

<b>Comments Template on EIOPA-CP-11/006</b> <b>Response to Call for Advice on the review of Directive 2003/41/EC: second consultation</b>		<b>Deadline</b> <b>02.01.2012</b> <b>18:00 CET</b>
Company name:	AFTI (Association Française des professionnels des Titres)	
Disclosure of comments:  <b>PUBLIC</b>	EIOPA will make all comments available on its website, except where respondents specifically request that their comments remain confidential.  <i>Please indicate if your comments on this CP should be treated as confidential, by deleting the word <b>Public</b> in the column to the left and by inserting the word <b>Confidential</b>.</i>	Public
<p>The question numbers below correspond to Consultation Paper No. 06 (EIOPA-CP-11/006).</p> <p><b>Please follow the instructions for filling in the template:</b></p> <ul style="list-style-type: none"> <li>⇒ <u>Do not change the numbering</u> in column "Question".</li> <li>⇒ Please fill in your comment in the relevant row. If you have <u>no comment</u> on a question, keep the row <u>empty</u>.</li> <li>⇒ There are 96 questions for respondents. Please restrict responses in the row "General comment" only to material which is not covered by these 96 questions.</li> <li>⇒ Our IT tool does not allow processing of comments which do not refer to the specific question numbers below.               <ul style="list-style-type: none"> <li>○ If your comment refers to multiple questions, please insert your comment at the first relevant question and mention in your comment to which other questions this also applies.</li> <li>○ If your comment refers to parts of a question, please indicate this in the comment itself.</li> </ul> </li> </ul> <p><b>Please send the completed template to <a href="mailto:CP-006@eiopa.europa.eu">CP-006@eiopa.europa.eu</a>, in MSWord Format, (our IT tool does not allow processing of any other formats).</b></p>		
<b>Question</b>	<b>Comment</b>	
General comment	<b>The Association Française des Professionnels des Titres ("AFTI")</b> is the French association and a leading trade association within the European Union representing the post- trade industry.	

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	<p>AFTI has over more than 100 members, all actors in the securities market and back office businesses: banks, investment firms, market infrastructures, issuers.</p> <p>AFTI welcomes the opportunity to contribute to the EIOPA Call for advice on the review of directive 2003/41/EC – second consultation .</p> <p>In its submission, the response of AFTI to the EIOPA consultation will focus on the depositary issues</p> <p><b>AFTI agrees with the aim of the EIOPA’s advice to strike the appropriate balance between the Directive’s objective of ensuring a high level of members/beneficiaries’ protection by introducing a requirement for compulsory appointment of a depositary when the risks associated to the sakekeeping of assets and the investements are borne by the members/beneficiaries,while refraining from placing the entire responsibility on depositaries which would adversely impact members/beneficiaries through increased costs and restriction of service offering.</b></p>	
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83.	<p><b>83.What is the view of the stakeholders on the proposed treatment of depositaries?</b></p> <p>AFTI supports the EIOPA's recommendation making the appointment of depositary compulsory for IORPs/schemes that are segregated pools of assets co-owned by members/beneficiaries which bear the consequences of operational failures associated with the asset safeguard and investment risks .</p>	

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	<p>In these circumstances, regulation should impose a segregation between management functions from assets safe-keeping and oversight functions for the benefit of members/beneficiaries protection.</p> <p>AFTI suggests that the appointment of a depositary should be compulsory for IORPs which have no legal personality and for DC schemes (option 2 and option 3 ). In addition, AFTI suggests that the appointment of a depositary should be mandatory in case of ring-fenced funds, regardless of the legal form of the IORP or of the type of the pension scheme whenever the cost of any operational failures associated with the asset safeguard and investment risks is borne by the members/beneficiaries</p>	
84.	<p><b>84 .How do stakeholders evaluate the positive and negative impacts of the proposals?</b></p> <p>The long-term nature of IORPs schemes reinforces the need to perform on-going controls of record-keeping of the assets and of compliance with the investment's rules in order to identify anomalies and enable actions addressing poor administration, negligence or fraud within the IORP. AFTI suggests that the tasks listed below have to be performed by the depositary:</p> <ul style="list-style-type: none"> <li>• Maintain a comprehensive inventory of all assets that are safekept on behalf of the IORP/Pension Scheme ,</li> <li>• controlling that the investments are carried out in accordance with the IORP's investment rules</li> </ul>	

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- controlling that contributions and investment returns are allocated to the correct accounts.

AFTI is of the opinion that these tasks are a necessary part of the risk management function of a pension system. The increase of costs will depend on whether these tasks are already performed or not.

85.

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

positive impacts

The value of the depositary's controls and functions are linked to its expertise and its statutory independence vis-à-vis the manager. The appointment of a depositary provide the IORPS and their members a higher protection from operational failures and investment breaches.

Negative impacts

EIOPA's proposal of not retaining a strict liability regime for the depositary should limit the additional

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	costs .	
86.	<p><b>86. What do stakeholders anticipate in terms of cost and other consequences of the implementation of the general requirements regarding: (a) the need for a written contract; (b) the role of a depositary in terms of safe-keeping; (c) the liability regime of depositaries; (d) the list of minimum oversight functions that should be perform; (e) conflict of interest?</b></p> <p>We support the general requirements regarding the depositary as they will clarify and harmonize the roles played by the depositaries and their duties and consequently they will harmonize the level of protection for members/beneficiaries at a reasonable cost .</p> <p>(a) <b>the need for a written contract:</b> The need for written contract will bring benefits since its clarifies respective obligations in terms of relevant information / communications flows. This is essential to an adequate members/beneficiaries' protection.</p> <p><b>(b) the role of a depositary in terms of safe-keeping :</b> AFTI supports the EIOPA's proposal. In addition, AFTI suggests that the scope of "assets held in custody" is clearly defined and related to transferable securities, money market instruments or units of collective investment undertakings – as listed in Annex I, section C of Directive 2004/39/EC. To qualify for assets held in custody, the financial instruments should have the following characteristics:</p> <p>1. they are registered in the name of the depositary or in the name of its sub-custodian acting on</p>	



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	<p>behalf the depositary;</p> <p>2. They are settled in a settlement system which maintains the relevant issuer account; in order to promote and protect investments and financial stability in Europe, the European banking system should not be exposed and made liable for weaker or less regulated financial markets outside the EU. We therefore suggest to restrict the settlement systems to those designated in Directive 98/26/EC".</p> <p>3. They have not been provided as collateral.</p> <p><b>(c) the liability regime of depositaries: AFTI supports</b> the EIOPA's advice that the depositary should be liable as a result of its unjustifiable failure to perform its obligation or of its improper performance of them. AFTI supports not to place the entire responsibility on depositaries which would adversely impact members/beneficiaries through increased costs, and potentially restrict the service offering.</p> <p><b>(d) the list of minimum oversight functions that should be perform</b> : see answer 87 below</p> <p><b>(e) conflict of interest : AFTI supports</b> EIOPA's advice proposal.</p>	
87.	<p><b>87.Do stakeholders agree that the list of minimum oversight functions that should be performed by a depositary is appropriate?</b></p> <p>AFTI agrees that the list of minimum oversight functions proposed by EIOPA is appropriate.</p>	

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AFTI makes the following observations and comments regarding the point 9.a) :

- i. the depositary oversight duties are to be performed by *ex post* controls.
- ii. the depositary should not perform first levels of control (operational & internal control) that are performed at the IORP level. The depositary performs secondary level controls. Therefore the depositary should neither substitute nor replicate the controls performed internally by the IORP.

Provided the above listed principles are implemented, and applicable to all oversight functions, AFTI is of the opinion that EIOPA's proposal should not cause significantly adverse effects on procedures and costs to IORPs and other IORP's third party providers.

For clarification purpose , .

AFTI suggests the following amendments:

~~9; a) carry out instructions of the IORP, unless they conflict with the applicable national law or the IORP rules;~~ verify the compliance of the IORP **regarding investment restrictions and leverage limits** with applicable national law and regulation as well as with the IORPs rules

88.

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

When a depositary is not appointed this will result in a lower level of protection of members/beneficiaries as the depositary plays an essential role in the external control environment.

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