



EIOPA-OPSG-15.02

25 June 2015

**OPSG**

**Position Paper on the European  
Commission's proposal for an IORP II  
Directive**

## **1. Executive summary**

The OPSG welcomes the objectives of the IORP II recast directive proposal published by the European Commission in March 2014. Changes in the IORP I Directive must aim to stimulate the accrual of pensions in the second pillar by finding a balance between safety, adequacy and sustainability of pension provision as well as improved transparency and governance. For providing good pension benefits the profitability and net returns of pension funds are important.

It is important to note that the directive proposal does not include provisions on solvency and aims to deal with prudential requirements, but not with issues that belong to the social and labour law of the member states. Subsidiarity and proportionality need to be taken well into account in the IORP directive, which means that EU level legislation should concentrate more on principles and leave enough room for flexible and feasible solutions at Member State and IORP level. The OPSG recognises that there are issues such as cross border transferability or tracking accrued pension rights in other Member States that are difficult to solve without a proper EU framework or a well-functioning European platform.

Good governance is a vital part of IORPs and it is important to enable the continuing participation of social partners while at the same time taking duly into consideration the need for expertise. It is important that the administrative and supervisory boards as a whole are fit and proper and no conflicts of interest exist in administering the key functions of the IORP.

The OPSG supports the objective of ensuring that information on guarantees and security mechanisms is clear for members and beneficiaries, who should be fully aware of the risks they bear, but does not think that a one-size-fits-all Pension Benefit Statement would be the right way to accomplish this. However, pension scheme members and beneficiaries would benefit from having access to concise and understandable information in a comparable form.

In line with our position we emphasize that as much as possible of the EU level legislation that is deemed necessary should be legislated at level 1 of the legislative procedure to make sure that both Member States and the European Parliament can decide on the content. If there is need for more detailed clarification, the OPSG suggests doing this at the most appropriate level. This can be EU level but also the Member State level.

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The proposed changes will have an impact on the IORPs and the OPSG regrets that the proposal has not passed the Impact Assessment Board.

### 2. Introduction

On 27 March 2014, the European Commission published a proposal for a Directive on the activities and supervision of institutions for occupational retirement provision (hereinafter IORP II Directive) as part of a long term investment package. The proposal has been debated in the European Council under the Italian Presidency in the autumn of 2014. In December the Council reached a compromise text and also a negotiating mandate and negotiating stance which enable negotiations with the European Parliament. The European Parliament has begun to work on the proposal and is expected to vote late 2015. The trialogues negotiations are expected in early 2016. OPSG comments are based on the Commission's proposal but we note that some of the issues which we have raised have been addressed in the text agreed by the Council.

According to the European Commission, the IORP I Directive (Directive 2003/41/EC) needs to be revised because:

- The economic and financial crisis revealed vulnerabilities in the pension sector particularly on governance;
- There is a need to take into account the changes of the occupational pension landscape with a clear shift from Defined Benefit (DB) schemes to Defined Contribution (DC) schemes, even though the majority of occupational pension fund assets still belong to DB schemes and e.g. in Germany only DB plans are legally qualified as 2nd pillar pension provision;
- Regulatory divergences, overlapping requirements and excessively burdensome cross-border procedures must be reduced in order to strengthen cross-border activity of IORPs;
- In some Member States the information requirements are strictly regulated but there are significant differences in this between Member States and thus there is evidence of significant gaps in the level of information provided to the members and beneficiaries.

The Directive proposes new rules for governance, risk management, disclosure and information to beneficiaries. The general objective of this proposal is to facilitate the developments of occupational retirement savings. In addition, this proposal has four specific objectives:

1. Removing remaining prudential barriers for cross-border IORPs, notably by requiring that

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Note: This input was developed by the OPSG Occupational Pensions Stakeholder Subgroup on "Solvency Issues" in line with mandate approved at 07/07/2014 OPSG meeting: [https://eiopa.europa.eu/Publications/Meetings/20140718-EIOPA-OPSG-14-01\\_OPSG\\_Subgroup\\_Solvency\\_issues\\_Mandate-cl.pdf](https://eiopa.europa.eu/Publications/Meetings/20140718-EIOPA-OPSG-14-01_OPSG_Subgroup_Solvency_issues_Mandate-cl.pdf)

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the rules on investment and disclosure of information to members and beneficiaries are those of the home Member State, as well as by clarifying procedures for cross-border activities and clearly defining the scope of action of home and host Member State;

2. Ensuring good governance and risk management;
3. Providing clear and relevant information to members and beneficiaries and
4. Ensuring that supervisors have the necessary tools to effectively supervise IORPs.

The OPSG supports generally the objectives of this proposal: The OPSG advocates the changing the IORP I Directive should stimulate the accrual of pensions in the second pillar by finding a balance between safety, adequacy and sustainability of pension provision. For providing good pension benefits the profitability and net returns of pension funds are important. However, the comparability of returns for pension fund outcomes is difficult due to the differences in national frameworks. Also within national frameworks it is very difficult to compare the returns for pension fund outcomes, because of differences between pension schemes.

The OPSG supports the specific objective of the Directive to ensuring good governance and providing transparent and relevant information to members and beneficiaries.

Nevertheless, the OPSG doubts the proposed Directive will help to achieve more cross-border activities as the main hurdles identified by stakeholders in previous consultations have not been – and cannot be in most cases- adequately addressed by the IORP Directive. The application of social and labour law as well as taxation legislation of different member states are the main issues and belong to the competence of the member states and cannot be legislated by the IORP directive.

The IORP II directive only targets to regulate the prudential regime, and not social and labour law. One hurdle for cross-border provision in the IORP directive is the full funding requirement, but the Commission does not propose to change it. The OPSG acknowledges that such requirement plays a key role in preventing regulatory arbitrage as regards the prudential requirements applied to IORPs in the different Member States. Capital requirements are not included in IORP II proposals and EIOPA continues to work on the solvency framework for IORPs. The OPSG will comment on this question in due course.

### **3. II. Subsidiarity and proportionality**

The histories and designs of occupational pension systems in Europe are very diverse. Occupational pension schemes are mostly embedded in national social, labour and tax laws or based on various agreements between social partners. They are often part of the national pension system and complementary to the first pillar or public pension schemes.

Therefore the OPSG stresses that it is a Member States' competence to decide on the design of the pension system according to the subsidiarity principle. The OPSG thinks it is essential that the IORP Directive has the right balance between the Member States and social partners competences on the one hand and the EU internal market competences on the other hand. Thus, any European regulation in the area of occupational pensions should be sufficiently flexible in order to cater for different national systems and not to infringe on the competence of the Member States or on the competence of social partners to negotiate and design occupational pensions when as part of the employee remuneration system wages. That being said, - and lacking any revision of the prudential regime – the OPSG sees a role for IORP II to ensure that members and beneficiaries are sufficiently informed about the conditions of their occupational pension schemes, the expected level of retirement benefits, their past real net performance especially when this is of relevance for the expected benefits and the risks they bear.

Risk management in IORPs should be based on commonly accepted broad principles and their implementation can vary in Member States.

The OPSG notes that the amount of cross border activity since the IORP I Directive was passed has been marginal, although there have been few cross border IORPs established in the last few years by multinational companies operating in a number of Member States. The OPSG acknowledges the Commission addressed some of the obstacles in the proposal (for example with regards to cross-border activity procedure and definition) but other steps may be needed to reach an optimal number of IORPs operating cross border.

Finally the OPSG is strongly supportive of the principle of proportionality, as set out in the Directive proposal, which would enable IORPs to comply with the governance requirements whilst leaving sufficient flexibility to take into account the nature, scope and complexity of their activities. Furthermore, information requirements should be non-exhaustive and outcome-focused rather than stipulate who provides the information and in what forms, as long as they aim to provide concise, understandable and comparable information to pension scheme members and beneficiaries. The cross-border comparability of information may need to be dealt separately. Information that is provided should help scheme members make informed choices about their retirement provision.

#### **4. Conditions governing activities**

The proposal contains detailed new rules on governance (see Title III of the Directive). These include provisions concerning an effective system of governance, that persons holding key functions have the necessary qualifications, knowledge, and experience and that there is a sound remuneration policy. Furthermore, the Directive proposal sets rules for an effective risk management function. The Directive also provides for rules for outsourcing and investment management.

The OPSG is in favour of good governance and therefore welcomes most of the improvements proposed by the European Commission. The OPSG wants to remind policymakers that social partners (representing employers and employees) in the Member States have an important role in setting up and administering occupational pension schemes. The alignment of interests between the scheme members and those administering the scheme is vital. In a number of Member States, agency issues can be dealt with in pension funds by the involvement of the major stakeholders (beneficiary, employee and employer representatives), in the administrative and supervisory bodies. These bodies could, also include external experts when deemed necessary taking into consideration the specificities of the IORP (size, complexity, professional qualifications of the members of the administrative and supervisory bodies etc.).

Therefore, - as stated many times in the proposal - the governance requirements should apply without prejudice to the role of social partners and of participants (“members” and “beneficiaries”). That is why we would stress the following:

- The OPSG considers the governance of IORPs to be a vital part of the occupational pensions and has worked on this topic during its previous mandate based on own initiative.
- The OPSG agrees that the body of persons “effectively running the institution” or have other key functions should be “fit and proper”. All those persons should be “proper” but it would be

disproportionate to require all those persons to be “fit” as long as the body as a whole is considered “fit”. For example, the trustees of trust based IORPs can have different specialisms and experiences, in order to ensure the best combined outcome for pension scheme members and can be fit as a whole. Should all be required to be fit individually, a practical problem would also arise: there are 44,000 IORPs in the UK, and most probably not enough “fit” persons for each of these schemes. Therefore, the requirement to be “fit” should be a collective responsibility and applied to the governing body as a whole.

- The OPSG states that in some pension systems, the sponsoring employer(s) and the IORP have a close link and those who run the IORP and hold key functions in the governance structure are employed by the sponsoring employer(s), and may perform similar functions for the IORP. This is especially true when it comes to the audit function. Therefore, the OPSG does not think that it should be prohibited to perform similar functions in the sponsor and the IORP provided there is full transparency and no conflict of interest arises for any member of an IORP governing body the persons carrying out the internal audit function. The OPSG notes this approach is also allowed under the Solvency II delegated acts (Article 271(2)).

- As regards the depositary, the OPSG notices there may be regulatory overlaps if an IORP is required to have a depositary at all times. As an example, in a situation where the asset management function is outsourced to an asset management company, the asset manager might already have a depositary. Another example is when the investment options include products with underlying investment funds. Such funds will in most cases already be subject to a requirement to have a depositary. Therefore, the OPSG suggests leaving it to member states to decide on the best approach for the safe-keeping of assets and oversight duties.

## **5. Information to the prospective members, members and beneficiaries**

The OPSG welcomes the intention of the European Commission to improve information disclosure to scheme members and beneficiaries (see Title IV of the Directive) and notes the new provisions are in line with what has been proposed in other areas of the financial sector. The Directive gives an overview of information to be provided to the members, prospective members and beneficiaries. In addition, the Directive proposes a so-called “Pension Benefit Statement” (hereinafter PBS).

The OPSG questions the “one-size-fits-all” approach taken by the European Commission given the heterogeneity of the occupational pension sector in Europe. This being said, the OPSG supports the

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objective of ensuring that information on guarantees, returns and security mechanisms is clear and comparable for members and beneficiaries, who should be fully aware of the risks they bear.

Although the OPSG recognizes some of the features included in the PBS would fit certain types of pension schemes, they could be difficult to implement and/or not be entirely relevant for other types of schemes. For instance, a member of a collective industry-wide Defined Benefit scheme do not expect and/or need the same information as a member who needs to take an investment decision with regards to the design of his/her payout phase.

That is why the OPSG is of the opinion that – while keeping the idea of an EU single and simple document – the information requirements must be more flexible and less prescriptive so as to cater for the different systems in the Member States, in light of the fact that it is the Member States, and often the social partners, that decide over the design of pension schemes. In order to fulfil these objectives, the information requirements in the directive proposal should not hinder good existing national practices and must be of a non-exhaustive nature as well as should focus on outcome rather than form as long as clarity, limited volume and comparability are preserved.

The OPSG thinks that information provision should put these findings into practice and rather promote effective information than providing members and beneficiaries with information that might not be fully understood or result in misleading interpretation. Information to scheme members has to be comprehensive, informative and meet their needs while reducing complexity and optimise attention. The information should be easy to understand by members and beneficiaries, and this would be in line with the best practices promoted in EIOPAs “MAX report”.

### **6. V. Delegated acts**

The OPSG notes the Commission is empowered to adopt delegated acts, yet limited to remuneration policy (article 24.3), risk evaluation for pensions (article 30) and on the Pension Benefit Statement (article 54).

The OPSG is convinced that pensions are not a purely technical issue, but comprise political elements. For instance pension communication is strategically so important for the further development of occupational pensions that it is not correct to see them as technical elements only. Pension policy represents a delicate balance between Member States' and European competence.

Therefore with regard to pensions, as much as possible of the EU level legislation that is deemed necessary should be legislated at level 1 of the legislative procedure to make sure that both Member States and the European Parliament can decide on the content. If there is need for more detailed clarification, the OPSG suggests doing this at the most appropriate level and this is in many cases the



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Member State level. However, cross border issues may require EU level legislation , except for the PBS that must enable EU pension fund participants to easily compare one plan to another, even if it is domiciled in another Member State.

## **7. Impact Assessment**

Finally, the OPSG regrets that the Impact Assessment of the proposal has not passed the Impact Assessment Board twice as mentioned by the Europe Commission in the Directive proposal (p.4). The OPSG also notes the European Parliament issued a negative advice in its initial appraisal of the European Commission Impact Assessment. The OPSG is concerned that the European Commission did not provide a reliable in-depth analysis of the potential impact of the current proposal.

The OPSG considers a robust Impact Assessment was needed in order to make sure that the intended changes in the Directive would actually not lead to higher cost and an increased administrative burden for the pension institutions, and furthermore to guarantee that more occupational pension institutions would be established and that those existing would continue to do so. The Impact Assessment should not only focus on the impact for pension institutions but also on the participants.

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Adopted by the EIOPA Occupational Pensions Stakeholder Group (OPSG) on 1<sup>st</sup> July 2015

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