

Response Federation of Dutch Pension Funds to the EC Consultation on the operations of the European Supervisory Authorities

I. Tasks and powers of the ESAs

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? Please elaborate on your response and provide examples.

As the Federation of Dutch Pension Funds, we see two different perspectives when it comes to supervisory convergence. On the one hand, referring to our role as institutional investors, we participate on financial markets and we fully support further integration of capital markets. We still encounter barriers when investing abroad, due to differences in legal systems or administrative requirements and sometimes due to discrimination of foreign investors. Hereby raising the costs of investments and influencing investment decisions (ex-ante). Step by step barriers should be identified and removed. Supervisory convergence can help in this regard.

On the other hand, we would like to emphasize the difference between supervision of IORPs and supervision of other financial institutions, such as insurers and banks. The IORP II directive has the character of a minimum harmonisation. The reason for that is that IORPs across Europe are imbedded in national history and in social and labour law. As the IORP II Directive (in Recital 32) stipulates, "IORPs are pension institutions with a social purpose that provide financial services. (...) Their social function and the triangular relationship between the employee, employer and the IORP should adequately be acknowledged (...)." They therefore cannot be compared to other financial institutions such as insurers and banks.

Furthermore, recital 5 of the IORP II Directive states that "The way in which IORPs are organized and regulated varies significantly between Member States. (...) It is not appropriate therefore, to adopt a 'one-size-fits-all' approach to IORPs. The Commission and the European Supervisory Authority (... EIOPA) (...) should have regard to the various traditions of Member States in their activities and should act without prejudice to national social and labour law in determining the organization of IORPs". The social purpose of and the large diversity in IORPs coupled with the express recognition of this by the EU legislator, therefore puts limits for supervisory convergence with regard to IORPs. Differences in national practices of NCA's that stem from the differences between their respective IORP's and pension systems, are legitimate.

When looking at the work carried out by EIOPA, we see however that EIOPA dedicates a lot of work on supervisory convergence and harmonisation for quantitative rules for IORPs. The Common Balance Sheet approach (as suggested for the IORP stress test 2017, formerly known as Holistic Balance Sheet) is an example in this respect. EIOPA continues developing this HBS-approach, even though the OPSG and other stakeholders have repeatedly raised concerns and issues on its applicability in the different national contexts. Given the diversity in European IORPs, striving for harmonisation through the HBS is not an appropriate approach.

In addition, we have doubts about some of the own initiatives taken by EIOPA. We believe there is a fine line to be drawn in this respect. The ESAs are tasked to develop the single rulebook, but we read this as referring to their tasks in level 2 and 3. This refers to their tasks in filling lacunae and their task in promoting supervisory convergence. This is particularly relevant for rules that are part of maximum harmonisation, or otherwise should be interpreted the same in all Member States. However at the same time ESAs should refrain from impinging upon the right of initiative of the European Commission to come up with new legislative initiatives that go beyond the existing framework of the single rulebook. As

an example, we would like to draw attention to the efforts of EIOPA towards a pan-European occupational DC framework (in the second pillar). We question the need and necessity of such an initiative seen that the IORP II Directive already provides for a sufficient framework to set up pan-European pension schemes. Also we note that some cross border IORPs already exist and interesting new ones are being developed, sometimes even with support of the Commission (example: ReSaver). In our view, the European Commission should be in the lead to assess whether new policy or legislative initiatives are needed. When necessary, the Commission can and will ask EIOPA for advice on these initiatives. We believe supervisors should exert restraint before embarking on own initiatives, and leaving wider issues to the institutions that are charged for this directly in the Treaties.

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?

From an IORP perspective, the small number of cross border issues as well as the character of IORP II as being institutions falling under minimum harmonisation we believe that the current tools available to EIOPA have not been a great hinder. In all of its activities regarding IORPs, EIOPA should act without prejudice to national social and labour law, as stipulated in Article 1 EIOPA Regulation (Regulation (EU) No. 1094/2010). For cross border issues we believe for the IORP II to provide adequate and sufficient rules.

Strengthening of peer reviews between NCA's is something we can conceptually well understand, and therefore support, but we do not have any practical examples to offer.

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? Please elaborate on questions and, importantly, explain how any weaknesses could be addressed

When it comes to supervision of IORPs, we are not aware of a lacking EU interest orientation in decisions of the BoS of EIOPA.

Although in general we agree that it is important that an EU interest orientation is taken, and that we do understand and appreciate this may lead to a need for another form of decision making than consensus and/or presence of all NCA's, in the case of IORP's this would raise another serious concern.

Whatever new procedures would be proposed, we believe that EIOPA should ensure that supervisors responsible for IORPs are well and prominently represented in the permanent members of EIOPA's Board of Supervisors and other colleges. Decision making on supervision of IORPs should be made by members with sufficient competences and experience on IORPs. Since in many EU countries IORPs are not yet well developed (there are only several real IORP countries) this is an issue. The decision making should be made according to the importance of the IORP sector in Europe. (For information we note that based on recent EIOPA figures, about 2/3 of all assets under management of IORP's in the EU27 is held by Dutch pension funds. This very big difference over Member States, has to be taken proper account of, when it comes to decision making on supervision of IORPs.)

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.

Convergence of supervisory practices is different in a context of maximum harmonisation than in a context of minimum harmonisation. Where maximum harmonisation has been achieved at EU level, the question is rather straightforward and should usually be answered positively.

This is however different in a context of minimum harmonisation where the legislator expressly recognised room for national differences based on national social and labour law, as is the case in IORP II. We believe EIOPA nevertheless can contribute to supervisory convergence, but through other means, such as sharing best and market practices. EIOPA should create an environment where national competent authorities and IORPs can learn from each other and from market developments, while respecting national differences. EIOPA can play an important role in knowledge sharing between these stakeholders.

In this respect, we welcome the database set up by EIOPA. In addition, the mapping exercise on pension systems and supervisory approaches in EIOPA, conducted in 2008, could be repeated more frequently in order to show the differences between Member States. Finally, (more) peer reviews could add to a better understanding of different supervisory cultures between Member States.

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?

We answer this question limited to cross-border cases of IORPs. The IORP Directive provides the relevant legal basis for cross-border activities of IORPs. We believe this provides a sufficient toolbox for dealing with cross-border activities.

Market practice shows limited cross-border IORPs and thus limited cases brought to EIOPA. We question whether extra policy is needed to stimulate more cross-border IORPs. The lack of growth lies in differences in national social and labour law and tax treatment. It is up to Member States to organize their pension systems and to social partners to agree on specific schemes for a sector or company. In this respect, we also question the ideas from EIOPA to develop a pan-European occupational DC Scheme.

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?

PM Response from asset managers

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.

PM asset managers (note that we need investor protection in many cases!)

Practice and tradition differ over Member States. In general investor and consumer protection (in the case of IORPs protection of beneficiaries) needs upwards convergence.

In the case of IORPs it is important to note that as far as protection of beneficiaries is concerned, these beneficiaries differ considerably from consumers of financial services.

IORPs are usually based on collective agreements backed by national social and labour law which provides for high standards of protection for beneficiaries. Furthermore, IORPs are not a business to consumer model, but involve a third party, the employers. This entails a double security for beneficiaries: the one from national SLL and employers through an employment contract which usually includes a pension plan (in the Netherlands). IORP II sets minimum rules in this respect as well, but beyond those it is Member State competence to further develop protection of beneficiaries, while taking into due account also the wide differences that exist between IORPs over the Member States, and their importance within the context of national pension systems

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?

PM asset managers

For supervision of IORPs, see answer question 6: No need for any further involvement of the ESA's.

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?

This is not relevant for IORPs as it is national competence.

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?

This question is not relevant for IORPs

PM Input asset managers

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?

In general we believe provision of data has to be limited to relevant data, and should also be proportionate to administrative burdens. For this it would be helpful if data to be provided to NCAs are the same as those to be provided to ESAs. In addition, such data should really be relevant for the supervision of the IORP concerned. Again this sets IORPs apart from other financial institutions.

According to us EIOPA already has access to the data gathered by DNB. It is thus able to efficiently and effectively use those data to deliver within its mandate as European supervisory authority. As a background information, it is important to note that pension funds are not for profit organisations based on collective agreements and imbedded in national social and labour law. Supervision is mainly done at national level. Each Member State has a different supervision and different rules with regard to data collection on occupational pensions. In the IORP world there is no harmonized data collection so far, also because different NCAs have different information needs related to the different national IORP arrangements/rules. That is why we would call for data collection from one single source, the national supervisory authority. It would make it much easier for pension funds to provide data in the used format to national supervisors rather than having to report to EIOPA, ECB and the national supervisory authorities with a different set of questionnaires.

This is especially important with regard to cost containing when being obliged to report to three different authorities.

In this case, see also IORP II, art. 45 to 65 and the improvements brought by the IORP II directive in this respect. We would recommend to first look at how this will improve data collection and then evaluate whether this works.

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

PM asset managers

As far as supervision of IORPs is concerned, see answer to question 10

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?

See our answer to question 10.

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?

See our answer to question 10

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 believe the ESA's could work together on data management and financial/macro-economic parameters. Also for example accounting standards for SMEs, with the aim of having financial information to remove barriers for investors to invest in Europe as part of the Capital Markets Union project. In this regard we would also advocate for harmonizing SME insolvency legislation and for the digitalisation of the accounting and audit process.

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

We think that there should be more time for stakeholders to be consulted and we don't see a need for further strengthening of ESMA's role.

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

We agree that this is not relevant for IORPs.

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?

We agree that this is not relevant for IORPs

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

We agree that this is not relevant for IORPs.

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?

PM Input from asset managers

Relevant: Securitisation and credit rating agencies

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

See above

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?

See above

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?

The text of the public consultation (p. 18-19) states 'Experience has shown that ...may fail ... best interest of the EU as a whole.' The ESAs, together with the European Commission can do more to show what possible shortcomings are and provide evidence of these shortcomings.

The ESAs need democratic legitimacy and accountability. This question is not only relevant for the question what the ESAs achieve, but also how they operate and at what costs. The ESAs could do more with regard to costs/benefits analyses in order to show value added of their work. A system of checks and balances should therefore be in place. We see an important role for the Commission, the Council and the European Parliament in the supervision of the ESAs, in order to check whether their operations align with the ambitions set by them. This control will also help in balancing the ambitions of the ESAs with the costs of their operations. Funding of the ESAs by Member States or institutions will lower the political checks and balances whether the ambitions and goals of the ESAs are in line with the policy of the EU.

EIOPA plays a role in the supervision of insurance companies and IORPs. We welcome that EIOPA has two stakeholder groups, one on the insurance sector and one on occupational pensions and we would like to continue this approach. Looking at the Board of Supervisors though, we see that most members have an insurance-only background, whereas they are also involved in decision making with respect to IORPs, which differ substantially from insurance companies (and banks).

After Brexit, this lack of hands-on experience and expertise with IORPs may get worse. Without implying anything on potential benefits of a "Twin Peak" structure for the ESA's, we nevertheless would like to stress that the specific nature of IORPs has to be duly recognised and taken into account. To achieve this, decision making on IORPs should not be done without the participation of Board of Supervisors' members with extensive expertise and experience with IORPs.

Finally, we refer again to our answer on question 1, urging for restraint on own initiative reports on wider policy issues.

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?

The current tasks and powers are appropriate, but might be clarified in areas where the drawing line between policy making and supervision is vague

The ESAs can be more transparent on the costs and benefits of their work, both ex ante before they start up new projects and ex post after finishing their tasks. An impact assessment before exploring new areas and picking up new tasks could become standard practice for the ESAs. This will help in improving the efficiency of the ESAs.

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?

Especially in the case of EIOPA, supervising both insurance companies and IORPs, EIOPA should make sure that supervisors responsible for IORPs are well and prominently represented among the permanent members of EIOPA's board. Decision making on the supervision of IORPs should be made by members with sufficient competences on IORPs. Since in many EU countries IORPs are not yet well developed (there are only several real IORP countries) this is an issue.

If it is felt that a small executive board of permanent members would make the governance of EIOPA better, at the same time, it will be of the utmost importance to task supervision of IORPs with a member having extensive expertise and experience with supervision of IORPs.

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?

We are not in favour of formally delegating more powers to the chairperson and have him / her making decisions without the approval of the board. A chairperson has to be neutral and be accountable by and through the board. We wonder whether the respective BoSs could not already strife for providing their respective chairpersons with better mandates to operate in the ESAs Joint Committee. We also could imagine that any step towards an executive board with a limited amount of members, could be helpful in this respect as well.

In addition, a well-functioning system of checks and balances with the other European institutions should be in place. We see an important role for the Commission, the Council and the European Parliament in the supervision of the ESAs, also to check whether their operations align with the ambitions set by them. The nomination procedure of a chairperson should be designed commensurate to his or her tasks.

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?

We welcome that EIOPA has two stakeholder groups, one for occupational pensions and one for insurance companies and we would like to keep this difference. We see though that in the OPSG, EIOPA's stakeholder group on occupational pensions, over time the SME's representatives have gotten a bigger role, as well as consumer representatives at the

expense of the role of IORPs themselves. We also see that the ESAs are constructed around the concept of consumers, whereas in the case of occupational pensions, there is no free occupational pensions market, but there are beneficiaries who benefit from the benefits offered by the company and social partners.

We welcome the fact that EIOPA has organised meetings with experts inviting a broader group than the 30 members of their stakeholder groups. This leads to more involvement of a broader range and group of stakeholders, more and better input and alignment and most likely to more commitment by these stakeholders to the goals EIOPA strives to achieve. These meetings and the commitments of stakeholders improve the dialogue with the ESAs. We would like to invite EIOPA and the other ESAs to hold even more of these (expert) meetings.

The composition of the stakeholder groups should be a good representation of the relevant stakeholders. Since only a limited number of countries can be seen as having a well-developed IORP sector, we would suggest to give these countries a more substantial weight in the OPSG.

Whereas IORPs are important actors on financial markets and thus also fall under financial market regulation affecting their investment policy. It is therefore also important for us to be represented in the stakeholder group of ESMA in order to provide our expertise and explain the impact of level 2 and 3 standards on our investment activities. We therefore call for the ESMA to take this into account in future compositions of the ESMA stakeholder group.

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

The current model of sector supervision and separate seats for each of the ESAs seems to be good according to us. As deliberated in our answer to question 22 we call for better checks and balances with regard to the supervision of the supervisory authorities and see a clear role for the Council, the Commission and the European Parliament in this respect. Furthermore as mentioned in our response to question 1, we call for respecting the differences of institutions. This also needs to be reflected in supervisory decision making process.

Question 28: Would there be merit in maximizing 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?

In general, one could say that cost reduction and efficiency benefits could be a desired result of such synergies. A consolidation of EBA and EIOPA might help in this respect.

At the same time we note that the development of EU supervision is unequal over the different sectors. For banks in the Eurozone a much deeper integration has been achieved with the banking union. Solvency II achieves maximum harmonisation for the insurance sector, but does not yet foresee direct supervision at the European level. It is doubtful whether a legal base for this would be available under the existing treaties. As stated above, the IORP II Directive only provides for minimum harmonisation and national differences are very big. To us the most important consideration is that existing differences of this kind have to be reflected in the work that ESAs do, but this does not have to preclude a different set-up from the present one.

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.

The point of departure for supervision of IORPs in Europe is as mentioned above that supervision is mainly in the hands of national supervisory authorities. The Federation considers good and independent external supervision to be important. This requires that the supervisory authorities have enough means to fulfil their task. In this respect it is also important to take into account the triangle between regulators (in this case the European Commission and national governments), the supervisory authorities and the institutions that are being supervised.

Supervisory budgets need to be subject to adequate checks and balances, irrespective of how they are financed. The present EU budgetary procedure provides for ample checks and balances. Supervision is a public task and should according to us be kept as such. For these reasons, we are not in favour of industry funding.

In addition we note that within the institutional framework of the EU, the ESAs depend on the Commission, and their budget is part of the budget of the Commission, within the EU budget. According to the Treaty the EU budget is financed by own resources. Adding new own resources would require a change of the own resources regulation by the procedure foreseen in the Treaty for this. To our understanding only very limited exceptions exist to this.

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

No. As we believe the ESAs stands too far a way of the individual IORPs and their national context, IORPs would have to pay too much for inefficient supervision (see also answer to question 1).

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

No. As we believe the ESAs stands too far a way of the individual IORPs and their national context, IORPs would have to pay too much for inefficient supervision (see also answer to question 1).

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?

We are aware that limited exceptions exist to full public funding of EU agencies from the EU budget. (For instance EMA in London.) We stipulate however that these exceptions do not go, and also should not go beyond retributions in which individual institutions or companies are charged a retribution commensurate to tasks and costs that can be attributed to individualized benefits (for instance the granting of a license) they get from such an agency. The level of such retributions should be proportionate to the (incremental) costs made by an agency.

We note that any activities of an ESA of a general and public nature should therefore be publicly funded from the EU budget. Costs for controlling things, costs for advice to the Commission, own initiative reports etcetera, all of those will have to be funded through the EU budget.

At a practical level we note that financing of general activities will lead to the necessity of finding a key or keys for distributing the costs over different financial institutions for which it will be very hard to find objective grounds.

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?

See answer to question 30. Furthermore it should be noted that the EU can only act upon attributed competences, while Member States have, in principle, full sovereignty. Levering on national structures would furthermore easily lead to unfair outcomes between similar financial institutions from different Member States It would be hard to explain why the same activities of ESAs would have to lead to different bills depending on the Member State where an institution is coming from.

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

It is important to seek a good balance between prudential regulation and supervision and the capacity of IORPs to invest on a long term basis in the European economy while providing protection for beneficiaries of IORPs. Enough room has to be given to national supervisors in order to strike this balance.

The transparency of supervisory authorities could be improved.