

OPSG

# OCCUPATIONAL PENSIONS STAKEHOLDER GROUP

Advice on EIOPA's technical advice on the  
evaluation and review of the IORP II Directive

EIOPA-OPSG-22-30

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## **1. Adequacy and Proportionality**

### ***Adequacy***

In terms of adequacy of the prudential and governance minimum standards, the Directive already satisfies its aim, and does not seem to need to be reviewed.

In fact, its provisions assume a sufficient level of security for future pensioners and a sound, prudent and effective management of occupational pension schemes. Furthermore, the current regulatory framework does not seem to have compromised the stability of the institutions, but rather strengthened it, triggering some relevant improvements in governance and risk management. We could propose that Pension Benefit Statement and supplementary information must be assessed by consumer surveys as they could be too complex and could be improved.

It might be questionable if the conditions provided in article 13 (3) allowing for a tri-annual calculation of the liabilities is really resulting in a simplification (this is relevant for smaller IORPs), since a statement declaring the change of liabilities and funding of risks almost comes very close to a complete calculation.

The general framework of the Directive seems to be also satisfactory for pure DC pension schemes. Pure DC IORPs need a solid operational and governance structure to protect members/beneficiaries. The governance structure stemming from the Directive provides such an effective framework.

Two final comments.

- First, the governance coming from the Directive is substantially aligned with that of the other financial institutions.
- Second, some member states do not make full use of the possibilities offered by the Directive. For example, the possibility given in Article 14 (2) allowing for an underfunding for a certain period (in combination with a recovery plan) is not used everywhere, where IORPs are requested to be funded more than 100% at any time. On the other hand, it can be mathematically shown that for an IORP without lapse risk, in many constellations the probability that all benefits are sufficiently financed when they become due can be increased if more flexible funding requirements are used. Similar approaches of member

states not fully applying the possibilities offered by the Directive also occurred with article 5 on proportionality. This attitude should be re-addressed.

Thus, being said, as far as the adequacy of the current legislation is concerned, the new IORP 3 Directive should not bring relevant changes or improvements to the existing provisions.

### ***Proportionality***

A different reasoning should be made about proportionality. Indeed, this principle assumes that the application of the European standards stemming from this Directive must not lead to unduly burdensome requirements and should take into account the diversity of the size, nature, scale and complexity of the activities of IORPs within and across Member States.

Article 5 of the Directive allows member states to exempt IORPs having less than 100 active members. This criterion should be changed because now it has almost not practical relevance. First, because several member states do not practically allow those IORPs to be exempted by the provisions of the Directive and oblige all their national IORPs to fully apply the Directive. Maybe, this choice was also due to force consolidation and the reduction of the number of IORPs. But even when such an exemption from article 5 was authorized, this provision is not adequate: either because it excludes from its scope too few IORPs, or because it leaves out schemes that might be more problematic than those with more members. In fact, schemes with 50 members might have more assets and be more complex than one with 500 members.

More generally, better guidance on how to apply proportionality is needed. The pure size of an IORP should not be the only criterion for proportionality considerations. EIOPA should strive for a regulatory practice, in which – in addition to size – also other criteria such as the complexity of the business or its risk structure are relevant. EIOPA should also consider a regulatory practice allowing a lightened or facilitated application of the provisions depending on the size, complexity and the risk structure of the respective IORP. EIOPA should overcome the “all or nothing” logic, with regard to the application, which is currently predominant. Indeed, instead of full exemption which might sound as avoidance, it might be interesting to have adequate alternative policy options, mainly for education of IORPs, when national competent authorities have not defined practically the proportionality principle in their legislation.

In some cases, it was proved that the use of criteria other than the pure size was beneficial. Some NCAs assured a good level of flexibility to small IORPs to adapt the pre-existing risk management

structure to the IORP II provisions (for example, through a sort of "comply or explain" mechanism, instead of defining a clear measure to apply proportionality).

It should be assessed whether

- a basic, different minimum requirement approach should be drawn for DC schemes that invest only in European AIFs and UCITS and have simple activities, internal organization, nature, and scale;
- special exemptions should be made for those IORPs where operational costs are only covered by the employer; and
- the pension scheme administrator, the investment manager and custodian should be included in the supervision process when the IORP management is totally outsourced.

EIOPA could help in defining criteria for proportionality, but by cooperating closely with the NCAs given that the latter are better placed to acknowledge the issues and taking into account the minimum harmonization approach of the IORP II Directive.

Finally, it should be reminded that the horizontal approach followed by the SFDR and DORA does not sufficiently take into account the specificities of the IORPs, leading to unduly burdensome requirements.

## 2. Cross border

In its Call for Advice regarding the evaluation and review of the IORP II Directive<sup>1</sup> (later “the Directive”), the Commission reminded that “*facilitating the cross-border activity of IORPs and cross-border transfer of pension schemes is one of the main legislative objectives of the IORP II Directive.*” The Commission stated that EIOPA should assess the implementation and effectiveness of the rules governing the cross-border activities (Article 11) and cross-border transfers (Article 12). Furthermore, **EIOPA should analyse obstacles where identified.**

The OPSG welcomes the scope of the Commission’s request to EIOPA with regards to cross-border activities and transfers. The OPSG has previously highlighted its concerns about the implementation of cross-border provisions of the Directive. The issues have been raised several times during the OPSG meetings. Additionally, the OPSG adopted two own initiative reports, in June 2020<sup>2</sup> and in March 2022<sup>3</sup>, documenting formally its concerns. In the latter report, from March 2022, the OPSG stated that the concerns have been confirmed by the results of the report “Cross-Border IORPs” published by EIOPA in December 2021<sup>4</sup>, and also by market research and observations collected by OPSG members.

As explained in the report, despite the continued strong interest of many IORPs and their sponsors to operate cross-border in Europe, the cross-border activities in the EEA were carried out by only 33 institutions at the end of 2020. Together these institutions represent less than 0.2% of the total number of IORPs’ members and beneficiaries and only 0.4% of the total amount of assets of IORPs in the EEA.

While recognizing that many IORPs function perfectly well without undertaking cross-border activities, in particular because their sponsor companies have their workforce solely or mainly at national level and/or outside the European Union, **the OPSG regrets that the Directive has failed**

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<sup>1</sup> Legislative act, Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) [EUR-Lex - 32016L2341 - EN - EUR-Lex \(europa.eu\)](#)

<sup>2</sup> OPSG Advice, [OPSG advice on cross-border transfers of pension schemes -IORP II implementation | EIOPA \(europa.eu\)](#), June 30<sup>th</sup> 2020.

<sup>3</sup> OPSG Advice, [OPSG Advice on the upcoming review / cross-border activities, March 29<sup>th</sup> 2022.](#)

<sup>4</sup> The EIOPA report is available by clicking [here](#).

**to promote cross-border activities** because there are sponsor companies and IORPs that would like to be able to operate on a cross-border basis in an easy and efficient way without any unnecessary burden.

In this advice about the IORP II Review, the OPSG wishes **once more** to alert EIOPA and the Commission to the problem and **recommend that solutions be found to better facilitate the cross-border activities of IORPs**. The review of the Directive offers the ideal opportunity to progress in that direction.

### ***State of Play in Cross Border activities and transfers***

The OPSG welcomed EIOPA's "Cross Border IORPs" report documenting market activity. The OPSG broadly agreed with its detailed findings. EIOPA's report was mainly quantitative and often drew on conclusions from the much broader 2017 report. As many OPSG members have experience with cross-border activities of IORPs, the member of the Group assessed and complemented the findings of EIOPA's report.

**Based on the statistics included in the EIOPA report and on OPSG members' own observations, the OPSG considers that the Directive failed to deliver on its goal to facilitate cross-border activities of IORPs.** Although some cross-border IORPs extended their activities, the current level of cross-border activity remains marginal in relation to the size of the total market. Moreover, since the introduction of the Directive, there is no evidence of new cross-border transfers, even not between Member States where such transfers were happening previously. Projects are being abandoned due to regulatory hurdles. Multiple such cases came to the attention of OPSG members.

**Even if many IORPs do not suffer from this situation because they operate only locally, the interest for cross-border activities remains strong.**

Firstly, the OPSG confirms EIOPA's observation that many existing cross-border IORPs, included in both 2017 and 2021 reports, expanded their operations by starting new cross-border activities in new host countries like Germany or France (Art. 11 of the Directive).

Some other IORPs completed cross-border transfers from the host countries like the Netherlands and Ireland in 2017 and 2018. These transfers occurred ahead of the new prohibitive conditions

imposed by the Directive concerning approval by the majority of members and beneficiaries in case of cross-border transfers coming into force.

Secondly, many employers without existing cross-border arrangements are keen to explore more efficient management of occupational pensions in the EEA. Low-interest rates put increased pressure on financing of legacy defined-benefit plans and encourage cross-border consolidation. The transition from defined-benefit to defined-contribution plans continues, and social partners seek ways to improve defined-contribution plans to make them fit for purpose for the next generations of employees. Whereas a cross-border delivery model is often considered in feasibility studies performed by sponsors with operations in multiple European countries, this solution is rarely chosen due to inherent complexities.

### ***Way forward***

#### **The OPSG is committed to advising EIOPA on the preparation of its response to the Call for Advice.**

Last year the OPSG Working Group *IORP II Review* completed an OPSG Member Survey documenting various issues relating to the implementation of the Directive. This survey has recently been updated to highlight issues in the cross-border market. The legislative efforts of the last two decades have effectively failed to create a sizeable internal market for occupational retirement provision organized on a European scale. The directive's implementation in national law created substantial additional hurdles.

A thorough analysis of the existing barriers for cross-border activities and transfers could help to better understand what is missing to develop this market. This analysis should however not be limited to the Directive itself but should also look at its implementation in the different Member States and assess whether other rules and regulations prevent the facilitation of cross-border activities and cross-border transfers within the EU.

**As EIOPA is best placed to lead the work in this area, the OPSG strongly believes that, while responding to the Commission's Call for Advice, EIOPA should analyse all the obstacles that hinder or may hinder the cross-border activities and transfers with the EU, and to offer new innovative solutions to break down those barriers.** However, such solutions would have to ensure that IORPs having no need to undertake cross-border activities do not suffer any disadvantages against cross-border IORPs and that no potential for any kind of regulatory arbitrage is resulting out of them.

In the meantime, the OPSG will continue its work, not only by assessing the extent to which the implementation of the Directive facilitates cross-border activities and transfers but also by analysing what hurdles IORPs encounter when performing cross-border activities and what obstacles sponsors encounter when they want to offer their pension plan in another Member State.

There is a wide range of solutions that could be envisaged to encourage more cross-border pension provision. **The OPSG with its broad representation of the industry, members and beneficiaries, academics and associations, is well placed to advise EIOPA on these various possible approaches, on the back of a Call for Advice that would stimulate an open and unconstrained debate on the future of cross-border activities and transfers by IORPs.**

### 3. Information to members (WA3)

#### *Introductory statement*

The information duties of IORPs to their prospective and current members and beneficiaries are regulated by Title IV of the current IORPs II directive (EU/2016/2341). Recitals 63 to 69 and articles 36 to 44 stipulate in a comprehensive way which kind of specific information has to be provided by pre-contractual information documents, annual PBS, in the pre-retirement and pay-out phases, and any additional information on request by the members.

In the "Call for technical advice" to EIOPA of 14 June 2022 regarding the *evaluation and review* of the IORP II Directive the issue of *information to members* is mentioned twice in the section of "Scope of the request to EIOPA":

- No. 1 c: "The functioning of the Pension Benefit Statement. The purpose of the Pension Benefit Statement is to provide clear and comprehensive as well as relevant and appropriate information to facilitate the understanding of pension entitlements over time and across schemes. EIOPA should assess to what extent the current framework set out in Articles 38 to 40 of the Directive has delivered on these objectives including having regard to digitalisation and transparency of costs and charges."
- No. 2a: "This part of the advice should also explore and evaluate the possible options in relation to the different types of DC scheme, i.e. on prudential, governance, and business conduct requirements, as well as requirements on information to members and beneficiaries."



In consequence the PBS, mainly based on articles 38 to 40 of (EU) 2016/2341, and the additional information duties of DC pension schemes are of particular interest. Of course, other simultaneous and general developments like enhanced digitalization and sustainability aspects should be taken into consideration as well.

Looking at EIOPA's Annual Reports or its Consumer Trends Reports it may be stated that since 2018 and the implementation of IORPs II Directive (in some member states delayed) – fortunately – the issue of the information duties of IORPs seems not to be in the focus of any major criticisms. Therefore, the OPSG expresses the general opinion that the main focus of EIOPA's forthcoming technical advice should be the *evaluation* of the implementation of the existing information requirements of the current IORPs II directive for prospective members, current members and beneficiaries before adding any new requirements.

This statement does not exclude that there are some particular areas of concern like the digitalizing of information documents, the integration of information regarding ESG aspects in the pre-contractual phase or the broader scope of business of conduct rules which already now should be taken into consideration with regard to information requirements.

In order to make the evaluation of the implementation of the current IORPs II directive as effective as possible by EIOPA, the OPSG has formulated some guiding questions related to the issue of information to members. These questions should be clarified by questionnaires sent to the NCAs and IORPs as well as by consumer testings. Proposals for additional amendments of the current directive on this issue are outlined at the end of this part of the OPSG opinion.

***Guiding questions with regard to Title IV of the current IORPs II directive (EU/2016/2341)***

- a. Due the implementation of IORPs II in the different national legislations in EU MS since 2018, are there any additional national information requirements which could be included on the EU level as well (cf. article 36 (3) of IORPs II directive)?

Examples: mandatory design of pre-contractual / basic information on pension scheme for prospective members; mandatory presentation of biometric risk coverage like death and disability as well as of effects of exemption from payment of premiums on pay-outs? Which

are the specific additional mandatory information requirements of DC pension schemes in comparison to DB pension schemes?

- b. Have there been published the results of any empirical research works on the national level (by NCAs, professional, consumer, or other associations) on the acceptance and distribution of occupational pensions which should be taken into consideration on EU level (like "consumer testings")? This could be especially relevant for the quality and acceptance of PBS of IORPs which had been designed by EIOPA, but these designs have not to be used obligatorily by the IORPs (cf. EIOPA PR of 27 March 2020: Model IORP II Pension Benefit Statement. Providing clear, comparable information to pension scheme members in the EU).

*EIOPA website:*

[https://www.eiopa.europa.eu/media/news/model-iorp-ii-pension-benefit-statement\\_en](https://www.eiopa.europa.eu/media/news/model-iorp-ii-pension-benefit-statement_en)

- c. Some members suggest to evaluate if there are other information requirements already implemented in other sectors of the financial industry (banking, securities, life-insurances, or others) which are deemed so relevant (i.e. "value for money") that they could be added to IORPs as well (for ex. on performance scenarios, past performances, stress scenarios and conditions of pay-out reductions, impact of inflation on real purchasing power of pay-outs, cost disclosures, ESG)?

In this context, some members acknowledge that the *EIOPA Report on "Retail Investor Protection" of 29 April 2022* should be taken as strongly relevant for IORPs as well with regard to three issues:

- This report develops the idea of "most vital information" for customers of life-insurances in the pre-contractual phase (Report, no. 65, p. 40) and for the annual statements (Report, no. 38, p. 32). The idea of "most vital information" could be used for IORPs as well, especially with regard to the mandatory information for prospective members which is rather blur in the current IORPs II directive (cf. article 37 of EU/2016/2341).
- In order to prevent from any "information overload" we should take into consideration the increasing digital possibilities of "layering" of information (e.g. "sustainability preferences") and of "interactive information" (e.g. comparison tools for returns and costs) for customers (cf. Report, p. 50-52 and p. 58/59).

- The Report clearly points out that there should be shift from “paper by default” to “digital by default” related to customer information documents (Report, p. 51). This shift should be applied to IORPs and especially the PBS as well. By using the digital formal the obligatory integration of PBS into future Pension Tracking Systems on national level – if established - should be considered as a long-term objective.

*EIOPA website:*

[https://www.eiopa.europa.eu/document-library/advice/technical-advice-retail-investor-protection\\_en](https://www.eiopa.europa.eu/document-library/advice/technical-advice-retail-investor-protection_en)

### ***Proposals for additional amendments***

#### *a. Information to be given to prospective members with regard to ESG factors:*

The sub-paragraphs (2c) and (3c) of Article 41, of the current IORPs II directive stipulate that prospective members, both automatically enrolled or not, have to be “informed, before they join the pension scheme, about information on whether and how environmental, climate, social and corporate governance factors are considered in the investment approach”.

This information duty has been confirmed by the Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector which includes IORPs (cf. for example recital 4 and article 6 (3c) of EU/2019/2088).

Therefore some OPSG members refer to EIOPA guidance on the integration of “sustainability preferences” under IDD published on 20 July 2022, which could be taken as model for IORPs as well. They additionally stress that it should be recommended that prospective IORPs members are given practical popular examples of such investments even if not requested. This is similar to when blacklists were created as examples of unfair contract terms to make the legislation more clear to customers.

*EIOPA website:*

[https://www.eiopa.europa.eu/media/news/eiopa-publishes-guidance-integrating-customer%E2%80%99s-sustainability-preferences-suitability\\_en](https://www.eiopa.europa.eu/media/news/eiopa-publishes-guidance-integrating-customer%E2%80%99s-sustainability-preferences-suitability_en)

In contrast other OPSG members stress the principle of proportionality to be applied for these information duties. In some member states beneficiaries are either automatically enrolled or it can be part of a contract of employment that an employee has to join the IORP (mostly linked to collective investing and not single investment accounts). In these cases, the concept of pre-contractual information should be much less extensive as the beneficiary is not making any choice. Sometimes representatives of (present and future) beneficiaries are members of administrative and supervisory boards of IORPs and IORPs have a kind of annual meetings, where members or member's representatives can take part. If members have the preference, that certain sustainability aspects should be taken into account, they can raise this issue at such meeting and can decide, that the board of management of the IORP should follow that route, so that any kind of assessment regarding ESG preferences of individual members is not necessary.

The issues of risk assessment / Prudent Person Principle etc. of investment policies with regard to ECSG factors are pointed out in another work area of this opinion.

*b. "Scope of the supervision":*

The headlines of Title V (articles 45 to 59) and especially of article 46 of the current IORPs II directive (EU/2016/2341) should be amended and enlarged. Their headlines only mention "prudential" supervision, but "prudential" supervision is primarily linked to Title II ("Quantitative Requirements") and to Title III ("conditions governing activities") of the current directive.

As pointed out in the Call for Advice of June 2022 not only prudential, but governance and conduct of business requirements are more and more crucial, simply by the fact that DC pension schemes obtain more and more market shares of occupational pensions.

But independently from the general shift from DB to DC pension schemes, the issues of "information to be provided to members and beneficiaries" are explicitly mentioned in article 46, "Scope of Prudential Supervision", paragraph (j), of the directive, and obviously they do not belong to the area of prudential supervision, but to the supervision of conduct of business.

In consequence, stressing the importance of this issue, an amendment should be that the "scope" of supervisory activities shall be enlarged to "prudential, governance and conduct

of business supervision” in the headlines of Title V and article 46 of the revised IORPs II directive.

#### **4. Defined-contribution schemes**

The Call for Advice as it relates specifically to DC is based on the following:

*Exploring the need for and possible ways to adapt the regulatory framework to the shift from Defined Benefit (DB) to Defined Contributions (DC) schemes: In many Member States, DB schemes are becoming very rare and are increasingly replaced by DC schemes. This results in a shift of the investment risk from pension providers to pension savers and an erosion of the collective level of protection in occupational pension systems. The analysis should evaluate whether the requirements under the existing legal framework under the IORP II Directive are still adapted to this reality. This part of the advice should also explore and evaluate the possible options in relation to the different types of DC scheme, i.e. on prudential, governance, and business conduct requirements, as well as requirements on information to members and beneficiaries. The Commission is aware that EIOPA has already carried out work on specific requirements of DC schemes under the existing legal framework. By issuing this call for advice, the Commission intends to build on that work.*

There are a number of points worth noting on this:

- The shift to DC is not necessarily a shift from DB, as many Member States have never had DB schemes or have long established DC provision.
- Even in countries where there has been a shift towards DC provision, that does not necessarily mean that DB schemes are becoming rare as many will continue to exist until the final pension is paid.
- There is also a significant range of DC schemes that exist from very individualised arrangements where members need to make all or most of the decisions to collective arrangements where all decisions are made by those running the arrangement. Between those 2 extremes there are lots of hybrid arrangements that include different forms of risk sharing or even some guarantees. Therefore, a thorough analysis of status quo and trends in each Member State has to be a prerequisite before any discussions about further regulatory initiatives.

Furthermore, many of the requirements of the IORP II Directive apply equally to DB and DC schemes including the Investment, Governance, Key Function, Outsourcing and Information requirements. Large DC schemes are also subject to EIOPA Stress Tests. It is difficult to see what gaps exist. In assessing whether the requirements under the existing legal framework are still adapted to the new reality, the individual supplementary pension schemes should not be considered as a suitable reference. The special nature of the IORPs, the role of the social partners and the social purpose of IORPs should be always taken into account, no matter the regime in which the IORPs are organized. The main emphasis on DC plans, from a member perspective, should be ensuring they get the right information in order to make informed choices where choices exist. These are likely to be:

- On joining, where an individual has a choice whether or not to join an IORP. In many cases, joining could be compulsory or through automatic enrolment
- Where a choice exists on how much to contribute to the scheme. In some cases, the design may be that the more a member pays, the more the employer will contribute
- Where the member has a choice of investment fund
- When a member has a choice of retirement age or the form in which benefits can be paid

Having sufficient and clear information available to members at these points in time are crucial. Where members don't have choices, or where default options are in place for members who don't make an active choice, it is important that these are designed in a way that is appropriate for most of the members or a "typical" member. The existing Governance and Information requirements would seem adequate to achieve that. The work EIOPA had commenced on a DC Blueprint, looking to establish existing best practices would be a suitable method for establishing if there are any practices that would add value to the IORP II requirements.

## **5. Sustainable Finance (WA5)**

### ***Introductory statement***

In order to facilitate the work of National Competent Authorities in dealing with the changes that the EU Sustainable Finance policy framework entails, EIOPA has already issued a series of recommendations in its “Opinion on the supervision of the management of environmental, social and governance risks faced by IORPs”.

In this Opinion, EIOPA highlighted their increased need to take into account the potential long-term impact of investment decisions on ESG factors in order to support society’s sustainability goals and be in line with the European Commission strong sustainability policy agenda.

EIOPA has already clearly expressed its call to action for IORPs to embed sustainability goals and potential impacts in the investment decisions as part of the prudential responsibilities, clearly referring to their stewardship rights as way of ensuring that sustainability considerations are respected.

### ***Context***

According to the interpretation of the IORP II Directive issued in an EIOPA-opinion, it requires IORPs to take into consideration environmental, social and governance (ESG) factors and risks in the following areas<sup>5</sup>:

- the system of governance, as set out in Article 21;
  
- the investment policy, as set out in Articles 19 and 30;
  
- the risk-management system and the own-risk assessment, as set out in Articles 25 and 28;

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<sup>5</sup> Extract taken from the EIOPA ‘Opinion on the supervision of the management of environmental, social and governance risks faced by IORPs’ 10 July 2019

- the information to be provided to prospective members, as set out in Article 41.

### ***Recommendation N°1***

Against this backdrop, and in reference to the ‘investment policy’ a further improvement of ESG integration would be to mandate considerations around the long-term impact of their investment decisions on ESG factors with the Prudent Person Principle. This could be done by amending the provision of Article 19 (1) (b) without prejudice to the objective of providing occupational retirement benefits and in line with proportionality requirements. The concrete example of the wording is provided below.

#### *Article 19*

##### **Investment rules**

1. Member States shall require IORPs registered or authorised in their territories to invest in accordance with the ‘prudent person’ rule and in particular in accordance with the following rules:

- (b) within the prudent person rule, Member States shall ~~allow~~ **require** IORPs to take into account the potential long-term impact of investment decisions on environmental, social, and governance factors;

Furthermore, and building on this requirement, both relevance and financial materiality could be increasingly tested as part of the exercise to integrate ESG considerations in the investment policy, thus opening new avenues for double materiality considerations for IORPs. This would also reflect the work on corporate sustainability reporting – CSRD - currently been undertaken by EFRAG, and which was approved by the European Parliament on the 10<sup>th</sup> November 2022.

Double materiality consists of “the systematic integration of both outside-in and inside-out ESG risks by financial actors across financial decision-making processes”.

EIOPA makes reference to this in its Opinion already under 2.2 “Directive (EU) 2017/828 introduces in Article 3g(1) new requirements for institutional investors, including IORPs, **to publicly disclose their engagement policy on how they integrate shareholder engagement in their investment strategy and its implementation**”.



It will be noted that a minority of the OPSG members see several difficulties for the management of IORPs if they would be effectively obliged to consider ESG factors as part of their investment strategy and therefore would prefer opting for a 'Comply or Explain' approach. In this way IORPs would retain the possibility of not explicitly considering ESG factors (or to do it in a certain individually defined manner) while bearing the responsibility of explaining those instances in which they would deem such considerations to be out of scope.

### ***Recommendation n°2***

Notwithstanding the link with the WA on "information to be provided to prospective members' that may cover tangential issues, IORPs could support this principle through engagement and by means of holding investee companies accountable for aligning their business strategies with the EU sustainability goals. Without imposing specific ways of how governing bodies could or should deal with ESG factors, but rather emphasizing the need to document the inclusion of sustainability risks in the statement investment principles and in the voting policy reports provided by fund managers (where this is the case), IORPs could request information from their fund managers regarding their voting results at AGMs and make them available to their beneficiaries<sup>6</sup>. Small IORPs could be exempted from direct reporting obligations in view of the (SFDR disclosure required) reporting being conducted by their service providers. In some member states beneficiaries are either automatically enrolled or it can be part of a contract of employment that an employee has to join the IORP (mostly linked to collective investing and not single investment accounts). In these cases, the concept of pre-contractual information should be much less extensive as the beneficiary is not making any choice. Sometimes representatives of (present and future) beneficiaries are members of administrative and supervisory boards of IORPs and IORPs have a kind of annual meetings, where members or member's representatives can take part. If members have the preference, that certain sustainability aspects should be taken into account, they can raise this issue at such meeting and can decide, that the board of management of the IORP should follow that route, so that any kind of assessment regarding ESG preferences of individual members is not necessary.

### **Recommendation n°3**

Finally, and as emphasized by EIOPA in several documentations already, there is a concrete willingness to ensure that these ESG-type related requests are not perceived as burdens to small IORPs and it remains the role of supervisors to guide financial market participants and support them in their task. On this point, EIOPA together with the other ESAs and in collaboration and support of EFRAG could develop a platform where IORPs can learn and share examples of best practices to deal with ESG risks, in order to streamline and facilitate their work.

## **6. Diversity and Inclusion**

### ***Issue at stake***

Commitment to Equality, Diversity, and Inclusion (EDI) is increasingly topical and many pension funds are developing policies and strategies to address these both internally and externally.

Diversity and inclusion fall under the scope of the European Commission (EC) [Call for Advice \(CfA\) on the evaluation and review of the IORP II Directive](#) sent to EIOPA on 16 June 2022. By the 1<sup>st</sup> of July 2023, EIOPA must provide its technical advice on the EC request to *explore prudential requirements to include diversity and inclusion issues in relation to management bodies. This analysis should explore the need for such requirements in view of the objectives to ensure a broad representation in the management body in order to facilitate independent opinions and critical challenge and to more effectively monitor management and therefore contribute to improved risk oversight and resilience of institutions.*

EIOPA is preparing its response to the CfA on the IORP II and asked for the support of the OPSG. EIOPA must deliver its advice by 1 October 2023 (deadline has been extended 3 months).

It should be noted that:

- The EIOPA Board of Supervisors (BoS) supported in principle at its meeting on 31 March 2022 the proposal to pursue diversity of management bodies of European insurers and institutions for occupational retirement provision (IORPs).

- On 29 April 2022, EIOPA sent a [letter to the EC, European Parliament, and Council of the EU](#), asking to amend the IORP II Directive (and Solvency II) with new provisions on EDI. Annex II of the letter suggests new draft recitals and articles for the IORP II Directive, which are inspired by the current CRD IV Directive.
- In 2022-2023 EIOPA ACP will further work on proportionality, focusing in particular on its application in relation to diversity and inclusion in the composition of IORPs management bodies. At the last OPSG meeting, EIOPA noted that:
  - When addressing diversity and inclusion in the context of the composition of the Administrative, Management and Supervisory Body as well as along the decision-making process, namely regarding senior managers and key function holders, proportionality should be taken into consideration.
  - Proportionality on the implementation of such aspects is key in particular for entities with a lower number of staff. Nature and complexity of the risks are not seen as a factor that affect the implementation of diversity and inclusion. The aim should not be to increase the number of staff to comply with any diversity and inclusion provision but instead to embed the principles into the undertaking's culture while all undertakings should aim for adequate diversity in the composition of their AMSB it could take undertakings with smaller AMSBs longer to achieve their goal. Also, when the number of AMSB members or staff in general is low other measures to ensure diversity and inclusion in the decision-making process may be considered.
  - When an undertaking makes use of outsourcing it should ensure that lack of diversity or inclusion within the service provider do not lead to biased decision making and/or biased outcomes in the processes outsourced.

### ***Equality, diversity and inclusion – the EU legislative framework***

It is important to highlight that many of the EDI rules and values are well rooted in the EU legislative framework and policies. EIOPA must consider this already existing framework when preparing its advice.

**Equal pay for equal work** is one of the EU's founding principles enshrined in Article 157 of the Treaty on the Functioning of the European Union (TFUE): *each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.* This

implies that MSs must eliminate discrimination on grounds of sex with regard to all aspects and conditions of remuneration for the same work or for work of equal value. Article 157 has direct effect in proceedings between individuals in which failure to observe the principle of equal pay for male and female workers for work of equal value is pleaded. Thus, to legislate on this in secondary legislation, such as IORP II, would be unnecessary and superfluous.

**EU equality legislation** is legally binding in all EU Member States, and it has also been transposed in EEA countries, EU candidate countries and other countries that have undertaken to approximate their national legislation to EU equality law. This existing legislation includes e.g. the Race Equality Directive [2000/43/EC](#), the Framework employment Directive ([Directive 2000/78/EC](#)) against discrimination at work on grounds of religion or belief, disability, age or sexual orientation, Gender Goods and Services Directive ([Directive 2004/113/EC](#)) implementing the principle of equal treatment between men and women in the access to and supply of goods and services, the Gender Recast Directive ([Directive 2006/54/EC](#)) on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation and the Work-Life Balance Directive ([Directive \(EU\) 2019/1158](#)) of the European Parliament and of the Council on work-life balance for parents and carers. There is also pending legislative proposals such as the Pay Transparency Proposal – a [Proposal for a Directive](#) of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms. All in all, the EU has in many levels an existing legal framework in EDI issues that needs to be considered in assessing the need for additional legislative proposals.

In recent years, the EC has adopted **several policies to strengthen Europe's commitment to equality, diversity and inclusion**. In 2020, the European [Commission published a communication on the EU Gender Equality Strategy 2020-2025](#), which includes targeted measures to achieve gender equality, and also stresses the need to address the gender pension gap (a matter outside the scope of the call for advice). It is important to tackle gender stereotypes which is an important element of the gender equality strategy as there is very often a connection with the stereotype-part of gender equality

The 2020-2025 EU anti-racism action plan, the new Roma strategic framework for equality, inclusion and participation, the 2020-2025 LGBTIQ equality strategy, the 2021-2030 strategy for the rights of persons with disabilities and the action plan implementing the European Pillar of Social Rights all stress the importance of preventing and tackling discrimination enforcing EU law and principles in this field.

The **promotion of equality is a task for the Union, in all its activities, required by the Treaties.** Article 8 of the Treaty on the Functioning of the European Union states that *in all its activities, the Union shall aim to eliminate inequalities, and to promote equality between men and women.* Recently, the European Commission has taken important steps to promote and mainstream equality. With the support of dedicated internal Task Force, created in 2019, the Commission has integrated an equality dimension into all EU policies and major initiatives.

Finally, **equality is one of the EU's founding values.** The [Charter of Fundamental Rights of the EU](#) proclaims the fundamental rights and freedoms protected in the EU. It is addressed to the institutions and bodies of the EU and the national authorities of EU Member States when they are implementing EU legislation. Title III on equality contains general provisions on equality before the law and prohibition of any form of discrimination as well as more specific provisions concerning the rights of the child and of the elderly, integration of persons with disabilities, equality between women and men and linguistic diversity. Adopted in 2000, the Charter is legally binding since the entry into force of the Lisbon Treaty in 2009.

In summary, (gender) equality is a core value of the EU and a fundamental right, and key recent policy initiatives of the EC have been taken to make equality, diversity, and inclusion a European reality. It is also clear that there is a need to strengthen EDI in Europe, also with proper legislative actions.

### ***Proposals for changing the IORP II Directive – notes***

The EC call for advice mandates EIOPA to explore prudential requirements to include **diversity and inclusion** issues in relation to IORP management bodies<sup>7</sup>.

EIOPA made clear in its letter in April 2022 that it aims to ensure adequate representation in the management body of the population as a whole and to monitor management and mitigate biased decision-making more effectively. In its letter to the Commission, EIOPA included in Annex II draft recitals and articles for the IORP II Directive inspired by the current CRD IV Directive suggesting:

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<sup>7</sup> The IORP II Directive currently refers to “management or supervisory body”, see e.g. Article 20 IORP II Directive:

1. Member States shall ensure that the management or supervisory body of an IORP has ultimate responsibility under national law for the compliance, by the IORP concerned, with the laws, regulations and administrative provisions adopted pursuant to this Directive.
2. This Directive is without prejudice to the role of social partners in the management of IORPs.

- New paragraphs in **article 21** requiring IORPs to put in place a policy promoting diversity on management or supervisory bodies and introducing the notion of target for underrepresented gender in the management or supervisory bodies for significant IORPs.
- New paragraph in **article 23** stating that remuneration policies and practices shall be gender neutral
- Amendment of **article 6** defining a gender-neutral remuneration policy

#### ***OPSG comments on these proposals***

- While the OPSG could fully agree on the importance of EDI policy, EIOPA's aim of ensuring the adequate representation of *the population as a whole* seems problematic. The IORP's management or supervisory body should reflect the different interests of the IORPs, which are essentially those of the sponsor(s) employers, members, and beneficiaries, not of the population as a whole.
- As mentioned above, article 157 of the basic treaties has direct effect in legal proceedings between individuals in which failure to observe the principle of equal pay for male and female workers for equal work and work of equal value is required. This implies that the new draft paragraphs in article 23 and article 6, and the related recital suggested in EIOPA's letter would not have any new legal impact, as a remuneration policy or practice distinguishing between genders is illegal as it runs against the basic treaties of the EU. Therefore, there is no need of include new provisions in secondary legislation on a matter already covered in primary and directly applicable legislation.
- As for the suggested new paragraph in article 21, it is clear that achieving diversity, equality, and inclusion in organizations requires change behavior. A principle-based approach would most probably allow IORPs to take EDI issues in consideration in the way that best fits its size and characteristics. An important element is the relevance of the **proportionality principle** on governance issues, including on EDI. While it is important that the ACP will work on proportionality in this area, the OPSG should also comment some questions regarding the approach EIOPA is suggesting in the letter, such as:
  - For banks, CRD IV introduces the concept of *significant* CRD-institutions, i.e. institutions referred to in Article 131 of Directive 2013/36/EU (global systemically important institutions (G-SIIs'), and other systemically important institutions (O-SIIs'), and, as

appropriate, other CRD institutions or, for the purposes of Article 91 of Directive 2013/36/EU, financial holding companies and mixed financial holding companies, determined by the competent authority or national law, based on an assessment of the institutions' size and, internal organisation, and the nature, scope and complexity of their activities.

- According to applicable guidelines:
  - All CRD institutions must have and implement a policy promoting diversity on the management body
  - *Significant* institutions should set a quantitative target participation of the underrepresented gender and specify an appropriate timeframe within which the target should be met and how it will be met.
  - Other institutions (non-significant), and in particular those with a management body of fewer than 5 members, can express the target in a qualitative way.
- For IORPs (and insurance undertakings), EIOPA's letter states that they should set a target in a manner that is proportionate to their size, internal organisation and the nature, scope and complexity of their activities. It would therefore be in the remit of the NCAs to apply the new rules proportionally. The practical application of the proportionality principle in IORP II has not always worked as expected, also and especially concerning governance requirements. NCAs have often looked merely at the size of IORPs, without considering their internal organization and the nature, scope, and complexity of their activities. Therefore, there is a concrete risk that EIOPA's proposal will not be applied proportionally. The reflection of EDI policies in IORPs management bodies' composition should take account of all the characteristics of the IORP considered to best reflect the different interests in place.
- However, EIOPA's explanation refers to *significant* IORPs (and insurance undertakings), which is confusing, as this concept is not part of the IORP II Directive or elsewhere defined.

### ***OPSG draft views on the matter***

Ensuring an effective system of governance is essential for IORPs to ensure the adequate management of risks and the protection of members and beneficiaries. Equality, diversity, and inclusion considerations can be important factors for the good governance and decision-making of pension funds, and therefore for achieving good outcomes for their members and beneficiaries. The OPSG supports equal, diverse, and inclusive management bodies, as numerous studies diverse and the more inclusive management of an organization improves performance.

The OPSG expresses some reserve on EIOPA's approach on the matter. The letter sent by EIOPA to the EC includes specific amendments but did not assess nor consider the issue at stake in an appropriate manner. It is important that EDI is considered within the broader governance rules governing IORPs. The OPSG notes that IORPs have considerably improved the quality of their management bodies in recent years. The IORP II Directive provides for a quite complex system of governance, which is articulated in Title III. When regulating the composition of the management body, the current IORP II Directive does not require IORPs to have a diversity policy in place, nor to set a target for underrepresented gender in the management or supervisory bodies. However, it sets general governance requirements and more specific requirements for fit and proper management and the remuneration policy of people who effectively run the IORPs. Being a minimum-harmonization Directive, it leaves Member States the freedom to further specify the requirements at the national level. Many Member States have taken this opportunity in governance requirements and some have specified additional criteria for the composition of IORPs' management bodies. Therefore, the IORP II alone does not provide the full picture of the current situation. **Before suggesting specific changes to the IORP II, EIOPA should analyze how the Directive has been implemented and consider what rules IORPs must follow when nominating their management bodies, how they do it, and, in those instances where IORPs are already integrating EDI policies, how this impacted the management of the IORP considered.**

The OPSG also highlights that EDI is a multi-dimensional subject, as it may be reflected in differences in, *inter alia*, age, gender, gender identity, sexual orientation, education, religion or belief, race, ethnicity, socio-economic and/or cultural background, nationality, disability. **In its advice, EIOPA should take into account the different aspects of EDI.**

EIOPA should consider in its technical advice that EDI considerations in the context of good governance of pension funds are concepts already well rooted in the EU legislative framework and policies, as described in the chapter below.

**Given the heterogeneity of the IORP sector, it is key that in its advice EIOPA considers the importance of the proportionality principle in this field.** IORPs can be very diverse in terms of size, nature, scale and complexity and this should be considered by EIOPA and the EC when introducing new requirements. Also, a **principle-based approach on the matter should be preferred to “tick-the-box” rules.**



**Any changes introduced to the IORP II must consider the characteristics and specificities of the sector.** IORPs are pension institutions with a social purpose and contrary to other institutional investors such as banks, IORPs are often (not-for-profit institutions) based on collective agreements and deeply rooted in the national social and labour laws. In the context of occupational pension funds, EDI can be considered by the social partners when establishing the governance structures of the pension fund they are setting up through collective bargaining agreements. The members of occupational pension fund governing boards are often selected by sponsoring employers and employees (and not by the IORP itself), sometimes in equal numbers.

**Employee or member representation** can ensure a better alignment of the interest of the governing board with those of the members and beneficiaries. It is important that EIOPA recognize the characteristics and the heterogeneity of the IORP sector, as these reflect on the management bodies. **The inclusion of the social partners should be considered by EIOPA as an important factor to ensure diversity and inclusion in the management board.**

Finally, EIOPA should consider that many pension funds already have in place strategies and policies aimed at guaranteeing an equal, diverse, and inclusive representation of the interests within their management bodies.