aba – Arbeitsgemeinschaft für
betriebliche Altersversorgung e.V.

aba answer to the European Commission consultation on the operations of the European Supervisory Authorities

I. Tasks and powers of the ESAs

A. Optimising existing tasks and powers

I. A. 1. Supervisory convergence

Question 1: In general, how do you assess the work carried out by the ESAs so far in promoting a common supervisory culture and fostering supervisory convergence, and how could any weaknesses be addressed?

As an organisation promoting occupational pensions, we will answer this and the following questions with a focus on EIOPA, the relevant ESA for occupational pension.

Before answering the question, we would like to address the premise of the question: it assumes that promoting a common supervisory culture and fostering supervisory convergence is the objective for all ESAs. From our perspective, occupational pensions (which as IORPs fall under the remit of EIOPA) do not need a common supervisory culture or supervisory convergence. To the contrary, they might even be harmed and endangered by too much harmonisation and convergence of prudential requirements. Occupational pensions have grown over decades and play different roles in the different national pension systems depending on the design and the structure of the respective overall system. National labour, social and tax law differs accordingly. An EIOPA Regulation which seeks harmonisation and convergence of prudential regulation and which ignores the diversity of social, labour and tax law in the EU is not adequate on this backdrop. To the contrary, the most adequate solution is that the competent national authorities – who know their systems best – continue to directly supervise their IORPs. From our perspective, the German supervisor BaFin grants a good and adequate supervision of occupational pensions. However, it must be ensured that BaFin always has the required resources available for IORPs given the supervision of Solvency II and all the EIOPA activities concerning IORPs. In general, the supervision of IORPs in Germany is efficient and effective. We therefore call for maintaining a strong role of national supervisors in the future.

In addition prudential harmonisation and convergence are important to foster a single market across the EU if there is a need or demand for such a single market in the respective area. But again, this does not apply to occupational pensions: if a company sets up an IORP for their employees, they do not want to attract members beyond their own employees – they do not compete with other companies providing an occupational pension to their employees. To us it looks like EIOPA is overestimating the idea of competition and cross-border provision in the case of occupational pensions. Full harmonisation and convergence therefore are not adequate objectives for a European occupational pension supervisory regime.

More importantly the need for minimum standards rather than full harmonisation is recognized in the recently reviewed IORP Directive. Both the original IORP Directive and now IORP II set minimum standards rather than aiming at full harmonisation (Recitals 3 and 19). EIOPA cannot seek greater harmonisation than the level established in the Directive. Overall, it should therefore not be the aim of the ESA

review to fully harmonise European supervision and disempower the national competent authorities in the area of occupational pensions. This does not make sense and would be counterproductive. Any attempt at harmonisation in the area of occupational pensions must always obey the principle of subsidiarity and only be carried through if it can be implemented on the European level in an effective and productive manner.

We have identified a number of weaknesses in the EIOPA framework and the work carried out by EIOPA. Before we turn to the individual points, we would like to quote Recital 32 of the IORP II Directive, which describes the character and role of IORPs:

"(32) IORPs are pension institutions with a social purpose that provide financial services. They are responsible for the provision of occupational retirement benefits and should therefore meet certain minimum prudential standards with respect to their activities and conditions of operation, taking into account national rules and traditions. However, such institutions should not be treated as purely financial service providers. Their social function and the triangular relationship between the employee, the employer and the IORP should be adequately acknowledged and supported as guiding principles of this Directive."

With this description of IORPs in mind, we have identified the following weaknesses:

- Occupational pensions were only mentioned in the De-Larosière-Report from 2009 in relation to IAS 19. This shows that occupational pensions, or more specifically IORPs, were never seen as one of the reasons for the financial crisis which was the driver for setting up the ESAs. Due to the high time pressure during the ESA negotiations the role for EIOPA in the field of occupational pensions was not clearly defined.
  - Example: The EIOPA Regulation states that EIOPA shall act with regard to IORPs "without prejudice to national social and labour law." (Art. 1.4). While we of course welcome and support this provision that reflects the allocation of competences in the field of pensions within the European Union, it lacks clarity about what EIOPA should and shouldn't do. From our perspective it is often the case the EIOPA ignores national social and labour law, which leads to a move away from occupational pensions and towards personal pensions, for which social and labour law does not apply. While of course this is not directly against Art. 1.4, it neither does justice to the important role occupational pensions play in some countries and could potentially play in others.
- The EIOPA Regulation states EIOPA's mandate as follows: "The ESAs' mandate is to contribute to developing the Single Rulebook, solve cross-border problems, and promote supervisory convergence." The Recital quoted above shows that, this mandate does not fit occupational pensions.
  - Example: The Common Framework (first developed under the name of a Holistic Balance Sheet) is very much based on Solvency II and in the spirit of a Single Rule Book. As a result, the Common Framework is a completely inadequate for occupational pensions: a short term market interest rate is used to measure long-term liabilities. This leads to putative financing gaps which, in reality, don't exist and in consequence paint a wrong picture of the security level of IORPs. Overall, we agree with many of the points raised by the OPSG in their Position Paper on EIOPA's Opinion to EU Institutions on a Common Framework for Risk Assessment and Transparency for IORPs.
- Transposition of the IORP II Directive: The IORP Directive includes not delegated acts or any other role in its transposition for EIOPA. However, EIOPA seeks to further harmonisation by promoting the Common Framework.
  - Examples: In its Opinion from April 2016 ("EIOPA recommends that national supervisory authorities (NSAs) are provided with sufficient powers to take supervisory action based on

the outcomes of the common framework, if deemed necessary to achieve their supervisory objectives as defined by EU and national law.", p. 5) and in the speech Gabriel Bernardino gave recently in Berlin EIOPA promotes the Common Framework to be used by national supervisory authorities. This goes against the provision in Recital 77 of the Directive, which explicitly rules out the holistic balance sheet approach as a measure for funding and capital adequacy.

- As stipulated in Art. 1.6 f of the EIOPA Regulation, EIOPA's work focuses a lot on consumer protection. While without doubt this is an important issue, it is not relevant for occupational pensions, because there are no „consumers".
  - ➢ The EIOPA Regulation does not fit Recital 32 quoted above. As is stated there, occupational pensions are characterised by the triangular relationship between the employer, the employee and the IORP. This relationship is governed by national labour, social and where unions are involved co-determination law, protecting the beneficiaries better than any consumer protection. It therefore neither adequate nor necessary that EIOPA works on issues in relation to "consumers" of occupational pensions.
- The development of a single market and cross-border provision of occupational pensions are not a key concern for IORPs. At the end of 2015, there were 112,789 IORPs in the European Economic Area, including 171 in Germany. Of those, 79 were cross-border IORPs, with roughly half existing before the introduction of the IORP Directive (UK, Ireland). Put differently, at the end of 2015, 0.07% of IORPs in the EEA were cross-border IORPs. Nevertheless, EIOPA pushes the agenda of cross-border occupational pension provision.
  - ➢ Example: We question the necessity of a pan-European DC framework, given that the IORP II Directive is already providing a sufficient framework to set up pan-European pension schemes. For setting up a pan-European occupational DC framework fundamental social, labour and tax issues have to be solved (see point above). We doubt that EIOPA has the mandate and powers needed, but maybe EIOPA could contribute to supervisory issues.
- Finally we would like to address the consultations EIOPA has carried out in relation to IORPs. Generally it seems to us that EIOPA is interested in the views of IORPs, however, it does not seem to us as if the responses are actually taken into account.
  - ➢ Example: Work on the Common Framework (for details see above).

We therefore call for a clear mandate for EIOPA which unambiguously defines EIOPA's tasks and powers and sets clear limits for instance in the area of own initiatives, and for an improvement of EIOPA's governance structure regarding occupational pensions. Any changes should take into account the general direction set by IORP II, which is the setting of minimum standards rather than pursuing full harmonisation. These issues are of particular importance because EIOPA was established as an independent EU agency and is not subject to instructions from another (EU) body.

Question 2: With respect to each of the following tools and powers at the disposal of the ESAs:

peer reviews (Article 30 of the ESA Regulations); binding mediation and more broadly the settlement of disagreements between competent authorities in cross-border situations or cross-sectorial situations (Articles 19 and 20 of the ESA Regulations); supervisory colleges (Article 21 of the ESA Regulations);

To what extent:

a) have these tools and powers been effective for the ESAs to foster supervisory convergence and supervisory cooperation across borders and achieve the objective of having a level playing field in the area of supervision?

Current EIOPA tools and powers are more than sufficient for occupational pensions. Due to the role of national labour, social and tax law for occupational pensions and its diversity, IORPs should be supervised by the national supervisory authority. An EU-wide harmonisation of prudential regulation is neither necessary nor reasonable since regulatory arbitrage is not a problem: the most important provisions for occupational pensions are laid down in national social and labour law; company and sector-wide IORPs do not compete with each other.

We are aware that EIOPA has carried out several peer reviews regarding the provisions of the IORP Directive. We are not aware of any use of the tools and powers granted in Articles 19-21 of the EIOPA Regulation.

b) has a potential lack of an EU interest orientation in the decision making process in the Boards of Supervisors impacted on the ESAs use of these tools and powers?

We cannot assess whether Board members put their own national interests or European interests first. However, we would like to comment on the decision making process: According to Art. 44 of the EIOPA Regulation, every Member States has a vote, however, only some Member States actually have IORPs or a significant system of occupational retirement provision. It should therefore be ensured that despite this, there is sufficient expertise in occupational pensions in the Board of Supervisors. This could be achieved by establishing an internal committee working on occupational pension issues (see internal committee Art. 41 EIOPA Regulation). The committee should be composed of representatives of the national competent authorities which have significant occupational pension systems in their jurisdictions. Such a committee would be well placed to take or at least prepare the decisions the Board would then vote on. Importantly, such a committee would have to reflect the variety of occupational pensions across the EU.

Question 3: To what extent should other tools be available to the ESAs to assess independently supervisory practices with the aim to ensure consistent application of EU law as well as ensuring converging supervisory practices? Please elaborate on your response and provide examples.

First of all we would like to point out that the IORP II Directive sets minimum standards. In contrast to Solvency II it is not geared towards full harmonisation and therefore does not need an ESA ensuring converging supervisory practices. There are neither delegated acts nor any other tasks given to EIOPA during the transposition of the IORP II Directive. Recital 20 calls for a close cooperation between the Member States and the social partners to further improve occupational pensions – however, no role is envisaged here for EIOPA.

We understand that EIOPA needs to ensure that the minimum standards laid down in the IORP Directive are applied correctly and consistently across the EU. However, its mandate should not stretch beyond that. There should be very limited scope for own initiatives. The current objective to "ensure consistent application of EU law as well as ensuring converging supervisory practices" in the EIOPA Regulation does not fit occupational pensions. We therefore propose first, to delete "as well as ensuring converging supervisory practices" and second to amend Art. 1.4 of the EIOPA Regulation ("without prejudice to national social and labour law") to state that ".... the Authority shall respect national social and labour law." This change would ensure that EIOPA needs to take national social and labour law into account, rather than ignoring it, as is possible under the current wording. From our perspective, EIOPA requires no additional instruments for their work regarding IORPs: the application of European Union law (in this case the IORP II Directive) is achieved by a transposition into national law and supervision through the national competent authorities. As stated in our answer to question 1, the national

authorities are best placed to supervise IORPs taking into account national social, labour (including and co-determination) and tax law.

Question 4: How do you assess the involvement of the ESAs in cross-border cases? To what extent are the current tools sufficient to deal with these cases?

Background: At the end of 2015, there were 112,789 IORPs in the European Economic Area, including 171 in Germany. Of those, 79 were cross-border IORPs, with roughly half existing before the introduction of the IORP Directive (UK, Ireland – which might change after the Brexit). Put differently, at the end of 2015, 0.07% of IORPs in the EEA were cross-border IORPs.

We feel that EIOPA overestimates the desire of IORPs to be active across borders. Most IORPs have a very limited scope of operation, normally restricted to one or more sponsor companies or an industry segment. An important issue for cross-border provision are the different provisions in national social, labour, tax and co-determination legislation, which do not fall in the remit of EIOPA.

Overall, we therefore think that the tools EIOPA currently has to deal with cross-border cases are sufficient. In addition we would like to stress that in an uncertain political environment (e.g. Brexit), the incentives to set up cross border schemes are very limited. Cross border activities of IORPs are not an argument to transfer competences from the national competent authorities to EIOPA.

I. A. 2. Non-binding measures: guidelines and recommendations

Question 5: To what extent are the ESAs tasks and powers in relation to guidelines and recommendations sufficiently well formulated to ensure their proper application? If there are weaknesses, how could those be addressed?

As far as we are aware there are currently no guidelines (e.g. as for Solvency II) for IORPs. There are merely recommendations at the end of peer reviews conducted by EIOPA as well the Opinions EIOPA provides.

Up to today it is not clear to us, which tasks a supervisory authority with the objective of harmonisation and convergence has in relation to occupational pensions, which are characterised first and foremost through national social and labour law. In addition, we would like to point out:

- Occupational pensions were not the focus when establishing the European System of Financial Supervision in the aftermath of the financial crisis. They were not considered financial institutions which contributed to the crisis by their actions, rather, they were seen as stabilising factors because of their long-term horizons and the resulting asset allocation strategy.
- When establishing the ESAs, it was not well defined which competencies an EU body should have in the area of occupational pensions – or which role it can play given the important role of national social and labour law.
- As stated above, the EIOPA Regulation stipulates that the Authority acts „without prejudice to national social and labour law“. In a lot of cases, EIOPA simply ignores social and labour law, which plays into the hands of those providing individual pensions or savings products, rather than those providing collective occupational pensions. Most recently, EIOPA has suggested that national authorities take supervisory action based on the results generated through the Common Framework (see our answer to question 1), which clearly oversteps its remit. Particularly a valuation based on a cut-off-date with a risk-free interest rate is inappropriate for liabilities which run over decades and where entitlements cannot be paid out. We therefore propose to amend Art. 1.4 of the EIOPA Regulation (“without prejudice to national social and labour law”) to state that “.... the Authority shall respect national social and labour law.” This

change would ensure that EIOPA needs to take national social and labour law into account, rather than ignoring it as is possible under the current wording.

- Another example for EIOPA overstepping its remit is the stress test for IORPs. In May 2017 there will be a stress test based on the Common Framework methodology. This second stress text goes beyond the first stress test by including the scheme sponsor in the analysis, looking at what the sponsor would do in certain scenarios. EIOPA has no mandate to include sponsoring companies in their stress tests. In addition, we would like to stress that the character of the prudential regulation sets the framework for the types of pension promises given. EIOPA in this context not only promotes defined contribution plans, but also contributes to the demise of defined benefit schemes with the type of stress tests (based on the Common Framework) they conduct.

We are therefore strictly against the approach of just ignoring national social and labour law and EIOPA seeking supremacy of EU supervisory law. The current review of the ESAs should address the key questions for occupational pensions. National social and labour law needs to remain firmly in the hands of the Member States and should be supported rather than be undermined by EU regulation. The regulation should therefore only be principle-based, taking into account (rather than ignoring) national social and labour law.

Regarding EIOPA Guidelines, the comply-or-explain principle laid down in the EIOPA Regulation is sufficient, from our perspective there is no need to change this to a mandatory application by the national competent authorities.

I. A. 3. Consumer and investor protection

Question 6: What is your assessment of the current tasks and powers relating to consumer and investor protection provided for in the ESA Regulations and the role played by the ESAs and their Joint Committee in the area of consumer and investor protection? If you have identified shortcomings, please specify with concrete examples how they could be addressed.

Article 1 (6)f (enhancing consumer protection) and Article 9 (Tasks related to consumer protection and financial activities) of the EIOPA Regulation are not fit for purposes regarding occupational pensions. As shown above, there are no consumers in occupational pensions, only members and beneficiaries, who are mainly protected through national social and labour law. The social function of IORPs and the triangular relationship between the employee, the employer and the IORP should be adequately acknowledged and supported.

Pension policy making is not a task for EIOPA – it clearly falls into the remit of the Member States, with the Council, Parliament and Commission supporting the Member States in certain areas. EIOPA should only be involved in supervisory questions.

Question 7: What are the possible fields of activity, not yet dealt with by ESAs, in which the ESA's involvement could be beneficial for consumer protection?

What matters for members and beneficiaries of occupational pensions is the cost efficient delivery of occupational pensions. It would therefore be desirable if EIOPA carefully conducted cost-benefit-analyses before imposing additional requirements on IORPs (e.g. stress tests with inadequate methodologies, reporting, information requirements etc.). This would foster long-term stability of the legal framework which is necessary for the long-term liabilities IORPs deal with. Crucially, it would help them to focus on their key objective: delivering good occupational pensions to their members and beneficiaries.

I. A. 4. Enforcement powers – breach of EU law investigations

Question 8: Is there a need to adjust the tasks and powers of the ESAs in order to facilitate their actions as regards breach of Union law by individual entities? For example, changes to the governance structure?

In Germany, the national supervision of IORPs works well and therefore no adjustments of EIOPA's tasks and powers are necessary. IORPs should be supervised by national competent authorities who know their systems – we are not aware of any evidence showing that EIOPA would be able to carry out this task more effectively than the German national regulator.

I. A. 5. International aspects of the ESAs' work

Question 9: Should the ESA's role in monitoring and implementation work following an equivalence decision by the Commission be strengthened and if so, how? For example, should the ESAs be empowered to monitor regulatory, supervisory and market developments in third countries and/or to monitor supervisory co-operation involving EU NCAs and third country counterparts?

Currently this is not directly relevant to IORPs. However, with the UK leaving the EU this will become a more important issue. Currently there are 25 UK IORPs active in other EU Member States, and 28 IORPs active in the UK with a different EU home country (see Annex 3 of the EIOPA Report), meaning that equivalence decisions will become more relevant for IORPs in the future. We would therefore like to stress that the role for EIOPA as defined in Article 33 (2) is appropriate (The Authority shall assist in preparing equivalence decisions pertaining to supervisory regimes in third countries in accordance with the acts referred to in Article 1(2).).

I. A. 6. Access to data

Question 10: To what extent do you think the ESAs powers to access information have enabled them to effectively and efficiently deliver on their mandates?

First, we would like to take a look at EIOPA's mandate: It is not clear to us, which tasks and powers a supervisory authority with the objective of harmonisation (see EIOPA Regulation) has in relation to occupational pensions, which are primarily governed by national social and labour law. What is the relationship between the EIOPA Regulation (setting harmonisation and convergence as an objective) and the IORP II Directive (setting minimum standards)? EIOPA cannot seek greater harmonisation than the level established in the Directive.

Overall, EIOPA's current powers to access information seem sufficient to us (also see our answer to question 11), but EIOPA's mandate should be clarified. Direct supervision of IORP should be carried out only by the national competent authorities. Therefore the national authorities should collect data in their jurisdiction, and then pass on aggregated files to EIOPA. Given that there is no lack of trust in NCA there is no reason to give EIOPA access to data on an individual IORP basis. EIOPA has no mandate e.g. to ask for outcomes based on calculations using a Common Framework, which is an inadequate methodology for IORPs. In particular, EIOPA has no mandate to ask for additional cash-flow calculations and sponsor data.

Question 11: Are there areas where the ESAs should be granted additional powers to require information from market participants?

We recognise the importance of reporting for supervisory purposes. However, we would like to stress that before the introduction of new requirements a cost-benefit-analysis should be carried out. Unsurprisingly, additional data requirements always mean additional costs for IORPs – even if the questions

or categories vary only slightly from already existing requirements. New requirements should therefore only be introduced if the expected benefits clearly outweigh these additional costs.

In Germany, there are already extensive reporting requirements at the national level, to which in the future the information requirements set by the expected ECB Regulation will be added. In addition, EIOPA is working on its own Pension data project. We understand the need for additional reporting requirements due to macro prudential supervision, but they have to be restricted to the ECB Regulation. We ask for a clear ECB mandate for macro prudential supervision. Double mandates for EU authorities and therefore double reporting requirements are not an efficient set-up and therefore not acceptable.

Currently there are also EIOPA data requirements being carried out by the national authorities on behalf of EIOPA – without the national authorities knowing what the background and objective of the exercise is. In particular if that is unclear, IORPs are not prepared to spend much time and effort completing the forms.

We are against any direct involvement of EIOPA with IORPs - from our perspective all data should be submitted to the national authorities. Existing legislation should be taken into account and it should be ensured that data requirements are restricted to the supervised entities. If not explicitly necessary otherwise, national authorities should pass the data in an aggregated format to EIOPA. As the IORP II Directive stipulates, trade secrets should be respected (Chapter 2 „Professional secrecy and exchange of information"; Article 52ff. IORP II Directive). For IORPs this means that no data is collected on the sponsoring employer.

I. A. 7. 7 Powers in relation to reporting: Streamlining requirements and improving the framework for reporting requirements

Question 12: To what extent would entrusting the ESAs with a coordination role on reporting, including periodic reviews of reporting requirements, lead to reducing and streamlining of reporting requirements?

Streamlining of reporting requirements is important if there is a single set of supervisory rules – however, since the IORP II Directive sets minimum standards rather than harmonising supervision, this is not the case for IORPs. Differing national social, labour, tax and co-determination law might also make it necessary to tailor reporting to national circumstances rather than harmonise it at the European level. As stated above, the national authorities should collect data in their jurisdiction, and then pass on aggregated files to EIOPA. Since the consumer protection thinking and choices of the third pillar do not fit occupational pensions, there is no need to compare individual IORPs. For the same reason, a harmonised reporting across the EU is not necessary and the aggregation would in any case not lead to sensible results due to the diversity of IORPs across EU Member States.

Question 13: In which particular areas of reporting, benchmarking and disclosure, would there be useful scope for limiting implementing acts to main lines and to cover smaller details by guidelines and recommendations?

As stated in several previous answers, we would again like to point out the importance of national social, labour and tax law, which makes harmonisation at the European level difficult.

We also wonder what the legal basis for an EU-wide benchmarking of occupational pensions / IORPs would be, and who would chose the criteria for the benchmarking.

I. A. 8. Financial reporting

Question 14: What improvements to the current organisation and operation of the various bodies do you see would contribute to enhance enforcement and supervisory convergence in the financial reporting area? How can synergies between the enforcement of accounting and audit standards be strengthened?

We understand that this question refers to accounting. In this area, "convergence" can only refer to the application of minimum standards, and not go beyond this (see Article 13 IORP II Directive). In addition, harmonising financial reporting for IORPs would interfere in Germany with the sponsoring companies (HGB and/or IFRS), which is not within EIOPAs remit and would represent no improvement or benefit.

Question 15: How can the current endorsement process be made more effective and efficient? To what extent should ESMA's role be strengthened?

We would like to stress that the ESAs in this process should not have a broader remit than in other questions: they should confine themselves to their main task, which is to ensure the correct application of EU standards. According to Article 13 of the IORP II Directive, the calculation of technical provisions for IORPs is principle-based, which means there is an EU minimum standard.

B. New powers for specific prudential tasks in relation to insurers and banks

I. B. 1. Approval of internal models under Solvency II

Question 16: What would be the advantages and disadvantages of granting EIOPA powers to approve and monitor internal models of cross-border groups?

Solvency II is not relevant for IORPs.

I. B. 2. Mitigating disagreements regarding own funds requirements for banks

Question 17: To what extent could the EBA's powers be extended to address problems that come up in cases of disagreement? Should prior consultation of the EBA be mandatory for all new types of capital instruments? Should competent authorities be required to take the EBA's concerns into account? What would be the advantages and disadvantages?

Since the question is not relevant to IORPs, we are not answering it.

I. B. 3. General question on prudential tasks and powers in relation to insurers and banks

Question 18: Are there any further areas were you would see merits in complementing the current tasks and powers of the ESAs in the areas of banking or insurance?

It is not clear to us, which tasks and powers a supervisory authority with the objective of harmonisation (see EIOPA Regulation) has in relation to occupational pensions, which are primarily governed by national social and labour law. What is the relationship between the EIOPA Regulation (setting harmonisation and convergence as an objective) and the IORP II Directive (setting minimum standards)? EIOPA cannot seek greater harmonisation than the level established in the Directive. Please also refer to our answer to question 1. IORPs are neither insurers nor banks as mentioned in the title of this section.

C. Direct supervisory powers in certain segments of capital markets

Question 19: In what areas of financial services should an extension of ESMA's direct supervisory powers be considered in order to reap the full benefits of a CMU?

We understand that this question solely refers to ESMA, therefore we are not answering it in detail. However, we would like to point out that direct supervision should be carried out only by the national competent authorities for IORPs, not by the European level institutions.

Question 20: For each of the areas referred to in response to the previous question, what are the possible advantages and disadvantages?

Since the question is not relevant to IORPs, we are not answering it.

Question 21: For each of the areas referred to in response to question 19, to what extent would you suggest an extension to all entities or instruments in a sector or only to certain types or categories?

Please elaborate on your responses to questions 19 to 21 providing specific examples

Since the question is not relevant to IORPs, we are not answering it.

Question 22: To what extent do you consider that the current governance set-up in terms of composition of the Board of Supervisors and the Management Board, and the role of the Chairperson have allowed the ESAs to effectively fulfil their mandates? If you have identified shortcomings in specific areas please elaborate and specify how these could be mitigated?

- In contrast to insurers, banks or investment funds, IORPs are only present in some Member States, therefore most of the members of the Board of Supervisors and the Management Board do not have expertise in occupational pensions. In addition, that means that many EU Member States which do not have significant IORPs in their jurisdictions take decisions which will have fundamental consequences in particular for IORPs in Belgium, Germany, Ireland, The Netherlands and currently still in the UK. The discussions around the Common Framework are a case in point: if the majority does not have IORPs in their countries but rely more on insurance, the decision will rarely take into account the characteristics of occupational pensions and is therefor unlikely to lead to good outcomes for IORPs. In general, this effect will be even bigger with the UK leaving the European Union and thus the decision making process within EIOPA. As stated in our response to question 2, it should be ensured that there is sufficient occupational pension expertise in the Board of Supervisors. This could be achieved by establishing an internal committee working on occupational pension issues. The committee should be composed of representatives of the national competent authorities which have significant occupational pension systems in their jurisdictions. Such a committee would be well placed to take or at least prepare the decisions the Board would then vote on.
- Finally, we would like to raise a slightly more general question of governance, namely who supervises the supervisor. The EIOPA Regulation stresses the importance of the independence of the Board of Supervisors (Art. 42), and it merely needs to "transmit" an annual report on the activities of the authority to the European Parliament, the Council, the Commission, the Court of Auditors and the European Economic and Social Committee. However, this does not seem to be an adequate control mechanism to us – therefore there is no control beyond the budget (Art. 64 of the EIOPA Regulation) of EIOPA's activities and as a consequence no democratic legitimacy.

Question 23: To what extent do you think the current tasks and powers of the Management Board are appropriate and sufficient? What improvements could be made to ensure that the ESAs operate more effectively?

We would like to see a new task created for the Management Board: when preparing the work programmes, the Management Board should include a cost-benefit analysis before starting new projects. These cost-benefit analyses should include the perspectives of the sponsor, the IORP and the members / beneficiaries. This way it would be ensured that EIOPA makes the most of its work by focusing on the projects with the best scores.

Question 24: To what extent would the introduction of permanent members to the ESAs' Boards further improve the work of the Boards? What would be the advantages or disadvantages of introducing such a change to the current governance set-up?

Rather than introducing permanent members, we think that the establishment of an occupational pension expert committee would improve the work of the Board of Supervisors. This committee should be composed of representatives of the national competent authorities which have significant occupational pension systems in their jurisdictions. Such a committee would be well placed to prepare the decisions the Board would then vote on.

Question 25: To what extent do you think would there be merit in strengthening the role and mandate of the Chairperson? Please explain in what areas and how the role of the Chairperson would have to evolve to enable them to work more effectively? For example, should the Chairperson be delegated powers to make certain decisions without having them subsequently approved by the Board of Supervisors in the context of work carried out in the ESAs Joint Committee? Or should the nomination procedure change? What would be the advantages or disadvantages?

Considering Articles 48 and 49 of the EIOPA Regulation, we do not see any merit in strengthening or extending the mandate of the Chairperson. In particular when taking into account the diversity of occupational pensions across the EU, it seems sensible to share competences rather than to focus them in one person.

B. Stakeholder groups

Question 26: To what extent are the provisions in the ESA Regulations appropriate for stakeholder groups to be effective? How could the current practices and provisions be improved to address any weaknesses?

From our perspective it was a good decision to create two interest groups (Insurance and Reinsurance Stakeholder Group and Occupational Pensions Stakeholder Group - OPSG). The division into two groups means that the OPSG can properly discuss issues around occupational pensions. The aba would like to highlight that the OPSG should be maintained as an independent advisory body beside the insurance stakeholder group. Occupational pensions and insurance products have got fundamental structural differences that deserve a different treatment and hence different stakeholder groups.

We would very much welcome if the occupational pension expertise of EIOPA was strengthened – both by establishing an occupational pension committee advising the Board as laid out in our answer to question 2 and by strengthening the OPSG. EIOPA should be required to respond to recommendations the OPSG makes, in particular, if they are not followed, to explain the reasons for EIOPA's course of action.

The experience of the previous OPSGs shows that in the future membership should be limited to individuals who are closely involved with occupational pensions and therefore have an interest in active cooperation.

From our perspective the current composition of the OPSG – as stated in Article 37 – is not adequate for occupational pensions: because of the central role of sponsoring undertakings in occupational pensions, employers (not only from small and medium sized enterprises) should be mentioned directly in Article37 EIOPA Regulation. Overall it is not enough that only a third of the group is supposed to come from IORPs (which is the main topic discussed) – this should be increased. We suggest to combine those representing beneficiaries and employees and to reduce the number of academics.

The Article 37 of the EIOPA Regulation calls for an adequate geographic representation. Interpreting this as "a call for participants from as many Member States as possible" is sensible for banking and insurance. However, this does not make sense for occupational pensions, because they only exist in comparatively few Member States. OPSG members should represent Member States which actually have IORPs. Others can offer no practical experience and do little to further the development of IORPs.

III. Adapting the supervisory architecture to challenges in the market place

Question 27: To what extent has the current model of sector supervision and separate seats for each of the ESAs been efficient and effective?

Overall, we have no strong opinion on whether the ESAs should be merged or kept as they are – what matters to us is that a clear separation between the different sectors (banks, securities, insurances and occupational pensions) is kept and that occupational pensions are adequately taken into account. This should be reflected in an adequate governance structure of a merged EU authority. So whichever approach is chosen for the future of the ESAs, it should be ensured that the Authority in charge of occupational pensions can draw on the necessary expertise to foster occupational pensions across the EU. In addition, occupational pension expertise in high level decision making bodies should be ensured.

Question 28: Would there be merit in maximising synergies (both from an efficiency and effectiveness perspective) between the EBA and EIOPA while possibly consolidating certain consumer protection powers within ESMA in addition to the ESMA's current responsibilities? Or should EBA and EIOPA remain as standalone authorities?

As stressed before, the concept of consumer protection is not a topic for occupational pensions. Members and beneficiaries are mainly protected by national social and labour law including co-determination law - which in Germany offers much stronger protection than consumer protection. Occupational pensions therefore do not need any consumer protection supervision at the EU level. The national competent authorities are best placed to supervise IORPs while taking into account national social, labour and co-determination law.

As stated in the previous question, the structure of the ESAs isn't a main concern for us. What matters to us is that a clear separation between the different sectors (banks, securities, insurances and occupational pensions) is kept and that occupational pensions are adequately taken care of. This should be reflected in an adequate governance structure of a merged EU authority. So whichever approach is chosen for the future of the ESAs, it should be ensured that there is sufficient expertise in occupational pensions in the Board of Supervisors. This could be achieved by establishing an internal committee working on occupational pension issues (see internal committee Art. 41 EIOPA Regulation). The committee should be composed of representatives of the national competent authorities which have sig-

nificant occupational pension systems in their jurisdictions. Such a committee would be well placed to take or at least prepare the decisions the Board would then vote on.

Finally, we would like to generally point out that in particular for something as long-term as pensions, stable structures are beneficial. While we agree that it is right to monitor the work of the ESAs, it seems generally quite early to carry out a major overhaul of the system.

IV. Funding of the ESAs

Question 29: The current ESAs funding arrangement is based on public contributions. Please elaborate on each of the following possible answers (a) and (b) and indicate the advantages and disadvantages of each option.

a) should they be changed to a system fully funded by the industry?

Yes

No

Don't know / no opinion / not relevant

What are the advantages and disadvantages of option a)?

The aba would prefer to maintain the current financing modus of the ESAs. German financial institutions and IORPs are already financing the national supervisory authority (the BaFin in Germany).

EIOPA does not supervise individual IORPs, and rightly so, because this task is carried out more effectively by the national competent authorities. EIOPA supports the Commission with its Opinions and Reports (e.g. IORP II, PEPP etc.), which is very closely related to the legislative process which is a public task. Carrying out a public task, EIOPA should be funded accordingly, that is from a public budget rather than through fees collected from individual entities.

It should also be considered that IORPs are social institutions and that any additional costs are likely to be borne by their members and beneficiaries in the form of lower benefits. If, on the other hand, costs would have to be borne by the sponsor, this could harm occupational pension provision in countries where it is a voluntary benefit, as is the case in Germany.

Currently the budget acts as a lid to EIOPA's own initiative work – there is a limited amount of work which realistically can be carried out under the current budget. Under the proposed system, would there be a similar mechanism? (Parliament and Council are envisaged to act as the budgetary authority.)

We noticed that the Consultation paper draws comparisons to the funding of national competent authorities. The German national competent authority generates its budget from the institutions it supervises ("BaFin must cover its expenditure entirely out of its own income. It receives no funding from the Federal budget. BaFin raises the funds required to cover its costs from the undertakings it supervises instead. The legal foundation for this is the Act Establishing the Federal Financial Supervisory Authority (*F*inanzdienstleistungsaufsichtsgesetz – FinDAG). However, the BaFin and EIOPA are not directly comparable, because of the different structures in which they are embedded: the BaFin is subordinate to the German Finance Ministry and therefore subject to control. EIOPA does not fall under any comparable mechanism. A direct comparison therefore is difficult.

b) should they be changed to a system partly funded by industry?

- **Yes**
- **No**
- **Don't know / no opinion / not relevant**

What are the advantages and disadvantages of option b)?

We are also against a system where EIOPA would be partly funded by the industry and prefer the status quo. The arguments stated in our response to the previous question also apply here.

Question 30: In your view, in case the funding would be at least partly shifted to industry contributions, what would be the most efficient system for allocating the costs of the ESA's activities?

- **a) a contribution which reflects the size of each Member State's financial industry (i.e., a "Member State key")**

  First of all we would like to point out that IORPs are not necessarily considered to be part of the financial industry. Recital 32 of the IORP II Directive states: "IORPs are pension institutions with a social purpose that provide financial services". We therefore wonder whether and if so on which basis IORPs would be included under the term „financial industry".

  Generally, we would like to point out that the funding of the insurance and the IORP departments within EIOPA should be fair according to the tasks. Solvency II should solely be funded through insurance companies and the EU budget. We feel that in Germany the national system of IORP supervision is working. Furthermore since at the EU level only minimum standards are set and because of the important role of national social and labour law, there is only a limited scope of action for a European authority in this area.

  From our perspective it would be difficult to base contributions on the size of each Member State's financial industry – how would that be defined? In addition, the ESAs are responsible for very different entities, and from our perspective, it would be inadequate if e.g. IORPs ended up paying for the banking sector.

- **b) a contribution that is based on the size/importance of each sector and of the entities operating within each sector (i.e., an "entity-based key")**

  Even though we are in favour of maintaining funding as it is now (see response to the previous question), we note that under this option it would be positive that the insurance and the pensions sector could be looked at separately.

Please elaborate on (a) and (b) and specify the advantages and disadvantages involved with each option, indicating also what would be the relevant parameters under each option (e.g., total market capitalisation, market share in a given sector, total assets, gross income from transactions etc.) to establish the importance/size of the contribution.

Question 31: Currently, many NCAs already collect fees from financial institutions and market participants; to what extent could a European system lever on that structure? What would be the advantages and disadvantages of doing so?

German IORPs currently indirectly provide significant funding to EIOPA via the BaFin. Only in a few cases IORPs were able to get something in return – the review of the IORP Directive being one example. However, this is an exception rather than the rule. More often, EIOPA conducts consultations, stress tests, as well as data requirements which lead solely to more work for IORPs.

We are against an even more important role of IORPs in the financing structure of EIOPA, in particular if EIOPA's mandate is unclear in relation to occupational pensions. In the interest of member and beneficiaries it should be avoided that EIOPA pursues its "own initiative" work without any funding limits.

General question

Question 32: You are invited to make additional comments on the ESAs Regulation if you consider that some areas have not been covered above.

We would like to emphasise the following points:

- We call for a clarification of EIOPA's mandate regarding occupational pensions. It should be clear that EIOPA's remit is limited to ensuring that the minimum harmonisation called for in the IORP II Directive is adequately implemented.
- EIOPA should be held accountable to stick to its mandate.
- It is crucial that occupational pensions and specifically IORPs are adequately taken into account. We would welcome more expertise in occupational pensions in the Board of Supervisors. This could be achieved by establishing a committee working on occupational pension issues. The committee should be composed of representatives of the national competent authorities which have significant occupational pension systems in their jurisdictions. Such a committee would be well placed to prepare the decisions the Board would then vote on.
- Finally, it cannot be the task of an independent supervisory authority to engage in pension policy-making.

16. Mai 2017 / SD and VM