

<b>Comments Template on EIOPA-CP-11/006</b> <b>Response to Call for Advice on the review of Directive 2003/41/EC: second consultation</b>		<b>Deadline</b> <b>02.01.2012</b> <b>18:00 CET</b>
Company name:	BDA Bundesvereinigung der Deutschen Arbeitgeberverbände, Berlin	
Disclosure of comments:	EIOPA will make all comments available on its website, except where respondents specifically request that their comments remain confidential.  <i>Please indicate if your comments on this CP should be treated as confidential, by deleting the word <b>Public</b> in the column to the left and by inserting the word <b>Confidential</b>.</i>	Public
<p>The question numbers below correspond to Consultation Paper No. 06 (EIOPA-CP-11/006).</p> <p><b>Please follow the instructions for filling in the template:</b></p> <ul style="list-style-type: none"> <li>⇒ <u>Do not change the numbering</u> in column "Question".</li> <li>⇒ Please fill in your comment in the relevant row. If you have <u>no comment</u> on a question, keep the row <u>empty</u>.</li> <li>⇒ There are 96 questions for respondents. Please restrict responses in the row "General comment" only to material which is not covered by these 96 questions.</li> <li>⇒ Our IT tool does not allow processing of comments which do not refer to the specific question numbers below.               <ul style="list-style-type: none"> <li>○ If your comment refers to multiple questions, please insert your comment at the first relevant question and mention in your comment to which other questions this also applies.</li> <li>○ If your comment refers to parts of a question, please indicate this in the comment itself.</li> </ul> </li> </ul> <p><b>Please send the completed template to <a href="mailto:CP-006@eiopa.europa.eu">CP-006@eiopa.europa.eu</a>, in MSWord Format, (our IT tool does not allow processing of any other formats).</b></p>		
<b>Question</b>	<b>Comment</b>	
General comment	The review of the Directive on Institutions for Occupational Retirement Provision (IORP directive) calls for special prudence, not least against the background that the most recent amendment has been implemented only in the last years by all member states. We would like to point out, that in	

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	<p>particular, capital adequacy requirements ("Solvency II") should not be transposed into the IORP directive. Imposition of these requirements would cause great harm to institutions for occupational retirement provision (IORPs) and subscriber companies, and would markedly reduce the readiness of employers to enter into occupational pension commitments. This would run diametrically counter to the need to expand and strengthen occupational pension provision. Incorporation of Solvency II would ignore the risks faced by IORPs in terms of subsidiary employer liability as well as of insolvency cover by the pension protection association (<i>Pensions-Sicherungs-Verein</i> - PSV). In particular the last finance crisis in 2009 showed, that the legal framework of the finance authority stood the test.</p> <p>The objective of supervision and the underlying regulations of occupational pension schemes differ considerably from the objective of supervision of insurance companies. Thus for occupational pensions and IORPs, which are per definition sponsored by an employer, whose stakeholders interest are aligned and whose beneficiaries are protected by a several layers of interacting security mechanisms in social and labour law and also for the IORPs itself, the objective of Solvency II is not relevant. It is essential to continue in this regard with the concept of IORP I.</p>	
1.	<p><b>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?</b></p> <p>We agree basically with the analysis of the options as laid out in this advice. The position of EIOPA is correct, not to extend the scope of the IORP directive to direct pension commitments (book reserves) and other unregulated forms of occupational pension schemes. The main difference to the other occupational pension schemes which are covered by the IORP-Directive is the fact, that the beneficiaries have no legal right to the benefits to the institution but only to the employer. Thus there is no need for regulation here, because the employer is <u>directly</u> liable for such promises and PSV would intervene in the case of insolvency.</p> <p>The IORP-Directive should only regulate prudential supervision of institutions that fund retirement benefits. These pension provisions are imperatively related to an employer – employee relationship. Therefore the distinction between second and third pillar pension systems has to be made safeguard</p>	

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	<p>interests of pension savers and to ensure the functionality of the different national framework which includes many labour law provisions.</p> <p>There is considerable diversity in IORPs across EU member states, in particular considering that they are subject to the different national social and labour laws. The current directive strikes the right balance between providing for prudential regulation of IORPs whilst allowing member states the necessary flexibility to tailor pension schemes to national specificities, the needs of their citizens and those of the employers providing such pension schemes. We would also stress that the principle of proportionality should be adhered to and reflected in the EIOPA response to the Commission's call for advice. This means that any revision of the IORP Directive should not result in regulation that applies to the dominant provisions of only a handful of countries in the EU.</p> <p>As the consultation document states, there are borderline cases where it is not clear if the IORP Directive applies. This is a more general point regarding a lack of clarity on which EU legislation applies to which forms of pension provision across all three pillars. This also includes legislation on social security coordination. However, we agree that these issues would be better dealt with in implementation of the legislation rather than changing the scope.</p>	
2.	<p><b>Are there any other options that should be considered? Please provide details including where possible in respect of impact.</b></p> <p>No</p>	
3.	<p><b>Which option is preferable?</b></p> <p>We prefer Option 1.</p>	
4.		
5.	<p><b>Do stakeholders agree with the analysis of the options (including the positive and negative</b></p>	

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**impacts) as laid out in this advice?**

We agree in principle with the analysis laid out in this advice. It should be noted by all stakeholders that the internal market plays a subordinate role for IORPs – by contrast with life insurance companies. For the overwhelming majority of German IORPs, which operate as social institutions for their sponsoring organisations, business activity is restricted to their own sponsoring organisation. Hence, IORPs do not have a vocation to compete on the retirement provision market with a profit motive. For that reason, the vast majority of IORPs have no current or future need for common rules to achieve a single market.

Nevertheless the lack of consensus regarding the definition of cross-border activity has been an obstacle to the effective implementation of the IORP Directive and therefore has hampered the further development of cross-border provision of IORPs. However, it is important to remember that there has been some improvement, as EIOPA in July 2011 reported an increase of cross-border pension provision of 8% over the past year.

From an employers' point of view, the possible legal uncertainty regarding what is considered cross-border is a disincentive to providing pension funds cross-border. However, it is difficult to see how this issue can be tackled further, as the main cause of the different interpretations of cross-border activity is the natural diversity in the provision of IORPs across member states and the application of different national and social labour laws. In line with the subsidiarity principle, a revision of the IORP Directive in the direction of harmonisation of national social and labour laws, would not be acceptable.

As highlighted in the consultation document, the lack of cross-border activity of IORPs is also due to lack of demand, as in practice it is limited to those companies which are able to bear the upfront costs. As stated, this includes management and consultancy time to get the necessary information on the scope and details of social and labour laws, and on taxation. The information is sometimes insufficient. It is also due to cultural reasons (e.g. language barriers), as well as sometimes limited cooperation between supervisors.

6.

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12.	<p><b>What is the view of the stakeholders on the holistic balance sheet proposal? Do stakeholders think that the distinction between Article 17 (1) IORPs, 17 (3) IORPs and sponsor backed IORPs should be retained or removed?</b></p> <p>We strongly recommend to maintain the clear distinction between Article 17(1) IORPs, 17(3) IORPs and sponsor-backed IORPs (policy option 1). As a consequence we reject the undifferentiated usage of the holistic balance sheet as a catch-all approach because it doesn't fit the diversity of European IORPs: In our opinion, the holistic balance sheet approach doesn't meet the characteristics of sponsor-backed IORPs and to some extent Article 17 (3) IORPs. A reasonable holistic balance sheet model implies that the value of the employer covenant (backed by the pension protection scheme) will have to be determined by the gap it is supposed to fill. This will be the gap between the financial assets on the one hand and technical provisions. IORPs should only be bound to hold additional assets above the technical provisions to the extent they are not sponsor-backed.</p>	
13.	<p><b>Do stakeholders agree that assets of IORP should be valued on a market-consistent basis?</b></p> <p>The principles of valuation of assets of IORPs have to follow the purpose of IORPs. A valuation based on a snap-shot view is not appropriate for IORP because they work on a long-term base and their purpose is to provide continuous pension-payments. Basically, short-term market fluctuations are less relevant in the case of long-term liabilities as there is a chance that these can be compensated in the remaining period. Liquidity to pay the promised benefits is only needed in the long term. This might mean that short-term market developments are easier to deal with than in a situation where liquidity is required in the short term. In particular this applies to assets that they are held to maturity.</p>	

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14.	<p><b>What is the stakeholders view on the two options regarding the starting principle for valuing liabilities? Do stakeholders agree that such a principle for IORPs should contain no reference to transfer value?</b></p> <p>We do not agree that a Solvency II type regime is appropriate or necessary for pension funds (reasons provided in answer to question 38). This means that we do not agree with the proposal to apply a 'transfer value' model for valuing liabilities, similar to that used for insurance companies, to IORPs. The consultation IORPs document clearly outlines the negative implications of this. In particular, the long-term nature of IORPs means that they share risks across generations. Therefore, having sufficient financial assets at all times to transfer their liabilities, is not necessary. Due to their long-term nature, IORPs have the possibility to use future contributions as assets or to reduce future benefits to lower liabilities. In addition, even in the event of a transfer e.g. as a consequence of an acquisition, it is up the deal-partners to evaluate and decide whether they want to be compensate the pensions-liabilities.</p>	
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21.	<p><b>What is the stakeholders view on the two options presented regarding the interest rate used to establish technical provisions (including the positive and negative impacts)?</b></p> <p>We strongly oppose the use of a risk-free discount rate for the calculation of liabilities in IORPs. This means that the pension would have to assume a zero-risk approach regarding the rate of return on possible investments. The expected returns on investment would therefore be lower. This would lead to a substantial increase in technical provisions of the pension fund, i.e. the amount of funding needed for the pension fund to be able to pay the pension promise accrued by scheme members.</p>	

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	<p>This would increase costs for employers, thereby diverting money away from business investment and job creation. The result of such a regulation would lead to financial damages in rather short time. That means the risk which is intended to be avoided by this rule would be even be further encouraged.</p> <p>EIOPA's draft response to the Call for Advice does not specify what would be the correct risk-free rate to be used, however using a risk-free rate would lead to pension schemes moving away from equity and corporate bonds into government bonds. Although traditionally understood to be risk-free, the current turbulences in the Eurozone debt markets clearly question that assumption. Also, this would lower the yield and therefore reduce the actual return on the investment made by the pension fund, thereby increasing the cost to the employer even further.</p> <p>For these reasons, we support retention of the existing requirement in the IORP Directive of using a prudent market rate, which allows for some risk to be included in the valuation of liabilities, including high quality corporate bonds overwhelmingly used by IORPs.</p>	
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33.	<p><b>What is the stakeholders view on the analysis regarding sponsor support? Do stakeholders agree with EIOPA that IORPs should value all forms of sponsor support as an asset and</b></p>	

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	<p><b>take account of their risk-mitigating effect in the calculation of the solvency capital requirement?</b></p> <p>As we pointed out in question 12, we do not agree with the holistic balance sheet approach. On the one side it would be very difficult and costly to measure the risk-mitigation effects. On the other side, for sponsor-backed IORPs with additional insolvency protection, component 7 should not be interpreted as a calculated (by evaluation) asset position, instead it has to be interpreted as a flexible compensation position. Regardless of the definition of capital requirements, component 7 has to be regarded as an asset to fulfil any solvency capital requirement the IORP might face. In any event component 7 has to be qualified as an equivalent to financial assets.</p>	
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38.	<p><b>What is the stakeholders view on applying the Solvency II-rules for calculating the solvency capital requirement (SCR) to IORPs, taking into account their specific security and benefit adjustment mechanisms?</b></p> <p>We are strongly opposed to the application of Solvency II-rules introducing a solvency capital requirement for IORPs. This would considerably raise the cost of providing occupational pensions for employers. Despite employers continual commitment to funding their schemes to the appropriate level, introducing Solvency II type capital requirements would ultimately lead companies to stop offering such schemes to their employees and closing them to new entrants. This would damage pension provision across the EU. The consultation document recognises these negative implications and rightly takes a cautious approach regarding a solvency regime for pension funds, acknowledging that this is a political decision to be taken by the European Commission.</p> <p>There should also be recognition of the wider economic impact of such a measure. Currently, European pension funds hold total assets worth €2,500bn. If they had to apply Solvency II funding rules, they would have to hold extra assets worth €1,000bn. This is likely to force pension schemes</p>	



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to move away from investment in equity, such as company shares, to less risky investments. This would lead to lower returns for the pension fund, encouraging them to make less beneficial investment choices. It would also starve companies of equity capital, an important source of financing, preventing them from growing their business and creating jobs. Diverting money away from business investment would be detrimental to growth and economic recovery in Europe.

We do not agree that there is a need to create a level playing field with insurance provided pension funds, which is one of the main justifications for introduction of a solvency capital requirement for IORPs. Pension funds operate in a very different way to insurance provided pension products and the Solvency II framework is not in line with the needs and specificities of IORPs:

- An occupational pension is part of the benefit package provided by an employer to his employees. In most cases IORPs do not operate in retail markets or are non-profit making organizations. In other cases, they often have a collective character, e.g. being supported by a collective agreement, or being subject to a bipartite board, or a legal obligation for board members to protect members' benefits and interests. This is in stark contrast to insurance provided pension products.
- In addition, the characteristics highlighted above mean that IORPs are generally seen as socially desirable. Introduction of solvency II capital requirements would have a negative impact on those companies that have positively engaged in offering employees an occupational pension.
- Pension funds have long periods for recovering deficits. Their investment strategies are also based on this. The Solvency II directive is not suited to pension products which have a long-term investment perspective, as the directive bases its solvency calculations on a time horizon of one year. Therefore the financial stability of pension funds in comparison to other financial services products is not so much affected by short-term economic instability. This means that applying higher funding requirements is not necessary given the possibility pension funds have to spread their risks between different generations over long time spans.

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	<ul style="list-style-type: none"> <li>• Also, additional capital requirements would in effect lead to sponsoring companies holding “dead capital”, i.e. unused assets until the end of the life of the pension scheme. In some member states it is very difficult and in some cases impossible for companies to recover this so-called trapped surplus.</li> <li>• Security is already provided by the current IORP Directive and through different means at national level. The IORP Directive already includes quantitative requirements and security is provided through the legal employer covenant (the backing of the sponsoring employer). These are held liable for any underfunding. Security is also provided by national guarantee funds in Germany which protect employee benefits in the case of insolvency of the employer (see answer 41).</li> </ul> <p>Finally, the justification for reform of the IORP Directive is the need to increase cross-border activity in the EU. Higher solvency requirements for pensions do not in any way achieve this.</p> <p>Before any final decision is taken by the commission on the need for additional solvency requirements for pension funds, a detailed, high quality quantitative impact assessment should be carried out.</p>	
39.		
40.	<p><b>What is the stakeholders view on imposing a minimum capital requirement (MCR) upon IORPs? What adjustments to the Solvency II rules are needed regarding the structure and frequency of the calculation?</b></p> <p>The consultation document poses the question as to whether the special mechanisms which are only available to IORPs (as highlighted in answer to question 38), could be treated as equivalent to a solvency capital requirement (SCR) or a way of mitigating risk and therefore lowering the SCR. Any revision of the IORP Directive must take into account the specific security mechanisms available to IORPs, which vary across EU member states. However, it is difficult to see how these specificities can be quantified in the same way as capital requirements, as they are more of a qualitative nature, therefore measuring them is very difficult.</p>	

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41.

**What is the stakeholder view on the analysis regarding pension protection schemes? If included in the holistic balance sheet, should pension protection schemes be taken into account by reducing the sponsor’s insolvency risk or by valuing it as a separate asset?**

As highlighted in response to question 38, we are strongly opposed against solvency capital requirement for IORPs as they are currently intended. As a consequence, we do not believe that the solution put forward by EIOPA for a ‘holistic balance sheet’ is appropriate. As highlighted in response to question 40, valuing the employer covenant and any pension guarantee system (which exist in a number of member states) as assets, would be very difficult as the measurement of it would be incredibly complicated for employers. In any case, as highlighted in response to question 38, the existence of such security mechanisms for IORPs are precisely why we do not agree that solvency capital requirements are necessary.

At this point it might be helpful to explain the insolvency protection system in Germany briefly. The Pensions-Sicherungs-Verein aG (“PSVaG”) is the institution which was given the legal task to fulfil pension promises in case of the insolvency of employers in Germany. This pension protection institution was founded in 1974 as a mutual insurance association. The PSVaG now has more than 90,000 members (employers) representing a great part of the whole German economy. Over 10 million employees and retirees are currently insured. The PSVaG usually provides insurance for all benefits accrued at the date of insolvency up to a certain amount (at the moment about 90,000 euros a year) which should cover 100 % of promises made by employers via IORPs. Insolvency insurance provided by the PSVaG protects employees’ entitlements to pension benefits from an insolvent company pension to the extent that claims for said benefits cannot be fully covered by an institution for occupational retirement provision (IORP). Given this complete and thorough protection system, it makes sense and is entirely appropriate to take such pension protection schemes into account under a regulatory protection scheme for institutions for occupation retirement provision (IORPs). In view of the complete protection provided by the PSVaG-system, there would appear to be no need for further significant (and possibly expensive) protective mechanisms for the protected entitlements of members/beneficiaries of IORPs. Existing protection on the basis of employer covenants and pension protection schemes is complete and sufficient to ensure protection of pension

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	<p>entitlements. Further mechanisms of any kind which would impose an additional burden on institutions for occupational retirement provision (IORPs), sponsoring employers or members/beneficiaries would be counterproductive, as they would actually endanger present and future employee pension entitlements. Not taking pension protection schemes into account would not reflect the basic decisions of Germany to implement the PSVaG as the core of the German system of occupational pension provision. It would also be contradictory to the holistic-balance-sheet-approach which is the explicit consideration of all mechanisms that are so far taken into account implicitly. With regard to the two options in which pension protection schemes are taken into account the result should be the same in Germany. Backed by thousands of employers representing a great part of the German economy the PSVaG and/or the sponsor support would always be strong enough to cover the difference between the liabilities and the financial assets of the IORP.</p>	
42.	<p><b>42. Do stakeholders agree that capital requirements for operational risk should be applied to DC schemes where investment risk is borne by plan members? Should these capital requirements be uniform or tailored to the actual risk profile? Do stakeholders find it sensible to distinguish between DC and other schemes in the area of operational risk?</b></p> <p>Because we do not agree with the introduction of risk-based capital requirements we do also not see the need for harmonisation for DC schemes. In case that the commission deals with this matter it is important to avoid introducing rules at EU level which significantly increase the costs of operating such schemes. For example, EU rules detailing how schemes should be designed. If such schemes become too costly, it is likely to lead to employers lowering their contributions or being unable to offer such schemes. Equally, in many contract-based schemes, such as group personal pensions, it is actually the employee who bears the cost of scheme administration. Higher costs would lead to an increase in the overall scheme charge for the employee.</p>	
43.	<p><b>43. What is the stakeholders' view on the analysis regarding the duties of IORPs and the powers of supervisors in the case of deteriorating financial conditions as introduced by Article 136 and 141 of Solvency II</b></p> <p>We agree with option 1 of EIOPA's recommendation.</p>	

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44.	<p><b>44. What is the stakeholders' view on the analysis regarding the submission of recovery plans and the length of recovery periods as introduced by Articles 138 and 139 of Solvency II? Should the recovery periods – with regard to the SCR and possibly the MCR – for IORPs be flexible, fixed or a combination of both? What would be the reasons – if any – to allow IORPs longer recovery periods than prescribed by Solvency II?</b></p> <p>The long-term nature of pension liabilities in IORPs calls for a different approach regarding recovery periods to that included in Solvency II. This means that deficits are not as relevant as they can be recuperated over time. Therefore, the proposal that the scheme must have any deficit repaid back by the employer within a year (as in Solvency II), is not appropriate. This would put companies' cash flow under significant pressure, in many cases pushing them over the edge into insolvency. The recent recession is a clear illustration of the benefits of having a more flexible approach to recovery periods. Despite the significant impact on company cash flow and the drying out of credit lines, mass insolvencies and job losses were avoided by national regulators allowing longer recovery plan periods to be put in place, which were negotiated between employers and scheme trustees. This protects affordability and ensures the solvency of scheme sponsoring employers. Therefore we believe that the current Article 16 of IORP Directive is adequate in regulating the powers fo supervisors.</p>	
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52.	<p><b>What is the stakeholders' view on the analysis regarding the objective of supervision and the measures to avoid pro-cyclical behaviour?</b></p>	

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	<p>We do not agree with the analysis regarding the objective of supervision. The Solvency II Directive's main objective (Article 27) is to strengthen consumer protection achieving a balance between the commercial interests of insurance or financial service providers and individual consumer interests in the absence of a third party guarantor or lender of last resort. For Occupational Pensions and IORPs, which are per definition sponsored by an employer, whose stakeholders' interests are aligned and whose beneficiaries are protected by a web of interacting security mechanisms in social and labour law and also for the IORPs itself, the objective of Solvency II is not relevant. It is essential to continue in this regard with the concept of IORP I. So taking inspiration from Recital 7 of the current IORP Directive, we would redefine the objective for supervision of IORPs in IORP II as follows: "... to achieve the main objective of IORP supervision, namely both to clear the way for a sound development of occupational pension schemes provided by IORPs and to protect members and beneficiaries." In addition we propose to define the purpose of the IORP II Directive as: "This Directive supports the establishment and operation of IORPs, facilitates their efficient management and administration and supports the protection of members and beneficiaries".</p> <p>Furthermore the best way to avoid pro-cyclical effects is to disconnect from regulations based on market to market valuations.</p>	
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61.	<b>Do stakeholders agree that the material elements of the requirements on insurers in</b>	

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	<p><b>respect of supervision of outsourcing should apply also to IORPs?</b></p> <p>We do not support option 2. The revised directive should include the principle, that the IORP remains responsible for the outsourced activities. Therefore we reject considerations to empower the supervisory authority for direct inspections to the service provider in case the service provider is located in another member state.</p>	
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63.	<p><b>Do stakeholders agree with the principle that the material elements of the Solvency II requirements for governance apply to IORPs, subject to proportionality?</b></p> <p>In our view the proposed principles of the revised directive are applicable, provided they are modified by a general proportionality clause. It seems more effective not to refer to the size of the IORPs but rather to the nature and complexity. It is very important, to avoid needless bureaucracy and additional costs for IORPs. Account must be taken of the fact, that many IORPs have rather simple pensions plans and no staff of their own, because they are administered by the staff of the undertakings. Such IORPs should not have with additional burdens imposed on them.</p>	
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65.	<p><b>Do stakeholders agree the introduction of the same fit and proper requirements for IORPs as were introduced for insurance and reinsurance undertakings in article 42 (1) of the Solvency II Framework Directive?</b></p> <p>Of course it is essential, that the staff and all responsible persons of IORPs are fit and proper. But the responsibility has to remain by the management board members and should not be extended to staff members who have key-functions.</p>	
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68.	<p><b>What is the view of stakeholders on the proposed principles of the revised IORP directive?</b></p>	

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	<p><b>How do stakeholders evaluate the positive and negative impact of the proposed risk management principles?</b></p> <p>We agree to introduce general principles of risk management. So we agree also with EIOPA that the proposed requirements could significantly increase. Nevertheless the IORPs will need an adequate period for implementation. We agree with EIOPA's assessment that a proper impact assessment is necessary in order to guarantee that the requirements are suitable for IORPs. We reject risk-based capital requirements which are not appropriate for IORPs.</p>	
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72.	<p><b>What is the view of the stakeholders on the proposed new explanatory text on the whistle-blowing obligation of the compliance function?</b></p> <p>We are strongly opposed to the idea that the regulation should make it possible for the compliance function, should it come to existence, to also inform the supervisory authority. We believe that as a general principle staff of an IORP is responsible to the managing board of the IORP and that the managing board of the IORP is responsible to the supervisory authority. This applies for all required governance functions.</p>	
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95.	<p><b>What is the view of stakeholders as regards the level of harmonisation of information requirements that can be reasonably achieved with the revised IORP directive? Besides those envisaged by the EIOPA advice, are there other parts of the regulation that should be harmonized?</b></p> <p>No, we do not see other parts of regulation that should be harmonized.</p>	
96.		