

**Draft response to Call for Advice on the
review of Directive 2003/41/EC
*Scope, cross-border activity, prudential
regulation and governance***

EIOPA welcomes comments from interested parties on the following draft response to Call for Advice.

Please send your comments to EIOPA by email (firstconsultationiorpcfa@eiopa.europa.eu) by 15 August 2011, indicating the reference "EIOPA-CP-11/001".

*Please note that comments submitted after the deadline or not submitted in the provided template format **cannot** be processed.*

EIOPA will make all comments available on its website, except where respondents specifically request that their comments remain confidential.

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1. Executive summary

1.1. This consultation

1.1.1. This consultation is on EIOPA's draft advice on the scope of the IORP directive, the definition of cross-border activity, the scope of prudential regulation, and aspects of the governance of IORPs. Specifically it is on the following (the numbering follows that of the Commission's call for advice (CfA)).

CfA number	Subject
1	Scope of the IORP directive
2	Definition of cross-border activity
4	Prudential regulation and social and labour law
12	Supervision of outsourced functions and activities
13	General governance requirements
14	Fit and proper
17	Internal control system
18	Internal audit
20	Outsourcing

1.2. Background

1.2.1. In April 2011 the European Commission asked EIOPA for advice by mid-December 2011 on the EU-wide legislative framework for IORPs. Advice is sought 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. Thirdly, what information should be provided in respect of IORPs to members and beneficiaries, and to supervisory authorities.

1.2.2. Advice is sought 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.

1.2.3. Broadly speaking, on questions of governance, the consultation recommends that the Level 1 framework for governance set out in the Solvency II framework should also be applied to IORPs. Proportionality in application is essential however given the differences in size of IORPs across

the EU. There are further variations recommended in each specific piece of advice.

- 1.2.4. On issues of scope the challenge is to draw a coherent boundary between IORPs and other sorts of pension arrangement (social security on the one hand and individual personal arrangements on the other). The diversity of types of occupational pension arrangement in the 27 member states increases the scale of the challenge. The draft advice in this area therefore offers a number of options for the boundary between IORPs and other pension arrangements.
- 1.2.5. The draft advice also considers issues around facilitating cross border activity: in respect of the definition of cross-border IORPs and the scope of prudential regulation.
- 1.2.6. EIOPA would have liked, given more time, to have provided a robust assessment of impact of its draft advice. We would appreciate the assistance of stakeholders by including in their responses their assessment of impact of the draft advice. We have also provided some qualitative assessment of impact.
- 1.2.7. The consultation period runs from 8 July to 15 August 2011.

2. Introduction

2.1. Background to call for advice

- 2.1.1. [To come when advice on all areas is ready: drivers of call for advice, Commission's seeking economic risk-based approach based on three pillars]

2.2. Contents of call for advice

OVERALL

- 2.2.1. [To come when advice on all areas is ready: advice sought in 23 areas, main implications of advice as a whole.]

THIS CONSULTATION

- 2.2.2. This consultation is on some of the areas where advice is sought: on the scope of the IORP directive, on the definition of cross-border activity, on the scope of prudential regulation, and on aspects of the governance of IORPs. Specifically it is on numbers 1,2,4,12,13,14,17,18, and 20 of the call for advice.

2.3. EIOPA's approach to consulting on the Call for Advice

- 2.3.1. EIOPA will adhere in its consultation to the principles established in EIOPA's Public Statement of Consultation Practices¹. In particular Article 3.2, to consult at a sufficiently early stage to enable EIOPA to take the responses into account. Hence EIOPA is consulting on only some parts of the Call for Advice without waiting for its advice on all 23 parts to be ready.
- 2.3.2. Article 3.3 of the Public Statement says EIOPA will aim at allowing a three month consultation period. However, imposition of an external timetable is given as one reason to shorten the consultation period, which is the case on this occasion. The Call for Advice was received on 7 April 2011 with a deadline for response of 16 December 2011.

FURTHER CONSULTATION

- 2.3.3. EIOPA intends to consult on the remaining items in the call for advice in October 2011 and, if the opportunity arises, to re-consult on the areas in this draft advice.

STRUCTURE OF THIS CONSULTATION

- 2.3.4. The call for advice is considered under the following headings:
- Extract from the call for advice
 - Background
 - Explanatory text
 - EIOPA advice
 - Questions for stakeholders

¹ EIOPA-BOS-11-016

3. Response to call for advice

4. Overall response

To come

5. Responses on questions of scope, cross-border activity and prudential regulation

6. CfA 1 Scope of the IORP Directive

6.1. Extract from the call for advice

The Commission Services would like EIOPA to advise on the scope of the IORP Directive, covering at least the following issues:

- The possibility to extend the scope of the IORP Directive to other occupational pension funds that operate on a funded basis.
- The provisions that would need to be amended or added (if any) in order to suit the needs for the supervision of those occupational pension funds.
- Other advise, if any.

6.2. Background

Current legal requirements (IORP Directive)

- 6.2.1. The current scope of the IORP directive (Art. 2.1) is institutions for occupational retirement provision (IORP) and, where the IORP does not have legal personality, those authorised entities responsible for managing them and acting on their behalf.
- 6.2.2. The current Directive explicitly excludes (Art. 2.2)
- a) institutions managing social-security schemes which are covered by Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72²;
 - b) institutions which are covered by Directive 73/239/EEC, Directive 85/611/EEC, Directive 93/22/EEC, Directive 2000/12/EC and Directive 2002/83/EC;
 - c) institutions which operate on a pay-as-you-go basis;
 - d) institutions where employees of the sponsoring undertakings have no legal rights to benefits and where the sponsoring undertaking can redeem the assets at any time and not necessarily meet its obligations for payment of retirement benefits;
 - e) companies using book-reserve schemes with a view to paying out retirement benefits to their employees.
- 6.2.3. Art. 3 foresees the application of the Directive to the non-compulsory occupational retirement provision business of IORPs managing social-security schemes covered by Regulations (EEC) No 1408/71 and (EEC) No 574/72.
- 6.2.4. The second paragraph of Art. 5 provides the option for Member States not to apply Articles 9 to 17 to institutions where occupational retirement provision is made under statute, pursuant to legislation, and is guaranteed by a public authority.

² Replaced by respectively Regulation 883/2004 and Regulation 987/2009.

International standards, guidelines and good practice

6.2.5. The following OECD definitions are useful for common understanding of the proposals which are set out in this advice:³

<p>Public pension plans: Social security and similar statutory programmes administered by the general government (that is central, state, and local governments, as well as other public sector bodies such as social security institutions). Public pension plans have been traditionally PAYG financed, but some OECD countries have partial funding of public pension liabilities or have replaced these plans by private pension plans.</p>	<p>Private pension plans: A pension plan administered by an institution other than general government. Private pension plans may be administered directly by a private sector employer acting as the plan sponsor, a private pension fund or a private sector provider. Private pension plans may complement or substitute for public pension plans. In some countries, these may include plans for public sector workers.</p>
<p>Mandatory occupational plans: Participation in these plans is mandatory for employers. Employers are obliged by law to participate in a pension plan. Employers must set up (and make contributions to) occupational pension plans which employees will normally be required to join. Where employers are obliged to offer an occupational pension plan, but the employees' membership is on a voluntary basis, these plans are also considered mandatory.</p>	<p>Voluntary occupational pension plans: The establishment of these plans is voluntary for employers (including those in which there is automatic enrolment as part of an employment contract or where the law requires employees to join plans set up on a voluntary basis by their employers). In some countries, employers can on a voluntary basis establish occupational plans that provide benefits that replace at least partly those of the social security system. These plans are classified as voluntary, even though employers must continue sponsoring these plans in order to be exempted (at least partly) from social security contributions.</p>
<p>Mandatory personal pension plans: These are personal plans that individuals must join or which are eligible to receive mandatory pension contributions. Individuals may be required to make pension contributions to a pension plan of their choice normally within a certain range of choices or to a specific pension plan.</p>	<p>Voluntary personal pension plans: Participation in these plans is voluntary for individuals. By law individuals are not obliged to participate in a pension plan. They are not required to make pension contributions to a pension plan. Voluntary personal plans include those plans that individuals must join if they choose to replace part of their social security benefits with those from personal pension plans.</p>
<p>Occupational pension plans: Access to such plans is linked to an employment or professional relationship between the plan member and the entity that establishes the plan (the plan sponsor). Occupational plans may be established by employers or groups thereof (e.g. industry associations) and labour or professional associations, jointly or separately. The plan may be administered directly by the plan sponsor or by an independent entity (a pension fund or a financial institution acting as pension provider). In the latter case, the plan sponsor may still have oversight responsibilities over the operation of the plan.</p>	<p>Personal pension plans: Access to these plans does not have to be linked to an employment relationship. The plans are established and administered directly by a pension fund or a financial institution acting as pension provider without any intervention of employers. Individuals independently purchase and select material aspects of the arrangements. The employer may nonetheless make contributions to personal pension plans. Some personal plans may have restricted membership.</p>

³ Pensions Glossary, PRIVATE PENSIONS: OECD CLASSIFICATION AND GLOSSARY – ISBN 92-64-01699-6 – © OECD 2005

<p>Pension plan: A legally binding contract having an explicit retirement objective (or – in order to satisfy tax-related conditions or contract provisions – the benefits cannot be paid at all or without a significant penalty unless the beneficiary is older than a legally defined retirement age). This contract may be part of a broader employment contract, it may be set forth in the plan rules or documents, or it may be required by law. In addition to having an explicit retirement objective, pension plans may offer additional benefits, such as disability, sickness, and survivors' benefits.</p>	
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OPC reports

- 6.2.6. According to the OPC Report on pension institutions outside the statutorily managed first pillar⁴, pension schemes/institutions in the following member states are explicitly excluded from the scope of the IORP Directive on the basis of Art. 2.2:
- social-security schemes falling under Regulation 1408/71 & Regulation 574/72: BG, HU, IT, LI, LT, LV, NO, PL, RO, SK
 - covered by other EU Directives: AT, BE, CY, DE, DK, EE, ES, FR, HU, IE, IT, LT, LU, NL, NO, PT, PL, SE, UK
 - PAYG schemes: CY, FR, NO
 - institutions where employees of the sponsoring undertakings have no legal rights to benefits: DE, NO
 - book reserve schemes: AT, BE, CY, DE, IT, LU, NO, PT, SE.
- 6.2.7. Analysis of the current existing pension schemes/institutions and the applicable EU legislation⁵ has shown that there are pension schemes/institutions which fall outside the scope of any EU prudential legislation and the IORP Directive, although some member states apply the IORP Directive to these schemes/institutions on a voluntary basis. These schemes/institutions can be categorised as follows:
- voluntary personal pension plans in which the employer can make contributions: BG, CZ, HU
 - voluntary personal pension plans in which the employer cannot make contributions: MT, PT, SI, ES
 - mandatory personal pension plans in which the employer can make contributions: HU, IS
 - mandatory personal pension plans in which the employer cannot make contributions: HU

⁴ See Table 1 of the Commission working document accompanying the Green Paper, originally prepared by the OPC as part of its Report on pension institutions outside the statutorily managed first pillar, CEIOPS-OP-32-09 (fin), 30 October 2009

⁵ Table 1 of the Commission working document accompanying the Green Paper, originally prepared by the OPC as part of its Report on pension institutions outside the statutorily managed first pillar, CEIOPS-OP-32-09 (fin), 30 October 2009

6.3. Explanatory text

EIOPA's view on issues in the CfA

- 6.3.1 On the basis of the analysis of information available on the pension schemes/ institutions which fall outside the scope of the IORP directive (whether or not explicitly excluded) it appears that some of these are comparable with pension schemes/institutions which do currently fall within the scope of the IORP directive. As such this raises the issue of an unlevel playing field with regard to the rules applicable to the pension institution and the protection provided to the members.
- 6.3.2 All those not within scope appear to be DC and are specifically mentioned in the Call for Advice.
- 6.3.3 The IORP directive was drafted in the framework of the existing pensions systems of the then member states of the EU. However, since the entry into force of the IORP directive (2003) new member states have joined the EU, having different pensions models which do not entirely fit within the framework of the IORP directive. Most of these new member states have developed a pensions model which includes among other things a mandatory pensions pillar where employers' contributions are centrally collected and diverted to personal accounts managed by private financial institutions chosen by the employee.
- 6.3.4 Any extension of the scope of the IORP directive should be based on common principles which can apply to all pensions models. Although the issue of scope is especially relevant for DC schemes a specific extension of the scope for only DC schemes would be too limited.
- 6.3.5 EIOPA does not touch upon the current exclusions of the IORP directive as this is not requested by the Call for Advice. However, on the basis of the information available in the OPC reports, it seems that the exclusion for social security schemes is not applied consistently across the EU. More specifically it seems that some pension schemes which are currently being considered as falling under Regulation 883/2004 could in fact be considered as occupational schemes and not as social security schemes, for several reasons:
- (i) contributions are made in relation to an occupational (i.e. labour) activity;
 - (ii) pension schemes are managed by private financial institutions.
- 6.3.6 The main differences between these types of occupational pension scheme and those of the old member states are the following:
- (i) mandatory system
 - (ii) collection of contributions through the social security network
 - (iii) personal choice by employee of the financial institution

- 6.3.7 These elements are not in contradiction with the main principle of what comprises an occupational pension scheme, i.e. providing retirement benefits based on an occupational activity as a supplement to social security pensions. However, some of these elements can also be classified as a personal pension plan. The dividing line between 1st, 2nd and 3rd pillar is not always clear. Amendments to clarify the current exclusions could enhance a consistent application.

Policy options

- 6.3.8 EIOPA acknowledges that the decision to extend the scope of the IORP Directive is of a highly political nature. EIOPA is therefore not in a position to advise the Commission on necessary extensions, but only to advise on what could be the possible outcomes from the political process. Therefore, EIOPA has identified a number of options that can feed into the political decision-making process, highlighting the respective implications and how an option could be realised in practice.

Option 1: Leave the IORP directive unchanged

- 6.3.9 As highlighted in paragraph 6.2.6 above, leaving the IORP directive unchanged results in a number of pension schemes/institutions, with essentially the same characteristics as IORPs within the directive, falling outside the scope of the directive.

Option 2: Clarify what should be considered an occupational pension scheme

- 6.3.10 Under this option the scope of the current directive would be clarified by amending certain definitions to widen the application to those occupational schemes which are currently not covered by the Directive.
- 6.3.11 The current Art. 6.a refers to "providing of retirement benefits in the context of an occupational activity on the basis of an agreement or a contract agreed:
- individually or collectively between the employer(s) and the employee(s) or their respective representatives
 - with self-employed persons, in compliance with the legislation of the home and host Member States".
- 6.3.12 This reference does not fit with the pensions system in the new member states, where the provision of retirement benefits in the context of an occupational activity is not based on an agreement or contract between employers and employees but instead on a legal obligation.
- 6.3.13 Under this option a reference to such legal obligation could be included.
- 6.3.14 Furthermore the confusion created by Article 3 should be removed. This article refers to IORPs "which also operate compulsory employment-related pension schemes which are considered to be social security schemes covered by Regulations 1408/71 and 574/72" versus "their non-compulsory

occupational retirement business". The fact that contrast is being made between non-compulsory occupational retirement business and compulsory employment-related pension schemes means the focus is withdrawn from the main issue of the exclusion i.e. being considered as a social security scheme. Reading this article could give the impression that compulsion leads to exclusion from scope in contrast to the non-compulsory schemes, which clearly fall under the IORP directive according to Article 3.

6.3.15 Additionally, EIOPA suggests that the Commission examines the consistency of application of Regulation 883/2004.

Option 3: Permit the optional application of the Directive to those pension schemes currently falling outside its scope

6.3.16 In this option the scope of the directive will remain as currently, as well as the definitions, but member states will have the option to permit the application of the Directive to institutions operating mandatory occupational pension schemes and/or those covered by Regulation (EEC) No 883/2004.

6.3.17 Already today, the IORP directive does not prohibit member states to apply the Directive to those institutions which currently fall out of scope, however a specific mention provides clarity.

Option 4: Extend the scope of the IORP directive to all providers of occupational pension schemes operating at their own risk

6.3.18 The purpose of this option is to submit all pension providers, which are not yet covered by an EU prudential regulation, irrespective of the classification of the pension scheme (1st bis or 2nd), and therefore would also include schemes which are or could be considered as social security, if the IORP operates these schemes at its own risk.

6.3.19 The words "at their own risk" refer to the insurance directives and a decision of the Court of Justice (see below). In the context of the IORP directive the words mean "not guaranteed by a public authority". For the remainder of this advice the terms are interchangeable.

6.3.20 In other words, all pension schemes which are not guaranteed by a public authority will fall under the scope of the directive.

6.3.21 The purpose of this option is to give the same protection to the members and beneficiaries of pension schemes (irrespective of whether they are considered social security schemes) that are managed by institutions (with or without legal personality and irrespective of whether they are public or private) operating at their own risk.

6.3.22 Therefore the exclusion in Art. 2.2.a should be slightly amended, as well as Art. 3.

6.3.23 Inspiration can be sought in the current Directive Art. 5 2nd par. and in Art 2.3.c and Art. 3 of Solvency II. For an interpretation of the notion

"operating at their own risk", one can refer to the case C-206/98 of 18 May 2000 (Commission v/ Kingdom of Belgium).

6.3.24 In that context, one can ask if Art. 5, 2nd para. needs to be kept. The current wording of Art. 5 2nd para. seems to exempt IORPs managing some social security schemes from the application of Art. 9 to 17, but this wording is not coherent with current Art. 3.

Option 4(i): Permit the optional application of the Directive to all providers of occupational pension schemes operating at their own risk.

6.3.25 This option is a variation on option 4, but it considers the optional application to all providers of occupational pension schemes operating at their own risk.

Option 5: Extend the scope of the IORP directive to all providers of pension schemes operating at their own risk

6.3.26 This option is a variation on option 4, but it considers the application also to providers of personal pension schemes.

Option 5(i): Permit the optional application of the Directive to all providers of pension schemes operating at their own risk.

6.3.27 This option is a variation on option 5, but it considers the optional application also to providers of personal pension schemes.

Positive impacts

option 1: as now

option 2:

- all funded schemes are covered
- no occupational pension scheme remains unregulated/unsupervised

option 3:

- pension schemes/ institutions which currently fall outside the scope of the IORP can now fall under the IORP Directive so that a level playing field can be created.
- more obvious that application of the directive is an option

option 4:

- no gap in the prudential regulation and supervision of all types of occupational pension schemes
- same protection of the members and beneficiaries of schemes managed by institutions operating without the guarantee of a public authority.

option 4(i):

- current scope of the directive could be enlarged as in option 4 above.
- choice by member states of whether to apply the directive

option 5:

- no gap in prudential regulation and supervision of all types of pension scheme

option 5(i):

- current scope of the directive could be enlarged as in option 5 above
- choice by member states of whether to apply the directive

Negative impacts**option 1:**

- the current Directive is not fit for all types of pension models existing in the EU
- some pension schemes fall unintentionally outside the scope of the Directive

option 2: none foreseen**option 3:**

- the creation of a level playing field will depend on how many member states choose the optional application

option 4: none foreseen**option 4(i):**

- the creation of a level playing field will depend on how many member states choose the optional application
- risk of distortion of competition between member states.

option 5:

- possible interference with the PRIPS project

option 5(i):

- the creation of a level playing field will depend on how many member states choose the optional application
- risk of distortion of competition between member states.

Comparison of policy options

6.3.28 Due to the potential political implications of the proposed options, EIOPA withholds from comparing the policy options.

6.4. EIOPA's advice

The Commission Services would like EIOPA to advise on the scope of the IORP Directive, covering at least the following issues:

- The possibility to extend the scope of the IORP Directive to other occupational pension funds that operate on a funded basis.**
- The provisions that would need to be amended or added (if any) in order to suit the needs for the supervision of those occupational pension funds.**

The scope of the Directive can be extended by either clarifying the current scope of the Directive or by specifically extending the scope, optional or not. To that end EIOPA identified 4 options on top of the option to retain the current situation. EIOPA also suggests the Commission examine the consistency of application of Regulation 883/2004.

Option 1 will leave the scope as defined by the current directive unchanged.

Option 2 proposes to clarify what is to be considered as an occupational pension scheme.

Option 2 would need the following amendments to the directive:

Art. 3 Application to institutions operating social-security schemes

Institutions for occupational retirement provision which also operate ~~compulsory employment-related~~ pension schemes which are considered to be social-security schemes covered by Regulations (EEC) No 883/2004 and (EEC) No 987/2009 shall be covered by this Directive in respect of their ~~non-compulsory~~ occupational retirement provision business. In that case, the liabilities and the corresponding assets shall be ring-fenced and it shall not be possible to transfer them to the ~~compulsory~~ pension schemes which are considered as social-security schemes or vice versa.

Art. 6 Definitions

(a) "institution for occupational retirement provision", or "institution", means an institution, irrespective of its legal form, operating on a funded basis, established separately from any sponsoring undertaking, or trade or public authority for the purpose of providing supplementary retirement benefits in the context of an occupational activity

- on the basis of an agreement or a contract agreed:

- individually or collectively between the employer(s) and the employee(s) or their respective representatives, or

- with self-employed persons, in compliance with the legislation of the home and host Member States, or

- where the occupational retirement provision is made under statute, pursuant to legislation,

and which carries out activities directly arising therefrom;

[The rest of the Directive needs to be screened.]

Option 3 proposes the optional application of the directive to those pension schemes currently falling outside its scope.

Option 3 would need the following amendments to the directive:

Art. 3 Application to institutions operating social-security schemes

Add the following new final sentence "member states may choose to apply the provisions of this Directive to institutions operating compulsory employment -related pension schemes which are already covered by Regulation (EEC) No 883/2004 and Regulation (EEC) No 987/2009".

Option 4 proposes to extend the scope of the IORP directive to all providers of occupational pension schemes operating at their own risk.

Option 4 would need the following amendments to the Directive:

Art. 2 Scope

1bis. This Directive applies to institutions for occupational retirement provision, which provide occupational retirement benefits prescribed by or provided for in social insurance legislation, in so far as they are effected or managed at their own risk in accordance with the laws of a Member State.

2. This Directive shall not apply to:

(a) institutions managing social-security schemes, which are covered by Regulation (EEC) No 883/2004 and Regulation (EEC) No 987/2009 without prejudice to par. 1bis.;

Art. 3 Application to institutions operating social-security schemes

Institutions for occupational retirement provision which also operate ~~compulsory employment-related~~ pension schemes which are considered to be social-security schemes covered by Regulations (EEC) No 1408/71 and (EEC) No 574/72 shall be covered by this Directive in respect of their ~~non-compulsory~~ occupational retirement provision business that they effect or manage at their own risk. In that case, the liabilities and the corresponding assets shall be ring-fenced and it shall not be possible to transfer them to the ~~compulsory~~ pension schemes which are ~~considered as social-security schemes~~ effected or managed at their own risk or vice versa.

Art. 5 Small pension institutions and statutory schemes

~~Member States may choose not to apply Articles 9 to 17 to institutions where occupational retirement provision is made under statute, pursuant to legislation, and is guaranteed by a public authority.~~

Art. 6 Definitions

(a) "institution for occupational retirement provision", or "institution", means an institution, irrespective of its legal form, operating on a funded basis, established separately from any sponsoring undertaking, ~~or trade~~ or public authority for the purpose of providing retirement benefits

- on the basis of an agreement or a contract agreed:

- individually or collectively between the employer(s) and the employee(s) or their respective representatives, or

- with self-employed persons, in compliance with the legislation of the home and host Member States, or

- where the retirement provision is made under statute, pursuant to legislation,

and which carries out activities directly arising therefrom;

[The rest of the Directive needs to be screened.]

Option 4(i) proposes the optional application of the Directive to all providers of occupational pension schemes operating at their own risk.

Option 4(i) would need the following amendments to the Directive:

Art. 2 Scope

1bis. Member States may choose to apply this directive to institutions for occupational retirement provision, which provide occupational retirement benefits prescribed by or provided for in social insurance legislation, in so far as they are effected or managed at their own risk in accordance with the laws of a Member State.

2. This Directive shall not apply to:

(a) institutions managing social-security schemes, which are covered by Regulation (EEC) No 883/2004 and Regulation (EEC) No 987/2009 without prejudice to par. 1bis;

Art. 5 Small pension institutions and statutory schemes

~~Member States may choose not to apply Articles 9 to 17 to institutions where occupational retirement provision is made under statute, pursuant to legislation, and is guaranteed by a public authority.~~

[The rest of the Directive needs to be screened.]

- Other advice, if any.

EIOPA has identified pension schemes which currently do not fall under any EU prudential regulation and which are not considered to be occupational. Therefore these pension schemes would still remain outside the scope of a revised directive under the above options. To ensure that such pension schemes are covered by an EU prudential regulation in the event they are operated by an institution at its own risk

(i.e. not guaranteed by a public authority) EIOPA has identified the following 2 options to extend, optional or not, the scope of the directive.

Option 5 proposes to extend the scope of the Directive to all providers of pension schemes operating at their own risk.

Option 5 would need the following amendments to the Directive:

Art. 2 Scope

1. This Directive shall apply to institutions for ~~occupational~~ retirement provision. Where, in accordance with national law, institutions for ~~occupational~~ retirement provision do not have legal personality, Member States shall apply this Directive either to those institutions or, subject to paragraph 2, to those authorised entities responsible for managing them and acting on their behalf.

1bis. This Directive applies to institutions for retirement provision, which provide retirement benefits prescribed by or provided for in social insurance legislation, in so far as they are effected or managed at their own risk in accordance with the laws of a Member State.

1ter. This Directive applies to institutions for retirement provision, which provide retirement benefits offered to the public in accordance with the laws of a Member State.

2. This Directive shall not apply to:

(a) institutions managing social-security schemes, which are covered by Regulation (EEC) No 883/2004 and Regulation (EEC) No 987/2009, without prejudice to par. 1bis.;

Art. 3 Application to institutions operating social-security schemes

Institutions for occupational retirement provision which also operate ~~compulsory employment-related~~ pension schemes which are considered to be social-security schemes covered by Regulations (EEC) No 1408/71 and (EEC) No 574/72 shall be covered by this Directive in respect of their ~~non-compulsory~~ occupational retirement provision business that they effect or manage at their own risk. In that case, the liabilities and the corresponding assets shall be ring-fenced and it shall not be possible to transfer them to the ~~compulsory~~ pension schemes which are ~~considered as social-security schemes~~ effected or managed at their own risk or vice versa.

Art. 5 Small pension institutions and statutory schemes

~~Member States may choose not to apply Articles 9 to 17 to institutions where occupational retirement provision is made under statute, pursuant to legislation, and is guaranteed by a public authority.~~

Art. 6 Definitions

(a) "institution for ~~occupational~~ retirement provision", or "institution", means an institution, irrespective of its legal form, operating on a funded basis, established

separately from any sponsoring undertaking, ~~or~~ trade or public authority for the purpose of providing retirement benefits

- on the basis of an agreement or a contract agreed:

- individually or collectively between the employer(s) and the employee(s) or their respective representatives, or

- with self-employed persons, in compliance with the legislation of the home and host Member States, or

- with individual persons, or

- where the retirement provision is made under statute, pursuant to legislation,

and which carries out activities directly arising therefrom;

[The rest of the Directive needs to be screened.]

Option 5(i) proposes the optional application of the Directive to all providers of pension schemes operating at their own risk.

Option 5(i) would need the following amendments to the Directive:

Art. 2 Scope

1bis. Member States may choose to apply this directive to institutions for retirement provision, which provide retirement benefits prescribed by or provided for in social insurance legislation, in so far as they are effected or managed at their own risk in accordance with the laws of a Member State.

1ter. Member States may choose to apply this directive to institutions for retirement provision, which provide retirement benefits offered to the public in accordance with the laws of a Member State.

2. This Directive shall not apply to:

(a) institutions managing social-security schemes, which are covered by Regulation (EEC) No 883/2004 and Regulation (EEC) No 987/2009 without prejudice to par. 1bis;

Art. 5 Small pension institutions and statutory schemes

~~Member States may choose not to apply Articles 9 to 17 to institutions where occupational retirement provision is made under statute, pursuant to legislation, and is guaranteed by a public authority.~~

[The rest of the Directive needs to be screened.]

6.5. Questions for Stakeholders

1. Do 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?
2. Are there any other options that should be considered? Please provide details including where possible in respect of impact.
3. Which option is preferable?
4. How should it be determined whether a compulsory employment-related pension scheme is to be considered as a social-security scheme covered by Regulations (EEC) No 883/2004 and (EEC) No 987/2009(see Art. 3)?

7. CFA 2 Definition of cross border activity

7.1. Extract from the call for advice

The Commission Services would like EIOPA to advice on how the wording of the IORP Directive needs to be amended in order to clarify that cross border activity arises only when the sponsoring undertaking and the IORP are located in two different Member States.

7.2. Background

Current legal requirements (IORP Directive)

7.2.1. Under the IORP Directive, institutions for occupational retirement provision (IORPs) have the possibility of providing their services in other Member States, thereby allowing them to operate pension schemes with members and beneficiaries in more than one Member State. The Directive provides the basic framework for IORPs that wish to operate cross-border, including the procedure that needs to be followed before cross-border activity can be started.

OPC reports

7.2.2. OPC research has shown that cross border activity has been defined differently in member states with three interpretations (member states which fall within the interpretations are identified in brackets):

- **Location of the sponsoring undertaking (AT, BG, DE, LI, NO, CZ);**

A Member State that uses the location of the sponsoring undertaking as the decisive criterion, considers an activity to be cross-border if the sponsoring undertaking is located in another Member State than the IORP.

- **Nationality of the Social and Labour Law (BE⁶, PT, IE, UK, FI);**

A Member State that uses the nationality of the social and labour law as the decisive criterion, considers an activity to be cross-border if the applicable social and labour law originates from a Member State other than the Member State where the IORP is established.

- **Nationality of the scheme (LU, NL);**

A Member State that uses the nationality of the scheme as the decisive criterion, considers an activity to be cross-border if the scheme is from a different Member State to where the IORP is established.

⁶ However, the criterion for notification is based on the location of the sponsoring undertaking.

7.3. Explanatory text

EIOPA's view on issues in the CfA

- 7.3.1. The use of different definitions has led to a number of cases where two (or more) Member States potentially involved in a cross-border activity have come to different conclusions whether or not the proposed activity is cross border or not. This has created considerable difficulties in both the operation of cross border IORPs and the notification, authorisation and approval processes.
- 7.3.2. The cross border market is very small with only 76⁷ cross border schemes to date. As the Commission highlighted in the CfA, the differences in definition may hamper IORPs' willingness to engage in cross border activity. A more consistent interpretation of what is a cross border activity may help address this issue.
- 7.3.3. It should be noted that EIOPA has not been asked to provide the Commission with advice on how best to amend the IORP Directive in order to arrive at the most suitable definition of cross border. It has however been asked to provide advice as to how the Directive should be amended to reflect the position that cross border activity arises only when the sponsor and IORP are located in two different Member States. The option of no change is also included for completeness.

Policy options

Option 1: Leave the IORP directive unchanged

- 7.3.4. As highlighted in paragraph 7.3.1 above, leaving the IORP directive unchanged results in difficulties in both the operation of cross border IORPs and the notification, authorisation and approval processes.

Option 2: Amend the wording of the IORP directive to reflect the position that cross border activity arises only when the sponsor and the IORP are located in two different Member States

- 7.3.5. In order to achieve this, there are a number of elements that need to be considered.
- 7.3.6. **Firstly** the definition of home and host state and that of the sponsoring undertaking: Articles, 6 (c), 6 (i) and 6 (j) of the IORP Directive:

6 (i) "home Member State" means the Member State in which the institution has its registered office and its main administration or, if it does not have a registered office, its main administration;

⁷ OPC Market Developments report 2011

6 (j) "host Member State" means the Member State whose social and labour law relevant to the field of occupational pension schemes is applicable to the relationship between the sponsoring undertaking and members.

7.3.7. The wording of home state is clear - this is the location of the IORP. The challenge lies in defining the host state. The current wording brings in the location of the applicable social and labour law. This has led to countries defining an IORP as operating on a cross border basis where it has members which are working in, and subject to the SLL, of another Member State.

7.3.8. The simplest method to resolve this would be to adjust the definition of host state to reflect the position in respect of location of the sponsoring undertaking:

"host member state" means the Member State where the sponsoring undertaking is located.

7.3.9. The second element that would need to be clarified is the definition of the sponsoring undertaking. The IORP directive currently states that:

6 (c) "sponsoring undertaking" means any undertaking or other body, regardless of whether it includes or consists of one or more legal or natural persons, which acts as an employer or in a self-employed capacity or any combination thereof and which pays contributions into an institution for occupational retirement provision;

7.3.10. This leaves open the general issue of what is meant by sponsoring undertaking: is it the branch, the subsidiary, the head office ultimately paying the contribution, or any other entity. To add further clarity we need to introduce a new element which states that the sponsoring undertaking would be the one that supports the scheme. Additionally, there should be a direct link between the sponsor and the provision of the benefits to the member. Therefore, an additional element that requires there to be an agreement between the sponsor and the IORP and/or members would resolve this.

7.3.11. Thus the following definition is appropriate.

'sponsoring undertaking' means any undertaking or other body, regardless of whether it includes or consists of one or more legal or natural persons, which acts as an employer or in a self-employed capacity or any combination thereof and which has a direct agreement with either the institution or the members and pays contributions into and/or supports the institution for occupational retirement provision;

7.3.12. **Secondly**, references to the host state are mentioned elsewhere in the Directive with reference to cross border activity - specifically in Recitals 34 and 37 and in Articles 6, 14, 18, 20 and 21. While these references do not need to be changed in order to achieve the objective required by the CfA, the consequences of these requirements create a number of issues which are highlighted in the negative impacts section below.

Positive impacts

option 1:

- 7.3.13. While the legal environment may not be perfect, it is adequate for at least some cross-border activity to take place. It is possible that the lack of take-up is not due to failings of the Directive or Member States' interpretations, but to other reasons such as a basic lack of demand.
- 7.3.14. A reason for this lack of demand may be that pension arrangements must operate as part of each Member State's overall legal systems in respect of occupational pensions - for example taxation and social and labour law - and it is difficult for a foreign IORP to manage this, so they are unattractive to sponsors.
- 7.3.15. As regards the benefits of single markets, schemes do receive the benefits of this already through the ability to pool assets and risks.

option 2:

- 7.3.16. This would have the benefit of introducing a single definition of a cross border activity which could help provide clarity to enable the cross border market to develop.
- 7.3.17. This would solve the problem that because of the differing national approaches, situations can arise where two (or more) Member States potentially involved in a cross-border activity come to different conclusions whether or not the proposed activity is cross border or not.

Negative impacts

option 1:

- 7.3.18. The cross border market is very small by comparison with the number of IORPs across the EU in total. A more consistent interpretation of what is a cross border activity may add clarity and increase IORPs' willingness to engage in these activities.

option 2:

- 7.3.19. In essence there are really two types of cross-border activity (often coinciding) that the current IORP Directive puts together – one based on social welfare and protecting the member and the other based on promoting the free market and the employer. A definition based on the sponsoring undertaking takes into account the second but not the first. EIOPA sees no possibility of serving both aims by drafting one definition based on the 'sponsoring undertaking.'

- 7.3.20. A definition based solely on the location of the IORP and the sponsoring undertaking would not take into account the location of members and beneficiaries explicitly. This could lead, for example, to a situation where:
- The IORP is in the home state and subject to the prudential law of that member state;
 - The sponsoring undertaking would be in the host state and the IORP subject to the social and labour law and any other requirements as allowed by the Directive (additional investment or disclosure rules) specific to the host state; and
 - The member would be in a third state benefiting from neither the prudential nor the social and labour law of either state and nor from the other requirements the host state may impose on cross border IORPs;
 - In effect, the host state requirements for IORPs would have a direct impact on members located in another Member State entirely and any requirements in the Member State where the member is located would have no impact and the supervisory authority of that Member State would not be involved in the notifications process as detailed in Article 20 and so also would not play a role in the supervision of the IORP.
- 7.3.21. This definition does not ensure comparable level of protection of the members and beneficiaries affected by the SLL of:
- The member state where the sponsoring undertaking is located;
 - Another member state (e.g. where they are working or living).
- 7.3.22. Indeed, the most important consequence of the notification procedure is that it gives the ability to the authorities of the member state of the social and labour law to take measures on the basis of art. 20(9) and 20(10) of the directive against the IORP (with or without the collaboration of the authorities of the home member state) in the event of breach of SLL.
- 7.3.23. This ability disappears when only the member state of the location of the sponsoring undertaking can be considered as the host member state.
- 7.3.24. A solution could be to insert a new article giving the ability to the authorities of the member state of the SLL (i.e. another member state than the home and the host member states) to take measures against the IORP. Inspiration can be found in the current article 20(9) and 20(10). This would give a similar protection for members and beneficiaries as the current version of the directive. But it is a complex solution because several competent authorities could act against the same IORP.

Comparison of policy options

- 7.3.25. In view of the specific request in the CfA, EIOPA proposes option 2.

7.4. EIOPA's advice

The Commission Services would like EIOPA to advise on how the wording of the IORP Directive needs to be amended in order to clarify that cross border activity arises only when the sponsoring undertaking and the IORP are located in two different Member States.

EIOPA proposes to amend Articles 6 (c) and (j) as follows:

6 (c) "sponsoring undertaking" means any undertaking or body, regardless of whether it includes or consists of one or more legal or natural persons, which acts as an employer or in a self-employed capacity or any combination thereof and which has a direct agreement with either the institution or the members and pays contributions into and/or supports an institution for occupational retirement provision.

6 (j) "host member state" means the Member State where the sponsoring undertaking is located

7.5. Questions for Stakeholders

5. Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?
6. Are there any other options that should be considered?
7. Do you agree with EIOPA that option 2 is preferable?
8. Even with defining the sponsoring undertaking, problems of overlapping or contradicting regulation between member states could emerge. Should the revised Directive include procedures to settle such problems between the Home and the Host member states and/or also between the Home member state and the member state of the applicable social and labour law?

8. CfA 4 Prudential regulation and social and labour law

8.1. Extract from the call for advice

The EIOPA advice should address at least the following subject:

- The IORP Directive needs to determine the scope of prudential regulation, as administered by the home Member State.

8.2. Background

Current legal requirements

- 8.2.1. The current IORP directive does not determine the scope of prudential regulation. It only provides some examples in Recital (37) of what is considered to be social and labour law: "... the social and labour law in force in the host Member State insofar as it is relevant to occupational pensions, for example the definition and payment of retirement benefits and the conditions for transferability of pension rights." and in Art. 20.1 "Without prejudice to national social and labour legislation on the organisation of pension systems, including compulsory membership and the outcomes of collective bargaining agreements...".
- 8.2.2. The IORP directives defines the Home member state as "the Member State in which the institution has its registered office and its main administration or, if it does not have a registered office, its main administration" (Art. 6.i) and the Host member state as "the Member State whose social and labour law relevant to the field of occupational pension schemes is applicable to the relationship between the sponsoring undertaking and members" (Art. 6.j).
- 8.2.3. The current IORP directive does provide for an allocation of tasks between the Home supervisor and the Host supervisor in the case of cross-border activity (Art. 20):
- a) The Home supervisor:
 - authorises an IORP based in the Home member states to operate cross-border
 - communicates the information received from the Host to the IORP
 - supervises the IORP for all aspects except for what is listed for the Host
 - takes measures to stop any breach of SLL
 - b) the Host supervisor:
 - informs the Home supervisor of the Host's SLL
 - informs the Home supervisor of the Host's transparency rules (cfr. Art 20.7)

- informs the Home supervisor of the Host's investment rules (cfr. Art. 18.7)
- supervises the IORP with regard to the compliance with the SLL
- supervises the IORP with regard to compliance with the transparency rules
- informs the Home supervisor of any breaches of the SLL and transparency rules
- may take further measures to stop a breach of SLL (only if measures by the Home supervisor are insufficient)

8.2.4. The IORP directive determines the responsibilities of the member state in respect of every institution located in its territory (i.e. the Home member state):

- a) Art. 7 - activities of an institution
 - limiting the activities to retirement benefit related operations
- b) Art. 9 - conditions of operations
 - registration in a national register or authorisation
 - authorisation in case of cross-border activities
 - fit & proper requirements
 - existence of proper rules for the functioning of the pension scheme
 - disclosure of these rules to the members
 - calculation and certification of technical provisions
 - regular financing by the sponsoring undertaking, in case of sponsor guaranteed IORPs
 - information of the conditions of the pension scheme: rights and obligations of parties, the nature and distribution of the risks associated with the scheme
 - permission or obligation to entrust the management of the IORP to other entities operating on behalf of the IORP
- c) Art. 10 - annual accounts and annual reports
 - drawing up of annual accounts and annual reports, and approval by authorised persons
- d) Art. 11 - information to be given to members and beneficiaries
- e) Art. 12 - statement of investment policy principles
- f) Art. 13 - information to be provided to the competent authorities
- g) Art. 14 - powers of intervention and duties of the competent authorities
 - sound administrative and accounting procedures
 - adequate internal control mechanisms
 - restrict or prohibit free disposal of the assets
 - transfer of powers of persons running the IORP
 - prohibit or restrict the activities
- h) Art. 15 - technical provisions
- i) Art. 16 - funding of technical provisions
- j) Art. 17 - regulatory own funds
- k) Art. 18 - investment rules
- l) Art. 19 - management and custody
 - option to make the appointment of custodian compulsory

OPC reports

- 8.2.5. EIOPA has conducted studies with regard to the scope of member states' social and labour law but not with regard to the scope of member states' prudential regulation.

8.3. Explanatory text

EIOPA view on issues in the CfA

- 8.3.1. According to the responses to the Green Paper there is a lack of a clear definition of the scope of SLL and its interaction with prudential regulation. EIOPA studies have shown that there is a wide variety in the scope of SLL amongst member states and therefore it is likely that there is the same level of diversity of prudential legislation.
- 8.3.2. It is as a minimum expected that the areas the IORP Directive determines as a competence of the Home member state should be in the regulation of each member state, but not necessarily the prudential regulation.
- 8.3.3. Many member states do not have in their legislation a distinction between prudential regulation and SLL. Indeed this is probably a grey area that may include transparency (issues that the IORP Directive itself deals with apart from the others), governance and organisation. Such grey areas can be interpreted either as an overlap between these two general concepts or possibly as a tertium genus.

Policy options

Option 1: Leave the IORP directive unchanged

- 8.3.4. As can be seen from paragraph 7.2.1 and following, the current directive does not define the scope of prudential regulation but lists in several articles throughout the Directive the responsibilities of the member state in which the IORP is located.

Option 2: Determine the scope of prudential regulation as administered by the Home member state

- 8.3.5. This option defines prudential regulation as that administered by the Home member state. This would include at least the requirements which are already imposed on the Home member state by the current Directive (see paragraph 8.2.4).
- 8.3.6. Irrespective of the above proposal some requirements on the home member state in the current directive need further investigation with regard to the real nature of the requirement, i.e. prudential or not.
- 8.3.7. A list of what might be considered prudential law does also not necessarily mean similar (or the same) areas cannot be included in the social and labour law of a member state.

Positive impacts

option 1:

- The scope of the prudential legislation and the SLL can be determined by the practical experience of the supervisors and, if necessary, the Court of justice. This allows a flexible elaboration of scope.

option 2:

- More clear definition of responsibility of the Home supervisor
- Delineation of the regulation of the institution

Negative impacts

option 1:

- It would not solve the problem as identified by the Commission in the CfA

option 2:

- Still possibility of 'conflicting' laws (prudential law versus social and labour law)
- Any attempt to determine precisely the scope of prudential supervision may be seen as an indirect limitation of member states' competence on Social and Labour legislation.

Comparison of policy options

- 8.3.8. EIOPA is of the opinion that option 1 should not be retained as it does not provide a solution for the issue raised in the call of advice.
- 8.3.9. EIOPA proposes option 2.

8.4. EIOPA's advice

The EIOPA advice should address at least the following subject:

– The IORP Directive needs to determine the scope of prudential regulation, as administered by the home Member State.

Option 2 proposes to include a new article in the directive which describes the scope of prudential regulation derived from the requirements of the current directive on the Home member state. However, further analysis is needed to ensure that this list only contains the requirements of a real prudential nature.

Art. 7 - activities of an institution

- limiting the activities to retirement benefit related operations

Art. 9 - conditions of operations

- registration in a national register or authorisation
- authorisation in case of cross-border activities
- fit & proper requirements
- existence of proper rules for the functioning of the pension scheme
- disclosure of these rules to the members
- calculation and certification of technical provisions
- regular financing by the sponsoring undertaking, in case of sponsor guaranteed IORPs
- information of the conditions of the pension scheme: rights and obligations of parties, the nature and distribution of the risks associated with the scheme
- permission or obligation to entrust the management of the IORP to other entities operating on behalf of the IORP

Art. 10 - annual accounts and annual reports

- drawing up of annual accounts and annual reports, and approval by authorised persons

Art. 11 - information to be given to members and beneficiaries

Art. 12 - statement of investment policy principles

Art. 13 - information to be provided to the competent authorities

Art. 14 - powers of intervention and duties of the competent authorities

- sound administrative and accounting procedures

- adequate internal control mechanisms
- restrict or prohibit free disposal of the assets
- transfer of powers of persons running the IORP
- prohibit or restrict the activities

Art. 15 - technical provisions

Art. 16 - funding of technical provisions

Art. 17 - regulatory own funds

Art. 18 - investment rules

Art. 19 - management and custody

- option to make the appointment of custodian compulsory

Art. 20 – cross-border activity

- authorises an IORP to operate cross-border

8.5. Questions for Stakeholders

9. Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?
10. Are there any other options that should be considered?
11. Do you agree with EIOPA that option 2 is preferable?
12. Even with defining the scope of prudential regulation, problems of overlapping or contradicting regulation between member states could emerge. Should the revised Directive include procedures to settle such problems between the Home and the Host member states and/or also between the Home member state and the member state of the applicable social and labour law?

9. Response on questions of governance

10. CfA 13 General Governance Requirements

10.1. Extract from the call for advice

The Commission Services would like EIOPA to advise on how to include rules concerning governance requirements

- *The EIOPA advice should address at least the following subjects:*
- *The material elements of Article 41 of Directive 2009/138/EC that should be amended or removed to adequately address the specificities of IORPs in relation to general governance requirements;*
- *Provisions to ensure a sound remuneration policy, possibly based on the Level 2 implementing measures currently being developed for Article 41 of Directive 2009/138/EC;*
- *Other requirements for IORPs, if any.*

10.2. Background

Current legal requirements (IORP Directive)

- 10.2.1. Currently the IORP Directive does not contain rules concerning the clear allocation of responsibilities, written documentation of key governance functions or contingency plans. The only references in the IORP directive to the governance requirements are as follows:

Article 9

Conditions of operation

1. Each Member State shall, in respect of every institution located in its territory, ensure that:

[...]

(c) properly constituted rules regarding the functioning of any pension scheme operated by the institution have been implemented and members have been adequately informed of these rules;

[...]

4. A Member State may permit or require institutions located in its territory to entrust management of these institutions, in whole or in part, to other entities operating on behalf of those institutions.

[...]

Article 14

Powers of intervention and duties of the competent authorities

1. The competent authorities shall require every institution located in their territories to have sound administrative and accounting procedures and adequate internal control mechanisms.

2. The competent authorities shall have the power to take any measures including, where appropriate, those of an administrative or financial nature, either with regard to any institution located in their territories or against the persons running the institution, which are appropriate and necessary to prevent or remedy any irregularities prejudicial to the interests of the members and beneficiaries.

[...]

- 10.2.2. Furthermore, article 8 of the IORP Directive stipulates that there shall be a legal separation of the sponsoring undertaking and the institution for occupational retirement provision. This is in line with principle 2 of the OECD Recommendation on the Core Principles of Occupational Pension Regulation (OECD Core Principles) mentioned below.
- 10.2.3. Finally, Article 12 of the IORP Directive states that every IORP shall at least review its written investment policy every three years or without delay whenever a significant change has occurred.

International standards, guidelines and good practices

- 10.2.4. In principle 2 of the OECD Core Principles it is recommended that within pension institutions there should be a functional system in place comprising the adequate legal, accounting, technical, financial and managerial criteria, without excessive administrative burden. The pension fund and sponsor must be legally separated or such separation must be guaranteed through appropriate mechanisms. Additionally, principle 6 of the OECD Core Principles states that the governance structure should ensure an appropriate division of operational and oversight responsibilities, and the accountability and suitability of those with such responsibilities. To encourage good decision making, proper and timely execution, transparency and regular review and assessment, appropriate control, communication and incentive mechanisms should be in place.
- 10.2.5. The OECD Guidelines for Pension Fund Governance, June 2009, identify as part of a governance structure a clear identification of responsibilities, the existence of a governing body, the accountability of the governing body, the suitability of the members of the governing body, the possibility to delegate functions and to get expert advice from external sources, the appointment and performance of an auditor, an actuary for defined benefit plans and a custodian. Furthermore, there should be a risk based internal control system and appropriate reporting and disclosure mechanisms.
- 10.2.6. According to Good practice 2 in the OECD/IOPS Report on Good Practices for Pension Funds' Risk Management Systems, January 2011, the governing board is responsible for defining, implementing and improving the risk management system as well as determining and regularly reviewing the risk management strategy. Responsibilities should be clear and reflect the nature and extent of risks, and different people are to be assigned for

decision making, execution and checking functions. There should be a strong internal control culture within the organisation including communication of information between levels of management. A policy for conflict of interests as well as a code of conduct policy for all staff should be in place. Policies and practices (including compensation) that may provide incentives for inappropriate activities should be avoided.

Results of the public consultation on Green Paper on pensions

10.2.7. The summary of consultation responses to question 10 of the Green Paper on pensions concludes that many respondents considered pillars 2 and 3 of Solvency II as potentially offering some useful principles. According to respondents, these principles could be explored at EU level in areas around governance, risk management and information disclosure. While the degree of explicit support varied by type of organisation, there was no response suggesting that the qualitative requirements of Solvency II would be unsuitable for pension funds.

Solvency II Framework Directive

10.2.8. Directive 2009/138/EC (Solvency II Framework Directive) in Article 41 provides for the following rules on general governance requirements for insurance and reinsurance undertakings:

Article 41

General governance requirements

1. Member states shall require all insurance and reinsurance undertakings to have in place an effective system of governance which provides for sound and prudent management of the business. That system shall at least include an adequate transparent organisational structure with a clear allocation and appropriate segregation of responsibilities and an effective system for ensuring the transmission of information. It shall include compliance with the requirements laid down in Articles 42 to 49.

The system of governance shall be subject to regular internal review.

2. The system of governance shall be proportionate to the nature, scale and complexity of the operations of the insurance or reinsurance undertaking.

3. Insurance and reinsurance undertakings shall have written policies in relation to at least risk management, internal control, internal audit and, where relevant, outsourcing. They shall ensure that those policies are implemented.

Those written policies shall be reviewed at least annually. They shall be subject to prior approval by the administrative, management or supervisory body and be adapted in view of any significant change in the system or area concerned.

4. Insurance and reinsurance undertakings shall take reasonable steps to ensure continuity and regularity in the performance of their activities, including the development of contingency plans. To that

end, the undertaking shall employ appropriate and proportionate systems, resources and procedures.

5. The supervisory authorities shall have appropriate means, methods and powers for verifying the system of governance of the insurance and reinsurance undertakings and for evaluating emerging risks identified by those undertakings which may affect their financial soundness.

The Member States shall ensure that the supervisory authorities have the powers necessary to require that the system of governance be improved and strengthened to ensure compliance with the requirements set out in Articles 42 to 49.

OPC reports

10.2.9. CEIOPS OPC Report on Management Oversight and Internal Controls Rules Applicable to IORPs (CEIOPS-OP-37-10 Rev1), 9 June 2010, concludes in section II.2 that all EEA countries that took part in the survey have already implemented at least some of the general governance requirements laid down in article 41 of Solvency II Framework Directive.

10.3.Explanatory text

EIOPA's view on issues in the CfA

10.3.1. As regards article 41 of the Solvency II Framework Directive, EIOPA is of the opinion that the equivalent standard of general governance requirements as provided for the insurance and reinsurance undertakings in the Solvency II Framework Directive should be applicable also to IORPs.

OBLIGATION TO HAVE AN EFFECTIVE SYSTEM OF GOVERNANCE

10.3.2. Similarly to the insurance undertaking the governance system of IORP should

- ensure that its management is sound and prudent,
- secure a high standard of members' and beneficiaries' protection and
- assist the management board in setting and, on an ongoing basis, adjusting the IORPs' overall risk profile to match their financial strength.

An adequate governance framework should facilitate appropriate decision-making and other actions by the IORP, thereby reducing the probability and impact of non-compliance. All these requirements are in line with the OECD Guidelines for Pension Fund Governance.

SEPARATION OF IORP FROM A SPONSORING UNDERTAKING

10.3.3. EIOPA wants to stress that an IORP must be legally separated from a sponsor as it is currently stated in Article 8 of the IORP directive and also

stipulated in the above mentioned principle 2 of the OECD core principles. The obligation to separate the IORP from its sponsoring undertaking should be carried over to a revised IORP directive.

GENERAL PROPORTIONALITY CLAUSE

- 10.3.4. There are vast differences in the nature, scale and complexity of IORPs among individual Member States as well as within the same Member State. Some of the governance requirements could be too burdensome for IORPs of a less complex nature, smaller scale and lower complexity of the operations. A new supervisory system for IORPs should not undermine the supply or the cost efficiency of occupational retirement provision in the EU. EIOPA finds it very important that the revised IORP Directive contains a general proportionality clause applicable to all elements of the governance in the fashion similar to that in the Solvency II Framework Directive. Since the occupational pension landscape is very heterogeneous, there might be cases where the proportionality principle will need to be construed and applied more broadly than under the Solvency II regime.
- 10.3.5. The principle of proportionality should apply to the whole governance system and, as a consequence, to all future implementing measures.
- 10.3.6. In assessing what is proportionate, the focus must be on the combination of all three criteria: nature, scale and complexity in order to arrive at a solution that is adequate to the risks an IORP is exposed to.
- 10.3.7. Proportionality does not mean the introduction of automatic and systematic simplifications for certain IORPs. The principle will be applied where it would be disproportionate to the nature, scale and complexity of an IORP's business to apply the general rules without relief. The individual risk profile should be the primary guide in assessing the need to apply the proportionality principle.
- 10.3.8. In this regard EIOPA for the purpose of this advice distinguishes between the following two categories of IORPs:
 - a) Small IORPs are those mentioned in article 5 of the present IORP Directive, that can be exempted from (the whole or part of) the scope of the Directive. As a result, they cannot apply article 20 of the IORP Directive concerning cross-border activities.
 - b) IORPs with less complex natures, smaller scale and lower complexity of their operations are those that would fall within the scope of the revised Directive but, for reasons of proportionality, they could choose to implement alternative measures meeting the general objectives of the governance requirements.
- 10.3.9. A hypothetical example of an alternative measure could be that the compliance function is carried out by the administrative, management or supervisory body of the IORP, that for instance discusses the subject at least once a year with a special mention in the minutes.

DOCUMENTATION OF IORP POLICIES AND BUSINESS CONTINUITY

- 10.3.10. EIOPA believes that written policies, not only for asset management but also for internal control, internal audit and, where relevant, outsourcing, should be applicable to IORPs in order to facilitate a control mechanism. The written policies should be reviewed regularly, and when significant changes have been made. However, EIOPA is of the opinion that imposing an obligation to perform at least annual review as stated in Article 41(3) of the Solvency II Framework Directive would be overly burdensome for some IORPs. Therefore the revised IORP Directive should provide for enough flexibility in this respect.
- 10.3.11. Consistently with the Solvency II Framework Directive, the written policies of IORP shall be subject to prior approval by its administrative, management or supervisory body. The wording of this requirement should be sufficiently clear so as to avoid the impression that these policies should be submitted to the supervisory authority of the IORP.
- 10.3.12. Additionally, EIOPA believes that the development of contingency plans as in Article 41(4) of the Solvency II Framework Directive should apply to IORPs since members and beneficiaries will benefit from long term planning.

ROLE OF THE SUPERVISORY AUTHORITY

- 10.3.13. EIOPA is of the view that Member States should be required to equip supervisory authorities with the means, methods and powers necessary for verifying the system of governance and evaluating emerging risks identified by IORPs which may potentially impact on their financial soundness.
- 10.3.14. The implementation of governance requirements is the obligation and the responsibility of the IORP. This obligation and responsibility cannot be transferred to the supervisory authority of the IORP.

PARTICIPATION OF MEMBERS IN THE MANAGEMENT OF THE IORP

- 10.3.15. In some Member States, the participation of members and/or beneficiaries is embedded in the governance structure of an IORP. For example, some Member States provide that employers and employees should be represented equally in the IORP bodies in certain situations.
- 10.3.16. In some other Member States the IORPs are professional, single purpose pension fund managers run by persons with appropriate education and proven experience of acting in the managerial capacity in the area of financial services. Thus participation of employees in the administrative, management or supervisory bodies of IORPs in these countries may not be necessary or appropriate.
- 10.3.17. EIOPA notes that the revised general governance system for IORPs should not prevent Member States from requiring or permitting IORPs to allow for the participation of members in their governance structure, if appropriate.

REMUNERATION POLICY

10.3.18. EIOPA believes that a sound remuneration policy should be part of a good governance system.

10.3.19. However, to develop the sound remuneration policy some special characteristics of IORPs must be considered such as:

- Some IORPs do not employ staff. They use staff from a sponsoring undertaking to fulfil their duties and the remuneration of these staff is linked to the employer's pay policy.
- Some IORPs use volunteer, unpaid staff. Therefore a remuneration policy for these individuals may be irrelevant.

10.3.20. EIOPA is in favour of adding a general principle requiring IORPs to have in place a sound remuneration policy, providing the special characteristics of the IORP do not make such policy irrelevant. This principle should be provided for in the level 1 text of the revised IORP Directive, The details on what constitutes a sound remuneration policy can be developed at level 2.

DIFFERENCES BETWEEN DB AND DC PENSION PROVISION

10.3.21. Regarding governance requirements EIOPA does not see any major differences between defined benefit and defined contribution schemes. Therefore the same requirements should be applied to both types of schemes.

IMPACT

10.3.22. EIOPA does not foresee a high impact from the introduction of the general governance requirements to IORPs and supervisory authorities. The proposed general governance framework increases the standard of IORPs' prudential regulation and secures a high level of members' and beneficiaries' protection.

10.3.23. EIOPA notes that the above assessment of impact is only an estimation of the various supervisory authorities and does not in principle replace the need for an impact study to assess the real impact of the new requirements. Furthermore EIOPA stresses that the impact could significantly increase if the principle of proportionality were not appropriately applied.

10.4. EIOPA advice

The material elements of Article 41 of Directive 2009/138/EC that should be amended or removed to adequately address the specificities of IORPs in relation to general governance requirements;

1 EIOPA proposes to introduce the same general governance requirements for IORPs as for insurance and reinsurance undertakings in article 41 of the Solvency II Framework Directive with the following amendments:

- an IORP must remain legally separated from the sponsoring undertaking as currently laid down in article 8 of the IORP directive,
- if appropriate, the governance system should not prevent members' and beneficiaries' participation in the governance structure of the IORP, ,
- written policies on certain governance areas that the IORPs will be required to have shall be reviewed regularly (instead of "at least annually" as in Solvency II Framework Directive); The clarification of what is meant by "regularly" will be provided in the L2 text.
- the policies shall be subject to prior approval by the administrative, management or supervisory body of the IORP and be adapted in light of any significant change in the system or area concerned.

2 Furthermore EIOPA wants to stress that given the large heterogeneity of IORPs throughout Europe the principle of proportionality as laid down in article 41 (2) of the Solvency II Framework Directive needs to apply to all elements of the governance system of IORPs (e.g. internal control, internal audit, outsourcing).

Provisions to ensure a sound remuneration policy, possibly based on the Level 2 implementing measures currently being developed for Article 41 of Directive 2009/ 138/EC;

3 EIOPA is in favour of adding the general principle requiring IORPs to have a sound remuneration policy providing the special characteristics of the IORP do not make such policy irrelevant. The details will be provided at level 2.

Other requirements for IORPs, if any.

None

10.5. Questions for Stakeholders

13. What is the view of stakeholders on the proposed principles of the revised IORP Directive? How do stakeholders evaluate the positive and negative impacts of the introduction of proposed general governance requirements?

11. CfA 14 Fit and proper

11.1. Extract from the call for advice

EIOPA is invited to provide advice on at least the following questions:

- *Scope: to whom should the fit and proper criteria be applied? The current directive states that it applies to the persons that "effectively run" the IORP. Should it apply only to the management board members or also to other people such as those carrying out functions: risk management, internal control, internal audit, compliance, actuarial and outsourced.*
- *Timing: when should fit and proper requirements be applied?*
- *What procedures and ongoing controls should be set up by the supervisory authority to check the continued respect of fit and proper criteria?*
- *What powers should the supervisor exercise when fit and proper requirements are not fulfilled?*

11.2. Background

Current legal requirements (IORP Directive)

11.2.1. The IORP Directive contains in Article 9 a general requirement concerning the fitness and propriety of persons who effectively run the IORP. The relevant provisions are as follows:

*Article 9
Conditions of operation*

1. Each Member State shall, in respect of every institution located in its territory, ensure that:

[...]

(b) the institution is effectively run by persons of good repute who must themselves have appropriate professional qualifications and experience or employ advisers with appropriate professional qualifications and experience;

[...]

International standards, guidelines and good practices

11.2.2. Principle 2 of the OECD Recommendation on the Core Principles of Occupational Pension Regulation, June 2009, stipulates that members of the governing bodies of the pension entity should be subject to fit and proper requirements.

11.2.3. The OECD Guidelines for Pension Fund Governance, June 2009, identify as part of a governance structure inter alia the suitability of the members of the governing body.

Results of the public consultation on Green paper on pensions

11.2.4. As mentioned in section 2.3 of the CfA 13, the summary of consultation responses to question 10 of the Green paper on pensions concludes that many respondents considered the qualitative requirements of Solvency II (pillar 2 and 3) suitable for pension funds.

Solvency II Framework Directive

11.2.5. The Solvency II Framework Directive in Article 42 provides for the following rules on fitness and propriety for management and key functions of the insurance and reinsurance undertakings:

Article 42

Fit and proper requirements for persons who effectively run the undertaking or have other key functions

1. Insurance and reinsurance undertakings shall ensure that all persons who effectively run the undertaking or have other key functions at all times fulfil the following requirements:

(a) their professional qualifications, knowledge and experience are adequate to enable sound and prudent management (fit); and

(b) they are of good repute and integrity (proper).

2. Insurance and reinsurance undertakings shall notify the supervisory authority of any changes to the identity of the persons who effectively run the undertaking or are responsible for other key functions, along with all information needed to assess whether any new persons appointed to manage the undertaking are fit and proper.

3. Insurance and reinsurance undertakings shall notify their supervisory authority if any of the persons referred to in paragraphs 1 and 2 have been replaced because they no longer fulfil the requirements referred to in paragraph 1.

Article 43

Proof of good repute

1. Where a Member State requires of its own nationals proof of good repute, proof of no previous bankruptcy, or both, that Member State shall accept as sufficient evidence in respect of nationals of other Member States the production of an extract from the judicial record or, failing this, of an equivalent document issued by a competent judicial or administrative

authority in the home Member State or the Member State from which the foreign national comes showing that those requirements have been met.

2. Where the home Member State or the Member State from which the foreign national concerned comes does not issue the document referred to in paragraph 1, it may be replaced by a declaration on oath – or in Member States where there is no provision for declaration on oath by a solemn declaration – made by the foreign national concerned before a competent judicial or administrative authority or, where appropriate, a notary in the home Member State or the Member State from which that foreign national comes.

Such authority or notary shall issue a certificate attesting the authenticity of the declaration on oath or solemn declaration. The declaration referred to in the first subparagraph in respect of no previous bankruptcy may also be made before a competent professional or trade body in the Member State concerned.

3. The documents and certificates referred to in paragraphs 1 and 2 shall not be presented more than three months after their date of issue.

4. Member States shall designate the authorities and bodies competent to issue the documents referred to in paragraphs 1 and 2 and shall forthwith inform the other Member States and the Commission thereof.

Each Member State shall also inform the other Member States and the Commission of the authorities or bodies to which the documents referred to in paragraphs 1 and 2 are to be submitted in support of an application to pursue in the territory of that Member State the activities referred to in Article 2.

Article 50 Delegated acts

1. The Commission shall adopt delegated acts, in accordance with Article 301a[...], to further specify the following:

[...]

(c) the requirements set out in Article 42 and the functions subject thereto;

OPC reports

11.2.6. With respect to fit and proper requirements the EIOPA OPC Report on Management Oversight and Internal Controls Rules Applicable to IORPs (CEIOPS-OP-37-10 Rev1), 9 June 2010, concludes that Member States'

approach in this area differs quite a lot. In the large majority of responding EEA countries the fit and proper requirements apply to the management board members, actuaries and outsourced functions. These requirements apply very rarely to the compliance function, which, moreover, exists only in 12 jurisdictions.

11.3.Explanatory text

EIOPA's view on issues in the CfA

- 11.3.1. In general, EIOPA agrees on the applicability of principles contained in Articles 42 and 43 of Solvency II Framework Directive to IORPs.
- 11.3.2. EIOPA notes that the fit and proper requirements in the revised IORP Directive will have to take into account the heterogeneous nature of occupational pensions among Member States.

SCOPE

- 11.3.3. EIOPA is of the view that the fit and proper criteria should apply to persons that 'effectively run the IORP' and 'persons who have other key functions'.
- 11.3.4. It should be stressed that it is, in principle, the responsibility of the IORP to ensure that the persons who effectively run the IORP and have other key functions within the IORP are fit and proper. This responsibility cannot be transferred to the supervisory authority.

FITNESS

- 11.3.5. IORPs should be required to ensure that persons who effectively run the IORP or carry out other key functions have to be fit to do so, i.e. their professional qualifications, knowledge and experience have to be adequate to enable sound and prudent management of the IORP or to properly perform their key function.
- 11.3.6. The level of professional qualification, knowledge and experience expected from persons who effectively run the IORP or have other key functions depends on the nature, scale and complexity of the activities of the IORP, as well as the responsibilities that go with the particular key/management function of the person and, in the case of persons who effectively run the IORP, the composition and functioning of the whole group of persons who effectively run the IORP.

PROPRIETY

- 11.3.7. Persons who effectively run the IORP and have other key functions have to be proper, i.e. of a good repute and integrity.

KEY FUNCTIONS

11.3.8. In Recital 31 the Solvency II Framework Directive provides for the following definition of "function":

"A function is an administrative capacity to undertake particular governance tasks. The identification of a particular function does not prevent the undertaking from freely deciding how to organise that function in practice save where otherwise specified in this Directive. This should not lead to unduly burdensome requirements because account should be taken of the nature, scale and complexity of the operations of the undertaking. It should therefore be possible for those functions to be staffed by own staff, to rely on advice from outside experts or to be outsourced to experts within the limits set by this Directive."

11.3.9. The term 'function' is used to denote that the insurance and reinsurance undertaking must have the administrative capacity to perform a certain task. Given the principle of proportionality, the term does not imply that the particular person(s) may not perform any additional tasks, i.e. that insurance and reinsurance undertakings need a separate organisational unit. To what extent staff may perform in dual or multiple roles is a question of appropriate segregation of duties. The performance of some tasks is incompatible with certain other responsibilities. In such cases, good practice dictates that these tasks be performed by different persons.

11.3.10. EIOPA finds the above definition and interpretation of 'function' suitable for IORPs.

11.3.11. Taking into account the heterogeneous nature of the IORP sector, the principles of good governance must be implemented in a reasonable and proportionate manner. It must be the responsibility of each IORP to define a consistent and adequate solution to the carrying out of a function (depending on the nature, scale and complexity of its activities and hence depending on its risk profile).

11.3.12. In order to be considered proportionate, the way in which a key function is carried out by an IORP, has to be, at least, suitable and necessary to achieve its objective as well as appropriate. This could imply that IORPs outsource certain key functions, subject to the requirements included under 'outsourcing' (CfA 20).

11.3.13. In some IORPs full segregation of duties may be considered unreasonable and disproportionate. Therefore IORPs in these cases may make other arrangements to ensure that conflicts of interest are avoided or effectively managed. This must however not lead to a lower level of protection. Additional procedures should be implemented in order to ensure a level of control equivalent to that achieved through a full segregation of duties.

11.3.14. The IORPs' own responsibility for ensuring that persons who have key functions are fit and proper should be emphasized. Given the different ways in which key functions can be carried out (e.g. it could be dedicated persons/units within the IORP, tasks allocated to employees or tasks that

have been outsourced to professional service providers), EIOPA considers that IORPs need to assess whether the persons who have key functions meet the fit and proper criteria.

- 11.3.15. Proportionality works two-ways: it justifies simpler and less burdensome ways of carrying out key functions for IORPs of simple nature, scale and complexity of their operations, but could also increase the extent of carrying out key functions for IORPs of a more complex nature, larger scale and higher complexity of their operations.

TIMING

- 11.3.16. The fit and proper requirements must be fulfilled by persons who effectively run the IORP, and those who have key functions, at all times.

PROCEDURES AND CONTROLS FOR CHECKING COMPLIANCE WITH FIT AND PROPER

- 11.3.17. With respect to the procedure and controls for checking compliance with the fit and proper requirements, EIOPA is of the view that the Level 1 text should contain a flexible principle on the assessment procedure and ongoing controls, which will be interpreted at Level 2. The L1 principle should require Member States to ensure that the supervisory authority has effective powers to assess and monitor whether at least persons who effectively run the IORP are fit and proper. In the text below, EIOPA gives also some indications of what details may be included in the Level 2 text.
- 11.3.18. Given the differences in the pension landscapes among Member States, the role of the supervisory authority in the assessment of fitness and propriety could be different for authorised and non-authorised IORPs.
- 11.3.19. In the case of IORPs that are subject to authorisation, the supervisory authority could be required to assess fitness and propriety of candidates for persons who will effectively run the IORP prior to granting the authorisation. The IORP should be required to supply the supervisor with all information needed for the assessment. When a person effectively running the IORP is to be replaced by other individual, the supervisory authority could be required to assess fitness and propriety of the candidate prior to taking up his/her duty. The IORP should notify to the supervisory authority all changes in the composition of persons who effectively run the IORP and provide it with all information needed in order to carry out the assessment of fitness and propriety. Finally, the IORP should notify the supervisory authority when a person who effectively runs the IORP ceases to be fit or proper.
- 11.3.20. For persons who have key functions (in IORPs that are subject to authorisation) EIOPA does not necessarily foresee a need that the Supervisory Authority be involved in assessing the fitness and propriety of candidates. IORP could be required to supply all information needed to assess the fitness and propriety but only upon the request from its supervisory authority.
- 11.3.21. In the case of IORPs that are not subject to authorisation at the national level, the majority of EIOPA members do not see a need for ex-ante

assessment by supervisory authority of appointments of persons who effectively run the IORP or have a key function. However, IORPs could be required to supply information on fitness and propriety of persons mentioned above upon the request of its supervisory authority.

11.3.22. As to the ongoing responsibility, a supervisor should be able to reassess fitness and propriety of a person who effectively runs the IORP or has other key function if there are facts and/or circumstances that constitute reasonable grounds. This does, however, not involve the standard or periodical assessment of these requirements. Given the enormous differences between the different types of IORPs in Europe as well as the nature, scale and complexity of the operations of IORPs, proportionality in reassessing fitness and propriety is needed.

POWERS OF SUPERVISORY AUTHORITIES

11.3.23. When fit and/or proper requirements are not fulfilled, the supervisory authority should, among other proceedings, be able to refuse that a person is appointed to run the IORP or be in a key function or to require the replacement of individuals that do not meet these criteria.

11.3.24. Given the level of detail and the fact that proportionality is needed, EIOPA recommends further elaborating the supervisory powers in the level 2 text. A more general principle should be included in the level 1 text.

MUTUAL RECOGNITION OF PROOFS OF GOOD REPUTE

11.3.25. EIOPA considers that rules for the proof of good repute contained in Article 43 of the Solvency II Framework Directive should be applied mutatis mutandis to the IORPs. EIOPA is of the view that the establishment of what would be sufficient evidence for one Member State to assess the good repute of nationals from another Member State, and the acceptance of proofs provided by another Member State, are important aspects to facilitate cross border activities of IORPs.

11.4.EIOPA advice

11.4.1. EIOPA proposes to introduce 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. It is suggested that the requirement for persons who effectively run the IORP or have other key functions to be fit is amended as follows: “professional qualifications, knowledge and experience are adequate to enable sound and prudent management of the IORP or to properly perform their key function (fit)”

Scope: to whom should the fit and proper criteria be applied? The current directive states that it applies to the persons that "effectively run" the IORP. Should it apply only to the management board members or also to other people such as those carrying out functions: risk management, internal control, internal audit, compliance, actuarial and outsourced.

11.4.2. EIOPA recommends applying the fit and proper criteria to persons who effectively run the IORP and to persons who have other key functions.

Timing: when should fit and proper requirements be applied?

11.4.3. Fit and proper requirements should apply at all times.

What procedures and ongoing controls should be set up by the supervisory authority to check the continued respect of fit and proper criteria?

11.4.4. EIOPA recommends that the revised IORP Directive contains a principle requiring Member States to ensure that there are effective procedures and ongoing controls in place to enable the supervisory authority to assess the fitness and propriety of persons who effectively run the IORP or have other key functions.

11.4.5. In particular, each Member State shall ensure that the supervisory authority has effective powers vis-a-vis IORPs registered or authorised in its territory to assess and monitor whether at least persons who effectively run the IORP are fit and proper. The details will be elaborated in Level 2 text.

What powers should the supervisor exercise when fit and proper requirements are not fulfilled?

11.4.6. EIOPA recommends adding a paragraph to article 42 Solvency II Framework Directive stating that the Member States shall ensure that the supervisory authorities have the powers to take measures when fit and/or proper requirements are not fulfilled. The details of the measures will be provided in Level 2 text.

11.5. Questions for Stakeholders

14. What is the view of the stakeholders on the proposed principles of the revised IORP Directive? How do stakeholders evaluate the positive and negative impacts of the introduction of proposed fit and proper requirements?

12. CfA 17 Internal control system

12.1. Extract from the call for advice

The Commission Services would like EIOPA to advise on detailed rules by which supervisors can ensure that IORPs have proper internal control systems and a compliance function in place.

The EIOPA advice should address at least the following subjects:

- The material elements of Article 46 of Directive 2009/138/EC that should be amended or removed to adequately address the specificities of IORPs in relation to internal control systems and the compliance function;*
- Other internal control requirements for IORPs, if any.*

12.2. Background

Current legal requirements (IORP Directive)

- 12.2.1. According to article 14 (1) of the IORP Directive "The competent authorities shall require every institution located in their territories to have sound administrative and accounting procedures and adequate internal control mechanisms." The directive does not provide any further requirements on the internal control system of IORPs.

International standards, guidelines and good practices

- 12.2.2. Various international standards and recommendations applicable to pension institutions provide more details on the design of internal controls system.
- 12.2.3. The OECD Recommendation on the Core Principles of Occupational Pension Regulation of June 2009 stipulates in its 6th core principle that adequate internal controls should be in place to ensure that all persons and entities with operational and oversight responsibilities act in accordance with the objectives set out by the pension fund, and that they comply with the law. Such controls should cover all basic organisational and administrative procedures depending upon the scale and complexity of the plan. The governing body should develop a code of conduct and a conflicts of interest policy. There should also be appropriate controls to promote the independence and impartiality of the decisions taken by the governing body, to ensure the confidentiality of sensitive information pertaining to the fund and to prevent the improper use of privileged or confidential information.
- 12.2.4. Principle 9 of the OECD Guidelines for pension fund governance of June 2009 recommends the same principles.
- 12.2.5. Good practice 6 (control and monitoring mechanisms) of the OECD/IOPS Good Practices for Pension Funds' Risk Management Systems of January 2011 recommends that control and monitoring mechanisms should be implemented and should operate at every level. Monitoring needs to be part of daily activities but also include separate periodic evaluations of the

overall internal control process, with the frequency of monitoring different activities determined by the risks involved and the frequency and nature of changes occurring in the operating environment.

- 12.2.6. Key elements of the risk management and monitoring system are the internal audit and compliance functions – the nature and scope of which should be appropriate to the operations of the pension fund. Performance measurement and compensation mechanisms should be part of risk management systems.
- 12.2.7. The OECD Pension Funds' Risk Management framework: regulation and supervisory oversight of February 2010 examines what sort of risk-management framework pension funds should have in place. At the heart of any risk-management framework are the control mechanisms. These should operate at every level and be an integral part of daily activities, at the top management level, as well as within each department. The core of these mechanisms is to ensure that decision making, execution and checking functions are assigned to different people and have suitable oversight.

Results of the public consultation on Green paper on pensions

- 12.2.8. As mentioned in section 2.3 of the CfA 13, the summary of consultation responses to question 10 of the Green Paper on pensions concludes that many respondents considered the qualitative requirements of Solvency II (pillar 2 and 3) suitable for pension funds.

Solvency II Framework Directive

- 12.2.9. Solvency II Framework Directive in Article 46 provides for the following rules on the organisation of internal control system for insurance and reinsurance undertakings:

Article 46.

"1. Insurance and reinsurance undertakings shall have in place an effective internal control system.

That system shall at least include administrative and accounting procedures, an internal control framework, appropriate reporting arrangements at all levels of the undertaking and a compliance function.

2. The compliance function shall include advising the administrative, management or supervisory body on compliance with the laws, regulations and administrative provisions adopted pursuant to this Directive. It shall also include an assessment of the possible impact of any changes in the legal environment on the operations of the undertaking concerned and the identification and assessment of compliance risk."

OPC reports

- 12.2.10. The EIOPA OPC Report on management oversight and internal controls rules applicable to IORPs (EIOPA-OP-37-10 Rev1), 9 June 2010, concludes in its sections II. 4, 5 and 6 that the vast majority of respondents have requirements establishing the existence of an internal control system and most of them also have rules concerning the main components of such a system.
- 12.2.11. As far as functions and their role is concerned, in general rules on independence from operational functions are stronger in the case of internal audit function compared to the compliance function. The existence of requirements for business continuity planning is already a reality in half of the responding countries. Requirements regarding the proper execution and prior evaluation of the investment policy have proved to be common practice amongst respondents.
- 12.2.12. As for the supervisory practices, results show that around 80% of those requirements are directly handled by the competent authorities. On-site inspections are the most common form of surveillance, with regulatory reporting and analysis and offsite surveys and surveillance ranking next.

12.3.Explanatory text

EIOPA view on issues in the CfA

- 12.3.1. The IORP Directive already contains the general principle that the competent authorities shall require every institution located in their territories to have sound administrative and accounting procedures and adequate internal control mechanisms (article 14 (1)). There is currently no explicit requirement for a compliance function. The application of these principles varies in the EU. EIOPA acknowledges the necessity of increasing the level of harmonisation in this area.

EFFECTIVE INTERNAL CONTROL SYSTEM AND ITS COMPONENTS

- 12.3.2. EIOPA agrees with the principle that IORPs should have an effective internal control system. However, as regards the wording of Article 46 (1) of the Solvency II Framework Directive, EIOPA has the following observations:
- 12.3.3. Firstly, this article doesn't take into account that a large number of IORPs outsource one or more of their critical or important functions or activities to a service provider. Therefore, EIOPA is of the opinion that the provisions of the revised IORP Directive regulating the internal control system should contain a reference that the outsourced activities are an integral part of the scope of the internal control system.
- 12.3.4. In case critical or important functions or activities are outsourced, the IORP should be required in particular to perform due diligence in order to determine whether, having regard to the nature of the outsourced activities,

the third party has a well-adapted and effective internal control system in place. If this is not the case, the IORP should itself monitor the activities of the third party and urge the third party to take the appropriate measures in order to comply with the principle of internal control. In no case does outsourcing diminish the responsibility of the IORP.

- 12.3.5. Secondly, the wording of Article 46 (1) of the Solvency II Framework Directive is not fully suitable for IORPs as it singles out some of its internal activities (compliance, reporting) but fails to point out others, e.g. record keeping, outsourcing. It is also somewhat tautological since it says internal controls should include an internal control framework. The concrete wording that would better suit to the specificities of IORPs is suggested below.
- 12.3.6. Further details on the framework for internal controls could be elaborated in level 2 implementing measures.
- 12.3.7. Finally EIOPA points out that there is no major difference between IORPs that manage DC schemes and those that manage DB schemes relating to an internal control system; both two types of IORPs should have such a system. It is inevitable that the implementation of that system will be different. The internal control system should be appropriate to the situation of the IORP. It should therefore also take into account the specific risks that are attached to DB or DC schemes (to be developed further in the Level 2 implementing measures).

COMPLIANCE FUNCTION

- 12.3.8. EIOPA agrees that a regular assessment of compliance is part of an effective internal control system.
- 12.3.9. EIOPA has the following observations as regards suitability of the wording of Article 46 (2) of the Solvency II Framework Directive for IORPs:
- 12.3.10. EIOPA proposes to clarify that the compliance function is required to perform its activities in relation to the administrative, management or supervisory body of the IORP. This wording is more precise and secures that the text clearly refers to the internal "supervisory body" of the IORP and not to the supervisory authority.
- 12.3.11. At the same time the regulation should make it possible for the compliance function to perform its role not only internally (i.e. vis-a-vis those within the IORP), but also to inform the supervisory authority on its own initiative when necessary. Moreover, the supervisory authority should at all times have the power to require reports from the compliance function of the IORP.
- 12.3.12. EIOPA suggests making it clear that the compliance function should include not only compliance with the laws, regulations and administrative provisions "adopted pursuant to this Directive", but with all legislation relative to the operations of the IORP, e.g. Social & Labour law. This is particularly important in cross-border situations where the IORP has to take into account foreign legislation.

- 12.3.13. As for the definition of "function" EIOPA refers to the explanation given in CfA 14 concerning fit and proper.
- 12.3.14. Taking into account the heterogeneous nature of the IORP sector in EU Member States, given the big differences that exist between IORPs as regards form, size, pension schemes, risk level and complexity of activities of different IORPs, the principles of good governance (including internal control) must be implemented in a reasonable and proportionate manner.
- 12.3.15. The revised IORP Directive should make it clear that it is the IORP that is responsible for defining a consistent and adequate solution in regard to carrying out the compliance function (depending on the nature, scale and complexity of its activities and hence depending on its risk profile).
- 12.3.16. It occurs to EIOPA that the compliance function can be carried out in different ways (this list is not exhaustive):
- a) The compliance function may be assigned to a person, a compliance officer. The advantage of the designation of a person is that the supervisory authorities or other parties concerned have one contact person. Moreover, it's clear who carries the responsibility. The compliance officer may be a member of the staff or the compliance function may be performed by a member of the board of directors. The competence of that person is essential, but he/she should have the possibility of obtaining external opinions or outsourcing certain tasks when he/she feels he/she does not have the competence required for this purpose (e.g. when asked to provide advice on very specific legal issues the compliance officer should have the opportunity to obtain an external advice/consultation). Nevertheless, if he/she seeks assistance from an external specialists, he/she shall remain responsible for the quality of his/her function.
 - b) The compliance function does not necessarily need to be an internal function. EIOPA insists on leaving the possibility for IORPs to outsource the compliance function. That way, the IORP can use the expertise and knowledge of a third party. Who the third party can be should be determined in the level 2 implementation measures. In that case the competent body of the IORP should monitor the compliance activity and should appoint the persons responsible for following up on the expert's recommendations.
 - c) The general perception that the compliance function requires the appointment of a compliance officer, could be overelaborate for some IORPs of less complex nature, smaller scale and lower complexity. Therefore, on the grounds of proportionality, the IORPs should be allowed to elect to implement alternative measures meeting the general objectives of a compliance function. A hypothetical example of an alternative measure could be that the compliance function is carried out by the administrative, management or supervisory body of the IORP, which for instance discusses the subject at least once a year with a special reference in the minutes. The supervisory authorities should have the possibility to review the proposed alternative measures. However, the Supervisory Authority should, in its consideration, pay extra attention where the IORP operates

cross border. Indeed, cross border activities imply a certain level of complexity (structure, administration, communication) where a minimum level of internal control and supervision of compliance is needed. This could be further developed in the level 2 implementation measures.

12.3.17. Questions about the fit and proper requirements of the compliance function are discussed in CfA 14.

IMPACT

12.3.18. EIOPA doesn't foresee a high impact of the level 1 requirement with respect to internal control for the pension industry, supervisors or members/beneficiaries of IORPs.

12.3.19. In any case, the principle of proportionality (cf. the above remarks) should fully apply to the compliance function in order to prevent the impact of this regulation being overly burdensome and thus potentially undermining the supply of occupational pensions.

12.4. EIOPA advice

The material elements of Article 46 of Directive 2009/138/EC that should be amended or removed to adequately address the specificities of IORPs in relation to internal control systems and the compliance function;

- 1 EIOPA agrees with the principle that IORPs should have an effective internal control system and that a regular assessment of compliance is part of this effective internal control system.
- 2 The framework for internal control should include at least administrative and accounting procedures and reporting and compliance arrangements, outsourcing arrangements and appropriate controls for outsourcing.
- 3 The compliance function shall include reporting and recommending to the administrative, management or supervisory body of the IORP on compliance with the laws, regulations and administrative provisions relating to the operations of the IORP (i.e. including Social and Labour law).
- 4 The revised IORP Directive should state that it is the responsibility of each IORP to define a consistent and adequate way of carrying out the compliance function. It should enable assigning the compliance function to a member of the staff or a member of the board of directors. On proportionality grounds the IORP should be allowed to outsource the function or employ the alternative measures of carrying out the function while meeting the general objectives of this function. The Supervisory Authorities should have the possibility of reviewing the proposed alternative measures and should, in its consideration, pay extra attention to cross border situations.

5 The details of the framework for internal controls and ways of carrying out the compliance function may be elaborated in level 2 implementing measures.

Other internal control requirements for IORPs, if any.

none

12.5. Questions for Stakeholders

15. What is the view of the stakeholders on the proposed principles of the revised IORP Directive? How do stakeholders evaluate the positive and negative impacts of the introduction of a compliance function?

13. CfA 18 Internal audit

13.1. Extract from the call for advice

The Commission Services would like EIOPA to advise on detailed rules by which supervisors can ensure that IORPs have an internal audit function in place.

The EIOPA advice should address at least the following subjects:

- The material elements of Article 47 of Directive 2009/138/EC that should be amended or removed to adequately address the specificities of IORPs in relation to the internal audit function;*
- Other internal audit requirements for IORPs, if any.*

13.2. Background

Current legal requirements (IORP Directive)

13.2.1. The IORP Directive does not contain any specific provision concerning internal audit.

International standards, guidelines and good practices

13.2.2. Although the OECD Recommendation on the Core Principles of Occupational Pension Regulation of June 2009 (Core Principle 6 (auditor)) and the OECD Guidelines for pension fund governance of June 2009 recommend adequate internal controls (cf. comments CfA 17), they are silent on the appointment of an internal auditor.

13.2.3. OECD/IOPS Good Practices for Pension Funds' Risk Management Systems of January 2011 (Good practice 6 (control and monitoring mechanisms)) recommends the implementation of Control and Monitoring Mechanisms. Key elements of the risk management and monitoring system are the internal audit and compliance functions – the nature and scope of which should be appropriate to the operations of the pension fund. These functions report directly to the governing board and they should not conflict with other obligations. Those responsible for internal audit and compliance require access to records and the ability to communicate freely to carry out their role effectively.

13.2.4. The internal auditing function within a pension fund should cover the effectiveness of operations, the reliability of financial reporting, deterring and investigating fraud, safeguarding assets, and compliance with laws and regulations.

Results of the public consultation on Green paper on pensions

13.2.5. As mentioned in section 2.3 of the CfA 13, the summary of consultation responses to question 10 of the Green paper on pensions concludes that

many respondents considered the qualitative requirements of Solvency II (pillar 2 and 3) suitable for pension funds

Solvency II Framework Directive

13.2.6. Solvency II Framework Directive in Article 47 provides for the following rules on internal audit for insurance and reinsurance undertakings:

Article 47

1. Insurance and reinsurance undertakings shall provide for an effective internal audit function.

The internal audit function shall include an evaluation of the adequacy and effectiveness of the internal control system and other elements of the system of governance.

2. The internal audit function shall be objective and independent from the operational functions.

3. Any findings and recommendations of the internal audit shall be reported to the administrative, management or supervisory body which shall determine what actions are to be taken with respect to each of the internal audit findings and recommendations and shall ensure that those actions are carried out.

OPC reports

13.2.7. EIOPA OPC Report on management oversight and internal controls rules applicable to IORPs (EIOPA-OP-37-10 Rev1), 9 June 2010, points out in its section II.4, 5 and 6 that as far as functions and their role is concerned, in general, rules on independence from operational functions are stronger in the case of internal audit function compared to the compliance function.

13.2.8. For more details see comments regarding CfA 17.

13.3.Explanatory text

EIOPA view on issues in the CfA

13.3.1. EIOPA holds the opinion that the introduction of an internal audit function in the IORP Directive would be beneficial. Generally, the material elements of article 47 of Solvency II Framework Directive are suitable for IORPs.

EFFECTIVE INTERNAL AUDIT FUNCTIONS AND ITS COMPONENTS

13.3.2. As in the CfA concerning internal control system, EIOPA is of the opinion that also wording of provisions on internal audit should take into account that a large number of IORPs outsource one or more of their critical or important functions or activities to a service provider. The provisions of the revised IORP Directive regulating the internal audit should contain a

reference that the outsourced critical or important functions or activities of the IORP are an integral part of the scope of the internal audit.

- 13.3.3. As for the definition of "function" EIOPA refers to the explanation given in CfA 14 (fit and proper).
- 13.3.4. Taking into account the heterogeneous nature of the IORP sector in EU Member States, given the big differences that exist between IORPs as regards form, size, pension schemes, risk level and complexity of IORPs' activities, the principles of good governance (including internal audit) must be implemented in a reasonable and proportionate manner.
- 13.3.5. The revised IORP Directive should make it clear that it is the IORP that is responsible for defining a consistent and adequate solution in regard to carrying out the internal audit function (depending on the nature, scale and complexity of its activities and hence depending on its risk profile).
- 13.3.6. In EIOPA's opinion the internal audit function can be carried out in different ways (this list is not exhaustive):
- 13.3.7. The internal audit function may be assigned to a member of the staff - an internal auditor. The advantage of the designation of a person is that the supervisory authorities or other parties concerned have one contact person. Moreover, it's clear who carries the responsibility. The internal auditor must be independent and thus cannot be involved in the activities that are subject to audit. An internal auditor cannot be involved in the management of the IORP. The professional competence of that person is essential, but he/she should have the possibility to obtain external opinions or outsource certain investigations when he/she feels he/she does not have the competence required for this purpose. Nevertheless, if he/she seeks assistance from an external specialists, he/she shall remain responsible for the quality of his/her function.
- 13.3.8. The internal audit function does not necessarily need to be an internal function. EIOPA insists on leaving the possibility for IORPs to outsource the internal audit function, regardless of the size of the IORP. That way, the IORP can use the expertise and knowledge of a third party. Who this third party can be should be determined in the level 2 implementation measures.
- 13.3.9. The general perception that the internal audit function requires the appointment of an internal auditor, could be overelaborate for some IORPs of simple nature, scale and complexity of the operations⁸. Therefore, on the grounds of proportionality, the IORPs should be allowed to elect to implement alternative measures meeting the general objectives of an internal audit function. The Supervisory Authorities should have the possibility of reviewing the proposed alternative measures. However, the supervisory authority should, in its consideration, pay extra attention where

⁸ It should be noted that OECD recommendations do not necessarily support the appointment of an internal auditor for IORPs (Core Principles of occupational Pension Regulation, June 2009; core principle 6; OECD Guidelines June 2009)

the IORP works cross border. Indeed, cross border activities imply a certain level of a complexity (structure, administration, communication) where a minimum level of internal supervision is needed. This could be further developed in the level 2 implementation measures.

- 13.3.10. Questions about the fit and proper requirements of the internal audit function are discussed in CfA 14.
- 13.3.11. Finally EIOPA points out that there is no major difference between IORPs that manage DC schemes and those that manage DB schemes related to internal audit; both two types of IORPs should have an internal audit function. It is inevitable that the implementation of that function will be different and should be appropriate to the situation of the IORP. It should therefore also take into account the specific risks that are attached to DB or DC schemes (to be developed further in the Level 2 implementing measures).

OBJECTIVENESS AND INDEPENDENCE OF THE INTERNAL AUDIT FUNCTION

- 13.3.12. EIOPA agrees with this principle. Where there is an internal auditor, he/she should be independent of the activities audited. This means that he/she has an appropriate status and performs his task impartially and objectively. He may not be involved in the management of the IORP. Rules with respect to conflicts of interests could be developed in the level 2 implementing measures.
- 13.3.13. The professional competence of the internal auditor is essential for the proper functioning of internal audit. Questions about the fit and proper requirements of the internal auditor are discussed in CfA 14.

REPORTING BY INTERNAL AUDIT FUNCTION

- 13.3.14. EIOPA is of the opinion that the internal audit function should have the right to express his/her opinions freely. He/she must report his/her findings and recommendations to the competent administrative, management or supervisory body of the IORP at least once a year.
- 13.3.15. EIOPA proposes to clarify that the internal audit function is required to perform its activities in relation to the administrative, management or supervisory body of the IORP. This wording is more precise and secures that the text clearly refers to the internal "supervisory body" of the IORP and not to the supervisory authority.
- 13.3.16. The administrative, management or supervisory body of the IORP should be required to determine what actions are to be taken with respect to each of the internal audit findings and recommendations and shall ensure that those actions are carried out.
- 13.3.17. At the same time the regulation should make it possible for the internal audit function to perform its role not only internally (i.e. vis-a-vis those within the IORP), but also to inform the supervisory authority on its own initiative when necessary. Moreover, the supervisory authority should at all

times have the power to require reports from the internal audit function of the IORP.

IMPACT

- 13.3.18. EIOPA doesn't foresee a high impact of the level 1 requirement for the pension industry, supervisors or scheme members/beneficiaries of IORPs. Nevertheless EIOPA wants to point out that the introduction of an internal audit function could have the potential to be overly burdensome without a corresponding increase in benefits on the scheme, with potential adverse cost impacts for members if the principle of proportionality (cf. the above remarks) is not taken into account.
- 13.3.19. The cost burden of setting up and running an internal audit function, or an outsourced internal audit function, may be partly borne by a sponsoring employer who provides a scheme but could in some cases ultimately be borne by the member. This is particularly the case with DC schemes where each individual's amount of money available at retirement could be reduced by this additional cost over each year of contribution.

13.4. EIOPA advice

The material elements of Article 47 of Directive 2009/138/EC that should be amended or removed to adequately address the specificities of IORPs in relation to the internal audit function.

- 1 EIOPA recommends the introduction of an internal audit function in the IORP Directive. In general, the material elements of article 47 of Solvency II Framework Directive are suitable for IORPs.
- 2 The internal audit function shall include an evaluation of the adequacy and effectiveness of the internal control system and other elements of the system of governance of the IORP, including the outsourced critical or important functions or activities.
- 3 EIOPA points out that taking into account the heterogeneous nature of the IORP sector, the principles of internal audit must be implemented in a reasonable and proportionate manner.
- 4 The revised IORP Directive should state that it is the responsibility of each IORP to define a consistent and adequate way of carrying out the internal audit function. It should enable assigning the internal audit function to a member of the staff. The IORP should be also allowed to outsource the internal audit function or employ the alternative measures for carrying out the function while meeting the general objectives of this function. The Supervisory Authorities should have the possibility of reviewing the proposed alternative measures and should, in its consideration, pay extra attention to the cross border situations.
- 5 EIOPA proposes to clarify that the internal audit function is required to perform its activities in relation to the administrative, management or supervisory body of the IORP.

- 6 The relevant body of the IORP should be required to determine what actions and recommendations are to be taken with respect to the internal audit findings and ensure that those actions are carried out.
- 7 The details on the internal audit function and ways of filling it in may be elaborated in level 2 implementing measures.

Other internal audit requirements for IORPs, if any.

none

13.5. Questions for Stakeholders

16. What is the view of stakeholders on the proposed principles of the revised IORP Directive? How do stakeholders evaluate the positive and negative impacts of the introduction of an internal audit function?

14. CfA 12 Supervision of outsourced functions and activities

14.1. Extract from the call for advice

The EIOPA advice should address at least the following subjects:

- *The way in which Article 13(b) of Directive 2003/41/EC should be clarified. Particular attention should be paid to determine whether the material elements of Article 38(1) of Directive 2009/138/EC could be used for this purpose;*
- *The way in which Article 13(d) of Directive 2003/41/EC should be clarified. Particular attention should be paid to determine whether the material elements of Article 38(2) of Directive 2009/138/EC could be used for this purpose;*
- *Other rules to supervise outsourced functions and activities, if any: e.g. location of main administration, sub-contracting of the transferred activity by the third-party service provider (chain outsourcing).*

14.2. Background

Current legal requirements (IORP Directive)

14.2.1. The IORP Directive in its current wording requires the Member States to give their competent Authorities necessary powers for effective supervision in cases of outsourcing. The various references included in the Directive in this regard are as follows:

Recital 25: "Where an institution for occupational retirement provision has transferred functions of material importance such as investment management, information technology or accounting to other companies (outsourcing), it should be possible for the rights to information and powers of intervention to be enlarged so as to cover these outsourced functions in order to check whether those activities are carried out in accordance with the supervisory rules."

Article 13: "Each Member State shall ensure that the competent authorities, in respect of any institution located in its territory, have the necessary powers and means:

...

(b) to supervise relationships between the institution and other companies or between institutions, when institutions transfer functions to those other companies or institutions (outsourcing), influencing the financial situation of the institution or being in a material way relevant for effective supervision;"

...

(d) *to carry out on-site inspections at the institution's premises and, where appropriate, on outsourced functions to check if activities are carried out in accordance with the supervisory rules."*

International standards, guidelines and good practices

14.2.2. With regard to the supervision of outsourcing the applicable international standard (OECD/IOPS good practices for pension funds' risk management systems) requires that the service provider must commit itself to enable monitoring of its activities by the supervisory authority of the pension institution on an on-going basis. This should include access to the information and the premises of the service provider (where appropriate), including right of the supervisory authority to perform or require an audit of the service provider. The service providers may not charge a fee for providing information or access to the supervisory authority of the pension institution.

Results of the public consultation on Green Paper on pensions

14.2.3. As mentioned in section 2.3 of the CfA 13, the summary of consultation responses to question 10 of the Green paper on pensions concludes that many respondents considered the qualitative requirements of Solvency II (pillar 2 and 3) suitable for pension funds.

Solvency II Framework Directive

14.2.4. Directive 2009/138/EC (Solvency II Framework Directive) in Article 38 provides for the following rules on supervision of outsourced functions and activities of insurance and reinsurance undertakings

Article 38

Supervision of outsourced functions and activities

1. Without prejudice to Article 49, Member States shall ensure that insurance and reinsurance undertakings which outsource a function or an insurance or reinsurance activity take the necessary steps to ensure that the following conditions are satisfied:

(a) the service provider must cooperate with the supervisory authorities of the insurance and reinsurance undertaking in connection with the outsourced function or activity;

(b) the insurance and reinsurance undertakings, their auditors and the supervisory authorities must have effective access to data related to the outsourced functions or activities;

(c) the supervisory authorities must have effective access to the business premises of the service provider and must be able to exercise those rights of access.

2. The Member State where the service provider is located shall permit the supervisory authorities of the insurance or reinsurance undertaking to carry out themselves, or through the intermediary of persons they appoint for that purpose, on-site inspections at the

premises of the service provider. The supervisory authority of the insurance or reinsurance undertaking shall inform the appropriate authority of the Member State of the service provider prior to conducting the on-site inspection. In the case of a non-supervised entity the appropriate authority shall be the supervisory authority. The supervisory authorities of the Member State of the insurance or reinsurance undertaking may delegate such on-site inspections to the supervisory authorities of the Member State where the service provider is located.

OPC reports

14.2.5. In 2007 – 2008 the CEIOPS OPC carried out a survey regarding applicable outsourcing principles for the IORPs among the EEA Member States. This survey obtained information on how Member States regulate outsourcing of IORPs' functions and activities and how the supervision of the outsourced functions and activities is done. The results were summarised in the Report on outsourcing by IORPs (CEIOPS-OP-12-08M final), OPC, 30 October 2008. The explanatory text below builds on the most important finding of the survey.

14.3.Explanatory text

EIOPA view on issues in the CfA

OUTSOURCING CONDITIONS

14.3.1. Currently there are no details provided in the IORP Directive on what are the "necessary powers and means" the Member states are required to give to their supervisory authorities to supervise the relationship between IORP and service provider. This wording therefore enables different interpretations by Member States. Indeed, the findings of the OPC report on outsourcing show differences in what powers of supervisory authority vis-à-vis service provider exist among the Member States. According to the survey, supervisory authorities have different powers over the service provider to whom the function is outsourced. Most of them, however, have a power to carry out on-site inspections on the premises of the service providers and obtain all necessary reports directly from them. Moreover, the ultimate responsibility for outsourced functions is borne by the IORPs in all Member States. Consequently, IORPs have to manage all possible problems arising from outsourced functions and provide all the requested information to their supervisory authorities. A large majority of respondents (24) indicated that the IORP's supervisory authority in their country is able to obtain any data and/or reports necessary to fulfil supervisory functions from the service provider via the IORP. This is catered for in the national legislation and/or in the outsourcing agreements concluded between IORPs and service providers. Most of the supervisory authorities (19) also have the power to require the service provider itself to supply data and/or reports. Supervisory authorities in most of the cases are empowered to carry-out on-site inspections at the premises of the service provider (21).

- 14.3.2. Article 38 (1) of the Solvency II Framework Directive contains more details with respect to supervision of outsourcing. In general the EIOPA members support the idea of using elements of this article to clarify the IORP directive in the area of supervision of outsourcing.

ROLE OF THE SUPERVISORY AUTHORITY

- 14.3.3. The survey on outsourcing shows that there is different scope of powers delegated to IORPs Supervisory authorities among Member States. Supervisory authorities have different powers over the service provider to whom the function is outsourced. Most of them, however, have a power to carry out on-site inspections in the premises of the service providers and obtain all necessary reports directly from them. Moreover, the ultimate responsibility for outsourced functions is borne by the IORPs in all Member States. Consequently, IORPs have to manage all possible problems arising from outsourced functions and provide all the requested information to their supervisory authorities. The survey also examined possible geographic limitations of outsourcing. It revealed that more than one third of the respondents require the custodian to be located in the EU/EEA. Furthermore, three countries indicated that asset management can be outsourced only to an EEA based investment manager. None of the respondents have in place any specific rules with regard to cross-border outsourcing other than discussed above. One country noted that the supervisory authority is allowed to conclude collaboration agreements with other authorities with respect to implementing the rules applicable to IORPs.
- 14.3.4. EIOPA members in general support the idea to use material elements of the Solvency II Framework Directive to clarify Article 13(d) of IORP directive in particular when the service provider is located in another Member State. This could provide specific rules how to proceed with on-site inspection when service provider is located in another member state and ensure a common approach among the Member States.
- 14.3.5. Article 38 (2) of the Solvency II Framework Directive contains more details with respect to cross-border supervision of outsourcing. In general EIOPA members support the idea of using elements of this article to clarify the IORP directive in the area of supervision of outsourcing. The relevant provision of the IORP II Directive could provide that the Member State where the service provider is located shall permit the supervisory authorities of the IORP to carry out themselves, or through the intermediary of persons they appoint for that purpose, on-site inspections at the premises of the service provider. The supervisory authority of the IORP shall inform the appropriate authority of the Member State of the service provider prior to conducting the on-site inspection. In the case of a non-supervised entity the appropriate authority shall be the supervisory authority. The supervisory authorities of the Member State of the IORP may delegate such on-site inspections to the supervisory authorities of the Member State where the service provider is located.
- 14.3.6. In addition EIOPA is on the view that further amendments should be introduced primarily providing that Member States must ensure the

supervisory authority has the powers to intervene on outsourced functions or activities, if necessary.

- 14.3.7. At the same time Article 38 (2) of the Solvency II Framework Directive does not cater for the cases when a service provider is located in a non-EEA country. In this case cooperation between supervisory authorities would not work in the same way.
- 14.3.8. Some EIOPA members propose to provide additional amendments to article 13(d) of the current IORP Directive stating that when the service provider is located in a non EEA country it is an obligation of the IORP to ensure that the supervisory authority or their appointed persons are able to carry out on-site inspections at the premises of the service provider. This obligation would be regulated as a requirement to be included in the contract with the service provider. In order to ensure these requirements are fulfilled by an IORP, the supervisory authority might ask for prior notification of the contract with the service provider located in the non EEA country.
- 14.3.9. However, there are also opposite views on this issue among EIOPA members stating that there is no place for such a regulation. Also the survey on outsourcing shows that there are different approaches among the Member States as regard notifications by the supervisory authority. The respondents are nearly evenly split in their approach to the procedure that must be undertaken by the IORP before the actual transfer of functions occurs.
- 14.3.10. In majority (14) of the cases, the outsourcing of IORP's functions is subject to approval by the supervisory authority or notification (a priori or ex-post) to it and more than half of these countries (8 out of 14) require IORP to get a prior approval before the actual transfer of function although some of them indicated that this refers to certain functions only while other functions are subject to ex-post notification.
- 14.3.11. In 9 cases, no approval by the supervisory authority is required regarding the transfer of an IORP's function. However, some of these respondents pointed out that there are certain other requirements with a similar effect.
- 14.3.12. To ensure supervisory authority or their appointed persons are able to carry out on-site inspections at the premises of the service provider located in another country, development of the respective procedure could be considered in level 2 implementing measures.

CHAIN OUTSOURCING

- 14.3.13. Currently the IORP directive is silent on chain outsourcing and does not state any requirements on this subject. A survey carried out by the OPC on outsourcing requirements implemented by member states also shows that area in most of the member states is not regulated and consequently could cause obstacles for the supervisory authority to fulfil its functions as regards the actual service provider. According to the findings of the survey subcontracting of the transferred activity by the service provider (chain outsourcing) is allowed in slightly less than a half of the cases (12).

Moreover, there are several cases (9) where the national primary law is silent on this issue and the chain outsourcing is allowed in practice subject to certain conditions, such as ensuring that the supervisory authority shall have the right to obtain information it might need from the subcontractee or that the IORP still has the necessary powers to issue instructions and obtain information from the subcontractee. Four respondents indicated that chain outsourcing is not allowed under their national legislation. In a further two cases this issue is not expressly regulated by law. In these cases, respective supervisory authorities do not allow IORPs' service providers to enter into subcontracting agreements. One of these cases indicated that this approach is justified by other provisions of its prudential law regulating the overall design of the IORPs. Only five countries allowing subcontracting of the transferred activity indicated that this arrangement is subject to a priori or an ex-post notification. In one case prior approval is required. In all other cases no formal approval by supervisory authority or notification to it is required.

- 14.3.14. To avoid such situations additional rules could be introduced in the IORP directive to ensure that, in the case of chain outsourcing, IORPs and supervisory authorities have the same controlling powers to the actual service provider.

LOCATION OF THE MAIN ADMINISTRATION

- 14.3.15. Another non-regulated area in the IORP directive is location of the main administration of the IORP and how this influences duties of the supervisory authority. In fact Article 6 of the IORP Directive states that the Home State is the EU country where the IORP has its main administration. At the same time there is no definition of "main administration". The survey on outsourcing shows that different countries treated this in different way. The majority of Member States stated that main administration means the registered office while some others refer to the location of a headquarters or central office, and there are even countries who interpret it as the location of administration or asset management.
- 14.3.16. Since location of the main administration is important to determine what is the home country of the IORP which is then crucial for supervision of cross border activities it might be advisable to provide details on what is to be understood by the "main administration" at Level 2.
- 14.3.17. Alternatively, it might be possible to amend the definition of the "home state" and make it consistent with the definitions used for other sectors.
- 14.3.18. Relevant directives in other financial sectors provide for the following definitions of home state:
- a) UCITS IV Directive - "management company's home Member State" means the Member State in which the management company has its registered office;
 - b) CRD - "home Member State" means the Member State in which a credit institution has been authorised in accordance with Articles 6 to 9 and 11 to 14;

- c) Solvency II - "home Member State" means any of the following:
- for non-life insurance, the Member State in which the head office of the insurance undertaking covering the risk is situated;
 - for life insurance, the Member State in which the head office of the insurance undertaking covering the commitment is situated; or
 - for reinsurance, the Member State in which the head office of the reinsurance undertaking is situated.

14.3.19. Based on the above examples and taking into account the specificities of IORPs, it seems to be most appropriate that the home state is defined as the state where the IORP was authorised or registered. Furthermore, the revised IORP Directive could include a requirement that main administration is always located in the home member state. It could be also made clear that the term "place of main administration" refers to a place where the main strategic decisions of the IORP's executive body are made.

14.3.20. In any case, however, the supervisory authority must be able to effectively supervise the IORP.

14.4. EIOPA advice

***The EIOPA advice should address at least the following subjects:
The way in which Article 13(b) of Directive 2003/41/EC should be clarified.
Particular attention should be paid to determine whether the material elements of Article 38(1) of Directive 2009/138/EC could be used for this purpose;***

- 1 EIOPA holds the view that the material elements of article 38(1) of the Solvency II Framework Directive are generally applicable to IORPs.
- 2 The revised IORP Directive could provide that:
 - the service provider must cooperate with the supervisory authorities of the IORP in connection with the outsourced function or activity;
 - the IORPs, their auditors and the supervisory authorities must have effective access to data related to outsourced functions or activities;
 - the supervisory authorities must have effective access to the business premises of the service provider and must be able to exercise those rights of access.

The way in which Article 13(d) of Directive 2003/41/EC should be clarified. Particular attention should be paid to determine whether the material elements of Article 38(2) of Directive 2009/138/EC could be used for this purpose

- 3 EIOPA proposes to introduce the requirements for IORPs as they were introduced for insurance and reinsurance undertakings in article 38(2) of the Solvency II Framework Directive, with the following amendment: Member States must ensure the supervisory authority has the necessary powers to intervene on outsourced functions or activities.

- 4 Further details on the case where the service provider is located in a non-EEA country could be considered in level 2 implementing measures in order to ensure access of the supervisory authority to the information and premises of the service provider. These measures could include provisions that when the service provider is located in a non EEA country, it is the responsibility of the IORP to ensure access of the supervisory authority to the information and premises of the service provider. Member States might require the IORPs to include this obligation in the contract concluded between the IORP and service provider. Member States might also require prior notification by the IORP of the contract with a service provider located in a non-EEA country.

Other rules to supervise outsourced functions and activities, if any: e.g. location of main administration, sub-contracting of the transferred activity by the third-party service provider (chain outsourcing).

- 5 EIOPA proposes to introduce additional rules on chain outsourcing stating that Member States must ensure that in the case of sub-contracting of the outsourced activity (chain outsourcing) IORPs and supervisory authorities have the same controlling powers to the actual service provider.
- 6 EIOPA proposes to introduce additional rules on location of main administration in line with one of the options outlined above.

14.5. Questions for Stakeholders

17. What is the view of stakeholders on the proposed principles of the revised IORP Directive? How do stakeholders evaluate the positive and negative impacts of the introduction of revised outsourcing principles?

15. CfA 20 Outsourcing

15.1. Extract from the call for advice

The Commission Services would like EIOPA to advise on detailed rules on outsourcing for IORPs.

The EIOPA advice should address at least the following subjects:

- The material elements of Article 49 of Directive 2009/138/EC that should be amended or removed to adequately address the specificities of IORPs in relation to outsourcing;*
- Other outsourcing requirements for IORPs, if any.*

15.2. Background

Current legal requirements (IORP Directive)

15.2.1. The IORP Directive in its current wording permits IORPs to transfer some or all of their activities to a 3rd party service provider. This transfer is explicitly referred to as "outsourcing" in several provisions of the Directive:

Article 9 (4): "A Member State may permit or require institutions located in its territory to entrust management of these institutions, in whole or in part, to other entities operating on behalf of those institutions."

Article 19 (1): "Member States shall not restrict institutions from appointing, for the management of the investment portfolio, investment managers established in another Member State and duly authorised for this activity, in accordance with Directives 85/611/EEC, 93/22/EEC, 2000/12/EC and 2002/83/EC, as well as those referred to in Article 2(1) of this Directive."

Article 19 (2): "Member States shall not restrict institutions from appointing, for the custody of their assets, custodians established in another Member State and duly authorised in accordance with Directive 93/22/EEC or Directive 2000/12/EC, or accepted as a depositary for the purposes of Directive 85/611/EEC.

The provision referred to in this paragraph shall not prevent the home Member State from making the appointment of a depositary or a custodian compulsory."

International standards, guidelines and good practices

15.2.2. With regard to outsourcing the applicable international standard (OECD/IOPS good practices for pension funds' risk management systems) requires pension institution to develop a written policy on outsourcing.

15.2.3. Furthermore, the relations between pension institution and service provider must be set in the written outsourcing agreement that should at least contain the following elements:

- a) the ultimate responsibility for the outsourced activity must remain with the pension institution,

- b) the service provider must commit itself to enable monitoring of its activities by the IORPs governing bodies themselves or via audit as well as supervisory authority on an on-going basis. This should include access to the information and the premises of the service provider (where appropriate), including right of the supervisory authority to perform or require an audit of the service provider. The service providers may not charge a fee for providing information or access.

Results of the public consultation on Green paper on pensions

- 15.2.4. As mentioned in section 2.3 of the CfA 13, the summary of consultation responses to question 10 of the Green paper on pensions concludes that many respondents considered the qualitative requirements of Solvency II (pillar 2 and 3) suitable for pension funds.

Solvency II Framework Directive

- 15.2.5. Solvency II Framework Directive in Article 49 provides for the following rules on outsourcing for insurance and reinsurance undertakings:

*"Article 49
Outsourcing*

1. Member States shall ensure that insurance and reinsurance undertakings remain fully responsible for discharging all of their obligations under this Directive when they outsource functions or any insurance or reinsurance activities.

2. Outsourcing of critical or important operational functions or activities shall not be undertaken in such a way as to lead to any of the following:

(a) materially impairing the quality of the system of governance of the undertaking concerned;

(b) unduly increasing the operational risk;

(c) impairing the ability of the supervisory authorities to monitor the compliance of the undertaking with its obligations;

(d) undermining continuous and satisfactory service to policy holders.

3. Insurance and reinsurance undertakings shall, in a timely manner, notify the supervisory authorities prior to the outsourcing of critical or important functions or activities as well as of any subsequent material developments with respect to those functions or activities.

OPC reports

- 15.2.6. In 2007 – 2008 CEIOPS OPC carried out a survey regarding applicable outsourcing principles for the IORPs among the EEA Member States. This survey obtained information on how Member States regulate outsourcing of IORPs functions and activities and how the supervision of the outsourced functions and activities is done. The results were summarised in the Report

on outsourcing by IORPs (CEIOPS-OP-12-08M final), OPC, 30 October 2008 (Outsourcing Report). The explanatory text below builds on the most important finding of the survey.

15.3.Explanatory text

EIOPA view on issues in the CfA

15.3.1. The IORP Directive currently foresees that Member States may permit to entrust to third party service providers the whole or part of IORP management. Furthermore, it also requires Member States not to restrict IORP from appointing for the management of investment portfolio and the custody of assets the investment managers or custodian established in another Member State duly authorized for these activities. Finally, it permits the home Member State to make the appointment of depository or custodian compulsory. These principles are pivotal for functioning of IORPs in most EU Member States. EIOPA therefore suggests that they must be maintained also in the new regulatory regime for IORPs.

RESPONSIBILITY FOR OUTSOURCED FUNCTIONS

15.3.2. The outsourcing report concluded that in the majority of Member States the IORP remains ultimately responsible for functions they outsource to a 3rd party service provider, even in case of compulsory outsourcing. EIOPA is of the view that the principle of keeping with IORP the ultimate responsibility for outsourced critical or important functions or activities should be explicitly prescribed in the revised IORP Directive.

15.3.3. The IORP that outsources its critical or important functions or activities must be able to perform regular monitoring of how they are carried out by the service provider. The IORP cannot be required to have the technical skills or abilities to perform the activities outsourced to 3rd parties, especially when critical or important function (e.g. asset management) are outsourced mandatorily by law. With specific reference to outsourcing of asset management activities, it is important that the approach adopted will be aligned with the one followed for the implementation of art. 132 (2) of the Solvency II Framework Directive. (This topic will be revisited when the draft advice regarding investment rules for IORPs is finalised).

APPROACH TO OUTSOURCING

15.3.4. In EU Member States there are two different approaches to outsourcing:

- a) for the majority of Member States, a limited number of functions and activities have to be carried out by IORPs themselves and all the other functions and activities may or must be carried out by a 3rd party service provider
- b) in a small number of Member States, IORPs cannot outsource the majority of their functions and activities to 3rd party service providers.

- 15.3.5. At the national level the outsourcing is subject to a various specific limitations:
- a) Certain (critical) functions and (important) activities may be outsourced only to service providers established under the specific legal framework and subject to supervision. The other functions can be carried out by undertakings which do not fall under specific prudential supervision.
 - b) In almost half of the EU Member States it is also possible to outsource some of its activities to another IORP.
 - c) Outsourcing cannot prejudice the integrity of the IORP's own systems and controls,
 - d) The IORP must verify prior to outsourcing that the 3rd party service provider is competent and financially sound.
- 15.3.6. With reference to the established practices at the national level and in order to ensure that members and beneficiaries are sufficiently protected EIOPA suggests that outsourcing of critical or important functions or activities of IORPs should be made subject to certain limitations that would be included in the revised IORP Directive. Outsourcing cannot lead to operating inefficiency in IORPs. Furthermore, it cannot hinder the exercise of an effective supervision by Supervisory Authorities.
- 15.3.7. In this context, the principles in Article 49 (2) of the Solvency II Framework Directive are broadly applicable to IORPs. However, EIOPA suggests drafting the limitation to outsourcing in a positive way vs. the negative way as drafted in Solvency II Framework Directive. Furthermore it is suggested to add a principle requiring IORPs to ensure the proper functioning of the outsourced activities through the selection process and ongoing monitoring.
- 15.3.8. Finally, in the majority of Member States, IORPs are required to have a legally enforceable document for any outsourced activity, in a written form. The national legislation also often provides for the minimum content of such contract.
- 15.3.9. EIOPA suggests that the revised IORP Directive contains a principle requiring IORPs to have a written outsourcing agreement. Level 2 would then provide for the minimum contents (chapter list) of the agreement.

ROLE OF THE SUPERVISORY AUTHORITY

- 15.3.10. Regarding the applicability of article 49 (3) of the Solvency II Framework Directive to IORPs, two mutually exclusive approaches are possible:
- a) The obligation to notify is applicable to IORPs. Thus under the revised IORP directive IORPs will be required to notify to the Supervisory Authority prior to the outsourcing of critical or important functions as well as any subsequent material developments. This requirement, however, cannot be interpreted as a prior approval of supervisor to outsource.
 - b) The obligation to notify is not applicable to IORPs. Thus under the revised IORP directive IORPs will not be required to notify to the Supervisory Authority prior to the outsourcing of a critical or important functions as well as any subsequent material

developments. However, the revised IORP directive should make it possible for Member States to impose on IORP the obligation to notify (national option).

- 15.3.11. In any case the Supervisory Authority has to have the necessary powers to request all information on outsourcing at any time of the outsourcing process. It is also important to ensure that the Supervisory Authority has the power to intervene if necessary
- 15.3.12. As the level of outsourcing and the approach followed on the supervision of the outsourced activity varies enormously between countries, it's important that the solution suggested should guarantee a certain degree of flexibility in the system, leaving Member States to choose the level of burden taking into account the characteristics of the domestic pension funds and supervisory system. Members States should have maximum powers to have all the information - but how they use this power – e.g. ask in advance etc., is up to them.
- 15.3.13. Furthermore, the suggested solution should take into account the administrative burden for both the Supervisory Authority and IORPs. The Supervisory Authority has to be focussed on the supervision of real critical situations that could arise from the outsourced activities/function and the IORP should be responsible for the outsourced activities.
- 15.3.14. A possible solution could be that Member States must ensure Supervisory Authorities have necessary powers at any time to request information on outsourced functions and activities. In addition, Member States may decide to provide that IORPs shall, in a timely manner, inform or notify the supervisory authorities on the outsourcing of critical or important functions or activities.
- 15.3.15. With reference to the point above, some Member States suggest an alternative solution, in order to avoid that Member States decide to request or not request notification prior to outsourcing.
- 15.3.16. It is suggested to distinguish between IORPs that are registered and IORPs that are authorized by the Supervisory authority. According to this proposal, for IORPs that are registered the Supervisory authority should have the necessary powers at any time to request information on outsourced functions and activities. On the other hand IORPs that are authorized shall in a timely manner notify the Supervisory authority prior to the outsourcing of critical or important functions or activities as well as any subsequent changes with respect to those functions or activities.

15.4.EIOPA advice

The material elements of Article 49 of Directive 2009/138/EC that should be amended or removed to adequately address the specificities of IORPs in relation to outsourcing;

- 1 EIOPA holds the view that the material elements of article 49(1) of the Solvency II Framework Directive are generally applicable to IORPs.
- 2 The IORP cannot be required to have detailed technical skills or abilities to carry out the activities outsourced to 3rd parties. Member States shall ensure that IORPs remain fully responsible when they outsource functions or activities to third parties.
- 3 Outsourcing of critical or important functions or activities must be undertaken in such a way that:
 - (a) the quality of the system of governance remain intact;
 - (b) there is no undue increase in operational risk;
 - (c) supervisory authorities remain sighted of the outsourcing and are able to monitor the compliance;
 - (d) a satisfactory service to members and beneficiaries continues to be delivered;
 - (e) the competent operational body of the IORP has to ensure the proper functioning of the outsourced activities in how both the selection process and the ongoing monitoring is carried out.

Drafting options regarding the role of supervisory authority:

Option 1:

3. Member States must ensure that supervisory authorities have the necessary powers at any time to request information on outsourced functions and activities. Member States may decide to provide that IORPs shall, in a timely manner, inform or notify the supervisory authorities on the outsourcing of critical or important functions or activities as well as any subsequent changes with respect to those functions or activities.

Option 2:

3. Member States must ensure that supervisory authorities have the necessary powers at any time to request information on outsourced functions and activities. For IORPs that are registered the Supervisory authority should have the necessary powers at any time to request information on outsourced functions and activities. IORPs that are authorized shall in a timely manner notify the supervisory authority prior to the outsourcing of critical or important functions or activities as well as any subsequent changes with respect to those functions or activities.

- Other outsourcing requirements for IORPs, if any.

none

15.5. Questions for Stakeholders

18. What is the view of stakeholders on the proposed principles of the revised IORP Directive? How do stakeholders evaluate the positive and negative impacts of the introduction of revised outsourcing principles?

16. Collated questions for stakeholders

CfA 1 Scope of the IORP Directive

1. Do 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?
2. Are there any other options that should be considered? Please provide details including where possible in respect of impact.
3. Which option is preferable?
4. How should it be determined whether a compulsory employment-related pension scheme is to be considered as a social-security scheme covered by Regulations (EEC) No 883/2004 and (EEC) No 987/2009(see Art. 3)?

CfA 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?
6. Are there any other options that should be considered?
7. Do you agree with EIOPA that option 2 is preferable?
8. Even with defining the sponsoring undertaking, problems of overlapping or contradicting regulation between member states could emerge. Should the revised Directive include procedures to settle such problems between the Home and the Host member states and/or also between the Home member state and the member state of the applicable social and labour law?

CfA 4 Prudential regulation and social and labour law

9. Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in this advice?
10. Are there any other options that should be considered?
11. Do you agree with EIOPA that option 2 is preferable?
12. Even with defining the scope of prudential regulation, problems of overlapping or contradicting regulation between member states could emerge. Should the revised Directive include procedures to settle such problems between the Home and the Host member states and/or also between the Home member state and the member state of the applicable social and labour law?

CfA 13 General Governance Requirements

13. What is the view of stakeholders on the proposed principles of the revised IORP Directive? How do stakeholders evaluate the positive and negative impacts of the introduction of proposed general governance requirements?

CfA 14 Fit and proper

14. What is the view of the stakeholders on the proposed principles of the revised IORP Directive? How do stakeholders evaluate the positive and negative impacts of the introduction of proposed fit and proper requirements?

CfA 17 Internal control system

15. What is the view of the stakeholders on the proposed principles of the revised IORP Directive? How do stakeholders evaluate the positive and negative impacts of the introduction of a compliance function?

CfA 18 Internal audit

16. What is the view of stakeholders on the proposed principles of the revised IORP Directive? How do stakeholders evaluate the positive and negative impacts of the introduction of an internal audit function?

CfA 12 Supervision of outsourced functions and activities

17. What is the view of stakeholders on the proposed principles of the revised IORP Directive? How do stakeholders evaluate the positive and negative impacts of the introduction of revised outsourcing principles?

CfA 20 Outsourcing

18. What is the view of stakeholders on the proposed principles of the revised IORP Directive? How do stakeholders evaluate the positive and negative impacts of the introduction of revised outsourcing principles?