Comments Template on EIOPA-CP-11/006 Response to Call for Advice on the review of Directive 2003/41/EC: second consultation		Deadline 02.01.2012 18:00 CET
Company name:	UK Association of Pension Lawyers	
Disclosure of comments:	EIOPA will make all comments available on its website, except where respondents specifically request that their comments remain confidential. *Please indicate if your comments on this CP should be treated as confidential, by deleting the word **Public** in the column to the left and by inserting the word **Confidential**.*	Public
	The question numbers below correspond to Consultation Paper No. 06 (EIOPA-CP-11/006). **Please follow the instructions for filling in the template:** ⇨ Do **not** change the numbering in column "Question". ⇨ Please fill in your comment in the relevant row. If you have no comment on a question, keep the row empty. ⇨ 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. ⇨ Our IT tool does not allow processing of comments which do not refer to the specific question numbers below. o 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. o If your comment refers to parts of a question, please indicate this in the comment itself. **Please send the completed template to *CP-006@eiopa.europa.eu*, in MSWord Format, (our IT tool does not allow processing of any other formats).**	
Question	**Comment**	
General comment	**A: Introduction:** This document sets out the comments of the UK Association of Pension Lawyers of the United Kingdom (the "APL") on the EIOPA Response to Call for Advice on the review of Directive 2003/41/EC: second consultation. The APL represents members of the UK legal profession with a particular interest in pensions. Currently it has over 1100 members. Our members include most, if not all, of the leading practitioners in the UK in this field. This response is submitted by the International Sub-Committee of the APL. Unlike Pension Funds established in some countries, Pension Funds established in the UK are not regulatory own funds for the purposes of Article 17 of the IORP Directive (Directive 2003/41/EC). Pension Funds in the UK are normally established under trust. This means that they act through their trustees and the Pension Fund does not have a separate legal personality, in contrast to a foundation or stichting which may be used in Belgium or the Netherlands.	

B: General comments

We have a number of general concerns with the approach taken in the Response. Our key concerns relate to:

- the complexity of the approach and the very significant additional regulatory burden that many of the proposals under consideration would impose on IORPs and their sponsors – see (1) below;
- the assumption that the Solvency II Directive is an appropriate benchmark to use in the regulation of IORPs, and that some degree of harmonisation between IORPs and insurance companies is necessary or appropriate – see (2) below;
- the potential economic impact of Solvency II, which seems to have been given little or no consideration – see (3) below;
- the disproportionate impact that the proposals would have on a small number of Member States, in particular the UK and the Netherlands – see (4) below; and
- given that it appears that book reserve pension schemes would remain exempt from the requirements of the Directive, the possibility that the UK would put in place an opt-out mechanism allowing sponsors of IORPs to shift their pension obligations from IORPs to book reserve arrangements – see (5) below.

(1) Complexity of approach and additional regulatory burden

The complexity of the approach under consideration is illustrated by the fact that the consultation document sets out only fairly broad suggestions, but nevertheless runs to over 500 pages. Actual implementing work is likely to be difficult and costly for national legislators and affected IORPs, and ongoing compliance with a regime that included the key elements of the proposed approach would impose a significant continuing cost burden on the resources of IORPs and their sponsors. However, we have yet to see any real evidence that a sensible cost/benefit analysis has been carried out as to whether the steps envisaged are genuinely necessary.

As we noted in our response to the first consultation on the Response to the Call for Advice, every additional layer of regulation in what is, at least in the UK, already an extremely well to over regulated area, imposes additional cost burdens. Every additional Euro or Pound spent on compliance with additional regulations puts up the cost of occupational pension provision by a Euro or a Pound and reduces the amount that can be spent on retirement benefits. We consider that the burden of proof should lie with those proposing additional regulations for pension funds to show that the additional regulation adds real value. In general, we do not believe that the proposed additional level of regulation will add real value (as distinct from theoretical value in a non-commercial environment). It should also be noted that, at a time of severe financial pressure on economies in the European Union, unnecessary additional regulation is difficult to justify. (See (3) below in particular for comments on the likelihood that applying Solvency II will have a negative impact on economic growth.)

We would like to emphasise that the sheer complexity of the document makes it very difficult to analyse all the likely practical consequences of implementing the measures that are under consideration. We would strongly urge EIOPA to reconsider the need for additional regulation, and to press the Commission to do the same.

(2) Use of Solvency II Directive as a benchmark and desirability of harmonisation between IORPs and insurance companies

We remain very concerned that an assumption has been made in advance that Solvency II is an appropriate benchmark to use in the regulation of IORPs, and more broadly that IORPs should be treated like insurance companies unless very good reasons can be found to the contrary. That assumption is in our view misplaced.

As we noted in our response to the first consultation on the Response to the Call for Advice, to argue in favour of harmonisation between these arrangements confuses 2 concepts:

(a) the concept of the insurance company operated for profit, and

(b) the concept of the IORP established on a not-for-profit basis by employers to provide retirement benefits for their employees.

In the UK, IORPs established by employers are non-trading, cannot themselves decide to expand their activities by entering new markets or admitting new members (or customers), cannot generally terminate their activities and do not provide a profit to shareholders. These IORPs do not (and, under the terms of their constitutional documents, generally cannot) "act in a manner similar to insurance companies" (in the sense discussed at paragraph 10.3.20 of the consultation document). Many IORPs are in fact customers of insurance companies not competitors. It is not appropriate to impose Solvency II require hments on those who are not competing (and indeed cannot compete) with insurance companies. A 'level playing field' is not required for non-trading IORPs, because they are not 'players' and are not 'in the field'. The rules intended to support the single market in financial services should only apply to those who are or could be market participants.

Unlike insurance companies, UK IORPs are required by legislation to arrange that their governing trustee boards are composed of at least one-third member nominated directors or trustees (with some very limited exceptions for very small schemes or if there is a wholly independent trustee). Furthermore, subject to UK legislative constraints, the governing documents (trust deeds) of UK IORPs often include benefit adjustment mechanisms of the type referred to in the Annex to the consultation at Section 10.7.

What is also clear beyond doubt is that, if UK defined benefit pension schemes have to be funded like insurance companies, then they would either not exist or would not provide anywhere near the level of benefits which they currently provide. In other words, there is a trade-off between sustainability, affordability and adequacy on the one hand and security on the other hand.

Furthermore, the imposition of a Solvency II-type regime for IORPs would also entail major changes to the liabilities and responsibilities of IORPs (or their trustees) and their employer sponsors, and would be likely to have have a material impact on continued benefit provision to existing IORP members. Any intervention with existing or acquired rights amongst private parties on such a scale requires strong justification. That justification may exist at national levels but not at European Union level.

We have seen no case made that there is any major defect in the existing systems of regulation for IORPs. No real analysis has been done to justify why insurance company regulatory requirements should be applied to IORPs.

We understand that much of the pressure to treat IORPs in the same way as insurance companies comes from countries where either there are no IORPs or IORPs are not the dominant method of pension provision. The UK Government and other organisations, including those that may be viewed as corresponding to the "UK Government's Social Partners", oppose the suggestion that Solvency II is an appropriate benchmark for the regulation of IORPs. We refer EIOPA to the comments of those organisations, as summarised in the introductory comments to the first consultation on the Response to the Call for Advice. We also note the remarkable consistency with which a very diverse group of UK stakeholders oppose the approach of using Solvency II as a benchmark and the proposal to harmonise the treatment of IORPs and insurers.

As can be seen from the above, we do not see where the European Commission considers it derives any mandate to propose that IORPs should be regulated via a Solvency II-type approach.

A number of the questions in the consultation addressed points of detail relating to how a Solvency II-type framework could be reflected in valuation and funding requirements for IORPs (see in particular questions 13 to 33). In the interests of providing EIOPA with a UK technical legal perspective on these matters, we have provided comments in response to these questions on aspects of these points of detail. However, we should make it clear that a number of members of our committee had serious reservations about including comments on these particular questions, insofar as it could be seen as implictly supporting a proposal which we consider fundamentally flawed. The fact of our having commented on the specifics of these questions should not be interpreted as our having given explicit or implicit support to the core premise of applying Solvency II to the generality of IORPs, and those comments can only be viewed as initial thoughts in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of these general comments below), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of these general comments above).

(3) Economic impact of Solvency II

A critical concern is the likelihood that Solvency II will entail such a substantial increase in the cost of providing pension benefits and funding IORPs, that it may (through the diversion of a very significant amount of capital from other business needs and from shareholders) have a major negative impact on the ability of companies that sponsor IORPs to raise equity and debt finance and invest in their businesses. This in turn would have major negative implications for economic growth. The responses of a number of UK stakeholders to the EC Green Paper and to the first consultation on the Response to the CfA have made these points strongly and they must be taken into account in any credible analysis of the options that are available.

Because applying Solvency II would have a disproportionate impact on businesses in some parts of the European Union (see (4) below)) this step would amount to legislating to undermine the competitiveness of businesses in those jurisdictions.

Before any serious consideration can be given to the imposition of Solvency II on IORPs, the only responsible course would be to carry out a further consultation based on a detailed cost/benefit analysis including the implications for raising capital for new business and expanding existing business and the implications for economic growth and for expansion of employment (in particular for young people who are less likely to benefit from IORPs). Detailed feedback and analysis should be available from such an exercise to inform deliberations on policy before meaningful comment can be provided on any proposals to change the IORP Directive.

(4) Disproportionate impact on those Member States that have IORPs

We emphasise once more that the proposed additional regulation of IORPs will have a disproportionate impact on the UK and the Netherlands. As noted in our response to the first consultation on the Response to the Call for Advice, based on the available statistical information we have been able to find, it would appear that 2 EU Member States, the Netherlands and the United Kingdom, between them have IORPs which represent over 75% by value of the assets of IORPs established in the EU. See Appendix 1. A similar conclusion flows from a survey carried out by Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS), which concluded that, with regard to Defined Benefit Schemes, in 2006:

- UK IORPs represented 43% of premiums and 61% of Technical Provisions in Europe; and
- IORPs in the Netherland represented 30% of premiums and 24% of Technical provisions in Europe.

Note: Please see Appendix 1.

In contrast, as shown in Appendix 1 and Appendix 2, insofar as there are IORPS in France, Germany, Italy and Spain, they represent under 5% by value of assets and under 5% of technical provisions. In other words, IORPs are of limited importance to date in those countries. EIOPA has recorded a total of 84 cross-border IORPS in Europe as at June, 2011. By home country the UK and Ireland have by far the most number of cross-border IORPs with 31 and 28 each respectively.

In part, the differing importance of IORPs in the different EU member states reflects the different approaches of those member states to the balance between:

- first pillar retirement provision, and
- second pillar retirement provision.

It also reflects the fact that Member States who place greater emphasis on second pillar pension provision have tended to make most use of either IORPs or unfunded book reserve arrangements – contrast the UK and the Netherlands with Germany.

(See the March 2008 *Survey on fully funded, technical provisions and security mechanisms in the European occupational pensions sector* prepared by the Committee of European Insurance and Occupational Pensions Supervisors, which made clear that differing approaches to this balance, and to the appropriate legal structure and funding arrangements for IORPs, have their roots in long-standing historical and cultural differences that influence employment practices.)

It appears that there is a desire to increase the level of second pillar retirement provision, but the method of encouraging the level of increase of second pillar retirement provision is to over-regulate the funded second pillar retirement provision so that the opposite effect would be achieved. In other words, the over-emphasis on security would have material adverse negative consequences for both adequate and sustainable second pillar retirement provision at a time of very substantial financial pressure on public finances within the EU. It would also make book reserve arrrangements (in our experience a less secure form of pension provision than IORPs) less attractive to sponsors than IORPs, which would be a perverse outcome – see our response to question 1 on this point.

	(5) Option for the UK to opt-out We note that one option for the UK would be to alter its legislation so that: (a) employers could elect to assume the pension obligations of their pension funds so that they become direct obligations on a book reserve basis, and (b) the assets of the pension fund could then be transferred to a security trustee and hypothecated in favour of the beneficiaries to secure the performance of the pension promise by the employer. Such an arrangement would then take UK IORPs outside of the scope of the IORP Directive and put UK pension arrangements in the same position as book reserve schemes operated by German companies (often supported by contractual trust arrangements by way of hypothecation for the book reserve obligations). Such an approach may well be viewed as being in the UK's national interest, given, as noted above, the materiality of UK IORPs relative to those of other EU Member States and the likelihood that applying Solvency II would have a negative impact on the competitiveness of UK businesses, economic growth and second pillar pension provision.	

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1.	**CfA 1 (Scope of the IORP Directive): Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in the advice? Are there any other impacts that should be considered?** We agree with the advice though believe it could be put more strongly and clearly. We believe that EIOPA should be clearer that the scope of the exclusions is not part of the CfA and therefore it is not giving any advice on that subject. As we understand it, EIOPA is saying that all existing occupational and personal pensions would be covered by IORP or other EU regulation and that the extension to non-occupational schemes that are not covered by other EU regulation would require the wholesale rewrite of those regulations and is therefore not recommended. If this is the advice, we agree with it, at least as far as UK schemes are concerned. We agree with the approach of not looking at schemes which are covered by EU regulation other than the IORP Directive but believe, again, that EIOPA should be clearer that it is not advising in relation to such schemes. We note that EIOPA proposes that the current scope of the IORP Directive is not to be extended, but is of the opinion that all types of pension schemes should be subject to high standards of governance and appropriate regulatory and supervisory standards. The exclusion of pay-as-you-go (book reserve) schemes seems to us to be most relevant in this respect. The fact that not all arrangements that provide retirement benefits for employees will be covered by the Directive, such as book reserve schemes, is relevant to and calls into question the justifications for legislative changes based on protection of members and beneficiaries. The vast majority of UK pension schemes – a very high proportion of the existing IORPs in the EU, as noted in our general comments at the beginning of this document (see Appendix 1) – are more akin to book reserve arrangements than to insurance businesses that are subject to Solvency II in that UK IORPs provide security for an employer's pensions promises. The major difference between IORPs and book reserve schemes is that IORPs have the added benefit of ring-fenced assets in addition to sponsor support and, in the UK, a pension protection scheme to give further protection to the employee against the risk of the employer's insolvency. In that sense, members of UK IORPs are already better protected than members of book reserve schemes. Any justification for excluding book reserve schemes from the prudential requirements of the Directive must apply equally or more clearly to such UK IORPs. They should therefore be carved out from the new proposals to the same extent as book reserve arrangement because security for such arrangements is already well covered by domestic and EU legislation (and is in fact better than for book reserve schemes). See also our comments in response to question 10 in this respect. We have no comments on the specific proposals for the extension to DC schemes falling outside all EU prudential regulation as this does not affect the UK.	
2.	**CfA 1 (Scope of the IORP Directive): Are there any other options that should be considered? Please provide details including where possible in respect of impact.** We agree with the limited response made by EIOPA.	
3.		
4.		

5.	**CfA 2 (Definition of cross-border activity): Do stakeholders agree with the analysis of the options (including the positive and negative impacts) as laid out in the advice?** As a general matter, we very strongly disagree with the proposed extension of the definition of "sponsoring undertaking" that is made here – it would have a major impact in the UK. There are numerous IORPs in the UK that have been set up by employers based elsewhere in the EU for their UK-based employees (e.g. branch employees). These IORPs are not considered to be cross-border and nor should they be. Making them so would mean they were subject to the more onerous funding and investment rules applicable to cross-border schemes, and would create a real difficulty for a business to operate cross-border. Particular points of concern are as follows: (a) We consider that if the definition of "sponsoring undertaking" were to be extended, it would need to make clear that the branch in London of a French bank which has established a UK IORP (i.e. one where the UK is that IORP's home country as a usual UK occupational pension scheme under trust) for the benefit of the employees of the French bank working in its London branch is not engaging in cross-border activity. **Note:** The problem with the proposed definition is that, in legal terms, under English law, the French bank is the legal entity on whom the obligation to contribute, under English law, would fall. In other words, the London branch of a French company, or a German company, or a Belgian company, is not a separate legal entity from the French, German or Belgian company as a matter of English law. (b) An EU company that has (or has acquired) a UK business with a UK IORP that is sponsored by the UK company that employs the members could also be treated as engaging in cross-border activity (and hence subject to the full funding requirement) if it has provided a guarantee in respect of the liabilities of the UK company to the IORP. This would penalise EU companies that have chosen (in a particular commercial and regulatory context) to act in a responsible manner to safeguard benefits under IORPs within their groups. This could have perverse effects in relation to the willingness of non-UK EU parent groups to provide guarantees in the future. It may also create a competitive disadvantage for EU companies investing in or operating UK businesses as compared with “pure” UK groups and non EU investors with UK businesses, which could amount to legislating to undermine competitivity (see part (3) of our general comments at the beginning of this document) and would also amount to a very material interference with existing rights (see part (2) of our general comments at the beginning of this at the beginning of this document). Similar considerations (of discincentive to groups to act responsibly and provide financial support) apply in other areas raised in the consultation – see our comments in response to questions 60 and 89 below. (c) The advice in section 5.5 does not highlight the difficulties of complying with the SLL from three different states and thus the negative impacts of this approach. The proposal to introduce a requirement to respect applicable SLL in addition to the home and host member state approach would increase the complexity and uncertainty from this approach. (d) The analysis does not point out the risks associated with different interpretations of where a sponsoring undertaking may be "located" in the new "host member state" definition. The location may be defined in a number of different ways, such as the place of incorporation, the location of managers or the location of active business units and there is certainly a risk of uncertainty to be highlighted.	

6.	**CfA 3 (Ring-fencing): What is the view of stakeholders on the proposed principles of ring-fencing? Are the principles responding to the concerns expressed in the CfA?** Our response to this question will be divided into four parts: • (A) – some preliminary comments on this issue; • (B) – our comments on the extent to which the principles respond to the concerns expressed in the CfA; • (C) – our comments on the proposed principles in respect of cross-border activity; and • (D) – our comments on the proposed principles in respect of stress situations. **(A) – Preliminary comments** Our view is that the aim of protection of pension benefits must be linked to expansion of provision and mobility. Otherwise it is merely about legislating for jurisdictions which have existing provision for protection of benefits, which would not be justified by Treaty aims and would be contrary to the principle of subsidiarity. Ring-fencing has a role in ensuring new regulation designed to create a level playing field and develop or enhance a market in provision of retirement benefits does not have a disproportionate impact on existing arrangements and create unwarranted interference with local prudential regulation of existing arrangements or social and labour law and with the rights and obligations and financial burdens of employers who have established pension arrangements in a different regulatory environment. It is appropriate for ring-fencing to operate between arrangements which are subject to different regulatory regimes. This is the approach taken under the existing IORP Directive in Article 3 (ring-fencing compulsory pension arrangements which are considered to be social security schemes from non-compulsory occupational retirement business), Article 4 and Article 7 (ring-fencing occupational retirement provision business of insurance undertakings from other insurance activities), Article 8 (legal separation between sponsoring entity and institution for occupational retirement provision) and Articles 16, 18 and 21 (option for to impose requirement for ring-fencing of assets and liabilities related to cross-border activity).	

There is tension in the legislative intent between:

- "what is appropriate ring-fencing in the context of cross-border activity"
- "general principles which warrant ring-fencing measures in the case of stress situations" and
- "which would improve adequate protection of pension benefits".

The matters that warrant ring-fencing may be:

- different regulatory regimes (as above);
- different sponsor;
- different benefit terms applicable pursuant to employment contract or applicable social and labour law;
- different protections under social and labour law; and
- local prudential requirements or pension protection schemes.

We are not clear that of itself protection of pension benefits as a general aim (rather than protection of particular pension benefits) is a reason for imposing any levels of ring-fencing. In particular, as a statistical fact, cross-subsidy or "solidarity", to use EIOPA's term, improves the protection of pension benefits for the generality even though it weakens protection for particular groups. The issue is when is it right to allow or to require pension benefits to be protected by ring-fencing.

We do not think that the general benefit from "solidarity" can be reason enough to legislate to require removal of ring-fencing for acquired protection of workers who currently benefit from ring-fencing or priorities.

Where ring-fencing is appropriate, we think only "patrimony protection rules" applicable either upfront or when the stress situation arises are effective and administrative ring-fencing measures are necessary to enable patrimony protection rules to be put in place in stress situations.

Where ring-fencing is to be imposed on a mandatory basis, there should be good reason if it removes current levels of "solidarity" protecting acquired rights of individuals or sponsors.

There should be no high barriers to permitting ring-fencing on a voluntary basis at the option of sponsors, IORPs or member states, since ring-fencing (and other protections such as priorities) defines the financial risks which such parties are willing to accept and the level of protection of pension benefits which they should be able to agree to the same extent they are able to agree the level of such benefits.

(B) – Are the principles responding to the concerns expressed in the CfA?

This is not clear. The concerns expressed in the CfA itself are not clear. As noted in our preliminary comments on this question above, there is tension in the legislative intent between:

- "what is appropriate ring-fencing in the context of cross-border activity";
- "general principles which warrant ring-fencing measures in the case of stress situations"; and
- "which would improve adequate protection of pension benefits".

The aims of the legislation appear to cover competing objectives:

- protecting pension benefits;
- expanding pension provision;
- removing barriers to competition between IORPs in different jurisdictions and between IORPs and insurance companies.

The objective of increasing protection for existing pension rights needs to be justified as it would have the effect of increasing financial burdens on existing IORPs and sponsors of IORPs. This would have a disproportionate impact on businesses in some parts of the European Union and could be seen as legislating to undermine competitivity in those jurisdictions (see parts (3) and (4) of our general comments at the beginning of this document). Furthermore, any intervention with existing or acquired rights or private parties requires strong justification. That justification may exist at national levels but not at European Union level. The objective of creating a level playing field or increased competition between IORPs and insurance companies or expanding pension provision will not be served by such increase in protections.

The aim of removing barriers to competition between IORPs in different jurisdictions and between IORPs and insurance companies may justify legislating in areas where IORPs and insurance companies already compete. It cannot justify legislating for IORPs that are restricted in their activities and do not operate commercially. It also cannot justify legislating for defined benefit IORPs if there is no clear evidence that insurance companies can and wish to compete for such business.

Having regard to the above, we think an appropriate objective for ring-fencing legislation is to enable a legal framework to be developed for cross-border IORPs or certain types of IORPs without interference with existing rights of members, sponsors and others or with the operation of existing IORPs. We think with this objective in mind the principles would be appropriate.

	(C) – The scope of ring-fencing measures needs to be clarified in the context of cross-border activity by IORPs In considering ring fencing measures for cross border activity, as a general comment it is important to balance the concerns of the protection of benefits with the other purposes of the IORP Directive, particularly that of allowing and facilitating the provision of cross border IORPs. As noted in section 5, the incidence of cross border IORPs is low and, in fact, appears to have reduced since the introduction of the directive. A IORP which is ring-fenced as between the portion in each Member State in which it operates loses many of the advantages that it might otherwise gain in terms of ease of administration and the value of economies of scale and diversification of risk from a shared investment pool. In those circumstances, ring-fencing will make the cross border IORP significantly less attractive for the sponsoring undertaking compared with operating different IORPs in each jurisdiction, and is likely to result in a further reduction in the number of cross border IORPs in operation. In cross border ring fencing, this particular concern needs to be balanced against the need to provide protection. Our specific comments on the proposed principles are as follows: 1. We broadly agree that the aim of Articles 16.3 and 18.7 is the same, i.e. facilitating compliance and protection of rights of members and beneficiaries, but the scope of each is different. Article 16.3 appears aimed at ensuring full solvency for cross border without requiring full solvency for local activities, and Article 18.7 is directed at investments and ratios of assets of particular categories that may be held by an IORP. However, even if the aim and scope is not identical, it may be difficult to operate ring-fencing for each matter differently within any one IORP. 2. Option 1 is preferred. 3. We agree. 4. We agree.	

	(D) – The text of an article to be inserted into the Directive with the aim of establishing the general principles which warrant ring-fencing measures in the case of stress situations including the legal implications and common safeguards, which would improve adequate protection of pension benefits In relation to stress situations, the need for ring fencing is of more relevance. Within the UK, the IORPs are held separately from other businesses and as such the requirements should be complied with without difficulty. So long as the concept of a stress situation is closely defined and relating to a genuine risk of loss to the IORP from insolvency or similar, as a general matter we believe that this is an appropriate response. Our specific comments on the proposed principles are as follows: 5. We agree. 6. If stress situations are identified as situations in which benefits may be reduced on the liquidation of the IORP or part of the IORP, we agree that any ring-fencing needs to be effective in such situations. We would also think that such stress situations may be triggers for shifting from administrative ring-fencing to patrimony protection but that they should not necessarily be triggers for ring-fencing that had not previously existed. However, if under existing arrangements stress situations are triggers for ring-fencing we would think it inappropriate to interfere with such arrangements. Therefore we would recommend that legislation should not prohibit stress situations being triggers for ring-fencing (subject to the conditions set out at 3.). 7. We agree except in respect of transfers. The prohibition on transfers between IORPs and indeed between IORPs and insurance companies may be anti-competitive. Transfers should be permitted with the consent of the members or beneficiaries. However, transfers must not be permitted in stress situations to the extent that they affect the value of any members' or beneficiaries' rights and the level of protection without the consent of such members and beneficiaries.	

	8. We would suggest it may be inappropriate for the IORP to determine the aim and functioning of ring-fencing in relation to employer sponsored IORPs that have no independent business. Instead, the sponsor may determine the aim and functioning of ring-fencing either alone or with the IORP. Existing rights to trigger ring-fencing should not be varied by legislation without good reason. 9. We are not sure of the reasoning in suggesting that supervisory authorities should have the power to impose ring-fencing measures in situations where the IORP and/or sponsor do not determine to use ring-fencing and where ring-fencing is not mandatory under either the directive or legislation in the host or home Member States. As ring-fencing benefits some members and beneficiaries and disadvantages others (loss of "solidarity"), such powers would be an intervention in the rights of such members and beneficiaries by an independent body without legislative authority. This may be contrary to the ECHR. 10. We broadly agree. However, we would recommend that the restrictions on transfers under Article 4 and as proposed for Article 16.3 and 18.7 be relaxed to allow transfers either with the consent of affected members and beneficiaries or on terms which do not materially affect the protection of their benefits or as may be permitted by Member States where ring-fencing is not mandatory. 11. We agree. 12. We agree. 13. We agree that Member States should have the option to determine privilege rules. Privilege rules as suggested which put members ahead of employees of the IORP and tax authorities and perhaps creditors and service providers to the IORP risk making it expensive or difficult for IORPs to operate in jurisdictions with such privilege rules. These rules could have significant impact on protection in stress situations and on the development of IORPs and would undermine the "level playing field" objective. We think this is not reason enough to prohibit privilege rules or to impose them where none currently apply because such privilege rules might hamper the development of pension provision in IORPs and prohibiting them would be an inappropriate interference in the private rights of members, beneficiaries and other creditors of the IORPs not justified by the objectives of the directive. 14. We agree.	

	Comments Template on EIOPA-CP-11/006 Response to Call for Advice on the review of Directive 2003/41/EC: second consultation	Deadline 02.01.2012 18:00 CET
7.	**CfA 3 (Ring-fencing): How do stakeholders evaluate the positive and negative impacts of the introduction of the proposed principles of ring-fencing?** The impact assessment fails to point out the negative effects of ring-fencing, in terms of its reduction in the effectiveness of a cross border IORPs as described in our response to question 6 above. The associated administrative costs in most cases will incentivise employers simply to operate the separate IORPs in different jurisdictions, defeating the purpose of a cross border arrangement. This is an issue for the IORP and sponsoring undertaking but also, we would argue, for the member, which loses the advantage of a business-wide IORP. As noted in our response to question 6 above (paragraph 9), the imposition of ring-fencing can benefit some members and beneficiaries and disadvantage others. Any interference with existing rights is negative. It may benefit some members or beneficiaries but only to the detriment of others. If ring-fencing principles were to be introduced in relation to new IORPs or new cross-border or other activities of an IORP without impacting existing rights, they should provide clarity on the level of protection for members and beneficiaries in stress situations and should enable higher (or lower) levels of protection in new arrangements.	
8.	**CfA 3 (Ring-fencing): What is the view of stakeholders on making ring-fencing obligatory in case of cross-border activity? Should the Member States be obliged to introduce such rules or only in cases where investment rules are not compatible?** For the reasons given in response to question 6 above, it is important to limit the use of ring-fencing to the situations where it is necessary to reduce unacceptable risks. A fully ring fenced section of an IORPs is, in effect, an entirely separate IORP. The purposes of the IORP Directive included a vision of cross border pensions with no distinction between different member states, and this is lost entirely if all cross border IORPs are ring fenced. A requirement to ring fence assets will further disincentivise cross border IORPs, particularly given the administrative costs and loss of diversification that would result. We do not see an advantage to ring fencing merely due to cross border activity unless it is introduced as a means of avoiding disproportionate regulation. We would argue strongly that cross-border ring-fencing should not be generally mandatory, and that it would only be appropriate for Member States to be obliged to: ■ introduce ring-fencing only where investment or funding rules or other prudential or privilege rules are not compatible; or ■ permit the operation of ring-fencing rules at the option of an IORP or its sponsor.	

9.	**CfA 3 (Ring-fencing): What is the view of stakeholders on the introduction of privilege rules? Should the Member State be obliged to introduce such rules? If not, why not? If yes why?** (a) Article 7 of the IORP Directive requires each IORP to limit its activities to retirement benefit related operations and activities arising therefrom to avoid cross-contamination risk (e.g. between providing pension benefits and operating nuclear power stations). Furthermore, under Article 18(2) of the IORP Directive, IORPs may not borrow (other than for liquidity purposes and on a temporary basis) or act as a guarantor on behalf of third parties. (b) In general, the external creditors of a UK IORP (i.e. creditors other than members and their survivors who have rights to receive pension benefits) are few in number and, in general, will be limited to service providers to the UK IORP in respect of their fees and to the tax authorities for any taxes that should have been withheld on pension benefits when paid. (c) However, where, as is permitted by Article 18(1)(d), the IORP has invested in derivative instruments for the purpose of reduction in investment risk or to facilitate efficient portfolio management, there will be situations where the IORP will be net "out of the money" on the derivative instruments which it has entered into with that counterparty. In such a situation, the counterparty will be an external creditor of the IORP. (d) If privilege rules were to be put in place, along the lines of those under the Insurance Directives under which direct policyholders rank ahead of other unsecured creditors on the insolvency of an insurance company, then this is likely to make a counterparty dealing with the IORP willing to transact only on the basis of being granted security over the assets of the IORP. **Note:** At present, most UK IORPs will have liabilities to pay benefits which, if valued as the cost of securing those liabilities with an insurance company, would substantially exceed their assets. (e) We would note that, in the UK, this has become an increasingly common approach for those dealing with insurance companies who are not direct policyholders. Examples include: (i) reinsurance policyholders, where it is normal practice for floating charges to be entered into to put the reinsurance policyholder in the same position as the direct policyholder, and (ii) other substantial unsecured creditors of insurance companies (usually the UK IORP established by that insurance company to provide pension benefits for its employees and former employees) which may seek a fixed charge over the assets of the insurance company in order to prevent the claims of the UK IORP ranking behind the claims of the direct policyholders. (f) In other words, if you move from a theoretical analysis of the position to a practical impact, it would appear to be the case that such a preference rule would, in practice, simply increase the cost of doing business (by appropriate legal mechanisms being used to negate the consequences of the privilege rule).	

10.	**CfA 4 (Prudential regulation and social labour law): Do stakeholders agree with the analysis of the options as laid out in this advice, including the preference for option 2?** The options presented, to do nothing, or to define the scope of prudential regulation, seem complete and we agree with the analysis. We agree with the recommendation to adopt option 2. We note that the CfA has asked EIOPA to address the following subject – "The IORP Directive needs to determine the scope of prudential regulation, as administered by the home Member State". Currently, the scope of prudential regulation is not explicitly defined under the Directive. The EIOPA response discusses the fact that social and labour law ("SLL"), while illustrated with a few examples, is also not defined. SLL in the context of cross-border activity is the responsibility of the "host state", in contrast to prudential regulation which is the responsibility of the "home state" (i.e. the country in which the IORP is registered). The response highlights the fact that different Member States have prescribed SLL in different ways (to some extent a function of the very different domestic circumstances and legal structures underlying the occupational pension arrangements in each country). Although analysis has not been carried out, it is felt likely that prudential regulation is similarly subject to significant variation between Member States. The lack of definition of both prudential regulation and SLL means there is significant scope for both overlap and "gaps" in areas of responsibility in the context of cross-border activity. The EIOPA response recommends explicitly defining prudential regulation, based on existing requirements currently mentioned throughout the Directive as responsibilities of the Member State in which the IORP is location. It recognises that this will still leave scope for "grey areas" and recommends formalising a system of "concurrent competence" where two sets of requirements (for example on information to be given to members) coexist. Although not included in the final advice, the discussion of the policy option suggests that where a conflict arises the SLL should prevail. While many specificities of IORPs have been identified, there is little focus on the fact that very many (if not the majority of) IORPs are not marketing to the public and that legislation aimed at protecting customers in relation to insurance companies has no application in relation to IORPs, which may be viewed as 'safe-deposit boxes' for an employer's pension promises to its employees. This fundamental difference is also the reason why the sanctions for breaching security mechanisms under Solvency II cannot be easily adapted to IORPs (terminating activities, transferring their business to another insurance company). The fact that not all arrangements that provide benefits for employees will be covered, such as book reserve schemes, is relevant to and calls into question the justifications for legislative changes based on protection of members and beneficiaries. The vast majority of UK pension schemes – a high proportion of the existing IORPs in the EU – are more akin to book reserve arrangements in that they provide security for an employer's pensions promises; the major difference is that they have the added benefit of ring-fenced assets in addition to sponsor support and, in the UK, a pension protection scheme to give further protection to the employee against the risk of the employer's insolvency. In that sense, members of UK IORPs are better protected than members of book reserve schemes. Any justification for excluding book reserve schemes from prudential regulation must apply equally or more clearly to such UK IORPs. They should therefore be carved out from the new proposals to the same extent as book reserve arrangement because security for such arrangements is already well covered by domestic and EU legislation (and is in fact better than for book reserve schemes).	

11.	**CfA 4 (Prudential regulation and social labour law): How would you assess the impact of option 2?** We would not expect an adverse impact on any stakeholders as a result of explicitly determining the scope of prudential regulation in the manner proposed in option 2. We would expect the adoption of option 2 to bring an increased level of certainty to all stakeholders in the context of cross border activity, which could encourage an increased level of market activity in this area (while recognising that the lack of certainty on prudential regulation and SLL is only one, and not the most important, of the current barriers to the adoption of cross border arrangements).	

12.	**Chapter 8 Quantitative requirements: What is the view of 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?** **<u>General comments on approach underlying the holistic balance sheet proposal and on the goal of harmonisation</u>** As we interpret it, the holistic balance sheet is viewed primarily as a means of achieving a much deeper degree of harmonisation than is currently the case in the sphere of IORPs. Under this logic, the proposal would reconcile the great differences in the nature of IORPs across the Member States within a single framework by enabling the imposition of a Solvency II framework for IORPs, and the accommodation of IORPs within such a framework despite the fundamental differences between (the generality of) IORPs and insurance companies. In this respect we note EIOPA's desire (as stated at paragraph 8.1.4) to satisfy the objectives set by the Commission, in particular the achievement of a much larger degree of harmonisation than is currently the case in the sphere of IORPs (whereby EU legislation would not need additional requirements at the national level) and a similar or uniform level of security across Member States. In our view, the objective of harmonising the regulatory framework for IORPs across Member States to this extent is misconceived. The current IORP Directive already provides for a degree of harmonisation to the extent necessary to allow for the achievement of certain key goals (e.g. facilitating the common market in financial services through the removal of restrictions on the manner in which IORPs' assets could be invested, or attaining a minimum degree of security for the benefits of the members and beneficiaries of IORPs through a mandatory requirement that the employer sponsors of defined benefit IORPs other than regulatory own funds IORPs provide funding under a recovery plan to remedy any deficit disclosed by mandatory regular valuations). We have seen no evidence in support of any case that a much greater degree of harmonisation is justified, or in support of any argument that the existing approach to regulation of IORPs across Europe is flawed. Indeed, there seems to be an underlying assumption that harmonisation in the sphere of IORPs is desirable for its own sake, and to such an extent that little if any justification is offered as to whether this is a necessary or desirable objective. In each Member State, second pillar occupational pension provision has been characterised by very different legal structures and, often, features of benefit design, reflecting long-standing historical and cultural differences that influence employment practices. As the March 2008 *Survey on fully funded, technical provisions and security mechanisms in the European occupational pensions sector* prepared by the Committee of European Insurance and Occupational Pensions Supervisors made clear, these differences have in turn driven very distinct approaches to funding and security arrangements. To pursue the objective of harmonisation across Member States in relation to IORPs' funding and security arrangements (as well as closely linked areas such as governance and regulatory supervision) would entail a disregard of the deeply-rooted nature of the differences in approach and, given the inherent complexity in the IORP system used in each Member State (complexities which are necessarily difficult to convey at the European Union level of policy formation), the pursuit of more thoroughgoing harmonisation would be dangerous and run the risk of unintended consequences.	

Furthermore, harmonisation would also require major revisions to the European regulatory structure for IORPs and hence in the legislative regimes of Member States and the compliance burden borne by IORPs and their sponsors, which in turn would entail significant costs that would to a considerable extent discourage second pillar pension provision (see our general comments at the beginning of this document). In this sense, the pursuit of the objective of harmonisation would directly conflict with the goal of improving second pillar pension provision.

The desirability of the deeper harmonisation of regulatory requirements governing IORPs between Member States is not such that it should necessarily outweigh other important considerations, and the imposition of deeper harmonisation should be pursued at the cost of substantial negative effects in other areas.

Specific comments on the the holistic balance sheet proposal

We have a number of concerns with the holistic balance sheet proposal as currently outlined.

- As an approach to IORP funding and benefit security it would be highly complex and difficult to implement. Its complexity is apparently the result of seeking to integrate the regulation of IORPs with the framework provided for insurers by the Solvency II Directive, and in this sense exemplifies the fact that the regulatory regime for insurers is not appropriate for IORPs, which are very different entities operating in very different contexts.
- In particular, we do not agree that it would be appropriate to impose on IORPs the Solvency II regime for the calculation of risk based capital requirements (see our general comments set out at the beginning of this document on why it is not appropriate to treat IORPs and insurers as carrying out similar functions and as potentially subject to similar regulatory regimes).
- The proposal to treat the sponsor covenant as a "contingent asset" of the IORP is artificial and potentially entails major negative consequences. We see it as positive that EIOPA is willing to recognise and place value on the sponsor covenant – a factor which is a fundamental distinguishing feature between IORPs (other than regulatory own funds) and insurers. However, to count the sponsor covenant as an "asset" of the IORP is conceptually difficult. UK defined benefit occupational pension schemes have extensive experience in assessing the sponsor covenant for funding, investment and risk management purposes and this experience demonstrates that it would very difficult to design a consistent approach to assessing and placing value on the sponsor covenant which could be counted on the IORP balance sheet. Covenant assessment for the purposes of determining funding requirements for a defined benefit pension scheme if often only meaningful in the context of the very specific circumstances of that scheme, with different value often being placed on different aspects of the covenant and the sponsor's business depending on the needs of the scheme. It also raises the question of whether disposals of assets by sponsors are to be restricted if such assets are treated as being on the IORP balance sheet. In our view, the ability of the IORP to have recourse to the sponsor is a key reason why it is unnecessary to impose the Solvency II regime (or a regime that is consistent with it) on IORPs.

However, we welcome the willingness of EIOPA to recognise and take account of the significance of the sponsor covenant and pension protection schemes. Our view is that it is unnecessary to change the existing IORP Directive in relation to funding and security precisely because it enables Member States to take due account of these factors. If EIOPA is nonetheless minded to advise that the IORP Directive be changed in relation to funding and security, we would urge that the approach adopted allow for these matters to be taken into account in a more workable manner.

13.	**CfA 5 (Valuation of assets, liabilities and technical provisions): Do stakeholders agree that assets of IORPs should be valued on a market-consistent basis?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is that the concept of a "market consistent basis" appears logical, but market volatility is de-stabilising and negative in its effects, so consideration should be given to some smoothing. Input is also needed from the actuarial profession to highlight any practical or conceptual difficulties inherent in this approach.	

14.	**CfA 5 (Valuation of assets, liabilities and technical provisions): 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?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is that the transfer value principle should only be relevant in circumstances where pension rights under an IORP are to be assumed by another IORP (or insurance company) and the application of that option should be confined to circumstances where it is relevant. The "price" for a third party IORP to assume transferred liabilities is completely inappropriate for (and irrelevant to) valuing the liabilities in an IORP which continues to be supported over the long term by the covenant of its employer sponsor.	
15.	**CfA 5 (Valuation of assets, liabilities and technical provisions): Do stakeholders agree that the own credit standing of IORPs should not be taken into account when valuing liabilities?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is that it appears correct to exclude the own credit standing of the insurance or re-insurance undertaking when calculating the value of liabilities. The credit standing would be relevant when considering whether it would be prudent to make a transfer to that undertaking.	

16.	**CfA 5 (Valuation of assets, liabilities and technical provisions): What is the stakeholders' view on inserting a recital in the IORP Directive saying that supervisory valuation standards should, to the extent appropriate, be compatible with accounting standards?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is that we agree with the views expressed in paragraph 9.3.23 that the wording does not appear to add a great deal and could cause confusion.	
17.	**CfA 5 (Valuation of assets, liabilities and technical provisions): Do stakeholders agree with the EIOPA view to adopt Articles 17(1), (4) and (5) with appropriate amendments into a revised IORP Directive? What is the stakeholders' view on the two options regarding Article 76(3)?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is that Article 76 provides a framework which is relevant to insurance and re-insurance undertakings and widening it to IORPs would be to extend it to financial structures which are quite different. One size does not fit all.	

18.	**CfA 5 (Valuation of assets, liabilities and technical provisions):What is the stakeholders' view on the three options regarding the inclusion and calculation of a risk margin as introduced by Article 77?** We support leaving the IORP Directive unchanged. The extension of Solvency II principles to IORPs is misplaced.	
19.	**CfA 5 (Valuation of assets, liabilities and technical provisions): Do stakeholders agree with the proposed conditions defining in what cases IORPs should take into account future accruals or not when establishing technical provisions?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is that we think that the IORP Directive provisions on technical provisions should not be extended beyond accrued rights. The extent to which future service benefits represent legal rights for employees or can be changed by the sponsor is very different from Member State to Member State and from benefit to benefit, and adopting a uniform rule for funding for future service rights is likely to create significant confusion. The suggested language is also difficult to interpret.	

20.	**CfA 5 (Valuation of assets, liabilities and technical provisions): Do stakeholders agree that the best estimate of IORPs should be calculated gross without deduction of amount recoverable from reinsurance contracts and special purpose vehicles?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is that if the best estimate is to correspond to the probability-weighted average of future cash flows, it is appropriate to include in the calculation amounts recoverable from reinsurance and special purpose vehicles, where there is a right for the IORP to receive payment.	
21.		

22.	**CfA 5 (Valuation of assets, liabilities and technical provisions): Do stakeholders agree that expenses incurred by the IORP in servicing accrued pension right should be taken into account in technical provisions as introduced by Article 78 of Solvency II?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is that some IORPs provide for expenses to be paid by the sponsor direct and there would therefore be double counting of expenses, if they were also automatically taken into account in the technical provisions. This point is acknowledged at paragraph 9.3 104. It would therefore be more appropriate to provide that the expenses shall be included in the technical provisions unless there is a sponsor covenant to pay.	

23.	**CfA 5 (Valuation of assets, liabilities and technical provisions): Do stakeholders agree with the analysis regarding the inclusion of unconditional, conditional and discretionary benefits in technical provisions as introduced by Article 78 of Solvency II? Do stakeholders find that discretionary benefits should be included in the best estimate of technical provisions? Is the Solvency II article on surplus funds useful for IORPs in this respect?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is that we agree with the analysis of what amounts to an unconditional, conditional or discretionary benefit. We consider that unconditional benefits only should be included in the technical provisions. Unless the IORP must pay a benefit i.e. it is unconditional, the sponsor should not be required to fund for it. They should not therefore be included in the best estimate of technical provisions. While Article 91 of Solvency II may be of some application where benefits are secured with an insurer, it is not relevant to the type of structure where the sponsor funds the IORP and surplus arises because of outperformance of assets in relation to the cost of providing unconditional benefits. Such excess funds are appropriately governed by the rules of the IORP and existing legislation under national laws.	

24.	**CfA 5 (Valuation of assets, liabilities and technical provisions): Do stakeholders agree with EIOPA's view of introducing Article 79 of Solvency II with appropriate amendments into a revised IORP Directive regarding allowances for financial guarantees and contractual options when establishing technical provisions?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is that the UK already has a regulatory structure in place for establishing technical provisions. As set out at 9.3.138, it is important that proportionality should be taken into account and implementing a universal valuation technique across Europe for all schemes is disproportionate as there would be limited value in practice. Therefore, we do not agree with EIOPA's view.	
25.	**CfA 5 (Valuation of assets, liabilities and technical provisions): Do stakeholders agree that it would be useful to introduce Article 80 of Solvency II with appropriate amendments into a revised IORP Directive regarding appropriate segmentation of risk groups when calculating technical provisions?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is that we do not agree that the introduction of Article 80 into the context of a new IORP Directive would be useful. Additional wording may cause confusion and is not necessary.	

26.	**CfA 5 (Valuation of assets, liabilities and technical provisions): What is the view of stakeholders on the two options regarding recoverables from reinsurance contracts and special purpose vehicles as introduced by Article 81 of Solvency II?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is that Option 1 (not to include Article 81 but incorporate its principles in the calculation of technical provisions) is the most appropriate out of the two options, but we must note that both options are not necessary given the lesser importance of this in relation to IORPs.	
27.		

28.	**CfA 5 (Valuation of assets, liabilities and technical provisions): Do stakeholders believe that it would be useful to introduce Article 83 of Solvency II with appropriate amendments into a revised IORP Directive regarding the need for assumptions to calculate technical provisions to be regularly compared against experience and adjustments made when appropriate?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is that we do not think it makes sense to require IORPs to consider specific experience and adjust for it. While large IORPs will do this, many IORPs are too small for their own experience to be statistically significant – a small number of deaths could have a big impact on a small IORP's liabilities, but is unlikely to be representative of its future position. It makes sense for small schemes to base their arrangements on mortality experience in general rather than their own.	

29.	**CfA 5 (Valuation of assets, liabilities and technical provisions): Do stakeholders agree that it would be useful to introduce Article 84 of Solvency II with appropriate amendments into a revised IORP Directive regarding the need for IORPs to demonstrate to the supervisor on request the appropriateness of the level of technical provisions?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is that we do not believe that the introduction of Article 84 would have much of an impact on the current position in the UK as there is already a requirement for technical provisions to be submitted to the UK supervisor (the Pensions Regulator) for review. As acknowledged in paragraph 9.3.167, the impact of such an introduction would be minimal.	
30.	**CfA 5 (Valuation of assets, liabilities and technical provisions): Do stakeholders agree that it would be useful to introduce Article 85 of Solvency II with appropriate amendments into a revised IORP Directive regarding powers of the supervisor to require IORPs to raise the amount of technical provisions corresponding to supervisory law?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is that we do not agree that this would be a useful introduction. The Regulator in the UK already has this power. The introduction of an additional regulatory power/body would, again, increase costs and add confusion to the workable system that is currently in place in the UK.	

31.	**CfA 5 (Valuation of assets, liabilities and technical provisions): Do stakeholders agree that a new IORP Directive should allow for the Commission to adopt level 2 implementing measures regarding the calculation of technical provisions as introduced by Article 86 of Solvency II?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is: no, we do not think the Commission should be able to adopt level 2 implementing measures. The suggestion in paragraph 9.3.175 that "more detailed rules" would be required indicates that these measures will be inflexible and difficult for every scheme to adopt in the same way.	

32.	**CfA 5 (Valuation of assets, liabilities and technical provisions): Do stakeholders agree that individual Member States should not be permitted to set additional rules in relation to the calculation of technical provisions as currently allowed under Article 15(5) of the IORP Directive?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is: no, we do not agree. Individual Member States should be allowed to implement their own additional rules in relation to the calculation of technical provisions. Given the significant differences in relation to how IORPs are structured and funded in different Member States and the inherent complexity in the IORP system used in each Member State (complexities which are necessarily difficult to convey at the European Union level of policy formation), we believe that enabling some degree of flexibility is desirable and indeed that not allowing flexibility would be dangerous given the risk of unintended consequences. We do not believe that the desirability of harmonisation of regulatory requirements governing IORPs between Member States is such that it should necessarily outweigh other important considerations to the extent that the imposition of harmonisation should be pursued at the cost of substantial negative effects in other areas – see our response to question 12 above for more detailed comments on this point.	

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33.	**CfA 5 (Valuation of assets, liabilities and technical provisions): What is the stakeholders' view on the analysis regarding sponsor support? Do stakeholders agree with EIOPA that IORPs should value all forms of sponsor support as an asset and take account of their risk-mitigating effect in the calculation of the solvency capital requirement?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. We have nonetheless provided a comment in response to the specific question raised here, in the interests of providing EIOPA with a UK technical legal perspective on this matter, but (to emphasise a point made in raised in part (2) of our general comments at the beginning of this document) our having commented on this question should not be interpreted as our having given explicit or implicit support to the proposition of applying Solvency II to the generality of IORPs. Furthermore, this comment can only be viewed as an initial thought in the absence of further consultation on the potential economic effects of Solvency II (see the concerns raised in part (3) of our general comments at the beginning of this document), and indeed in the absence of an opportunity to carry out a more detailed technical analysis of the proposals under consideration and of the likely practical consequences of implementing them (see the comments made in the last paragraph of part (1) of our general comments at the beginning of this document). With those important qualifications in mind, our comment in response to this specific question is that the "one size fits all" approach to the valuation of sponsor support ignores the complexities and costs of such a valuation. See our comments on sponsor covenant in response to question 12 above. We strongly suggest that a financial impact assessment of the proposed harmonised valuation techniques (and the alignment of the IORP directive with Solvency II as a whole) is undertaken in order for the stakeholders to provide fully informed responses.	
34.	**CfA 6 (Security mechanisms): Do the stakeholders agree that Articles 87-99 of Solvency II on own funds should be applied to IORPs? What amendments, other than the ones suggested by EIOPA, should be made?** We do not support the core premise of adapting Solvency II for the generality of IORPs or re-legislating for IORPs by reference to the single market or a level playing field with insurance companies without reference to whether the IORPs actually or potentially "act in a manner similar to insurance companies" or are genuinely and meaningfully competing or operating in the same market as insurance companies. See the general comments we make in relation to question 38 below. For those IORPs or other pension providers that are trading (whether or not for profit) and are soliciting customers who might instead approach an insurance company, it may be appropriate to adapt Articles 87-99 of Solvency II, following a thorough analysis of the issues.	
35.	**CfA 6 (Security mechanisms): Do stakeholders agree that subordinated loans from employers to the IORP should be explicitly allowed in a revised IORP Directive?** Yes.	

36.	**CfA 6 (Security mechanisms): What is the stakeholders' view on the analysis whether to introduce or not a uniform security level for IORPs across Europe? Do the stakeholders agree with EIOPA's decision not to recommend a specific probability? If not, what specific probability should be imposed upon IORPs?** It is inappropriate to introduce a uniform security level for IORPs across Europe because it would harm pension provision by harming the confidence of employers (and related companies who may provide guarantees) who engage voluntarily in pension provision. Employer confidence has already been damaged by repeated changes to regulation. It is also inappropriate because it will not achieve any of the legitimate aims identified. Members and beneficiaries will not have greater clarity or understanding about the security of their pensions for the reasons identified at paragraph 10.3.39: it will create only a "false sense of "uniform" security" because of benefit reduction mechanisms that may apply, as well as privilege rules and the availability of pension protection schemes and sponsor support if not included in any 'holistic balance sheet'. Further, members and beneficiaries, unlike the customers of insurance companies, generally cannot switch between IORPs, at least not in the UK where the IORP is more like a 'safe-deposit box' providing security for their employer's pension promises. There are therefore no member choices for which a uniform security level would provide useful information. We agree with EIOPA's decision not to recommend a specific probability.	
37.	**CfA 6 (Security mechanisms): Do the stakeholders agree that the confidence level should apply to a one-year time horizon?** The purpose of such a requirement must be borne in mind. What is the relevance of the information? What will be the consequences? Who will use it? What for? Pension liabilities are long-term liabilities and a one-year time horizon would generally be relevant only to a winding up of the IORP within that period (on insolvency of the sponsors or otherwise) or to transfer decisions that might be available to members and beneficiaries. It might also be relevant to supervisor action or funding requirements. However, as noted by EIOPA, imposing funding requirements in relation to a confidence level measured on a one-year time horizon will be pro-cyclical and increase volatility and economic and financial instability for the sponsors and the IORP. This will be damaging for pension provision and for businesses that sponsor them (either as employers or as guarantors).	
38.	**CfA 6 (Security mechanisms): 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?** Our response to question 38 will be made up of: • some general comments on the overall approach taken to security mechanisms; and • our responses to the specific question.	

General comments on the overall approach taken to security mechanisms

It is important to recognise that security mechanisms, including those addressed in EIOPA's consultation document are not cost-free and may represent a transfer of value or a redefinition of the "social contract" between stakeholders (to use the terms of the consultation (see paragraph 10.6.8) or indeed of the explicit legal obligations of the parties (including both employer sponsors and guarantor sponsors). Legislative changes intended to apply in relation to existing obligations which are already binding on the parties effectively represent a retrospective variation of the financial obligations assumed by the parties. In recognition of this, there must be strong justification for such legislative intervention, so far as it applies to existing obligations or a specific carve-out to ensure it applies only to obligations that may be assumed by private parties in the future.

The stated objectives of the revision of the IORP directive include protection of members and beneficiaries, enhancement of pension provision across the EU and creation of a level playing field between IORPs and insurance companies. We believe each provision should be justified by reference to these objectives.

For various reasons, in part relating to the definition of the role of EIOPA, the scope of the directive excludes certain types of arrangement for pension provision, including book reserve schemes and pension schemes which are not established by the employer or where the employer does not play an essential role in the funding of the scheme. The consequence however is that the proposals will apply to pension schemes that are not in any significant sense in competition with insurance companies and will not apply to arrangements which are (for instance the UK National Employment Savings Trust (NEST)).

This is relevant to the "level playing field" argument for applying Solvency II in a modified form. In the UK, IORPs established by employers are non-trading, cannot themselves decide to expand their activities by entering new markets or admitting new members (or customers), cannot generally terminate their activities (in the sense of paragraph 10.3.32, i.e. the inclusion of new rights for participants) and do not provide a profit to shareholders. In the sense of paragraph 10.3.204, these IORPs do not (and, under the terms of their constitutional documents, generally cannot) "act in a manner similar to insurance companies". Many IORPs are in fact customers of insurance companies not competitors and it is not appropriate to impose the requirements on schemes that are not competing with insurance companies. A 'level playing field' is not required for non-trading IORPs, because they are not 'players' and are not 'in the field'. The rules intended to support the single market in financial services should only apply to those who are or could be market participants.

	Response to specifics of question 38 With our overall approach in mind, we are firmly of the view that there is no good justification for changing funding measures and obligations for IORPs that are not soliciting customers. The damage to the confidence of employers in the fairness and stability of regulation of pensions would be significant and would damage not enhance pension provision. For IORPs that "act in the manner of insurance companies" and are trading and soliciting customers in competition with insurance companies it may be appropriate to use Solvency II rules appropriately adapted. We do not think that the specific security and benefit adjustment mechanisms can be appropriately taken into account as part of an SCR. It is not coherent to treat a benefit adjustment mechanism as a contingent asset in a solvency measure since it is in fact a pre-agreed mechanism for addressing distribution on insolvency of the IORP (as identified in paragraph 10.6.8). It is correctly described as a risk-sharing mechanism. Removing it would be a variation of the contract between the parties (members, beneficiaries and employers). We think it is also not appropriate to treat pension protection schemes as assets of the IORP. This is further discussed in response to question 41. Treating pension protection schemes and benefit adjustment mechanisms as contingent assets of the IORP could be misleading to members and beneficiaries as it muddies the distinction between the level of security for their unadjusted benefits and the security of adjusted benefits in the event that the assets of the IORP are insufficient to cover its liabilities. Such an approach could lead to the conclusion that UK IORPs are always fully funded assuming the pension protection scheme is adequate to provide adjusted benefits. In effect it would measure only the strength or availability of the pension protection scheme. We agree strongly however that the existence of sponsor support, pension protection schemes or benefit adjustment rules should not be disregarded. Our view is that the protection they offer members and beneficiaries is sufficient in combination with existing funding requirements under IORP I and national legislation. Protection of customers and 'level playing field' issues do not apply to the majority of UK IORPs.	
39.	**CfA 6 (Security mechanisms): Do the stakeholders believe that IORPs should assess the SCR on an annual or three-yearly basis?** Three-yearly.	

40.	**CfA 6 (Security mechanisms): 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?** For the reasons already stated (see the general comments we make in relation to question 38 above), we do not think changes to the funding requirements for IORPs is required or appropriate or likely to achieve any of the stated objectives of the European Commission. The purpose of the MCR is to trigger certain supervisory actions that are either inappropriate or inapplicable for IORPs or prejudicial to the members, such as cessation of activities or transferring the business of the insurance company to another insurance company or imposing prohibitions on the disposal of assets. The objective of such measures is to protect current and future customers on the basis that they have the option of choosing another insurance company that is better capitalised. Such measures do not translate well in relation to most UK IORPs. Equivalent steps would include terminating future accrual and forcing the transfer of the IORP's 'activities' to an insurance company by winding it up. These are sanctions currently available under the UK supervisor's statutory powers. Such actions are however detrimental to the members and beneficiaries rather than to other parties. As the objective (protecting current and future customers) and purpose (triggering certain supervisory actions that achieve such protection without detriment to the customers) of the MCR do not apply to UK IORPs, we do not think it appropriate to impose the MCR to the majority of UK IORPs because it will not serve its purpose. The UK also has experience of using a minimum funding requirement. It created a false sense of security and became a standard measure of funding that was inappropriately low. We think introducing an MCR would be a regressive measure.	
41.	**CfA 6 (Security mechanisms): What is the stakeholders' view on the analysis regarding pension protection schemes? If included in the holistic balance sheet, should pension protection schemes be taken into account by reducing the sponsor's insolvency risk or by valuing it as a separate asset?** As noted in our answer to question 34, we do not support the core premise of adapting Solvency II for the generality of IORPs. However, given the existence of a pension protection scheme, if a holisitic balance sheet approach were to be adopted (on which, see our comments in response to question 12) value for it should be taken into account. In other words, it should be valued as a separate asset, though there are numerous complexities with such an approach that would need to be given propoer consideration.	

42.	**CfA 6 (Security mechanisms): 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?** No. Such capital requirements merely add cost for members diminishing the benefits they receive from their DC funds. Operational risk (in the form of theft, fraud or administrative error) may not ultimately lie with members or with the IORP but with external administrators or the perpetrators and there may be many means of redress. If the risk does not lie with the members or the IORP, it is not appropriate for them to fund a reserve to cover such risks. Irrecoverable operational risk is also unlimited in amount (subject to the totality of the assets of the IORP). It is therefore difficult to determine an appropriate capital requirement and the protection provided may not be sufficient. The distinction between DC and DB funds in relation to operational risk is not clear.	
43.	**CfA 6 (Security mechanisms): 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?** Article 136 (requirements for insurance companies to have procedures in place for identifying and notifying deteriorating financial conditions). The principle of monitoring and reporting changes in financial conditions can be extended to IORPs. In the UK, there are already requirements applicable to IORPs which could fall within Article 136. The challenge is in the detail, particularly as to the level and frequency of any monitoring, the level of investigation required and associated cost and available supervisory actions and the need for redress or action on what may be short term deterioration in financial conditions in relation to what are long-term liabilities. If monitoring of short term deterioration in financial conditions results in supervisory action or increased funding obligations over the short term, this may increase volatility and pro-cyclicality in a manner that is unnecessary and harmful to pension provision overall. Article 141 (supervisory powers to protect policy holders in deteriorating circumstances). It is impossible to comment as the views expressed at 10.3.196 are too vague. We agree that any measures should be 'proportionate' and 'suitable'. Clearly what is proportionate and suitable for an insurance company marketing to the public and covering a variety of unpredictable risks will be very different to what is proportionate and suitable in relation to non-trading bodies holding assets as security for an employer's pension promises and administering them where the only risk of early 'hits' relates to the solvency of the sponsors. We would add that any interference with the existing financial rights of members and beneficiaries or sponsors, both employers and guarantors, needs strong justification. It is a revision of both the 'social contract as referred to on 10.6.8 and the legal contracts made by private parties. Also, the purpose of benefit adjustment mechanisms that may be in place is to address deteriorating circumstances for the protection of members and beneficiaries and they strike a particular balance in terms of risk sharing and solidarity.	

44.	**CfA 6 (Security mechanisms): 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?** Article 138 (options for recovery plans). We prefer Option 1, retaining the IORP Directive. As discussed at question 43 above, setting new funding obligations requires strong justification. There are also good reasons why funding obligations for some IORPs should be flexible. Our response is focussed on UK IORPs providing (or providing security for) defined benefit promises. The primary obligation of the employer and sponsor under UK IORPs that are defined benefit in nature is to ensure the pension promises are made. The funding of the IORP as the ring-fenced vehicle provides security against the risk of default by the employer or sponsor. Such funding can and should be flexible in order enhance security for the pension promises and avoid pro-cyclicality which may threaten the survival of the IORP by prejudicing the sponsors. Solvency II is designed to ensure insurance companies have sufficient capital to act as a buffer in the event of 'hits' to the insurance company. The nature of the insurance companies' business is that they are exposed to a variety of risks that may create such 'hits'. In contrast, the main risk of 'hits' to IORPs is the risk of an acceleration of the funding obligations in the event of the insolvency of the sponsors. There is a real risk that regulatory burdens such as fixed obligations to meet SCR or MCR funding obligations over an arbitrary and unnecessarily short period could create the 'hits' that cause the IORP to fail. Flexibility is therefore not only permissible and beneficial in avoiding pro-cyclicality and damping volatility but also necessary. It is unnecessary and may be risky to have short recovery plans for these IORPs. Given the long term nature of the pension liabilities, if solvency measures used have a one-year time-scale and high confidence levels, there will be significant volatility. This may not be damaging if long recovery period are used. If short recovery periods are used, regulation will have created artificial, pro-cyclical strains on sponsors, increasing the risk of 'hits' (i.e. defaults of sponsors) and prejudicing the survival of these IORPs and defined benefit pension provision. The purpose of the recovery plan must be considered. Under Solvency II, recovery plans to the SCR and MCR are intended to protect current and future customers by ensuring that they are protected from trading with insurance companies that have insufficient buffers to withstand the various risks to which they are exposes, which includes a range of unexpected events creating liabilities or 'hits'. Specifically, failure to comply with a recovery plan (particularly in respect of the MCR) can trigger supervisory action such as requiring the insurance company to cease its activities and to transfer its business to another insurer. For a UK IORP, similar supervisory powers already exist (related to current IORP Directive funding requirements), i.e. the supervisor can require termination of benefit accrual for existing and new members in the event of breach of funding requirements and can force the transfer of liabilities not to another IORP but to an insurance company or the UK pension protection scheme. However, if short term or fixed recovery periods were used or recovery plans to a lower and more rigid MCR were used, these supervisory powers would come into play more frequently because of the volatility and pro-cyclicality of such funding measures. We believe this is not proportionate or suitable. It would lead to a reduction in pension provision at least on a defined benefit basis.	

45.	**CfA 6 (Security mechanisms): Do stakeholders agree that the IORP Directive should be extended with stipulations introduced by Article 137 and 140 allowing supervisors to prohibit the free disposal of assets when IORPs do not comply with the capital requirements or the rules for establishing technical provisions?** We are not clear as to what is intended by a prohibition on the free disposal of assets. If it applies only to the assets of the IORP, this should cause no difficulty. If it is redefined as suggested in 10.3.195 as a restriction on discretionary increases, again it should cause no difficulty. If it applies to assets within the holistic balance sheet (i.e. assets of the sponsors, including employers and guarantors), it is a significant interference with the property rights of those sponsors and would need strong justification. This goes beyond prudential regulation of IORPs and involves wider issues of corporate and insolvency law and international law (guarantors of UK IORPs are often located elsewhere in the EU but may be located outside the EU). Any concept of 'free disposal of assets' would need to be tightly defined as to what constitutes free disposal of assets (gifts only, exercise of a discretion on pay rises, disposal of business assets for value).	
46.	**CfA 6 (Security mechanisms): Do stakeholders agree that it should be specified in the IORP Directive what constitutes a recovery plan as introduced by Article 142 of Solvency II? How should the contents differ from those of insurance companies?** As previously noted, we do not agree that a recovery plan as introduced by Article 142 of Solvency II should apply. That said, in any event, the contents of the recovery plan should differ from those used for insurance companies by: • Referring at (b) to income and expenditure of the IORP, namely contributions, annuities and other income sources receivable and pensions and other benefits, levies and taxes payable; • Referring at (d) the assets of the IORP and other (conditional) commitments, escrows and guarantees and the availability of any pension protection scheme; • Referring at (e) to the statement of funding policy.	

47.	**CfA 7 (Investment rules): Do stakeholders believe that the prudent person principle is a sufficient basis for the investment of IORPs or is additional provision needed?** We agree that the prudent person *principle* is a sufficient basis for the investment of IORPs and that no additional provision is needed. In particular, we would not support introducing elements of Article 132(2) of Directive 2009/138/EC for the following reasons: (a) In practice the real issues such an Article would protect against are already covered by elements of the existing IORP directive (notably Article 18(1)); (b) Inevitably there will be exceptions, where the principles are not appropriate. For example, some IORPs are set up on the basis that members will make investment decisions, and the IORP itself has no discretion (even as to "supervision or control"), which seems inconsistent with such an article. Other IORPs will pool their assets with those of other IORPs, accepting in some cases less transparency of investment but with an expectation of greater returns. (c) The draft language suggests that the IORP should "keep full responsibility for all ... aspects" of investment. This seems inconsistent with outsourcing – very few IORPs will keep responsibility at all levels. We agree with the points that you highlight in paragraphs 11.3.4, 11.3.5 and 11.3.6 and note that these are very real concerns for UK IORPs.	
48.	**CfA 7 (Investment rules): Do stakeholders feel that Member States should have the option to impose limitations on investments in addition to those set out in the IORP Directive? What about host member states?** From a UK perspective, we do not have strong feelings on amendments to Articles 18(5) and 18(7). The UK has not generally implemented more onerous investment rules.	
49.	**CfA 7 (Investment rules): To what extent do stakeholders believe the investment provisions of the Directive should differ between defined benefit and defined contribution pensions?** We would not support adopting Article 132(3) where IORPs "are functioning similarly to insurance undertakings". In our experience most defined contribution pension funds are neither similar to insurance undertakings nor to UCITS, and would not under the current Directive be applying technical provisions at all. The rationale for this suggestion seems confused	

50.	**CfA 7 (Investment rules): Do stakeholders agree with the analysis of the options (including the pros and cons) as laid out in this advice? Are there any other impacts that should be considered?** We agree that it would not be beneficial to introduce a Value at Risk limit or specific rules for funds where members bear non-investment risks. We would note that in virtually all defined contribution funds members bear those other risks. We do not support a geographical criterion in investment decisions. Diversification of investments is already required under the existing IORP directive, but *geographical* diversification will not always be considered a positive, insofar as it can increase the risk of a currency mismatch between the Scheme's assets and liabilities (this issue may be particularly pronounced in countries that do not use the Euro). In any event, many investments are inherently geographically diversified. For example, an investment in shares of an oil company involves exposure to risks and rewards all over the world, not just in the jurisdiction in which the company is incorporated or traded. We do think that the definition of "efficient portfolio management" could be clarified. The UK has interpreted this term as including "the generation of additional capital or income, with an acceptable level of risk" – we think this is within the existing Directive, but greater clarity would be beneficial, provided that such clarification would not prevent the continuance of reasonable and well-established practices that are currently viewed as coming within this term. In particular it would be helpful for there to be clarity that entering into transactions to control risks other than investment risks – for example interest rate risk, inflation risk, longevity risk or counterparty credit risk – are expressly within this definition.	
51.		

52.	**CfA 8 (Objectives & pro-cyclicality): What is stakeholders' view on the analysis regarding the objective of supervision and the measures to avoid pro-cyclical behaviour?** Subject to one qualification (see below), we have no objection to the principle that the protection of members and beneficiaries is a central object of supervision, and that this should be reflected in the revised Directive. UK law already imposes a duty on the UK regulator of occupational pension schemes (the "Pensions Regulator") to treat as a main objective the protection of benefits in respect of scheme members, which is consistent with the principle recommmended by EIOPA. Our qualification to is that this object of supervision should not be enshrined as the sole "main objective" to the exclusion of other reasonable objectives. The UK Pensions Regulator also has a main objective the reduction of the risk of claims being made on the Pension Protection Fund (the "PPF"), which is the UK's mandatory pension compensation scheme which provides a defined level of compensation in the event that employer sponsor insolvency means that an occupational pension scheme cannot meet its obligation to pay the requisite level of benefits in full. The PPF is funded by levies on all occupational pension schemes whose members could benefit from its compensation, and because of this claims on the PPF impose costs that must be met by remaining schemes and their sponsoring employers. Given this background, and the need to avoid the potential for moral hazard that is inherent in the obligation on the PPF to provide compensation in the event of insolvency (as the PPF could otherwise be used as a repository to "offload" pension liabilities), we consider it appropriate and necessary that the Pensions Regulator continue to have as one of its main objectives the reduction of the risk of claims being made on the PPF. Our concern is that enshrining the objective of the protection of members and beneficiaries as the sole "main" objective in the Directive could (unless drafted with sufficient care) have the effect of detracting from the Regulator's ability to exercise its functions with the aim of protecting the PPF from additional liability. As a general principle, we agree with the recommendation to include in the revised Directive the obligation of supervisors to consider the potential impact of their decisions on the stability of the financial systems and to take into account the potential pro-cyclical effects of their actions in case of extreme stress. This seems to us to be a sensible objective that may help to reduce the de-stabilising and negative effects of market volatility, and in particular mitigate the imposition of additional funding strain at a time when it can be least afforded. We note that for many IORPs, cyclical issues can have a less immediate impact than would be the case for financial institutions such as banks and insurers by reason of the generally long duration of IORPs' obligations and the fact that many IORPs are backed by the covenants of employer sponsors. For different IORPs and their employer sponsors, the impact of cyclical volatility will vary depending on the duration of the recovery plan for remedying scheme deficits that is permitted under local law.	

	In relation to the specific anti-cyclical measures discussed in Part 12 the second consultation: • The discussion of whether the "equity dampener" in Article 106 of the Solvency II Directive and the "Pillar II dampener" in Article 138(4) of the Solvency II Directive would be appropriate instruments to include in a revised IORP Directive is based on the assumption that the Solvency II framework is an appropriate starting-point and framework for the regulation of occupational pensions. As stated in our response to the first consultation (and throughout this response to the second consultation in relation to a number of separate issues), we do not agree with this assumption. • Specifically in relation to the pro-cyclical concerns discussed in Part 12, we do not agree that capital requirements similar to those imposed under the Solvency II Directive would be an appropriate requirement to impose on IORPs across all Member States. • A major negative of mandatory capital requirements would be that they would take no account of the covenant of the employer sponsor supporting the IORP. If capital requirements were nonetheless to be included in a revised Directive, we would recommend that these allow the regulation of IORPs under local law to take due account of the covenant of the employer sponsor and not impose (or minimise) mandatory requirements for the inclusion of additional funding within the IORP itself (though given our concerns in relation to the "holistic balance sheet" approach currently under consideration, as discussed in our response to question 12 above, this approach as currently proposed should not be the mechanism used to take account of sponsor covenant). Such an approach would also help to address pro-cyclicality concerns as fluctuations in IORP assets could be assessed against the ability of the employer sponsor to bear the risk of market movements over the long term, avoiding the requirement to rapidly increase funding to eliminate shortfalls caused by such fluctuations.	

53.	**CfA 9 (General principles of supervision, scope & transparency & accountability): Do stakeholders agree with the principle that the material elements of the Solvency II requirements in respect of the general principles of supervision, and in relation to transparency and accountability should also apply to IORPs?** 1. We support policy option 1: Retain status quo. 2. As we have said elsewhere in this response, we consider that the application of Solvency II Directive principles to IORPs is invalid. It is attempting to adapt a regime applicable to insurance company regulation to IORPs: 2.1. which are performing a different function in providing second pillar retirement savings for employees and the self-employed, and 2.2 which are, at least in the UK, not being established and supported by employers as a business with a view to profit but to provide retirement and risks benefit for their employees and former employees and their dependants. 3. An increase in regulation: 3.1 leads to an increase in cost (and, ultimately, a reduction in retirement benefits), and 3.2 leads to a further disincentive for employers to engage positively in the retirement provision for their employees (thereby going directly against the key principles of sustainability and affordability). 4. We note from Appendix 1 to this Response that the impact of any change to the IORP Directive will have a very substantial disproportionate impact on the United Kingdom. Out of the 27 EU member states assets held in UK IORPs would appear to comprise more than 52% of the total assets held by IORPs established in the EU. 5. We also note, if you take the Netherlands and the UK together, more than 75% of the assets held in IORPs established in the EU are held in IORPs established in the Netherlands or the United Kingdom (see further Appendix 1). Any change to the IORP Directive will have a disproportionate impact on those 2 countries, while having a minimal impact on France or Germany. 6. In this context, we note there is a specific carve-out from the IORP Directive for unfunded German second pillar occupational pension schemes. There can be no basis for extending Solvency II to IORPs if it is not also extended to unfunded German pension schemes (i.e. book reserve schemes – see Article 2(2)(e) of Directive 2003/41/EC). 7. Furthermore, if you follow the logic you should extend Solvency II to pillar one public sector pension schemes.	
54.	**CfA 9 (General principles of supervision, scope & transparency & accountability): Has EIOPA identified correctly those issues – need to enhance benefit security, differences between IORP and insurance supervision, and diversity of IORPs – where there should be differences between insurers and IORPs on supervision and transparency and accountability?** As we have said elsewhere in this response, we consider that the application of Solvency II Directive principles to IORPs is invalid and therefore IORPs and insurers should not be treated in the same way.	
55.	**CfA 10 (General supervisor's powers): Do stakeholders agree with the recommendation that supervisory authorities should have broadly the same powers to require IORPs to conduct stress tests as it has in respect of insurers?** We support option 1: do not change the current IORP Directive.	

56.	**CfA 10 (General supervisor's powers): Do stakeholders agree with reinforcing the sanctions regime for IORPs?** We support option 1: do not change the current IORP Directive.	
57.	**CfA 10 (General supervisor's powers**): **Should knowledge of the imposition of penalties be public or restricted?** For the reasons stated above there should be no penalties.	
58.	**CfA 10 (General supervisor's powers): Should host states be able to impose sanctions on IORPs without going through the home state?** For the reasons given above there should be no ability to impose sanctions with or without going through the home state.	
59.	**CfA 11 (Supervisory review processes & capital add-ons): What is the view of stakeholders on whether the requirements for the supervisory review process for insurers should also apply to IORPs?** We share EIOPA's view that a suitable supervisory review process should be in place and, to the extent that this is not explicit in IORP, that it can be made explicit. We believe that the existing IORPs process is adequate so any proposal to make explicit requirements should not go beyond existing supervisory powers. There are aspects of Article 36 of Solvency 2 that are inappropriate for IORPs and would require, for instance, a level of professional advice on covenant support that is not appropriate in an employer funded scheme where covenant information can be made available by the employer. However, without sight of specific drafting of how any express supervisory regime would look (whether based on Article 36 or otherwise), it is difficult to comment further.	
60.	**CfA 11 (Supervisory review processes & capital add-ons): What is the view of stakeholders on whether the requirements for capital add-ons for insurers should also apply to IORPs?** In the defined benefit sphere, IORPs already have the possibility of capital add-ons as the assets supporting a defined benefit pension scheme could be said to include not only the assets of the pension scheme but also the assets of the sponsoring undertaking up to a level consistent with the full value of the scheme liabilities. To impose a further ability for trustees to call for the sponsor to add further capital to the pension scheme would undermine the scheme specific funding approach already in place which is clear about the two-way process of agreement between trustees and sponsoring undertakings on the rate at which capital is added to the IORP. To go further, and impose a further ability for trustees to call for the sponsor to develop further capital itself is meaningless in the context of employers sponsoring pension schemes and would only serve to hasten the demise of those sponsors whose ability to generate funding for their pension scheme is already low. This would lead to business insolvencies, a greater call on the PPF and lead to the further demise of occupational defined benefit pension schemes in the UK. This would also amount to a major interference with existing rights, which would need proper justification (see part (2) of our general comments at the beginning of this document). (See also the points made on putting in place a disincentive to groups to act responsibly and provide financial support to IORPs in our comments in response to question 5 above and question 89 below.)	

61.	**CfA 12 (Supervision of outsourced functions and activities): Do stakeholders agree that the material elements of the requirements on insurers in respect of supervision of outsourcing should apply also to IORPs?** The draft advice of EIOPA, summarised in paragraph 27.5, seems proportionate and balanced to us and we have no further comments here.	
62.	**CfA 12 (Supervision of outsourced functions and activities): What is the stakeholders' view on proposed changes to the definition of home state and rules on chain outsourcing?** The draft advice of EIOPA, summarised in paragraph 17.5, seems proportionate and balanced to us and we have no further comments here.	

63.

CfA 13 (General governance requirements): Do stakeholders agree with the principle that the material elements of the Solvency II requirements for governance apply to IORPs, subject to proportionality?

1. In relation to the policy options considered, we support option 1: Leave the IORP Directive unchanged.
2. We note that:
   - 2.1 EIOPA prefers option 2, and
   - 2.2 EIOPA says that:

     "… assessment of impact is only an estimation 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."
3. We would strongly recommend that:
   - 3.1 before any change is made, there should be an estimate of the number of person hours required to perform the proposed governance functions along with the cost per person hour in performing those functions and a clear analysis of the problems with existing systems which those changes are intended to address.
   - 3.2 the assumptions used for any impact assessment are widely publicised and that the impact assessment also be published in draft form so that it can be subject to critical scrutiny and challenge.
4. Within the UK there is some history in compliance cost analyses consistently under-estimating the true cost of compliance with any regulatory or legislative requirement.
5. We would suggest that governments and regulators are, in general, not good at proportionate and appropriate regulation. In the absence of compelling reasons to regulate, it follows that the status quo should be preserved.
6. Every Euro spent on regulation is Euro 1 less that could be spent on more retirement provision.
7. We note from **Appendix 1** to this Response that the impact of any change to the IORP Directive will have a very substantial disproportionate impact on the United Kingdom. Out of the 27 EU member states assets held in UK IORPs would appear to comprise more than 52% of the total assets held by IORPs established in the EU.
8. We also note, if you take the Netherlands and the UK together, more than 75% of the assets held in IORPs established in the EU are held in IORPs established in the Netherlands or the United Kingdom (see further Appendix 1). Any change to the IORP Directive will have a disproportionate impact on those 2 countries, while having a minimal impact on France or Germany.
9. In this context, we note there is a specific carve-out from the IORP Directive for unfunded German second pillar occupational pension schemes. There can be no basis for extending Solvency II to IORPs if it is not also extended to unfunded German pension schemes (i.e. book reserve schemes – see Article 2(2)(e) of Directive 2003/41/EC).
10. Furthermore, if you follow the logic you should extend Solvency II to pillar one public sector pension schemes.

64.	**CfA 13 (General governance requirements): Has EIOPA identified correctly the areas such as member participation and remuneration policy where there should be differences between insurers and IORPs on general governance requirements?** Our view is that the general governance requirements in Article 41 of the Solvency II Directive should not be introduced for IORPs (see our response to question 63 above). Accordingly we do not consider it necessary to identify areas in which distinctions between IORPs and insurers should be drawn.	
65.	**CfA 14 (Fit and proper): 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?** 1. Currently, the IORP Directive contains a general requirement on the fitness and propriety of persons who effectively run the IORP. 2. The Solvency II Framework Directive sets out fit and proper requirements for all persons who effectively run the insurance/reinsurance undertaking or have other key functions. 3. We note that EIOPA is in favour of adopting the Solvency II requirements recognising that the revised IORP Directive will have to take into account the heterogeneous nature of occupational pensions among Member States. It will be the responsibility of the IORP and not the supervisory authority to ensure that the persons who effectively run and have other key functions within the IORP are fit and proper. The principles of good governance must be implemented in a reasonable and proportionate manner. 4. We are of the view that the UK pension system does not need another layer of regulation in this area. We already have a sophisticated approach to the fit and proper criteria included in existing UK legislation such as the Pensions Acts 1995 and 2004. The UK Pensions Regulator already has power to provide sanctions where the trustees or managers of UK pension schemes act with impropriety. Other professionals administering functions on behalf of the trustees or managers are similarly governed by the robust standards of their own professional bodies. 5. The cost of additional but in our view unnecessary compliance diverts valuable funds that could otherwise be available for benefit provision to deserving members, and this is against a very poor economic backdrop where the average private sector pension is already very low. It should also be borne in mind that in the hitherto highly successful governance regime operated in the UK often individuals acting as trustees of pension schemes are ordinarily volunteers and do not receive remuneration for their role. Imposing a regime applicable to insurance companies in relation to IORPs is not appropriate in this instance. 6. Likewise, and of key importance in distinguishing IORPs in the UK from insurance/reinsurance companies, IORPs are, a least in the UK, not established to generate profit but instead constitute an element of the benefits package available to employees. Another layer of regulation in this area is highly likely to have the effect of encouraging employer disengagement with retirement benefits and consequently increase the burden on the state in providing retirement provision.	

66.	**CfA 14 (Fit and proper): Do stakeholders agree with the advice that: (a) the fit and proper requirements should apply at all times and (b) there should be effective procedures and controls to enable supervisory authorities to assess fitness and propriety?** For the reasons stated above we do not agree that the fit and proper requirements should apply at all and therefore it is not necessary to put such procedures in place.	
67.	**CfA 14 (Fit and proper): What powers should supervisory authorities have in the event that the fit and / or proper requirements are not fulfilled?** For the reasons given in response to question 65 above, there should be no such requirements.	
68.	**CfA 15 (Risk management): What is the view of stakeholders on the proposed principles of the revised IORP directive? How do stakeholders evaluate the positive and negative impact of the proposed risk management principles?** 1. Broadly, the Solvency II Framework Directive states that insurance/reinsurance undertakings should have in place an effective risk-management system comprising strategies, processes and reporting procedures necessary to identify, measure, monitor, manage and report, on a continuous basis the risks, at an individual and at an aggregated level, to which they are or could be exposed, and their interdependencies. It sets out the risks which should be covered by the risk-management system such as asset-liability management and investment. 2. Our view is that the introduction of general principles on risk management (even with the suggested clarifications) adds another layer of administrative burden which is unnecessary when such requirements in the UK are already burdensome enough. More administrative burden is not helpful on a UK pensions landscape which has ever dwindling numbers of employer sponsored pension arrangements. The aim should be to encourage pension provision and not stifle it by yet more regulation, which will only encourage further employer disengagement for little discernible benefit other than the idealistic achievement of a counsel of perfection where the ends do not justify the means and the end in itself achieves little or nothing more than is achieved already. 3. As already noted in this response, the cost of additional compliance diverts funds that could otherwise be available for benefits provision.	
69.	**CfA 16 (Own risk and solvency assessment): Do you agree with EIOPA that ORSA is, in principle, suitable for IORPs? Please provide evidence / reasons supporting your view.** We do not agree that the ORSA is in principle suitable for IORPs. It is our view that the potential complexities of IORPs regularly conducting an ORSA outweigh any potential benefits. History in the conduct of the operation and administration of IORPs in the UK does not indicate any need for such a step at all. There is no requirement needing to be fulfilled in this respect.	
70.	**CfA 16 (Own risk and solvency assessment): What should be the scope of ORSA for IORPs where members bear all the risks? How do you assess the impact of introducing ORSA?** There is no scope for introducing ORSA for IORPs at all. The cost of conducting an ORSA diverts funds that would otherwise be available for benefit provision.	

71.	**CfA 16 (Own risk and solvency assessment): What is the stakeholders' view of the necessity to perform ORSA in the event that the holistic balance sheet approach is adopted?** In the event that the holistic balance sheet approach is adopted, for the reasons given there should not be the necessity to perform ORSA.	
72.	**CfA 17: (Internal Control System): what is the view of the stakeholders on the proposed new explanatory text on the whistle-blowing obligation of the compliance function?** In principle we see no difficulty with the compliance function having a whistle-blowing obligation. However, as with this entire topic, the whistle-blowing obligation would need to recognise the flexibility that an IORP must have with regard to implementing a compliance function that is proportionate to the IORP's status (see our general comments in response to question 73 below). Within the UK domestic pensions legislation there are already various requirements on an IORP's internal supervisory body to report certain matters to the Pensions Regulator or to the IORP's membership. Care would need to be taken to ensure that no requirements are duplicated as a result of any new whistle-blowing obligation.	
73.	**CfA 17: (Internal Control System): What is the view of the stakeholders on the proposed new explanatory text on the scope (the fact that the compliance function should include all legislation with an impact on the operations of an IORP)?** As a general comment, we would repeat the comments we made as part of our response to the first consultation: that we support the proportionate approach being suggested by EIOPA to the matter of internal controls. Unless the approach taken to the compliance function is a proportionate one, it seems highly likely that such a requirement would simply be a costly regulatory burden that would do nothing for the advancement of good governance. In response to the specifics of question 73, if the compliance function is required to confirm that all legislation with an impact on the operations of the IORP has been complied with, this is likely to be an onerous task that would inevitably lead to increased costs and complexity for IORPs. The vast majority of pension scheme trustee boards that operate within the UK would not be able to provide such an unqualified confirmation themselves and it seems highly unlikely that they would be able to obtain such confirmation from one external adviser without incurring significant costs. For example, the legal advisers to the IORP would not ordinarily be able to provide this confirmation without undertaking significant extra work because they are not generally involved in the day to day operation of the IORP. At the same time, an administrator or auditor is unlikely to be able to provide this confirmation because it relates to legal compliance issues. Again, with a view to putting in place a proportionate compliance requirement, we suggest this confirmation is restricted so that the compliance function confirms that, after having taken such steps as are proportionate and appropriate to the status of the IORP, it is reasonable to conclude that all relevant legislation has been complied with.	

74.	**CfA 18 (Internal audit): Do stakeholders agree that the material requirements of internal audit in respect of insurers should also apply to IORPs subject to proportionality and other changes?** We do not consider that the introduction of an internal audit function in the UK will have a sufficiently positive impact upon members/beneficiaries of UK IORPs to support Option 2, to adopt the material elements of Article 47. We therefore support Option 1. UK legislation already requires trustees and managers of most UK IORPs to put in place: (a) arrangements and procedures to be followed in the administration and management of the scheme, (b) systems and arrangements for monitoring that administration and management, and (c) arrangements and procedures to be followed for the safe custody and security of the assets of the scheme which are adequate for the purpose of securing that the UK IORP is administered and managed in accordance with its own rules and other legal requirements. The UK supervisory authority has issued a Code of Practice which encourages trustees and managers to consider the effectiveness of those arrangements, procedures and systems. It is not clear to us that a separate internal audit function in addition to the existing UK requirements would offer additional benefits to members/beneficiaries of IORPs in the UK. However, if Option 2 is adopted we agree that the principles must be implemented in a reasonable and proportionate manner. In particular, we welcome the principle that it would be the responsibility of each IORP to define its own approach to the internal audit function. This is essential because the size and complexity of IORPs in the UK varies so widely that we do not consider it would be possible to define an internal audit function that would be appropriate for all IORPs. We also welcome the principle that the internal audit function could be assigned to an internal member of staff. However, in the UK, this is likely to benefit only the biggest IORPs who have the capacity to carry out the administration and management of the IORP in-house rather than outsource these functions, to a third party administrator for example. The vast majority of IORPs in the UK are operated under trust with only a limited number of individuals appointed as trustees. It is unlikely that these IORPs will have an internal member of staff available to carry out the internal audit function. This would mean appointing an independent third party to carry out that function. Carrying out an internal audit will inevitably result in additional costs for IORPs. This will particularly be the case where it is necessary to appoint external auditors to carry out the function. As noted above, this will be the case for the vast majority of UK IORPs. However, even where an internal member of staff can be identified to carry out the audit function, there will be an additional cost associated with increased management time. Although we agree that costs are likely to be borne by sponsoring employers (particularly of DB schemes), those funds are being diverted away from providing members' benefits. This risk is greater in relation to DC schemes where, for example, the costs associated with the internal audit function could be included in an annual management charge levied on members' accounts.	

75.	**CfA 18 (Internal audit): What is the view of stakeholders on the proposed whistle-blowing obligation of the internal audit function?** Please refer to our comments under Question 74 above regarding whether or not an internal audit function should be introduced. If Option 2 is adopted, UK legislation already requires breaches of the law to be reported in writing to the UK supervisory authority where there is reasonable cause to believe that a duty has not been complied with that is likely to be of material significance to the UK supervisory authority in the exercise of any of its functions. This reporting requirement falls on the following individuals in relation to IORPS in the UK: (a) trustees or managers; (b) a person otherwise involved in the administration; (c) the employer; (d) a professional adviser; and (e) a person otherwise involved in advising the trustees or managers. The UK supervisory authority has issued a Code of Practice which sets out the expectations on such individuals to meet their reporting requirements. It is not clear to us that a separate whistleblowing option in addition to the existing UK requirements would offer additional benefits to members/beneficiaries of IORPs in the UK.	
76.	**CfA 19 (Actuarial function): What is the view of the stakeholders on the role and duties of the actuarial function of IORPs?** The roles and duties of the actuarial function in the majority of IORPs are different from those in the insurance companies. In IORPs, actuarial functions are performed by advisors who only act as advisors (the board of the IORP/ its trustees are decision makers) whilst in the insurance companies, those performing actuarial functions act as both advisors and decision makers.	
77.	**CfA 19 (Actuarial function): Are the requirement of solvency II the correct starting point for the actuarial function?** As noted in the answer to question 76, we do not agree that the roles and duties of the actuarial function in relation to IORPs are the same as those of insurance companies. Accordingly, no change to the existing IORP Directive should be made. However, if the requirements of Solvency II were to be used as the starting point for the actuarial function, adaptation will be required to address the specific position of IORPs. The adaptations in 25.5.5 – 24.5.9 of the draft advice are necessary. In addition, as the board of the IORP/ its trustees have the role of project management, the requirement of Article 48 1(a) of the Solvency II framework directives should be adapted to "advising on the calculation of technical provisions" instead of "co-ordinating the calculation of technical provisions".	

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78.	**CfA 19 (Actuarial function): Do you agree with the importance of independence of the actuarial function? What do stakeholders perceive as the necessary criteria for the independence of the actuarial function?** Yes, we agree with the importance of the actuarial function. We agree that the actuarial function must not perform a function which gives rise to a conflict of interest, or belong to a provider of other services which could lead to such a conflict, unless sufficient measures are in place to guarantee the actuary's independence. We do, however, recognise that as the board of the IORP/ its trustees are ultimately responsible for the decision making, where appropriate, they could decide to allow the actuarial function to perform a function which gives rise to a conflict of interest if: ▪ they have received full and frank disclosure of the conflict by the actuarial function; and ▪ they believe that allowing the actuarial function to perform such function is in the best interest of the members.	
79.	**CfA 19 (Actuarial function): Do stakeholders agree with the analysis of the options (including the pros and cons) as laid out in this advice? Are there any other impacts that should be considered?** Our view is that the options do not properly reflect the differences between insurance companies and IORPs (as detailed in our response to question 76. above). To be effective, option 2 will need to be amended more extensively than currently proposed.	
80.	**CfA 20 (Outsourcing): Do stakeholders agree that the material requirements on insurers in respect of outsourcing should also apply to IORPS?** We support Option 1: Leave the IORP Directive unchanged. An additional layer of regulation to regulate IORPs in general, when less than 1% of them will ever engage in cross-border activity, is a disproportionate approach which runs contrary to the principle of subsidiarity.	
81.	**CfA 20 (Outsourcing): Do stakeholders agree with the standardisation of outsourcing process in order to enlarge the cross border activity?** We support Option 1: Leave the IORP Directive unchanged. An additional layer of regulation to regulate IORPs in general, when less than 1% of them will ever engage in cross-border activity, is a disproportionate approach which runs contrary to the principle of subsidiarity.	
82.	**CfA 20 (Outsourcing): What are the minimum outsourcing contract elements stakeholders consider as useful to ensure the protection for IORP members and beneficiaries?** We support Option 1: Leave the IORP Directive unchanged. An additional layer of regulation to regulate IORPs in general, when less than 1% of them will ever engage in cross-border activity, is a disproportionate approach which runs contrary to the principle of subsidiarity.	

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83.	**CfA 21 (Custodian / depository): What is the view of stakeholders on the proposed treatment of depositaries?** From a UK Occupational Pension Scheme perspective, we would support option 1 (maintaining the current provision, leaving Member States the decision of whether to make the appointment of a custodian or depositary compulsory, according to the option that best suits the needs of its own occupational pension system). Under Option 2, the consultation states "For IORPs without legal personality in a trust based system, the appointment of a depositary for safe-keeping should be compulsory." We do not support this option. The appointment of a depositary would not be appropriate in all circumstances. UK occupational pension schemes invest in a wide range of assets often on a non-segregated basis including, for example, insurance policies, private equity, hedge fund and infrastructure investments. A number of UK IORPs invest all of their assets in one or more unit-linked insurance policies issued by an insurance company to the trustee of the UK IORP. The insurance policy is not tradable on a market. There is no useful purpose served in appointing a depository to hold the insurance policy. A similar point relates to other non-tradable investments, such as investing in limited partnerships (a common preferred legal structure for private equity style investments. Option 3 (which appears to relate to contract based DC schemes) would be a matter for DC scheme providers (for example insurance companies). This could however have cost implications for scheme members.	
84.	**CfA 21 (Custodian / depository): How do stakeholders evaluate the positive and negative impacts of the proposals?** The negative impact of the proposals would be increased costs. We have yet to see any real evidence to suggest that the proposals would have a positive impact.	
85.	**CfA 21 (Custodian / depository): What do stakeholders anticipate in terms of cost and other consequences of the implementation of a compulsory regime regarding the appointment of a depositary under options 2 and 3 for: (a) the safe-keeping of assets; (b) oversight functions?** See our responses to 83 and 84 above.	
86.	**CfA 21 (Custodian / depository): What do stakeholders anticipate in terms of cost and other consequences of the implementation of the general requirements regarding: (a) the need for a written contract; (b) the role of a depositary in terms of safe-keeping; (c) the liability regime of depositaries; (d) the list of minimum oversight functions that should be perform; (e) conflict of interest**? See our responses to 83 and 84 above. In addition, the proposed extension of a depositary's liability where it has delegated its functions may have the effect of restricting the markets in which pension schemes can invest, to their, their members' and sponsoring employers' disadvantage.	
87.	**CfA 21 (Custodian / depository): Do stakeholders agree that the list of minimum oversight functions that should be performed by a depositary is appropriate?** See our responses to 83 and 84 above.	

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88.	**CfA 21 (Custodian / depository): What do stakeholders anticipate in terms of cost and other consequences of the implementation of the general requirements that should be verified in case a depositary is not appointed?** See our responses to 83 and 84 above.	
89.	**CfA 22 (Information to supervisors): Do stakeholders agree with the analysis of the options (including the pros and cons) as laid out in this advice? Are there any other impacts that should be considered** The analysis does not properly distinguish the support which the businesses of sponsoring undertakings provide for defined benefit pension schemes. We believe that existing IORP information provisions provide a suitable basis for flexible, prudential regulation without the imposition of Article 35 requirements. By contrast, the wholesale adoption of Article 35 of Solvency 2 has the implication that supervisors would be able to pry into the business of the sponsoring undertaking, increasing compliance costs and restricting entrepreneurial activity and EIOPA should discourage this aspect. This would also amount to a major interference with existing rights, which would need proper justification (see part (2) of our general comments at the beginning of this document). It would also amount to a discincentive to groups to act responsibly and provide financial support to IORPs sponsored by subsidiaries – see also the points made on in our comments in response to questions 5 and 60 above. That said, there are aspects of Article 35 that could clearly form the basis for appropriate supervision so long as clearly restricted to the IORP itself.	
90.		
91.	**CfA 23 (Information to members / beneficiaries): Do stakeholders believe that additional information requirements - besides the current ones - are not only necessary for DC schemes, but also for DB schemes?** We are of the view that the current information requirements are already adequate so no additional requirements are necessary for either DC schemes or DB schemes. If additional information requirements are considered necessary, then these should be principles based rather than being prescriptive. This is because some Member States, such as the UK, are already heavily regulated in terms of information and disclosure requirements.	

92.	**CfA 23 (Information to members / beneficiaries): Are stakeholders happy with the potential introduction of a KIID-like document for DC schemes and with its contents as envisaged in the draft EIOPA advice? In particular are stakeholders happy with the introduction of a document (KID) that would contain information beyond investment? How important it is that this document facilitates comparisons between IORPs?** We believe that the introduction of a KIID-like document for DC schemes will not always be appropriate. The KII Document aims to provide protection for investors of financial products due to the investment risks involved. However, trust based DC schemes do not always offer members with investment choices and the level of details contained in a KII Document would therefore not be appropriate. The introduction of a KID may be appropriate for some Member States. However, care should be taken as to how it is introduced. For instance, in the UK, similar information is already available for most DC schemes so any introduction of a KID should reflect this to ensure that there is not an overload in regulations. There does appear to be a disconnect in the EIOPA framing of this question between the EIOPA world and what happens in practice in the UK. The question of which IORP an employer contributes to and, in turn, may permit an employee also to pay contributions to, is determined by the employer after taking appropriate expert advice. The employer's goal is aligned with that of the employee – namely, to maximise retirement benefits for the employee in a DC IORP. So, the concept of the employee going round "shopping" for IORPs is a concept that can be viewed as coming from a different planet. The concept is, of course, relevant to UK personal pension schemes, where the member may choose to pay contributions to the personal pension scheme without any employer contributions.	
93.	**CfA 23 (Information to members / beneficiaries): How would stakeholders suggest communicating in the KID the risk/reward profile and/or the time horizon of different investment options? Do they think that the risk ranking should be the same for all time horizons, or should vary with time horizons, allowing for a more favourable ranking of equity-oriented investment options for long horizons? How should performance scenarios be conceived? Should they vary for different asset allocations, allowing for a risk premium for equity-oriented investment options? What a reasonable measure of the risk premium would be?** Care should be taken in the level of information that should be set out in a KID, if one is introduced, concerning risk/reward profile and/or time horizon of different investment options. Clearly, the choice of asset allocation will depend on such factors as risk/reward profile and time horizon. However, the IORP should not be seen to be providing members with financial advice in relation to the choice of investments unless this is through an appropriately regulated financial adviser.	
94.	**CfA 23 (Information to members / beneficiaries): Are stakeholders happy with the introduction of a personalised annual statement to be delivered to each member? Whether and how should it contain information on costs actually levied, and how should it be coordinated with the ex-ante information on costs to be included in the KID?** In the UK, there is already a requirement for IORPs to provide members with annual statements of their benefit entitlements. We agree that, for transparency, it would be appropriate to include information on costs and charges which have been levied on members. However, how this can be achieved will depend very much on the relevant IORP, its structure and the terms by which it is governed. Flexibility should therefore be provided in this context.	

95.	**CfA 23 (Information to members / beneficiaries): 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?** We think it would be helpful to harmonise some of the information requirements but this would need to be at a relatively basic level due to different pension systems, laws and taxation policies being operated by individual Member States.	
96.	**CfA 23 (Information to members / beneficiaries): Do stakeholders agree with the impact assessment of the EIOPA proposals?** We agree with the EIOPA that introducing changes to the information requirements will involve additional costs for IORPs - the extent of this will depend on the extent of the changes.	