



European Parliament – Committee on Economic and Monetary Affairs:

[Draft Report on the Proposal for a Disclosure Regulation](#)

aba position paper

Summary

Paul Tang, Rapporteur in the responsible ECON Committee, published his Draft Report on the proposal for a regulation of the European Parliament and of the Council on disclosures relating to sustainable investments and sustainability risks and amending Directive (EU) 2016/2341 on 2 August 2018.

The aba very much welcomes that the delegated acts for the EU regulation of IORPs in Art. 10 of the Commission Proposal have been deleted in the ECON Draft Report. Generally, it is the right approach to make regulatory changes for IORPs by directly amending the IORP II Directive.

However, since the IORP II Directive is currently being transposed into national law (deadline: 13 January 2019), no changes should be made to the Directive at the moment. In line with the “Better Regulation Agenda” of the EU, the new (ESG) rules should be implemented and, after a number of years, reviewed and evaluated (deadline stipulated for review in the IORP II Directive: 13 January 2023).

Nevertheless, below we comment on the changes to the IORP II Directive the ECON Draft Report proposes. Overall, we welcome the EU's support for institutional investors to include ESG factors and risks in their investment decisions and risk management, but we reject a blanket requirement to do so.

Concluding, we would again like to emphasise that regulatory changes for IORPs should be made directly in the IORP II Directive. As a consequence, IORPs should be taken out of the definition of “financial market participants” as stipulated in the Commission Proposal for a Disclosure Regulation.

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Introduction

Paul Tang, Rapporteur in the responsible ECON Committee, published his Draft Report on the proposal for a regulation of the European Parliament and of the Council on disclosures relating to sustainable investments and sustainability risks and amending Directive (EU) 2016/2341 on 2 August 2018.

- Overall, the aba very much welcomes that the delegated acts for the EU regulation of IORPs in Art. 10 of the Commission Proposal have been deleted in the ECON Draft Report. The Draft Report includes a number of additions to the IORP II Directive. Their significance and effects are currently being discussed. While we welcome the EU's support for institutional investors to include ESG factors and risks in their investment decisions and risk management, we reject a blanket requirement to do so.

We would like to comment on a number of amendments relevant for IORPs:

1. Deletion of the empowerment to issue delegated acts in Art. 10

The Draft Econ Report deletes the empowerment to issue delegated Acts in the IORP II Directive. Paul Tang emphasised at the first hearing of the Draft Report on 03 September 2018 that during the Review of the IORP Directive it was agreed that delegated acts are not an adequate legal instrument for IORPs, and that this should be taken into account for the current legal proposal as well.¹

- We support the deletion of the delegated acts for IORPs as proposed in the Draft Report. The approach to change the IORP II Directive directly rather than empowering the Commission to issue delegated acts is generally adequate, because it takes into account the objective of the Directive, which is EU minimum harmonisation.

2. Changes to the IORP II Directive

The Draft Report proposes changes to the investment rules (A41 for Art. 19(1)a IORP II and A42 for Art. 19(1)b IORP II), to the own risk assessment (A44 to supplement Art. 28(2) with point (ga)) and to the statement of investment policy principles (A45 for Art. 30 IORP II).

We very much oppose any change to the IORP II Directive at this point in time. The IORP II Directive is at the moment being transposed into national law; the deadline for transposition is 13 January 2019. In Germany, the draft law is currently being discussed, it is expected that the transposition will be completed at the beginning of January 2019 as required.

The IORP II Directive itself includes the requirement for evaluation and review until 13 January 2023. Neither the Commission Proposal nor the amendments in the ECON Draft Report are based on any actual experience with the (ESG) new rules. In line with the Better Regulation Agenda the new rules which are being transposed now should first be evaluated before they are replaced / supplemented with additional rules.

- We therefore call on the Commission and the other EU institutions to give Member States and importantly the IORPs first of all some time to implement the new ESG rules set down in the IORP II

¹ [ECON Committee meeting 03 September 2018](#)

Directive before new rules are set up. The deadline for review and evaluation of the IORP II Directive is 13 January 2023.

2.1 Investment rules

Amendments 41 and 42 change Art. 19 (1) a and b (investment rules) of the IORP II Directive. A41 deletes the existing rules for addressing conflicts of interest and stipulates that the best interest of the beneficiaries is to be determined by an active consultation with beneficiaries.

- From our perspective, a survey of all beneficiaries mainly entails high costs and no added value. In our opinion, the interests of the beneficiaries are best safeguarded by including their representatives in the relevant IORP committees. Generally, the representatives hold such an office for several years, building up competence and experience, often considering questions in greater detail than a regular member would. In addition, representatives can obtain advice and exchange information amongst each other. We therefore propose that Art. 19 (1) IORP II is left unchanged. Should an amendment nevertheless be made, it should refer to an appropriate involvement of the representatives of the beneficiaries.

A42 changes the current *option* to include ESG criteria within the prudent person rule to a *requirement* to include ESG criteria.

- Generally, we support the inclusion of ESG risks into the proposed due diligence process. However, the framework for the final investment decision should remain as it is: determined by the prudent person rule and in the interest of all beneficiaries of the IORP.

2.2. Own risk assessment

A44 stipulates the inclusion of due diligence in the own risk assessment. A17 defines “due diligence”. The requirement as stipulated in the Draft Report goes well beyond what is currently required in Art. 28 (2) h IORP II Directive and should therefore not be included in the final text.

We generally welcome the definition of the central term “sustainability risk”, and that it includes not only environmental risks but also social and governance issues (A20). However, it seems difficult to incorporate this comprehensive definition into due diligence processes for all investments. From a cost-benefit perspective it is therefore necessary to grant IORPs some leeway if and how they incorporate sustainability risks.

- Risks related to a reduction in value because of changes to regulation should be included in the qualitative analysis within the own risk assessment for those assets making up a significant share of the IORP’s assets. Quantitative assessments are not likely to be feasible in most cases, or, if they are, they are likely to be beyond a reasonable cost-benefit ratio.

2.3. Statement of investment policy principles

To foster transparency, we support the proposal to include the due diligence process in the statement of investment policy principles. The description in the statement should be concise and free of jargon, so that those who are not experts in occupational pension can also understand it.

3. Due diligence

The Draft Report introduces the concept of due diligence as used by the OECD in their publication „Responsible business conduct for institutional investors“. While we generally welcome the use of research in the legislative process, we are against a direct reference in the main body of the legal text itself. In particular, the legal text should not automatically recognise potential future changes the OECD might make to its document.

- The reference to the OECD publication „Responsible business conduct for institutional investors“ should be moved from Art. 2 (1) pa (new) into Recital 16a (new). For the EU to retain sovereignty over its legislative acts, the Disclosure Regulation should not include a carte blanche for future changes to the OECD document.

4. Aim and scope of the Regulation

At the ECON committee meeting on 03 September 2018, Rapporteur Paul Tang called for a „change in the mind-set of investors.“² This is mirrored in the Amendments changing the aim and scope of the Regulation: A9 changes the aim of the Regulation, inserting „to **integrate environmental, social and governance risks into investment decision-making**“ as an objective to Recital 18. With this addition, the Recital goes beyond what is explicitly stipulated as the objective of the Regulation in Article 1. Article 1 it is also changed, the transparency requirements are extended from those financial products which take into account ESG factors to all financial products (A10).

- The Draft Report goes beyond the disclosure of the treatment of ESG factors for products that are ESG-oriented and pursues a "change in the mind-set of investors". However, how IORPs take ESG factors into account within the framework of the prudent person rule should be left to the IORPs.

5. ESG and remuneration policy

The proposed requirements regarding the remuneration policy are not clear to us. We are for example not sure what the minimum target of 50% refers to – 50% of assets or of the number of targets in the remuneration policy? How does this relate to an active consultation of members and beneficiaries, i.e. what happens if the consultation result calls for different remuneration targets? What exactly does a “sustainable investment target” look like?

- The new rules regarding remuneration for executive directors need to be clarified before we can conclusively comment. Art. 23 (3) of the IORP II Directive already addresses the question how incentives should be set i.a. for those who effectively run the IORP. The Article stipulates that the

² [ECON Committee Meeting 03 September 2018](#)

IORP shall comply with a number of principles; from our perspective this is adequate. A one-sided ESG focus is inappropriate for IORPs which have to fulfil obligations towards their beneficiaries. The decision as to whether and how ESG factors are taken into account in investment decisions should therefore remain with the IORPs.

6. Introduction of delegated acts in Art. 3 – not for IORPs

A25 empowers the Commission to issue two delegated acts regarding an overarching and mandatory framework with minimum standards for the written policies and the due diligence processes as well as minimum guidelines and best practises on the disclosure of sustainability risk. Since delegated acts are not an adequate legal tool for IORPs (see above), we expect that IORPs will not be covered by the two proposed delegated acts.

- It should be clarified that the delegated acts proposed in Amendment 25 are not intended to be incorporated into the IORP II Directive.

7. Definition of the term „financial market participants“

IORPs are currently defined as one subgroup of “financial market participants” in the Proposal for a Disclosure Regulation.

- Changes for IORPs should be made directly in the IORP II Directive. As a consequence, IORPs should be taken out of the definition of “financial market participants” as stipulated in the Commission Proposal for a Disclosure Regulation.

Berlin, 17 October 2018 (VM)