aba Arbeitsgemeinschaft für
betriebliche Altersversorgung e.V.

aba position

regarding 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

(COM(2018) 354 final)

The **aba Arbeitsgemeinschaft für betriebliche Altersversorgung e.V**. is the German association representing all matters concerning occupational pensions in the private and public sector. The aba has more than 1,000 members including corporate sponsors of pension schemes, IORPs, actuaries and consulting firms, employer associations and unions, as well as insurance companies, banks and investment managers. According to our statutes, our mission is to represent existing schemes as well as to expand coverage of occupational pensions independent of vehicle. We are a member of PensionsEurope, where we are active both on the board and in a variety of working groups.

Summary

On 24 May 2018 the European Commission published proposals for three Regulations. The aba is in particular critical of the Proposal for a regulation on disclosures relating to sustainable investments and sustainability risks and amending Directive (EU) 2016/2341 (hereafter Draft Regulation) with the amendment of the IORP Directive. For IORPs, the content of this Draft Regulation seems to go well beyond the IORP II Directive and, above all, beyond disclosure rules. The Draft Regulation misunderstands or ignores the existing minimum EU harmonisation character of the IORP II Directive and does not reflect its content fully correct in several cases (i.a. the inclusion of ESG criteria in investment decisions). Significant changes in the IORP regulation must be made via the IORP II Directive and the ordinary legislative procedure - and not via delegated acts and technical regulatory standards.

Regarding the Draft Regulation, we would like to emphasise the following points:

- We call for an adequate period of time for the Member States and, above all, the IORPs concerned, first to implement the new rules of the IORP II Directive and then to gather experience before new rules are created. The IORP II Directive provides for 13 January 2023 as the deadline for an evaluation and review.
- Delegated acts that regularly aim for full EU harmonisation do not fit into any directive that aims for minimum EU standards. Furthermore, delegated acts are limited to amending non-essential elements. The prudent person rule is an essential requirement for IORPs. It is neither justified nor understandable why the Draft Regulation should make such a fundamental change to the IORP II Directive, which aims at minimum EU harmonisation. The proposed Regulation should therefore be limited to the disclosure of information on sustainable investments and sustainability risks. Essential changes to the IORP II Directive should always be carried out by amending the Directive itself through the ordinary legislative procedure, because this is the only way which adequately involves the Council and Parliament.
- The coherence the delegated acts are supposed to achieve with the UCITS, AIFM and Solvency II Directives is neither reasonable nor necessary. IORPs are not to be treated as pure financial service providers (see Recital 32 IORP II Directive). This is another argument to reject proposed delegation of power to the EU Commission.
- The proposal for empowering the EU Commission to issue delegated acts (Article 10 of the Draft Regulation) is based on an interpretation of the IORP II Directive which we do not understand. The IORP II Directive does not make the integration of ESG criteria in investment decisions mandatory. The prudent person rule remains at the heart of investment rules. Within the framework of risk management, various areas must be covered, one of which are ESG-related *risks*.
- The European Commission classifies IORPs as financial market participants without respecting their social character or taking into account that IORPs are mostly (end-) investors in financial instruments/products in the financial market. Very few IORPs compete at all; most IORPs neither with each other nor with financial service providers. In view of the intended EU standardisation, a differentiation according to the scope of application of the Directives is therefore sensible and absolutely necessary. Transparency rules have to take into account – as for example done in the Shareholder Rights Di-

rective - whether they are directed at (end-) investors in financial instruments/products (e.g. IORPs) or sellers (asset managers) of financial products. We disagree with the assessment of the Commission that harmonisation in this area is necessary for all financial market participants covered by the Action Plan on 'Financing sustainable growth' because of their regular cross-border activities – this is not the case for IORPs.

The concepts of 'transparency' and 'disclosure' should not be a tool for influencing investment decisions, nor should they be an industrial policy benefiting the fund industry. We therefore call for the objectives and rules of the Draft Regulation to be made transparent. Furthermore, it should be a matter of course that essential elements of the future Regulation are set in an ordinary legislative procedure. Finally, we call for EU minimum supervisory standards for IORPs to continue to be laid down exclusively in the IORP II Directive.

If you have any questions, please contact:

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1. Introduction

Following the Commission`s action plan on financing sustainable growth, the European Commission published proposals for three Regulations on 24 May 2018. Of these, the Proposal for a regulation on disclosures relating to sustainable investments and sustainability risks and amending Directive (EU) 2016/2341 (hereafter Draft Regulation), which includes an amendment to the IORP II Directive, is central for Institutions of Occupational Retirement Provision (IORPs).

2. Proposal for a Regulation on disclosure: questions, positions and demands of the aba

In principle, we support the EU Commission's intention "to increase transparency on the integration of sustainability risks and on the pursuance of sustainable investments" (p. 7).

However, we strongly oppose a regulation supplementing the IORP II Directive with the powers of the EU Commission for delegated acts. Delegated acts aim at full EU harmonisation, which for IORPs for various reasons is inadequate. Below we will first discuss two more general points before turning to our specific questions and comments on Article 10 of the Draft Regulation.

2.1 General points regarding Article 10 Draft Regulation – supplementing Article 19 of the IORP II Directive

The provisions laid down in Article 10 of the Draft Regulation provide for an amendment of the IORP II Directive (Directive 2016/2341). For us, this raises two general questions:

1) Amending a Directive which is currently being transposed in the Member States?

The Draft Regulation provides in Article 10 for an amendment of the IORP II Directive. This Directive is currently being transposed into national law by the Member States (transposition required until 13 January 2019). The responsible German Ministry of Finance ("Bundesfinanzministerium") has published a Draft Bill (Text in German) on 2 July 2018 for consultation with the relevant stakeholders. The IORP II Directive itself provides for an Evaluation and Review (Article 62) by January 2023. This means that the amendment in the Draft Regulation is not based on any actual experience with the new requirements regarding environmental, social and governance (ESG) factors. The date for an evaluation of the IORP II Directive was intensely discussed during the EU legislative process and a period of six years was deliberately chosen for political reasons. We therefore cannot understand why the EU Commission is already proposing an amendment to the IORP II Directive at this stage.

⇨ We therefore call for an adequate period of time for the Member States and, above all, the IORPs concerned, first to implement the new rules of the IORP II Directive and then to gather experience before new rules are created. The IORP II Directive provides for 13 January 2023 as the deadline for an evaluation.

2) A delegated act for the Commission within the existing framework of EU minimum harmonisation by the IORP II Directive?

With Article 10 of the Draft Regulation, the Commission proposes an additional paragraph 9 to Article 19 (Investment Rules) and a new Article 60a (Exercise of the delegation) for the IORP II Directive. This would give the Commission the power to supplement or amend the Directive by means of delegated acts and thus to issue provisions for IORPs. This proposal by the EU Commission is surprising in several respects:

- According to Article 290 TFEU, delegated acts are limited to "certain non-essential elements". It is clearly stipulated that essential elements of an area are reserved for the legislative act. For IORPs, this includes the prudent person rule (Article 19 (1) IORP II Directive), which was already a central component of the IORP I Directive (Article 18) from 2003. In Germany, this Article in particular has led to the creation of the Pensionsfonds, a vehicle for delivering occupational pensions in Germany (see chapter 2.2, point 1 to 3).
- The IORP II Directive came into force in January 2017. In contrast to for example the Solvency II Directive, the IORP II Directive aims at minimum EU harmonisation. It does not contain a single delegated act (delegated acts are an instrument aiming for full EU harmonisation). The Council and the EP agreed to delete without substitution the three delegated acts proposed by the Commission in the IORP II Directive Proposal of 27 March 2014 (on Article 24 (3), Article 30 and Article 54 IORP II Directive Proposal) and to deliberately give the Member States more flexibility in the transposition of the IORP II Directive.

  The German Draft Bill transposing IORP II into national law is based on this understanding of the IORP II Directive (p. 47): "Since occupational pensions differ widely across Member States and are largely built on the respective national labour and tax law, the Directive is designed to achieve minimum harmonisation and thus leaves the Member States greater scope for implementation. Consequently, the Directive does not contain any authorisations to adopt delegated acts."(own translation from the German original)[1]
- If the EU Commission adopts a delegated act (Article 290 TFEU), it enters into force after three months if neither EP nor the Council raise objections or if EP and Council give notice before the three month deadline that they will not raise objections. The EP acts by a majority of its component Members and the Council by a qualified majority. The influence of the EP and the Council is therefore limited to raising objections. Adaptation at Member State level will no longer be possible under this full EU harmonisation approach. In addition, only a committee of experts - not the companies affected - will be consulted on delegated acts.
- The delegated acts to which the European Commission is seeking to be empowered through the changes to the IORP II Directive aim to ensure coherence with the UCITS, AIFM and Solvency II Directives – that is, with Directives aimed at full harmonisation. In contrast to providers of insurance and in-

[1] German text: „Da die Systeme der betrieblichen Altersversorgung in den Mitgliedstaaten große Unterschiede aufweisen und maßgeblich an das jeweilige nationale Arbeits- und Steuerrecht anknüpfen, ist die Richtlinie auf eine Mindestharmonisierung ausgelegt und lässt den Mitgliedstaaten damit größere Spielräume in der Umsetzung. Folgerichtig enthält die Richtlinie keine Ermächtigungen zum Erlass von delegierten Rechtsakten."

vestment fund products, IORPs - on the basis of a contractual relationship between employers and employees - ensure that occupational pension benefits are being paid. For IORPs, cross-border activity is marginal. In the area of asset allocation, IORPs to some extent use the investment fund industry's services. Ensuring coherence between IORPs and the financial service providers covered under the Directives mentioned above is neither sensible nor appropriate when IORPs are regularly on the demand side of the financial market (see chapter 2.2, point 5).

⇨ Delegated acts that regularly aim for full EU harmonisation do not fit into any directive that aims for minimum EU harmonisation. Furthermore, delegated acts are limited to amending non-essential elements. The prudent person rule is an essential requirement for IORPs. The coherence the delegated acts are supposed to achieve with the UCITS, AIFM and Solvency II Directives is neither reasonable nor necessary. IORPs are not to be treated as pure financial service providers (see Recital 32 IORP II Directive). The proposed delegation of power to the EU Commission must therefore be clearly rejected.

2.2 Specific questions and comments on Article 10 of the Draft Regulation (supplementing Article 19 of the IORP II Directive)

Article 10 of the Draft Regulation is intended to empower the Commission "to specify in delegated acts, in accordance with Article 290 TFEU, the 'prudent person' rule with respect to the consideration of environmental, social and governance risks and the inclusion of environmental, social and governance factors in internal investment decisions and risk management processes." (p. 12-13 Draft Regulation). These delegated acts "shall take into account the size, nature, scale and complexity of the activities of the IORPs and of the risks inherent to these activities" (Article 10 Draft Regulation) and they should ensure the coherence with Article 14 of the UCITS Directive (2009/65/EC), Article 132 of the Solvency II Directive (2009/138/EC) and Article 12 of the AIFM Directive (2011/61/EC). This proposal leads to a number of specific questions:

1) Wrong understanding of the IORP II Directive and its ESG requirements?

The IORP II Directive contains provisions on ESG regarding Investment rules (Article 19), General governance requirements (Article 21), Risk-management (Article 25), Own-risk assessment (Article 28), Statement of investment policy principles (Article 30) and regarding Information to be given to prospective members (Article 41). Furthermore, statements on ESG can be found in Recitals 57 and 58. We agree with the EU Commission's statement that the IORP II Directive represents "a first step towards a more concise framework in the financial services sector in relation to ESG factors." (p. 3 of the Draft Regulation). It is correct that the ESG requirements in the IORP II Directive are about greater transparency vis-à-vis the beneficiaries, the supervisory authority and the public.

The Commission sees the empowerment to issue delegated acts for IORPs (as proposed in Article 10 of the Draft Regulation) merely as a specification of the prudent person rule regarding the integration of ESG risks and the integration of ESG factors in internal investment decisions and risk management processes. We understand the ESG relevant provisions regarding investment rules and risk management as follows:

- The Investment rules for IORPs (Article 19 (1) IORP II Directive) do not include a requirement to integrate ESG criteria into investment decisions (for more detail see point 2)

- Regarding the risk management, Article 25 (2)g also refers to ESG *risks*: within their risk management system, IORPs are required to cover ESG risks ('stranded assets'). Without doubt, the integration of these risks has an impact on investment decisions. However, it does not mean that IORPs generally have to include ESG criteria in their investment decisions (which would go against the provisions laid down in Article 19). In relation to ESG, the IORP II Directive mainly focuses on disclosure, Recital 58 states that the Member States "should require IORPs to explicitly disclose where such factors are considered in investment decisions and how they form part of their risk management system."

  The IORP II Directive does not include a requirement for IORPs to integrate ESG *factors* in their investment decisions and in risk management processes. The last sentence of Recital 58 leaves no doubt in this regard: "This does not preclude an IORP from satisfying the requirement by stating in such information that environmental, social and governance factors are not considered in its investment policy or that the costs of a system to monitor the relevance and materiality of such factors and how they are taken into account are disproportionate to the size, nature, scale and complexity of its activities."

We therefore do not understand the following statements by the Commission in the Draft Regulation and the Impact Assessment (which accompanied the publication of the three Proposals for Regulations):

- "Since general governance and risk-management should already integrate ESG factors and risks, these activities should be organised to comply with the delegated acts." (p. 6, second paragraph).
- "Since governance and risk-management rules under Directive (EU) 2016/2341 already apply to investment decisions and risks assessments, including environmental, social and governance considerations, the activities and underlying processes of IORPs should be informed to comply with the delegated acts." (p. 13, first paragraph).
- The Impact Assessment addresses the issue of coherence across sectors as follows: "*Only IORP II explicitly states that occupational pension funds should consider ESG factors in their investment decisions, governance and risk management systems."* (p. 26)

Apparently the Commission has based its proposals for future IORP regulation on this wrong understanding.

⇨ The proposal for empowering the EU Commission to issue delegated acts (Article 10 of the Draft Regulation) is based on an interpretation of the IORP II Directive which we do not understand. The IORP II Directive does not make the integration of ESG criteria in investment decisions mandatory. Within the framework of risk management, various areas must be covered, one of which are ESG *risks*.

2) Content and aim of the proposed additions to Article 19 of the IORP II Directive?

- The investment rules for IORPs were changed with IORP II. Among other provisions, Article 19 (1)b IORP II Directive was newly introduced (compare to Article 18 (1)a and b IORP I Directive): "within the prudent person rule, Member States shall allow IORPs to take into account the potential long-term impact of investment decisions on environmental, social and governance factors". IORPs can include ESG factors in their investment decisions, but they do not have to. We very much support this voluntary character of the requirement, which can also be found in the Draft Bill transposing the IORP II Directive into national law (§ 234h VAG RefEDraft Bill, amending the Versicherungsaufsichtsgesetz (VAG) in its

Articles 1 and 2). IORPs have to disclose vis-à-vis the beneficiaries, the supervisory authority and the public if and how ESG criteria are included in investment decisions. As stated above, Recital 58 clarifies that to comply with the Directive it is sufficient for IORPs to declare that they do not take into account ESG factors in their investment decisions.

⇨ IORP II does not include investment rules making the consideration of ESG criteria mandatory.

- On this backdrop it is not clear to us what to expect from measures by the Commission ensuring that "the 'prudent person' rule with respect to the consideration of environmental, social and governance risks is taken into account" (Article 10 (1)). What will be addressed here, considering that in Article 19 (1) IORP II Directive (prudent person rule) the following points are already stipulated:

  "(a) the assets shall be invested in the best long-term interest of members and beneficiaries as a whole

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

  (c) the assets shall be invested in such a manner as to ensure the security, quality, liquidity and profitability of the portfolio as a whole"

  Considering the structure of Article 19 IORP II Directive, we also wonder what the relation between a delegated act stipulated in paragraph 9 and the rules laid down in paragraph 1 would be. Delegated acts cannot change essential elements of the legal act. Changing the concept of the prudent person rule would be changing an essential element of the IORP II Directive. We do not think that such a change is necessary, but if it was changed it would not be a "non-essential element" (Article 290 TFEU) and therefore would have to be made by changing the Directive.

  ⇨ From our perspective no delegated acts supplementing the investment rules as laid down in Article 19 IORP II Directive are necessary. The IORP II Directive already stipulates that IORPs are bound by the prudent person rule, this also applies if they take ESG criteria into account in their investment decisions.

- It is also not clear to us what to expect from measures by the Commission ensuring that "environmental, social, and governance factors in internal investment decisions and risk management processes are included" (proposed paragraph 9 item (b) in Article 19 IORP II)

  It is not clear what the relation between these measures and the rules laid down in Article 19 (1) a – c IORP II Directive would be. Is it correct to assume that the voluntary character of considering ESG factors in investment decisions would not be touched by the introduction of paragraph 9? Is the intention that the new paragraph 9 would specify the requirements for those IORPs only which decide to take ESG criteria into account?

  If this was the case, and the Commission would use the empowerment to issue delegated acts to stipulate detailed requirements for those IORPs deciding to integrate ESG factors in their investment deci-

sion making, this could become a strong argument against the inclusion of ESG factors. Detailed requirements could prevent IORPs from taking small steps towards the consideration of ESG factors, which would go against the objective of the Commission. IORPs should therefore not have to decide whether to integrate ESG factors completely or not all; they should be free to do things at their own speed and suitable to their specific environment, e.g. being in compliance to the CSR policy of their sponsor companies.

We would also like to point out that the inclusion of paragraph 9 is intended not only to ensure that ESG factors are taken into account in investment decision processes, but also in risk management processes. It is surprising to address the latter by supplementing the investment rules, as the rules on risk management can be found in Article 25 IORP II Directive.

However, if the proposed wording for Article 19 (9 b) IORP II Directive is to be understood as requiring all IORPs to take ESG factors into account in investment decision processes, then the Draft Regulation would go far beyond disclosure rules. In this case, there would be a substantial change to the IORP II Directive, which the Commission should make transparent. If it is politically really desirable to make the substantial change and make the consideration of ESG factors in investment decisions and risk management mandatory, it should only be done via the IORP II Directive itself - and not via a delegated act.

Considering Recital 12 of the Draft Regulation, it seems that the objective of the Commission is not only transparency but also about influencing investment decisions: The Commission is empowered to delegated acts to "specify how IORPs make investment decisions and assess risks in order to take into account environmental, social and governance risks".

⇨ If the Draft Regulation (on disclosure) includes a substantial change of the IORP II Directive, this should be made sufficiently clear by the Commission.

3) Minimum EU harmonisation through the IORP II Directive – now supplemented by delegated acts?

In contrast to the UCITS, Solvency II and AIFM Directives, the IORP II Directive has a minimum harmonisation character, so that Member States have flexibility when transposing the Directive into national law. Considering the diversity of occupational pensions across the Member States, its role within a three pillar pension structure and in particular national social and labour law, minimum EU harmonisation is adequate. The three delegated acts proposed by the Commission in March 2014 (Articles 30, 24(3) and 54 Commission Proposal IORP II) would therefore have been an inadequate one-size-fits-all approach and were rejected resolutely by the Council and the EP. The IORP II Directive therefore does not include any powers for the Commission to issue delegated acts.

We believe that national supervisory authorities are best placed to monitor how IORPs manage risks (including ESG risks). They can best ensure that local specificities such as different governance structures and specific sustainability preferences are taken into account. This is an argument against uniform and standardised specifications at EU level or by the EU supervisory authorities.

Section 3.2 of the Impact Assessment states, "Asset managers, insurance companies, pension funds, portfolio managers and investment advisers are largely working across borders in the EU. Therefore legislation applying to those market players is largely harmonised at EU level". However, this is not true

for IORPs. According to the EIOPA Report 2017 Market development report on occupational pensions and cross-border IORPs, there were 155,481 IORPs in the European Economic Area in 2016. The number of cross-border IORPs is stagnating at a very low level of around 0,05% (73 IORPs in 2016). Traditionally, a large share of these cross-border IORPs are active between the UK and Ireland. Once the UK has left the European Union, the number of cross-border IORPs will therefore fall even lower within the EU.

Consequently, the arguments around costs (discussed in the Impact Assessment, p. 33) do not apply to IORPs: "*Due to the fact that many asset managers, insurance companies, pension funds, portfolio managers and investment advisors already work at an EU if not global level, action at EU level will provide economies of scale.*"

⇨ It is neither justified nor understandable why the Draft Regulation should make such a fundamental change to the IORP II Directive, which aims at minimum EU harmonisation. The proposed Regulation should therefore be limited to the disclosure of information on sustainable investments and sustainability risks.

4) Principle of proportionality from Solvency II relevant for IORPs?

The Draft Regulation proposes to introduce in Article 19 (9) sentence 2 IORP II Directive that the delegated acts for IORPs "shall take into account the size, nature, scale and complexity of the activities of the IORPs and of the risks inherent to the activities". We do not understand why the Commission use the principle of proportionality from Solvency II, rather than from the IORP II Directive. In the IORP Directive, proportionality takes into account "size, nature, scale and complexity of the activities of the IORP". The Draft Bill transposing the IORP II Directive into national law is already reflecting that in Article 296 VAG Draft Bill.

Regarding IORPs (which in Germany are both Pensionskassen and Pensionsfonds), the BaFin statistics (Bundesanstalt für Finanzdienstleistungsaufsicht - Federal Financial Supervisory Authority) shows that beyond the principle of proportionality the IORP-specific regulatory rules are of utmost importance: In 2016, Pensionskassen had a total capital stock of EUR 155.6 billion and the Pensionsfonds of EUR 35.6 billion. The largest Pensionskasse by far had an investment portfolio of 26.6 billion euros. Around ¾ of the Pensionskassen have an investment portfolio of less than EUR 1 billion.

⇨ To IORPs, the principle of proportionality as stipulated in the IORP II Directive is applicable. A direct or indirect reference to the Solvency II Directive is not acceptable. Regulation should be appropriate and workable for IORPs.

5) Consistency of IORP rules with Directives which do not include ESG requirements in their investment rules?

The Draft Regulation stipulates for Article 19 (9) sentence 2 of the IORP II Directive, that the delegated acts "ensure consistency with Article 14 of Directive *2009/65/EC, Article 132 of Directive 2009/138/EC and Article 12 of Directive 2011/61/EU.".*

- What does the "consistency" envisaged by the Commission mean in this context? The Directives mentioned (UCITS, AIFM, Solvency II) do not contain requirements to include ESG factors and are not being changed by the Draft Regulation.
- Is the intention of the EU Commission sufficient to "make use of current empowerments to specify the integration of ESG risks" (p. 6)? Why should the proposed delegated acts for the IORP II Directive be sufficient to "equally safeguard consumer protection and a level playing field between IORPs and other financial market participants?" (p. 6) We do not follow this argumentation if substantial changes are to be made to the IORP II Directive.
- A level playing field between IORPs and UCITS, AIFMs and insurance companies is neither necessary nor adequate. Recital 32 of the IORP Directive states: "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, employer and the IORP should be adequately acknowledged and supported as guiding principles of this Directive."

⇨ IORPs are pension institutions with a social purpose. Very few IORPs compete at all; most IORPs neither compete with each other nor with financial service providers. The Commission's objective of coherence is apparently based on a misunderstanding of the character of IORPs.

- IORPs are (end-) investors in financial instruments/products in the financial market where UCITS and AIFM products are offered. We do not see that the product and sales interests of the fund industry and the interests of IORPs (which are clients of the fund industry) are the same. Institutional investors on the demand side, such as IORPs, have an interest to have their own definitions, specifications and assessments. In the interests of transparency, the IORPs may be required to disclose its principles to the supervisory authorities and in an appropriate manner to the beneficiaries, and to inform them whether ESG criteria are taken into account and how it addresses ESG risks. At the same time, however, IORPs are certainly interested in standards for products offered on the market that describe themselves as "sustainable". Standardisation can avoid "green washing" and make the choice of fund easier for IORPs.

  These issues were among other things taken into account in the new version of the Shareholder Rights Directive (Directive 2017/828) adopted in 2017, which is also currently to be implemented in the Member States. The Shareholder Rights Directive also provides for new disclosure requirements (Article 3g: Engagement policy; Article 3h: Investment strategy of institutional investors and arrangements with asset managers) for institutional investors such as IORPs and insurance companies. Article 3i contains transparency rules for asset managers.

We are very concerned that through the Joint Committee of EU Supervisory Authorities EBA, EIOPA and ESMA are to draw up draft technical regulatory standards on the presentation and content of pre-contractual information and sustainable investments (Article 5 (5) and (6); Article 6 (2) Draft Regulation). For IORPs, such rules would certainly lead to an expansion of fund investments at the expense of the direct holdings, as they themselves - despite the principle of proportionality - would hardly be in a position to meet such detailed and extensive requirements. The ESG rules for IORPs should leave it for the IORP to decide whether the investment organisation is internal or external.

⇨ In view of the intended EU standardisation, a differentiation according to the scope of application of the Directives is therefore sensible and absolutely necessary. IORPs are customers in the financial market where UCITS and AIFM products are offered.

3 Conclusion

The integration of ESG aspects into the investment processes and risk management of IORPs is generally to be supported. Better data availability would facilitate this. IORPs should be transparent for the EU supervisory authority and the beneficiaries and disclose whether and how they take sustainability factors into account. The primary objective of every IORP is to meet the expected or promised benefits through an appropriate, risk-controlled investment policy. ESG criteria are just one of several factors to consider in the investment process. In some cases, ESG guidelines of the sponsoring company also have to be taken into account; IORPs cannot be required to implement an ESG policy going against their own sponsor.

The IORP II Directive already contains sensible rules regarding ESG factors and risks, which are now being transposed by the Member States and will then be integrated by the IORPs. **Should the evaluation and review of the existing rules show that changes are necessary, these should be made within the framework of the IORP II Directive - and under no circumstances via delegated acts.** This aba position paper explained in detail why delegated acts are an unsuitable instrument for IORP regulation. In specific cases they should even be regarded as improper from a legal perspective, especially if delegated acts interfere with or restrict essential and central provisions of the IORP II Directive, such as the prudent person rule.

Paul Tang's ECON Draft Report published 2 August 2018 also opposes the insertion of delegated acts into the IORP II Directive by the Draft Legislation. If the proposals in the ECON Draft Report for amending the IORP II Directive are taken up in further EU legislative procedures, care should be taken to ensure that IORPs continue to be methodologically free in terms of information. How IORPs integrate ESG criteria and to what extent they provide information on the handling of ESG criteria and risks should be left to the IORP.

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