply to IORPs?

The OPSG supports EIOPA's view that a supervisory review process is necessary in order to check the compliance of IORPs with supervisory requirements. The OPSG observes that in many Member States, solid supervisory review processes are in place for IORPs and EIOPA correctly says that articles 13 and 14 of the IORP Directive already contain provisions relating to supervisory powers and information to supervisors.

Against this background, we agree that Article 36 of the Solvency II Directive can be used as a starting point for IORPs in order to clarify the supervisory process. However, we would like to highlight that the supervisory review process should be flexible enough to allow for reflecting the diversity of the type, size, complexity and the legal form of IORPs across MS.

We are strictly opposed to providing supervisors with the power to impose capital add-ons. In contrast to insurers, it is not possible for IORPs to acquire additional capital in the short term.

CfA EC n° 12: Supervision of outsourced functions and activities

61. Do stakeholders agree that the material elements of the requirements on insurers in respect of supervision of outsourcing should apply also to IORPs?

62. What is the stakeholders' view on proposed changes to the definition of home state and rules on chain outsourcing?

The OPSG agrees with the principles proposed by EIOPA but is looking for a definition of "activities". We especially highlight that a revised IORP Directive should not put outsourced activities (such as administration, data processing, IT provider) under direct supervision.

A consequence of this principle is that the supervisor's first contact point is the IORP which is responsible to assure an access to information necessary to fulfil supervisory functions with respect to outsourced activities. We also consider the IORP itself responsible for negotiating and controlling the outsourcing deals, including the impact of chain outsourcing in the agreement.

The OPSG is of the opinion that Article 38 (2) should not be applied to IORPs. Service providers should only deal with the supervisor of their country of establishment, rather than dealing with multiple foreign supervisors in case of an international client base. The supervisor of the country of establishment of the pension service provider can operate as an acting agent for the supervisor of the country of establishment of the foreign IORP.

We agree with the EIOPA that the IORP's home state should be defined as the one where the IORP was authorised or registered.

However, we do not see the benefit of the regulation that the main administration needs to be located in the home member state.

CfA EC n° 13: General governance requirements

General comments

The OPSG would like to emphasize that although some principles of the second pillar of the Solvency II regime may be adaptable for IORPs, the Solvency II Directive should not be the starting point of any modification of the IORP Directive. Instead and in line with EC Call for Advice, the OPSG would like to advocate for developing a supervisory regime sui generis, taking the IORP Directive as the starting point.

The OPSG highlights that in order to oversee all direct and indirect consequences of applying any qualitative requirements we urge EIOPA to table quantitative impact studies and proper impact assessments at every stage of the legislative process of revising the IORP Directive.

63. Do stakeholders agree with the principle that the material elements of the Solvency II requirements in respect of the general principles of supervision, and in relation to transparency and accountability should also apply to IORPs?

64. Has EIOPA identified correctly those issues – need to enhance benefit security, differences between IORP and insurance supervision, and diversity of IORPs - where there should be differences between insurers and IORPs on supervision and transparency and accountability?

The OPSG agrees that the amended IORP Directive should in principle contain general governance principles building on Article 41 of the Solvency II Directive. It recognises in line with EIOPA's view (18.3.1) that some of the standards within the Solvency II Directive can be transposed, such as the requirement for an adequate transparent organisational structure, the need for proportionality, and the requirements for written policies for risk management, internal control and outsourcing. However, unlike EIOPA it does not agree that all the standards need to be equivalent in order to provide sound and prudent management, such as a need to review written policies on an annual basis, as this will not always be within the context of proportionality for IORPs.

It agrees with EIOPA (18.3.2) that an effective governance system should

- ensure that the management is sound and prudent,
- secure a high standard of member and beneficiaries' protection,
- assist the management board (or equivalent management entity) in setting the appropriate risk profile for the IORP.

To a large extent, IORPs already enact these principles and we do not see therefore that extensive change is required. In particular the OPSG endorses the statement (18.3.5) that “there are vast differences in the nature scale and complexity of IORPs” and that a new supervisory system should “not undermine the supply or the cost efficiency of occupational retirement provision in the EU”. The OPSG understands that the principle of good governance is not a proportional issue – all members of IORPS however small, should be entitled to a high level of governance. However the implementation of this principle must vary according to the criteria of nature and scale. Complexity may be an issue in that an IORP with complex benefit design may consider a suitable level of internal control to be different from that of an IORP with very simple benefit offering – but the IORP itself is the best entity to judge the suitability of the particular governance structure. Provided the structure satisfies the principles of good governance, the specific structure should be IORP – specific. The OPSG therefore believes the principle of proportionality should be established at level 1.

In terms of documentation of IORP policies, the OPSG agrees that written policies would be applicable and should be reviewed regularly. It would also agree with EIOPA that imposing an annual review could be overly burdensome (18.3.11) and that more important than requiring specific timescales for review, IORPs should be required to monitor and review their policies, as appropriate without specific timescales. It agrees that a three yearly review of a statement of investment policy principles should be retained (18.3.12)

The OPSG does not support the idea of prior approval or submission of the written policies to an outside supervisory committee, but rather this should be approval by the IORPS own management body. It cannot see that the outside supervisory body would add value or enhance the security of members by approval, nor is it likely to have sufficient resources to add value as a result of the submission. It therefore agrees that the implementation of governance requirements should sit with the IORP and not with the supervisory authority.

The OPSG agrees with EIOPA that the general governance system should not prevent member states from allowing for the participation of members in their governance structure (18.3.19) – indeed this can only enhance both transparency and the security of benefits for members. However it also recognises the large variety of management structures, including the participation of sponsor nominated persons – which enhances the efficiency and willingness of sponsor support for the IORP – and independent professional persons.

In terms of remuneration policy the OPSG agrees with EIOPA (18.3.22) that special characteristics of IORPs need to be adequately recognised, for example that staff are often supplied by the sponsoring undertaking, at the sponsor's expense, or that they use volunteer unpaid staff, such as pensioner trustees. OPSG would therefore agree with the concept of a level 1 statement of principle provided it recognises these characteristics, but that there is no need for level 2 implementing measures. In addition if the IORP were to have specific remuneration

requirements, it might need for example a remuneration committee as a necessary internal control, which would lead to an increase in procedure and cost and breach the principle of proportionality for almost all but a few of the very largest IORPs.

The OSPG agrees that an adequate governance framework will further advance the decision making processes of IORPs. Therefore, the OSPG supports the view that some governance elements of the Solvency II framework could reasonably and in a proportionate manner be used as a basis for developing a EU level governance system for IORPs without interfering with governance models structures that may exist at MS-level.

CfA EC n° 14: Fit and proper

65. Do stakeholders agree the introduction of the same fit and proper requirements for IORPs as were introduced for insurance and reinsurance undertakings in article 42 (1) of the Solvency II Framework Directive?

66. Do stakeholders agree with the advice that:

a. The fit and proper requirements should apply at all times

b. There should be effective procedures and controls to enable supervisory authorities to assess fitness and propriety

67. What powers should supervisory authorities have in the event that the fit and/or proper requirements are not fulfilled?

The OPSG considers that the existing IORP Directive Article 9 is an adequate description of a fit and proper test and does not in itself need any expansion – it clearly requires that the institution is run by persons of good repute and who have the appropriate qualifications or employ those who have.

However in terms of establishing the **fitness criteria**, the OPSG would not object to the addition of “integrity” to the requirement to be of good repute – in line with Article 42 of the Solvency II Directive. Nor would it object to the addition of professional qualification and experience requirement, of an additional criterion of “appropriate” [knowledge] for sound and prudent management, although it does believe that this is already the way that Article 9 is operated. In so far as it extends to advisers, it is important for the criterion of proportionality, that this does not require any duplication of rules for professional advisers who are already governed by at least as strict professional standards. Being professionally qualified in light of these standards, should be sufficient evidence of the test of knowledge and qualification.

The OPSG agrees with EIOPA (19.3.6) that the level of fitness required to be shown depends on the nature and complexity of the activities. If the fit and proper test is adopted such that the qualification, knowledge and experience have to be “appropriate” to enable sound management, it is also very important that where there is a board, trustees, or other group of persons who effectively run the IORP, that the adequacy test be applied to the collective function and not to each individual component. For example, on a management board, it is acceptable and indeed useful, to have a person whose area of expertise is financial, another whose is investment , another whose is administration, but that collectively the level of qualification knowledge and experience should be “appropriate”.

A minority view in the OPSG was that it should be a requirement for every IORP to have an investment specialist on the IORP board. This would enable the IORPs to meet the requirements of the amendment proposed in response to CfA 7 to include suitably amended text from Article 132 (2), 1st subpar. of the Solvency II Directive.

As the OPSG considers that the fit and proper test as outlined in Article 9 is already sufficient, it cannot see a need for additional definitions of key functions. However, if this is introduced it fully endorses the view of EIOPA that in respect of fitness, the principles of good governance must be implemented in a reasonable and proportionate manner (19.3.11) and that this may allow for non-segregation of duties (19.3.13), outsourcing (19.3.12) and that it is crucially the IORP itself which must judge whether the persons with key functions meet the fit and proper criteria.

The OPSG does not consider that there is a need for ex-ante assessment by supervisory authorities, nor that there should be periodic assessment. The role of the supervisory authority should be to deal with the reporting and whistle-blowing in exceptional cases, for failures to comply with these fit and proper criteria. The test is in the proper performance of all the functions and duties of the IORP management bodies. If a matter comes to the attention of the supervisory authority which suggests a person may not be fit and proper, the supervisory body would then take into account the function of that person, its importance and relevance to the IORP and a number of other relevant factors. It would not be useful to try and set out a list of these matters in advance.

Given that these are criteria which should be managed and assessed by the IORP itself and that the way in which these criteria are evidenced in the various duties will differ extensively between different IORPs, the OPSG cannot see the need for further elaborating these principles in the level 2 text (19.3.26), although it is supportive of a level 1 general principle.

CfA EC n° 15: Risk Management

68. What is the view of stakeholders on the proposed principles of the revised IORP directive? How do stakeholders evaluate the positive and negative impact of the proposed risk management principles?

The OPSG supports EIOPA's view "that IORPs should have an effective risk management system comprising strategies, processes and reporting procedures to identify, measure, monitor, manage and report risks" (20.3.1). Furthermore, we appreciate the explicit reference of EIOPA to the heterogeneous nature of IORPs and therefore to the need for reasonable and proportional risk management requirements depending on the nature, scale and complexity of the IORP's activities.

We also agree with the impact assessment made by EIOPA. From our point of view, the main negative impact would be the sharp increase in costs to beneficiaries, sponsoring companies and IORPs if the requirements are not defined in a reasonable and proportional manner.

CfA EC n° 16: Own risk and solvency assessment

69. Do you agree with EIOPA that ORSA is, in principle, suitable for IORPs?

Please provide evidence/reasons supporting your view.

The OPSG understands the possible benefits of ORSA, since many IORPs already carry out similar reviews (maybe in a less structured way) and ORSA can help IORPs to further develop a risk-based internal control management. However, the OPSG would also point out that EIOPA should take care not to define several requirements with the same purpose. This would create an accumulation of legislation and requirements which is misleading and too burdensome.

70. What should be the scope of ORSA for IORPs where members bear all the risks? How do you assess the impact of introducing ORSA?

We believe that the scope of the ORSA should be flexible enough to consider the differences in the IORP's business models – especially in the case where members bear all the risks. In accordance with proposed principles for risk management, we believe that ORSA should also be considered from the perspective of members and beneficiaries based on the rules laid down in the agreement between IORP and employer/employee.

While ORSA may further improve risk-based governance of IORPs and strengthen the dialogue between IORPs and supervisory authorities, the OPSG would nevertheless back EIOPA's concerns on the costs of implementing ORSA.

71. What is the stakeholders' view of the necessity to perform ORSA in the event that the holistic balance sheet approach is adopted?

In the event that the holistic balance sheet approach is adopted, the OPSG believes that for both DB and DC schemes ORSA should not be performed, since funding calculations for solvency requirements are already covering this matter. Furthermore, the OPSG considers that ORSA

should rather be considered together with the risk-based internal control management tools as a substitute for costly solvency capital requirements.

Alternatively, if the holistic balance sheet approach is not adopted, ORSA should be performed exclusively for DB schemes.

CfA EC n° 17: Internal control system – compliance

72. What is the view of the stakeholders on the proposed new explanatory text on the whistle-blowing obligation of the compliance function?

73. What is the view of the stakeholders on the proposed new explanatory text on the scope (the fact that the compliance function should include all legislation with an impact on the operations of an IORP)?

The OPSG supports the view and principles proposed by EIOPA for an effective internal control system. In addition a regular assessment of compliance is an essential part of an internal control system.

However, we strongly advise against creating additional regulatory burdens for IORPs. The requirement of a separate compliance function may be too burdensome for small IORPs or IORPs of a simple nature or little complexity. It should be possible that the compliance function can be carried out within the risk management function. Against this background, it is essential to provide sufficient flexibility with respect to the definition of the compliance function.

The primary responsibility of the compliance function should be to inform the top executive(s) of the IORP of any non-compliance and to assist the IORP in resolving those issues. We believe that as a general principle of the organisation structure, the staff of the IORP should report to the managing board and in turn the managing board should, where appropriate, report to its supervisory body. The OPSG supports the idea that the compliance function can inform the supervisory authority “on its own initiative”, for non-compliance issues of material significance. However, some members of the OPSG felt that the compliance function should have an obligation to report to the supervisory authority in such cases, in line with existing legislation in some Member States.

The OPSG agrees with EIOPA that the framework for internal control should include administrative and accounting procedures and reporting and compliance arrangements, outsourcing arrangements and appropriate controls for outsourcing.

CfA EC n° 18: Internal audit

74. Do stakeholders agree that the material requirements of internal audit in respect of insurers should also apply to IORPs, subject to proportionality and other changes?

75. What is the view of stakeholders on the proposed whistle-blowing obligation of the internal audit function?

The OPSG supports EIOPA’s proposition to introduce an internal audit function on the basis of Article 47 of the Solvency II Directive. As proposed by EIOPA an internal audit function should be effective, objective and independent from operational functions.

OPSG also agrees with EIOPA that the requirements of internal audit should take into account the heterogeneous nature of the IORP sector (23.3.5). Furthermore the principles of internal audit must be implemented in a reasonable and proportionate manner (23.3.5).

Additionally, we believe that the requirements should be flexible enough to make sure that internal audit function can as well be fulfilled by means of or as a part of outsourcing (23.3.7; II).

Furthermore, as pointed out by EIOPA, carrying out an internal audit will inevitably result in additional costs for IORPs. This will particularly be the case where it is necessary to appoint external auditors. Consequently, the requirement of an internal audit function may be too burdensome for small IORPs or IORPs with small complexity. Therefore, it is of the utmost importance that alternative measures can be allowed (re EIOPA response draft 23.3.7, III) and an impact assessment be made before any decision is taken to introduce an internal audit function, and that the proportionality principle is defined as a part of Level 1 regulations.

In line with our response to Q. 73, OPSG believes that the primary responsibility of the internal audit function should be to inform the top executive(s) of the IORP of any arising issues and to assist the IORP in resolving those issues. We believe that as a general principle of the organisation structure, the staff of the IORP as well as the outsourced functions should report to the managing board and in turn the managing board should, where appropriate, report to its supervisory body.

The OPSG also supports the idea that the internal audit function can inform the supervisory authority “on its own initiative”, for arising issues of material significance.

CfA EC n° 19: Actuarial function

76. What is the view of the stakeholders on the role and duties of the actuarial function of IORPs?

The OPSG basically agree with the analysis of EIOPA. In particular:

- the "actuarial function" should perform the role currently undertaken for IORPs by the actuary referenced in Articles 9 and 15 of the IORP Directive i.e. compute and certify the technical provisions
- on grounds of cost, the Directive should not require an IORP to have two separate functions to compute and to certify the technical provisions (although member States could impose this additional requirement)
- the actuarial function can be an internal or an external (out-sourced) appointment
- the definition of the actuarial function should be sufficiently flexible to deal with the wide variety of IORPs in Member States
- an actuarial function should be required for all IORPs which bear biometric or investment risk i.e. all but "pure DC" schemes, although actuaries can perform other tasks in such schemes e.g. advice on investment options, member communications

Similar to our response to Q. 73, the OPSG is of the opinion that the primary responsibility of the actuarial function should be to inform the top executive(s) of the IORP of any materially

significant issues as set out in paragraph 24.3.17(b) and to assist the IORP in resolving those issues. We believe that as a general principle of the organisation structure, the staff of the IORP as well as the outsourced functions should report to the managing board and in turn the managing board should, where appropriate, report to its supervisory body. The OPSG supports the idea that the actuarial function can inform the supervisory authority “on its own initiative”, for issues of material significance. However, some members of the OPSG felt that the actuarial function should have an obligation to report to the supervisory authority in such cases, in line with existing legislation in some Member States.

77. Are the requirements of solvency II the correct starting point for the actuarial function?

Generally the OPSG believes that the current IORP Directive should be the starting point, although there was also the view that the requirements of Art. 48 (1) of Solvency II Directive suitably amended for IORPs would be appropriate.

78. Do you agree with the importance of independence of the actuarial function? What do stakeholders perceive as the necessary criteria for the independence of the actuarial function?

We strongly support the view set out in 24.3.24 that the actuarial function should provide competent, appropriate and independent advice to the IORP.

We agree that the actuarial function should have "operational independence". Conflicts of interests must be avoided because they diminishing the members/beneficiaries' level of protection and increase operational risks.

79. Do stakeholders agree with the analysis of the options (including the pros and cons) as laid out in this advice? Are there any other impacts that should be considered?

From an OPSG point of view, barriers to cross-border activities lie in the lack of detailed and comprehensive information on host state social and labour law relevant to occupational pensions. Tax as well continues to be seen as a hurdle for cross-border provision of services. We do not believe that standardisation of the requirements regarding the actuarial function would necessary lead to cross border activity

CfA EC n° 20: Outsourcing

80. Do stakeholders agree that the material requirements on insurers in respect of outsourcing should also apply to IORPs?

81. Do stakeholders agree with the standardisation of outsourcing process in order to enlarge the cross border activity?

82. What are the minimum outsourcing contract elements stakeholders consider as useful to ensure the protection for IORP members and beneficiaries?

The OPSG refers to the comments made under Question 61. Additionally, we agree with EIOPA that the current principles on outsourcing in the IORP Directive have to be maintained in the revised IORP Directive. There is a clear trend in the sector that IORPs outsource more and more activities.

With respect to the role of the supervisory authority we strongly support **option 1**. We believe that it is sufficient that “Member States must ensure that supervisory authorities have the necessary powers at any time to request information on outsourced functions and activities”.

We do not see the need to introduce a new member state’s option where the “member state may decide to provide that IORPs shall, in a timely manner, inform or notify the supervisory authorities on the outsourcing of critical or important function or activities as well as any subsequent changes with respect to those functions or activities”, as this could create unnecessary legal complexities for cross-border providers.

CfA EC n° 21: Custodian / depositary

83. What is the view of the stakeholders on the proposed treatment of depositaries?

The OPSG regrets that the review of the custodian/depositary function for the IORP is based on the UCITS and AIFM legal framework (26.3.4). We believe that it should be taken into account that IORPs have different governance structure and investment policies than UCITS and AIFM, even those without legal personality. Although we acknowledge that AIFM Directive is the latest and most advanced legislative act on the custodian issue and that it could be taken into account, the IORP Directive should be the starting point for the review.

The OPSG emphasizes that the flexibility and the respect of the subsidiarity principle must be maintained. Therefore the IORP directive should not be amended when it comes to the appointment of a depositary, leaving to Member States the decision of whether to make the appointment of a custodian or a depositary compulsory. Given the heterogeneity of IORPs in the EU, Member States should remain responsible for the appointment regime of IORPs. Anyway, according to the OPC report, the appointment of custodian/depositary is compulsory in a majority of CEIOPS members (16 countries).

84. How do stakeholders evaluate the positive and negative impacts of the proposals?

The OPSG is of the opinion that the costs of changing the current IORP Directive will outweigh the potential benefits.

85. What do stakeholders anticipate in terms of cost and other consequences of the implementation of a compulsory regime regarding the appointment of a depositary under options 2 and 3 for: (a) the safekeeping of assets; (b) oversight functions?

The appointment of a depositary should not be compulsory. The principles of flexibility and subsidiarity should be respected in order to leave this decision to the Member States. We believe that the implementation of a compulsory regime regarding the appointment of a depositary under the two options will lead to an increase in the fees that IORPs will have to pay to the depositary. This will lead to an increase in the contributions or a decrease of the benefits of the members/beneficiaries.

86. What do stakeholders anticipate in terms of cost and other consequences of the implementation of the general requirements regarding: (a) the need for a written contract; (b) the role of a depositary in terms of safekeeping; (c) the liability regime of depositaries; (d) the list of minimum oversight functions that should be performed; (e) conflict of interest?

The written contract will involve administrative costs. Moreover, the elements of the contract are not known yet (level 2), thus the costs could be bigger than those included in the providing of the flow of information.

The role of a depositary in terms of safe-keeping will lead to an increase in the fee that IORPs will have to pay to the depositary institution. Furthermore, the costs related to safe keeping are not clear yet since the definition of the term “financial instruments” and the type of financial instruments that can be included in the scope of the depositary’s custody functions is still under discussion (26.2.18).

The depositary must be liable to the IORP for the losses it encountered. It is essential that assets entrusted to depositaries are safe. It will have a positive impact on the general level of protection for members/beneficiaries. However, the cost of such a regime for depositaries could lead to an increase of the fee that IORPs have to pay to depositaries.

The oversight functions that should be performed by the depositary will entail some costs that will have an impact on the fee that IORPs have to pay to them. These costs will trigger either an increase of contributions or a decrease in benefits for the members and beneficiaries.

The OPSG agrees with the rules regarding conflicts of interest because such conflicts are seen as costly for members and beneficiaries as well as for supervisory authorities. A rule on conflict of interest will raise the level of protection for the members/beneficiaries.

87. Do stakeholders agree that the list of minimum oversight functions that should be performed by a depositary is appropriate?

The list of oversight functions will be burdensome, notably in the case of a cross-border activity. Indeed, the SSL difference among member states is the reason why the oversight function and the provision of information that it implies will entail some costs.

The OPSG points out that the depositary should not be responsible for ensuring that income produced by assets is applied in accordance with the IORP rules.

The OPSG does not agree with the introduction of the whistle-blowing function for the depositary. The depositary should only inform the IORP if any breaches of national laws or IORP rules are revealed.

88. What do stakeholders anticipate in terms of cost and other consequences of the implementation of the general requirements that should be verified in case a depositary is not appointed?

The implementation of such general requirements will lead to an additional burden for IORPs. However, the impact is expected to be quite low insofar as these measures are generally implemented at the IORP level.

CfA EC n° 22: Information to supervisors

89. Do stakeholders agree with the analysis of the options (including the pros and cons) as laid out in this advice? Are there any other impacts that should be considered?

90. Would stakeholders welcome convergence of provision of information to supervisors: (i) completely; (ii) in certain fields; (iii) not at all.

The OPSG agrees here with EIOPA's statement that the differences in existing practice should not be a reason for change unless that change brings benefits to member protection in a sustainable and proportionate way (28.3.9). As EIOPA recognises, it is important to identify the cost and regulatory burden, which impact assessment is not at present available to determine this issue.

However the OPSG would not necessarily agree with the statement that absent a common information regime, supervisory practices may take longer to converge and harmonise. There is a number of other much more significant reasons for non-convergence, such as the differences in the nature of the IORPs between member states, or the varying roles of the social partners for example, which are more likely to be a cause of non-convergence. So the OPSG does not agree that a case for convergence of information has been made. It is not clear that non-convergence is either a significant cost of operating cross border, or that greater convergence would lead to any increase in cross border activity

If there are to be further information requirements, then the OPSG would agree that there need to be different information requirements for different arrangements (28.3.20) – particularly but not limited to DB and DC differences. It would also agree that the fact the member bears investment risk under DC should be a driver behind the kind of information that a supervisory authority might reasonably want to see.

The OPSG agrees with EIOPA's view that the IORP Directive provides sufficient powers to enable member states to ensure that the right data is collected for the different types of scheme. It does not however agree that all the elements of Article 35 of the Solvency Directive need to be maintained for IORPs.

Firstly, collection of data is only useful in terms of member protection, if there is comprehensive monitoring of that data – and the resources to do so. Just collection of data is not an end in itself. Secondly, it is not clear to the OPSG why new provisions such as collecting the various investment rules of the IORPs (as in Article 35 of the Solvency Directive), would enable the supervisory authority either to monitor behaviour of IORPs, or to enhance member protection.

The OPSG is therefore in favour of Option 1.

CfA EC n° 23: Information to members/beneficiaries

91. Do stakeholders believe that additional information requirements - besides the current ones - are not only necessary for DC schemes, but also for DB schemes?

The OPSG believes that for DB schemes the IORP Dir. can continue to rely on what is required under art. 9, 11, 12 and 20.

92. Are stakeholders happy with the potential introduction of a KIID-like document for DC schemes and with its contents as envisaged in the draft EIOPA advice? In particular are stakeholders happy with the introduction of a document (KID) that would contain information beyond investment? How important it is that this document facilitates comparisons between IORPs?

The OPSG agrees about the opportunity to improve pre-enrolment information (the OPSG agrees with EIOPA that the term pre-contractual doesn't suit with IORP's nature) with the adoption of a KIID-like document for DC schemes (a KIID like document can be developed for the pre-enrolment stage but this should not limit the pension fund management decision to provide more information). The aim is, according to our opinion, to provide the possibility to have an immediate idea of the pension fund by a synthetic "picture", written in a simple and plain language. The OPSG clarifies that the KIID-like document has to be considered an information document only and not a source of legal commitments with respect to members. As far as the content is concerned, even if not fully standardized at EU level, according to EIOPA advice, the OPSG considers as necessary the following issues:

1. Information provided to members/beneficiaries should be correct, understandable (expressed in a *simple way*), useful and not misleading.
2. Identification of the IORP (funding vehicle) which could include financial structure of the IORP.
3. A brief description of the occupational pension scheme rules including i.a.:
 - contributions
 - deferred membership treatment
 - withdrawal possibility (if available)
 - insurance coverage offered on a compulsory or on a voluntary basis (death, long term care, critical illness). The kind of annuities offered (it's really a key element, the real aim of a pension fund which is too often considered like a financial instrument) and pay-out options available
 - if any, the guaranteed lines
 - life cycle mechanism
 - statement of investment principles including, if relevant, statement of social responsible investment.
4. Performance information (with past performances in a mid/long horizon backward looking, also for giving the message to members/beneficiaries that pension funds are a vehicle to be considered over a consistent period and not in a short term which seems of particular relevance in the context of this turbulent financial period)
5. The cost/charges - really a key issue⁵.

⁵ It could be useful to think about a synthetic index which represents all the costs burdening a pension fund; for example in Italy each pension fund, either occupational or individual has the duty to publish on its contractual and

6. Risk/reward profile (it is very difficult to express for pension funds, projected in a long term period)
7. Practical information
8. Cross references (referred to cross border activity)

The OPSG considers it very important that the document offers the opportunity to compare different investment fund options offered through the IORP structure or the occupational pension scheme if the scheme offers the possibility of choosing among them.

The OPSG agrees also “to go beyond the investment”, considering the social purpose of IORP and aiming to improve a better awareness in joining.

The OPSG highlights that there are already IT tools available that provide members with information as to their future pension. These tools should be encouraged further as they are simple, straight forward and able to cope with various levels of consumer sophistication in terms of financial literacy.

93. How would stakeholders suggest communicating in the KIID the risk/reward profile and/or the time horizon of different investment options? Do they think that the risk ranking should be the same for all time horizons, or should vary with time horizons, allowing for a more favourable ranking of equity-oriented investment options for long horizons? How should performance scenarios be conceived? Should they vary for different asset allocations, allowing for a risk premium for equity-oriented investment options? What a reasonable measure of the risk premium would be?

The OPSG considers that it is very difficult to communicate the risk/reward profile. It could be useful to consider it over different time horizons. It's very important that the member fully understands that a pension fund is not a financial investment but a retirement plan linked with pension age. Performance scenarios could be represented in a standardized way defined at national level by the competent authority considering also the effect of inflation. It's also important to consider different asset allocations.

94. Are stakeholders happy with the introduction of a personalised annual statement to be delivered to each member? Whether and how should it contain information on costs actually levied, and how should it be coordinated with the ex-ante information on costs to be included in the KID?

The OPSG considers that it is essential to provide a personalized annual statement to be delivered to each member. Particularly for DC schemes, it could be really important to include personalized pension projections, linking first and second pillar. It could be useful to report also information on costs actually levied, the OPSG considers that it is a better way of informing members ex ante of the level of costs.

information documents its own ISC (Indicatore sintetico di costo), published also for all the retirement instruments on the web site of Covip, the national competent Authority.

In this context, the OPSG emphasises the importance of IT tools allowing a simple and straight forward way to provide information to members/beneficiaries.

95. What is the view of stakeholders as regards the level of harmonisation of information requirements that can be reasonably achieved with the revised IORP directive? Besides those envisaged by the EIOPA advice, are there other parts of the regulation that should be harmonized?

Considering the wide variety of IORPs all over Europe due to structural and legal differences of all kinds and to differences in Social and Labour Legislation, it is preferable to aim at a minimum level of harmonization among Member States, maintaining in any case the competence of SLL regulation to host country (in a cross border perspective there will be a close cooperation between host and home Authority)

96. Do stakeholders agree with the impact assessment of the EIOPA proposals?

Yes, the OPSG agrees.

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Adopted by the EIOPA Occupational Pensions Stakeholder Group at Frankfurt am Main, 19 December 2011,

The Chairperson of the EIOPA Occupational Pensions Stakeholder Group

Chris VERHAEGEN