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EIOPA's Supervisory Statement on the sound practices within the registration or authorisation process of IORPs, including as regards suitability for cross-border activity

1. Introduction

- 1.1. The European Insurance and Occupational Pensions Authority (EIOPA) provides this Supervisory Statement on the basis of Article 29(2) of Regulation (EU) No 1094/2010 to promote common supervisory approaches and practices.
- 1.2. This Supervisory Statement is based on Directive (EU) 2016/2341 ('the IORP II Directive') and addressed to the competent authorities, as defined in point (i) of Article 4(2) of Regulation (EU) No 1094/2010.
- 1.3. The IORP II Directive provides the procedures which must be transposed into Member States' national law in order to facilitate the cross-border activity of IORPs and the cross-border transfer of pensions schemes. The IORP II Directive lays down minimum prudential requirements for the protection of members and beneficiaries. It also clarifies the scope of prudential rules to reduce legal uncertainty and the associated transaction costs for the cross-border activities of IORPs.
- 1.4. National requirements for the initial registration or authorisation of IORPs permitting IORPs to operate differ across Member States. Although competent authorities of home Member States ('home competent authorities') have been reviewing their registration and authorisation procedures with regard to the new requirements of the IORP II Directive, supervisory approaches to assess if IORPs are prudentially sound to operate domestically and across borders remain divergent.
- 1.5. EIOPA is of the view that in the context of operating across borders such divergent approaches could lead to supervisory arbitrage. Achieving supervisory convergence of the practices in relation to assessing IORPs' suitability for possible cross-border operations seeks to avoid supervisory arbitrage and build a level-playing field across the EU conducive to an internal market for IORPs, as well as to ensure adequate protection of the members and beneficiaries.

2. Sound supervisory practices within the registration or authorisation process of IORPs, including as regards suitability for cross-border activity, and in the context of the on-going supervision

- 2.1. Home competent authorities are expected to carry out a prudential assessment, which ensures that any registered or authorised IORPs meet all the requirements of the IORP II Directive to operate domestically or across borders.
- 2.2. Home competent authorities should perform this prudential assessment as part of their registration or authorisation process pursuant to Article 9 of the IORP II Directive. They should also take into consideration both the

specificities of possible cross-border operations and the business plans (or other relevant business documents)¹ of IORPs with respect to domestic and cross-border operations. Following on from that, home competent authorities should continue to monitor the prudential soundness of IORPs on an on-going basis in accordance with the supervisory review process set out in Article 49 of the IORP II Directive, for instance after notification on changes of IORPs' business plans.

2.3. The prudential assessment within the authorisation or registration process and in the context of on-going supervision seeks to ensure that IORPs are prudentially sound and have suitable administrative and governing structures to protect the interests of their members and beneficiaries when operating domestically or cross-border. When assessing an IORP's suitability to operate across borders within the registration or authorisation process or in the context of the on-going supervision, the home competent authorities have to ensure that any conditions and requirements set by them in that process do not duplicate other existing practices of home competent authorities or the requirements laid down in Article 11(4) and 11(5) of the IORP II Directive regarding the assessment of the compatibility of an IORP for the specific cross-border activity proposed. Furthermore, home competent authorities also have to ensure that any conditions or requirements set by them in that process do not result in unjustified obstacles to the exercise of the freedom to provide services by the IORPs concerned or by sponsoring undertakings from other Member States. In accordance with the case-law of the Court of Justice, any restrictions to the freedom to provide services must be non-discriminatory, strictly proportionate and justified by imperative requirements in the general interest.

2.4. In line with the objective of the IORP II Directive to facilitate cross-border activities, the prudential assessment should be proportionate to the additional risks linked to conducting cross-border operations in relation to the main objective of prudential supervision, as set out in Article 45 of the IORP II Directive. Against that background and in view of the necessity that IORPs are prudentially suitable for operating across borders, home competent authorities should assess, within the registration or authorisation process and as part of the on-going supervision, the following elements specific to cross-border activities:

- whether the integration of cross-border operations complies with the prudential requirements of the IORP II Directive and other EU laws

¹ Source: Opinion on the use of the governance and risk management documents in the supervision of IORPs www.eiopa.europa.eu/sites/default/files/publications/opinions/opinion_on_the_use_of_governance_and_risk_assessment_documents_in_supervision_of_iorps_0.pdf

applicable to IORPs (e.g. Directive 2007/36/EC (Shareholder Rights Directive));

- whether the integration of cross-border operations fits with the structure and the functioning of the IORP such as the IORP's by-laws, the IORP's system of governance including key functions, office infrastructure, technical resources (e.g. IT equipment);
- whether the IORP's system of governance includes adequate resources and expertise to monitor on-going compliance with Social and Labour Law ('SLL') and to promptly review the impact of changes in SLL on its cross-border operations (e.g. access to legal advice to verify SLL compliance);
- the administrative capability of the IORP to conduct cross-border operations (e.g. management of multi-country multi-currency transactions);
- the capability of the IORP's service providers to support adequately the IORP's cross-border operations in particular where core business processes and key functions are outsourced;
- whether the IORP's cross-border operations give rise to any specific conflicts of interest and how such conflicts of interest risk will be addressed and/or managed;
- the specific risks linked to conducting cross-border operations and the viability of cross-border operations in the future (e.g. cross-border projections set in the business plan, adequacy of capital reserves in relation to cross-border operational liabilities, discontinuity strategy and impact on members and beneficiaries); and
- the information requirements towards scheme members, in particular where members of the cross-border schemes have a different language from that of the employees of the IORP and its service providers running the scheme.