Insurance Europe feedback on the European Commission's proposal for a regulation amending the ESAs regulations

Our reference:	ECO-ESA-18-007	Date:	23 January 2018
Referring to:	Proposal for a regulation - COM(2017)536/948972		
Related documents:	Impact assessment - SWD(2017)308/949119 & Summary of impact assessment - SWD(2017)309/949120		
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Pages:	5	Transparency Register ID no.:	33213703459-54

General points

Insurance Europe appreciates this opportunity to provide feedback to the European Commission at an early stage in the review of the European supervisory authorities (ESAs) via the "Have your say" platform.

Insurance Europe welcomes the EC's recognition of the need for stability and sectoral expertise and to maintain the European Insurance and Occupational Pensions Authority (EIOPA) as a stand-alone authority, responsible for both prudential and conduct of business supervision.

Insurance Europe has long called for governance and oversight improvements to the ESAs. The current **governance structure** of the ESAs does not provide for adequate checks and balances, and the proposed changes exacerbate this in parts, especially where the powers and tasks of the authorities are increased without adequate control mechanisms. Insurance Europe recommends including **"acting in the interest of the European public good"** as an explicit part of the **ESAs' mandate** because this, together with other governance improvements, can help ensure that the ESAs have the necessary independence but also take a proportional and balanced approach to their supervisory activities, taking into account, for example, unintended consequences for citizens, the economy and the financial sector. In terms of governance improvements, Insurance Europe supports the proposal for the European Parliament and Council to appoint three senior executives to EIOPA Board as long as they are suitably senior, experienced and qualified. However, the extent to which the proposals exclude the Board of Supervisors (BoS), which brings much-needed practical and local knowledge and experience to discussions and decisions, is concerning. Such an exclusion is only necessary and justified where there is a significant risk of conflict of interest. There is also a need for higher transparency in relation to agendas and supporting documents in the BoS, the Executive Board and the Joint Committee.

Effective governance **and external oversight mechanisms** are essential to achieving a credible supervisory landscape. Both the European Parliament and the EC should play a role in ensuring that external oversight of the ESAs' activities is in place at all times.

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Insurance Europe remains unconvinced that EIOPA needs any significant changes to its **powers** to be able to fulfil its mandate, although it recognises that there is a need **for clarification of certain existing powers and to ensure EIOPA has access to information from national competent authorities (NCAs)**. However, care must be taken not to undermine the principles of subsidiarity and proportionality.

With a view to ensuring adequate and proportionate budgets to enable the ESAs to perform their tasks, it is essential that the process to establish the **ESAs' budget needs and their budgets** is overseen effectively by the European institutions, and that the process is sufficiently transparent to make this possible.

1. Mandate, structure & governance

a. Mandate — the European public good

Insurance Europe is concerned that the ESAs' underlying responsibility as independent agencies of the European Union is reflected too narrowly in the ESAs' founding Regulations (Art. 1 para. 6[1]). In Article 1, the obligation to protect the public good by contributing to the stability and effectiveness of the financial system should be expanded to require the ESAs **to act in the best interest of the European public good**. This would create an explicit obligation to consider, for example: the principles of better regulation and proportionality; the impact on the European economy, stability and competitiveness; effects on the availability and cost of products; as well as the potential effects on the financial sector. The following language could be added to Article 1 para. 6:

> "*The objective of the Authority shall be to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses.* ***When performing its tasks, the Authority shall consider whether its activities are conducive to the wider European public good and document its considerations in a transparent, timely and easily accessible manner. A section of the report referred to in Article 43(5) should be dedicated to the way in which the Authority performed its tasks in consideration of the European public good.***"

This would help to ensure balanced advice and activities in the full interests of Europe.

b. Structure — retention of EIOPA as a stand-alone authority

Ensuring appropriate expertise, experience and focus within EIOPA as a means of securing effective and credible oversight of the insurance industry and convergence of EU law is key. Insurance Europe therefore **welcomes the EC's proposal to maintain EIOPA's responsibility for both prudential and conduct of business matters, while preserving EIOPA as a stand-alone authority**.

c. Governance — Executive Board and Board of Supervisors

Insurance Europe has for some time raised its concerns over gaps in the current governance structure, calling for improvements to ensure that EIOPA fulfils — but does not exceed — its mandate and uses its existing powers effectively. There is merit in some of the changes proposed on governance and Insurance Europe understands the need for greater EIOPA independence for certain issues. However, as currently structured, the proposals exacerbate the existing concerns, especially where the powers and tasks of the authorities are increased without adequate control mechanisms.

Insurance Europe believes the governance structure in the proposal can be improved with the changes outlined below. Most notably, Insurance Europe believes that, in addition to the explicit inclusion of the European public good in EIOPA's mandate, the balance of responsibilities between the Executive Board and Board of Supervisors, as well as the concentration of powers in the Chairperson, need to be reconsidered.

[1] Where not indicated otherwise, Articles refer to the EIOPA Regulation 1094/2010 amended as proposed by the EC

- **Executive Board composition:** The Executive Board should be composed of the Chairperson, three (experienced and senior) independent, full-time members and at least four members of the Board of Supervisors (BoS).
- **Executive Board full-time members:**
  - The full-time members of the Executive Board should be recruited externally (not, routinely, from existing or recent ESA senior management) with a high level of seniority and industry experience, so that they can provide not only support, but also a degree of challenge to the Chairperson. Only sub-option 3 as considered in section 7 of the impact assessment, which proposes external recruitment and independent full-time board members, would achieve the objectives of the review.
  - The European Parliament should have a more active role in the appointment and re-appointment process.
  - The Vice Chairperson and the Member in Charge should both be designated by the Council of the EU and not by the Chairperson.
- **"European public interest":** This obligation should clearly include the European public good as defined earlier. The responsibility to account for this obligation, eg in the annual report referred to in Article 43 para. 5, should be clearly allocated to a full-time member of the Executive Board.
- **Board of Supervisors' tasks:** The BoS should continue to make the decisions and be ultimately responsible for issues related to Articles 22 (systemic risk), 29a (strategic supervisory plan), 32 (market developments & stress tests), 31a (outsourcing and risk transfer to third countries) and 35b to 35h (direct information request and enforcement thereof), while the Executive Board should prepare the decisions of the BoS. Only in **"conflict-of-interest matters"** should BoS members be excluded from the decision-making of the Executive Board, ie these decisions should be the only ones made independently by the Chairperson and full-time members of the Executive Board. Such "conflict-of-interest matters" are: breach of Union law investigations (Art. 17); settlement of disagreements between NCAs in cross-border situations (Art. 19) other than on internal model approvals; and review of NCAs (Art. 30).

2. Oversight and transparency

Both legally clarified competences and better external oversight mechanisms for the ESAs are important to ensure that mandates are not exceeded. The report referred to in Article 43 para. 5 is one such useful mechanism but further improvements — in addition to the suggested governance changes — are necessary. In Insurance Europe's view, the European Parliament would be best suited to take on a stronger and increased external oversight role. Similarly, the EC should have a broader role in holding EIOPA accountable for all actions where it exceeds its powers, not just guidelines and recommendations as per the proposed Article 16 para. 5. Furthermore, there is a need to ensure transparency in relation to agendas and supporting documents in the BoS, the upcoming Executive Board and the joint Committee.

3. New or redefined powers

In the build-up to the ESAs review, Insurance Europe was consistently clear in its view: **existing regulations contain sufficient powers to enable EIOPA to carry out its tasks, although clarification of certain of those powers may be beneficial.** Insurance Europe refers to the European Parliament's December 2017 Briefing[2], which notes in reference to the EC's 2017 public consultation on the ESAs review *that* "there was no … majority for changes to the 'current toolkit available to the ESAs' meaning that opinions [of respondents to the consultation] on increasing the ESAs' powers were split, especially as regards EIOPA".

Insurance Europe is supportive of certain specific proposed clarifications of EIOPA's existing powers in relation to cross-border dispute settlements between NCAs and breach of Union law investigations and the ESAs' role in the international context (monitoring of equivalence). Other aspects (see below) should, however, be

[2] European Parliament Briefing — Initial appraisal of a European Commission Impact Assessment: "Review of the European supervisory authorities (ESAs)(micro-prudential supervision)", December 2017

reconsidered as they could — together with the changes in the governance structure proposed by the EC — have unwanted effects, exacerbated by EIOPA's lack of accountability and transparency.

- **Principle of subsidiarity:** Insurance Europe believes that in a number of areas the proposed increased powers of EIOPA undermine the EU principle of subsidiarity, especially where EIOPA should act independently and on its own initiative (eg in proposed Article 31a on outsourcing and risk transfer). It is important to realise that EIOPA is not a (direct) supervisor. Comparison with the single supervisory mechanism (SSM) in banking is imperfect, since in that sector a distinction has been made between the regulator (the European Banking Authority) and the supervisor (the European Central Bank). This distinction is important to prevent these two roles from ending up in the same hands. Insurance Europe is therefore cautious about the allocation of (mainly) supervisory roles to EIOPA.

- **Local expertise:** Related to subsidiarity considerations, Insurance Europe is of the view that in certain areas of the proposal, an empowerment of EIOPA constitutes a direct weakening of the NCAs' remit. The expertise and knowledge that NCAs possess about their local markets is crucial for, for example, the approval of internal models and certain activities in supervisory colleges. Insurance Europe would suggest that losing this supervisory expertise may not be desirable, in particular when trying to maintain a sound and stable supervisory framework.

- **Legal certainty:** In some areas of the proposal, the EC introduces the empowerment for EIOPA to reverse a decision/authorisations already taken/granted by an NCA. This seems to be the case in, for example, Articles 19 para 3 (cross border dispute settlement), 31a para 4 (authorisations in relation to outsourcing and risk transfer) and potentially 231a para 1 of the Solvency II Directive (internal models). While Insurance Europe understands that the EC's current proposal does not aim to introduce direct supervisory powers for EIOPA, these decisions are of a quasi-binding nature, as NCAs are bound to either comply (and take back their decision) or explain, and they certainly affect insurance entities directly. Additionally, these empowerments raise significant concerns over legal certainty, as supervised entities will not be able to rely on a legally binding and enforceable decision taken by their NCA where EIOPA has such *ex-post* powers.

4. Union-wide stress tests (Article 32 of the EIOPA Regulation)

Results should only be made public at an aggregate level. The proposed amendments to Article 32 on Union-wide stress tests are of concern to the industry and could be addressed by the following measures:

- The current interval of conducting stress-test exercises every other year is sufficient, as the Solvency II regime is already based on stress tests. Given the long-term nature of the industry, exposure to risks not covered by Solvency II does not change quickly and the current tests already represent very expensive additional processes. If there is a need to allow additional stress tests on an exceptional basis, then EIOPA should be required to undertake a cost-benefit analysis to justify such an exercise. In view of the proposed changes to EIOPA's budget, it is key that the impact on the resources of EIOPA, the NCAs, as well as the affected financial institutions is adequately considered.
- Results should only be made public at an aggregate level because Solvency II is already based on stress tests and making public company-level results would inevitably lead to the stress tests becoming a capital-setting exercise, overriding the 1 in 200 solvency requirements set through the legislative process. Alignment with the EBA's current stress-testing regime for banks is unnecessary and inappropriate for numerous reasons including:
  - Unlike other regimes, Solvency II is already based on stress tests, so plenty of individual company information is available as part of the regular Solvency II reporting.
  - The public disclosure of individual results is not required to fulfil EIOPA's financial stability mandate. The focus of the exercise should remain at a macro-prudential level.
- EIOPA should maintain the practice of liaising with the industry prior to the publication of the results (as was done for the 2016 stress-test exercise).

- The European standard of professional secrecy is valuable and should not be impaired by the proposed changes to Article 32 of the EIOPA Regulation.

5. Funding and determination of budget

Insurance Europe welcomes the continued split of the EIOPA budget between the EU (retained at 40%) and the NCAs. Maintaining a significant EU budget line is necessary to ensure appropriate oversight of the ESAs, most notably by the European Parliament. Good supervision serves the general interest and it is reasonable that some of the costs are paid from the EU budget. This share should, however, remain at least 40% so as not to be diluted over time.

Increased transparency is needed to ensure the industry is not double-charged. Insurance Europe generally appreciates the planned activities-based budget allocation, acknowledging both the insurance and the pensions sector. It should, however, additionally be made transparent in what way the future direct industry contributions to EIOPA will be deducted from the current indirect industry contributions via national level to avoid double-charging. Insurance Europe welcomes the EC's clear rejection in its proposal of any such double-charging of insurers. Supervision by EIOPA and the NCAs should be seen as interlinked: more costs for EIOPA should lead to lower costs for NCAs and vice versa. The overall size of the supervision costs must remain reasonable and stable, with a strong and effective control mechanism involving the EU institutions and the supervisory authorities.

Insurance Europe is concerned over the compounding effect of the increased powers proposed, leading to annual increases in EIOPA's budget needs. There is a lack of safeguards in the proposal to prevent the supervised industries facing continuous increases in their contributions to fund the European supervisory system; a system that ultimately benefits undertakings by safeguarding a level playing field through increased convergence, but also benefits consumers and governments through stable and competitive markets. These concerns would be alleviated to a certain extent if the suggestions Insurance Europe has made in this paper on mandate, governance and oversight found reflection in the review.