

IORPS II: A missed opportunity to improve outcomes for savers, the economy and environment?

Summary

The Institutions for Occupational Retirement Provision (IORPs) Directive is being revised for several reasonsⁱ; to encourage more workplace pension saving, particularly across borders; to tackle governance and risk management deficiencies highlighted by the 2008 financial crisis; and to provide better information and protection to scheme members, who increasingly must bear risks and make decisions about their savings themselves. Furthermore, the European Commission's Capital Markets Union (CMU) proposal has emphasised that the €2.5 trillionⁱⁱ held by Europe's IORPs could be better deployed to help boost sustainable economic growth, and called for consumer distrust in financial services to be tackledⁱⁱⁱ

ShareAction wholeheartedly supports these aims and the Rapporteur's efforts to respect subsidiarity and focus on general principles of good governance and risk management instead of introducing overly prescriptive rules. There are however two key areas where we argue change is essential if the revised IORPS directive is to meet its stated aims, and deliver meaningful positive change for the EU's millions of savers.

Investment and Risk Management Approach

We are deeply concerned that the Rapporteur's text weakens risk management criteria. Of particular concern is the **removal** of requirements proposed by the Commission for IORPs to consider risks relating to 'climate change, resource use and the environment'. This puts savers, the economy and environment at risk and is inconsistent with recent policymaking developments in the EU and beyond that encourage consideration of environmental, social and governance (ESG) factors by investors and companies.

In addition to this, in many jurisdictions in the EU and beyond, legal requirements, such as those in this Directive, to invest in line with the 'prudent person principle' and in 'members' best interests' are often narrowly interpreted as a duty to maximise short term returns and there is much confusion as to whether ESG factors can be considered. This is a barrier to more long-term, responsible investment must be addressed through legislative clarification. The opportunity to do so through the revision of the IORPS directive must not be wasted. Legislative change from by EU policymakers is justified for this reason and to align the IORPs Directive with other recent policymaking initiatives.

Boost Transparency of Investment Policies and Fees through Pension Benefit Statements and Public Disclosure of Key Information

Finally, ShareAction proposes changes to improve transparency of IORPs' investment policies and practices and the charges levied on members saving. This is urgently needed to address the lack of available, comparable information about this sector. The proposed revisions to the text undermine and rights to information that members and beneficiaries enjoy under the current IORP Directive.

About ShareAction

ShareAction is a UK registered charity established to promote transparency and responsible investment practices by pension funds and other institutional investors. Our goal is an investment system that serves savers, society and the environment. We are a membership based organisation and count amongst our members a growing number of NGOs and trade unions, as well as over 35,000 individual supporters.

ShareAction's Proposed Changes to IORPS II

There are three key areas where ShareAction is proposing changes to the current ECON text. We set out below those areas, the logic behind our proposals and the detail of the change we are calling for.

Investment and risk management approach

- In the current draft ECON text, the Rapporteur has removed the requirement to consider environmental risk at a time where there is increasing recognition from the investment industry and policymakers worldwide that ESG factors have a material impact on investment portfolios, particularly those of investors with long-term liabilities.
- The figures are alarming. To take just one example around climate change, the Economist Intelligence Unit predict that global warming of 6°C could lead to losses of \$13.8 trillion against the world's current \$143 trillion stock of manageable assets – more than the entire market capitalisation of the London Stock Exchange.^{iv}
- If global warming can be limited to 2° these losses could be halved on average, but around 80% of known fossil fuel reserves will have to remain in the ground, and will, therefore be worthless, stranded assets.^v This is highlighted as an urgent risk area the World Bank^{vi}, the Bank of England^{vii} and the G20 has ordered the Financial Stability Board to convene an inquiry into the stranded asset problem. Exposure to fossil fuel reserves are an estimated 5% of total EU pension fund assets^{viii} making it a serious risk for IORPs.
- IORP's portfolios face myriad environmental risks from water and other resource scarcity^{ix} to extreme weather events.^x Research from the consultancy Mercer^{xi} demonstrates that climate change will inevitably impact investment returns across a wide range of sectors and geographies so investors need to embed these considerations in the investment process.

IORPs are not addressing these issues, putting savers, the economy and environment at risk

- ShareAction's 2014 survey of the UK's largest occupational pension funds^{xii} found that 70% consider climate change a material risk but only one fund could evidence a climate change policy. These issues exist in the UK despite apparently having Europe's most developed Responsible Investment market^{xiii}. The Dutch pension system is also amongst the EU's most sophisticated but only 57% of funds mention climate change in their investment policies.^{xiv} This suggests the problem is widespread in the EU.
- There is good reason to believe that the situation is worse amongst smaller funds who 'find it more difficult to fully consider ESG issues due to lack of time, resources and in some cases understanding'^{xv} according to another study.
- Other EU initiatives such as the current revision to the Shareholder Rights Directive, the Capital Markets Union proposal and the Commission's 2020 strategy for smart, sustainable and inclusive growth recognise the role institutional investors must play in supporting jobs and growth by adopting more long-term strategies and becoming more engaged, responsible owners of EU corporations. The IORPs Directive must be aligned with these developments.

Why is legislation needed to tackle this problem?

- The IORPs Directive requires investment in accordance with the ‘prudent person principle’ and in the best interests of beneficiaries. Similar legal concepts exist in different member states, such as the concept of fiduciary duty in the UK.
- These legal duties cause significant confusion and have come to be interpreted very narrowly as a requirement to maximise profit in the short-term. ShareAction has repeatedly experienced pension fund trustees stating that they believed the law to prohibit them from considering ESG factors, as they are non-financial, or ethical issues, or only financially material in the long-term thus forbidden by their duty to maximise short term profits^{xvi}. Where the law is unclear, legal advice tends to be overly cautious and conservative which has holding back the adoption of new investment approaches, for example ESG integration
- A recent, detailed review by the UK’s Law Commission concluded that the law on fiduciary duties is “complex, difficult to find and not well known ... [which] may lead trustees to be overly narrow in their approach to investment factors and to their beneficiaries’ concerns”. Confusion surrounding this area of law exists in many jurisdictions according to the UN-led PRI.^{xvii} The European Commission (DG Environment) has also recently commissioned a study into investors’ fiduciary duties^{xviii} after growing concerned that this area of the law is a barrier to resource efficient, low carbon investment.
- Aviva recently called for clarification of the concept of fiduciary duty, saying ‘we believe this would do much to mobilise the trillions of pounds required to transition to a low-carbon economy’^{xix}
- A legal framework relying solely on the prudent person principle and duty to invest in beneficiaries’ best interests is thus inadequate to safeguard the savings of 75 million members and beneficiaries of IORPs across Europe^{xx} or overcome IORPs’ short-term bias and deliver the sustainable investment needed to grow the EU economy in the long-term

How should the Directive be changed?

- Despite a number of legal reviews, confusion remains,^{xxi} showing only legislative clarification can solve this problem. Unless the law is explicit and clear concerning the factors IORPs can consider, narrow, overly cautious interpretations of these duties will continue, preventing proper management of ESG risks.
- Our proposed amendments to Article 20.1 set out considerations that the ‘institution is empowered to have regard to’ such as long-term consequences, ESG factors and impacts on beneficiaries’ and members’ quality of life. This would end the legal confusion surrounding whether these factors may be considered.

Potential objection: *changing the legal definition of investors’ duties could undermine the much valued flexibility of this legal concept or erode trustees’ and managers’ discretion*

- ShareAction is not calling for policymakers to tell institutional investors where to invest, ultimate responsibility and discretion would remain with the IORP. The wording of the amendment, that institutions may, or ‘are empowered to’ have regard to certain factors ‘among other matters’ avoids the risk that the law would prevent institutions from considering additional factors and risks that emerge in the future, and does not imply that investors have to make certain investment decisions.
- ShareAction has researched and campaigned on the issue of fiduciary duty for nearly 5 years, written several highly regarded reports^{xxii} and consulted numerous legal experts. We believe proposed wording of the amendment would not risk negative, unintended consequences.

Pension benefit statement

- The Commission's proposal for a pension benefit statement (Articles 40-54) was undoubtedly too long and overly prescriptive and the rapporteur is justified in efforts to simplify it. However, in our view too much has been cut and members stand to lose certain rights that they enjoy under the current directive, including the right to receive information about how to transfer pension rights to another scheme when they change employer.
- Avoidance of overly prescriptive rules must be balanced with the need for standardised, comparable information. Our proposed Amendments to Articles 31, 32 and 40a require each member state to mandate standardisation and comparability of disclosures, rather than EU wide harmonisation.
- A balance must be struck between information that is sent to all members in an annual pension benefit statement; information that is available on request to members who do want to know more; and information that is publicly available so that 3rd parties like academics and civil society groups can scrutinise it.

Justification

- The legislation was designed for Defined Benefit (DB) era, but Defined Contribution schemes, where members have to make investment choices and are impacted by charges are rapidly increasing. PensionsEurope argue that 'in many cases, a single member does not make any decision in relation to the IORP'^{xxiii}, but this is misleading. Even if members are auto-enrolled they still have the choices to opt out, to increase their contributions and often between different investment options.
- If members don't make the right choices and costs are not controlled, they risk not saving enough for retirement and will face poverty and/or require financial assistance from the state at a time when governments are struggling to pay for aging populations.
- We agree with EIOPA's assessment that 'In DC pension scheme arrangements, charges may immediately reduce the value of the members' capital and therefore have a clear and direct effect on outcomes – in this context, clear and comprehensive disclosure of costs and charges is important for DC pension scheme members'^{xxiv}
- The market for pension and investment products is consistently the lowest performing market in the European Commission's consumer scorecards, out of over 30 markets assessed.^{xxv} This market scores particularly badly on trust and ease of comparability. This gives EU policymakers an urgent mandate to improve disclosure and transparency

Potential Objection: *Consumer projection type rules aren't needed because the involvement of employers and social partners ensures good outcomes*

According to voices in the pension industry, including PensionsEurope, 'the occupational pensions sector shall not be seen as a "market" where "products" are sold to "consumers" ... 'This leads to apply individual consumer protection-type of regulation to IORPs and undermining the role of social partners'^{xxvi}

Response:

- Improving disclosure to members does not mean that the role of employers or social partners will be eroded. In fact, if IORPs are more transparent and members are better informed this will assist social partners in fulfilling their role of representing members' views.
- Sometimes, not even the employers, social partners or the IORP itself know the extent of charges or if a scheme is performing well in relation to its peers. A recent study into the

UK workplace pensions sector found 38 different types of charges levied on members' savings and 291 different charging structures. Over £25.4 billion of pension savings was identified as trapped in schemes with inappropriately high charges. If all costs are not disclosed in a comparable way, IORPs and their service providers are not subject to adequate scrutiny and costs can become excessive.

- One of the UK's largest occupational pension schemes recently reported that the headline fees they paid to asset managers were only around a fifth of the total fees paid. It took 18 months and much effort to find out the true figure.^{xxvii} Only by mandating disclosure of all costs in comparable formats can this problem be tackled.

Potential Objection: *members aren't interested or capable of scrutinising their pension so sending them information about investment policies, profiles and holdings is a pointless waste of money*

- We propose that the pension benefit statement is limited to the information it is key for all members to receive, such as accumulated contributions or entitlements and total costs. But additional information such as the investment approach and portfolio should be available to members who are interested upon request.
- Arguments that savers are usually not interested or engaged arise from the current culture of inadequate disclosure, lack of trust and complete imbalance of power between provider and member. It is currently far too difficult for members to find out where their savings are invested, or how ownership decisions are made on their behalf. The industry has shown great reluctance to address these factors, often hiding behind regulatory rules as an excuse for keeping members at a distance. In order to break the cycle of disengagement, and to truly be able to say whether savers care, savers need to be empowered and adequately equipped with information about how their money is being used. It is clear that industry will not take the lead on this, and thus regulatory intervention is urgently required.
- Although savers may not understand the technicalities of investment, there are many matters on which they are qualified to comment, including the way their scheme behaves as an owner of major companies, or its policy on ethical issues. Recent surveys in the UK for example that 49% of pension savers would like their employer 'to choose a provider which makes a specific point of investing ethically, even if this fund would achieve lower returns on investment'^{xxviii} and 70% 'felt it important for pension providers to invest in companies that concentrate on avoiding unethical practices'^{xxix}
- ShareAction has identified that best practice globally includes IORPs conducting surveys, focus groups, webinars and holding open meetings or AGMs to find out what beneficiaries are thinking^{xxx}. Although the pensions market will probably never be dominated by active and engaged consumers, the more consumers are empowered to be active and engaged, the better the market will work.

Public disclosure of key information

The fact that IORP members and beneficiaries are often not very engaged means the investment behaviour of these institutions is not subject to a level of scrutiny which is appropriate given the sector's importance to the economy as a whole and to millions of citizens' future financial security. Furthermore, as members often cannot choose to leave a scheme without sacrificing their employer contributions, the occupational pension sector is also not subject to market forces which would normally drive up standards and encourage innovation.^{xxxi}

- Even for professional researchers it is too difficult to find information to properly examine and hold IORPs to account. A recent study by the European Green Party found 'There is a

remarkable lack of comprehensive data on the value of the assets of pension funds in the European Union as a whole^{xxxii} for example. Another study on the position of savers in private pension products prepared for the European Commission found ‘there is an increasing demand for analysis in this area ... data on charges and costs has typically been difficult to obtain and has not been readily available on a consistent basis across countries.’^{xxxiii}

- As such ShareAction proposes that the annual accounts, major investment holdings, statement of investment principles and implementation results thereof should be publicly disclosed (Articles 31-32). As well as empowering savers, public disclosure of information also allows third parties, such as academics, trade unions and NGOs to scrutinise providers and hold them accountable for the benefit of members.
- This would ensure consistency with the public disclosure requirements for institutional investors’ engagement policies proposed under the current revision to the Shareholder Rights Directive

Suggested Amendments

	Currently Proposed ECON Text	ShareAction’s Proposed Amendment	Justification
Recital 41	It is essential that institutions improve their risk management so that potential vulnerabilities in relation to the sustainability of the pension scheme can be properly understood and discussed with the competent authorities. Institutions should, as part of their risk management system, produce a risk assessment for their activities relating to pensions. That risk assessment should also be made available to the competent authorities	It is essential that institutions improve their risk management so that potential vulnerabilities in relation to the sustainability of the pension scheme can be properly understood and discussed with the competent authorities. Institutions should, as part of their risk management system, produce a risk assessment for their activities relating to pensions. That risk assessment should also be made available to the competent authorities. <i>This risk evaluation should include environmental, social and governance risks</i>	The requirement in the Commission text to consider ‘risks relating to climate change, resource use and the environment’ has been deleted without justification. The wording ‘environmental, social and governance risks’ is consistent with wording in other EU texts
Article 5	With the exception of Articles 34 and 35(3) Member States may choose not to apply this Directive, in whole or in part, to any institution located in their territories which operates pension schemes which together have less than 100 members in total. Subject to Article 2(2), such institutions shall nevertheless be given the right to apply this Directive on a voluntary basis. Article 12 may be applied only if all the	With the exception of Articles 20, 22(1-5), 32-34, 35(3), 38 and 39 Member States may choose not to apply this Directive, in whole or in part, to any institution located in their territories which operates pension schemes which together have less than 100 members in total. Subject to Article 2(2), such institutions shall nevertheless be given the right to apply this Directive on a voluntary basis. Article 12 may	95% of IORPs operating in the EU have less than 100 members ^{xxxiv} , so this clause drastically reduces the scope of the Directive. Furthermore, cumulatively, these small schemes are important actors in the EU investment system. Members and beneficiaries of large and small schemes deserve robust protection by legislation and those looking after their money. This amendment ensures that the

	<p>other provisions of this Directive apply</p>	<p>be applied only if all the other provisions of this Directive apply</p>	<p>most important requirements of the Directive apply to all schemes</p> <p>Smaller schemes often outsource key functions and can comply with these requirements by issuing appropriate instructions to investment managers and other third parties.</p> <p>Article 20 concerns investment rules, based on the prudent person principle</p> <p>Article 22 concerns general governance requirements</p> <p>Article 32 concerns the statement of investment policy principles</p> <p>Article 33 concerns IORPs' responsibilities regarding outsourced arrangements</p> <p>Article 38 and 39 concern the prospective members', members' and beneficiaries' rights to information</p>
<p>Article 20.1(a)</p>	<p>1. Member States shall require institutions located in their territories to invest in accordance with the 'prudent person' rule and in particular in accordance with the following rules:</p> <p>(a) the assets shall be invested in the best interests of members and beneficiaries. In the case of a potential conflict of interest, the institution, or the entity which manages its portfolio, shall ensure that the investment is made in the sole interest of members and beneficiaries;</p>	<p>1. Member States shall require institutions located in their territories to invest in accordance with the 'prudent person' rule and in particular in accordance with the following rules:</p> <p>(a) the assets shall be invested in the long-term best interests of members and beneficiaries as a whole and to be fair between the beneficiaries and members. In the case of a potential conflict of interest, the institution, or the entity which manages its portfolio, shall ensure that the investment is made in the sole interest of</p>	<p>As discussed above, the prudent person principle and requirement to invest in beneficiaries best interests must be clarified in a flexible way that retains trustee or manager discretion whilst ending confusion about whether factors beyond short-term financial returns can be considered.</p> <p>It is necessary to mandate consideration of the long-term consequences to help overcome the problems caused by short term mandates between institutions and third parties and predominance of short term metrics and benchmarks used to evaluate performance.</p>

		members and beneficiaries;	
Article 20.1 (b) <i>new</i>		<p>(b) In doing so the institution is empowered to have regard (among other matters) to:</p> <ul style="list-style-type: none"> (i) the likely consequences of any investment decisions in the long-term, (ii) the impact of any investment activities on the financial system and economy, (iii) the implications of environmental, social and governance factors for return on investment (iv) the impact of any investment activities on communities and the environment (v) the impact of any investment activities for beneficiaries quality of life, and (vi) the views, including the social and ethical views of beneficiaries 	As for justification of Article 20.1(a)
Article 26(2) g <i>new</i> (risk management system and function)		<i>management of environmental, social and governance risks associated with the investment portfolio</i>	As discussed above, unless ESG issues are explicitly mentioned in the legislation it is likely that confusion surrounding whether it is permitted to take these factors into account and reticence to act will still abound amongst IORPs and those giving them legal advice.
Article 29(2) h <i>new</i> (Risk Evaluation for		<i>a qualitative assessment of environmental, social and governance risks</i>	The requirement in the Commission text to consider 'risks relating to climate change, resource use and the environment' has been deleted without justification.

pension)			The wording 'environmental, social and governance risks' is consistent with wording in other EU texts
Article 31 (Annual accounts and annual reports)	Member States shall require every institution located in their territories to draw up annual accounts and annual reports taking into account each pension scheme operated by the institution and, where applicable, annual accounts and annual reports for each pension scheme. The annual accounts and the annual reports shall give a true and fair view of the institution's assets, liabilities and financial position. The annual accounts and information in the reports shall be consistent, comprehensive, fairly presented and duly approved by authorised persons, in accordance with national law	Member States shall require every institution located in their territories to draw up and publicly disclose annual accounts and annual reports taking into account each pension scheme operated by the institution and, where applicable, annual accounts and annual reports for each pension scheme. The annual accounts and the annual reports shall give a true and fair view of the institution's assets, liabilities and financial position, and include disclosure of major investment holdings . The annual accounts and information in the reports shall be consistent, comprehensive, fairly presented and duly approved by authorised persons, in accordance with national law.	Given the importance of IORPs for the economy and retirement security of millions of Europeans, this information should be publicly available so that third parties, including academics and civil society organisations can scrutinise the behaviour of IORPs for the benefit of members and beneficiaries, given the importance of IORPs
Article 32 (Statement of investment policy principles)	Member States shall ensure that every institution located in their territories prepares and, at least every three years, reviews a written statement of investment-policy principles. That statement is to be revised without delay after any significant change in the investment policy. Member States shall provide for this statement to contain, at least, such matters as the investment risk measurement methods, the risk-management processes implemented and the strategic asset allocation with respect to the nature and duration of pension liabilities	Member States shall ensure that every institution located in their territories prepares, publicly discloses , and, at least every three years, reviews a written statement of investment-policy principles. That statement is to be revised without delay after any significant change in the investment policy. Member States shall provide for this statement to contain, at least, such matters as the investment risk measurement methods, the risk-management processes implemented, the strategic asset allocation with respect to the nature and duration of pension liabilities and approach to engagement, without prejudice to amendments to Directive 2007/36/EC .	Without public disclosure, including disclosure of implementation and results, it is likely that many of these statements will be vague and generic and therefore of limited usefulness. This aligns this Directive with the current revision to the Shareholder Rights Directive which is likely to require institutional investors to disclose their engagement policy and the results thereof on an annual basis.

		Member states shall ensure that every institution publicly discloses on an annual basis how this policy has been implemented and the results thereof	
Article 40(a) 4(e) (Pension benefit Statement)	information on the accumulated entitlements, contributions and costs of the pension scheme , taking into consideration the specific nature and organisation of the pension scheme;	information on the member's total accumulated entitlements or contributions taking into consideration the specific nature and organisation of the pension scheme	The Rapporteur's text does not make it clear whether information would be given at member or scheme level and would allow for only partial information about contributions, entitlements and costs to be provided
Article 40(a) 4(f) new (Pension benefit Statement)		for schemes without full or partial guarantees information on the total sum of the costs deducted from member's accumulated entitlements over the past twelve months, or, if the member has joined the scheme less than twelve months ago, the sum of the costs deducted from their contributions since joining; providers must account for all costs related to the scheme including those concerning administration, safekeeping and portfolio transaction charges and member states should ensure that costs are reported in a standardised, comparable manner	Partial re-insertion of Commission text and in line with EIOPA advice. ^{xxxv} If costs and charges cannot be compared, there is a risk that they will become excessive, causing member detriment.
Article 40(a) 4(h) new (Pension benefit Statement)		Where and how to obtain further information about the institution or the pension scheme, including the information specified in Article 32	Partial re-insertion of Commission text. Article 32 concerns the statement of investment policy principles.
Article 40b new (Additional information to be given on request to		On request of a member, a beneficiary or their representatives, the institution shall provide the following additional information: a) the annual accounts and the	Partial re-insertion of Article 58 of Commission text, the Rapporteur deletes these rights to information without providing justification. These rights are crucial to enable appropriate scrutiny IORPs' behaviour by

<p>members and beneficiaries)</p>		<p><i>annual reports referred to in Article 31, or where an institution is responsible for more than one scheme, those accounts and reports relating to their particular pension scheme</i></p> <p>b) The Statement of investment policy principles referred to in Article 32</p> <p>c) where the member bears the investment risk, the range of investment options, if applicable, and the actual investment portfolio</p> <p>d) the arrangements relating to the transfer of pension rights to another institution for occupational retirement provision in the event of termination of the employment relationship.</p>	<p>members and their representatives, to enable interested members to make informed investment decisions</p>
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For more information please contact:

Camilla de Ste Croix | Senior Policy Officer | camilla@shareaction.org | 0044 207 403 7833

ⁱ European Commission, 'Proposal for a Directive on the activities and supervision of institutions for occupational retirement provision, 2014/0091'

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ⁱⁱⁱ European Commission, 'Green paper: Building a Capital Markets Union /* COM/2015/063 final */', 2015

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