EIOPA-CP-14/004

1 April 2014

# Consultation Paper on the proposal for Implementing Technical Standards on the procedures to be used for granting supervisory approval for the use of ancillary own-fund items

EIOPA | WesthafenTower | Westhafenplatz 1 | 60327 Frankfurt | Germany
Phone: +49 69 951119-20 | Fax: +49 69 951119-19 | info@eiopa.europa.eu | www.eiopa.europa.eu

**Table of Contents**

# 1. Responding to this paper

EIOPA welcomes comments on the Implementing Technical Standards on the procedures to be used for granting supervisory approval for the use of ancillary own-fund items.

The consultation package includes:

- The Consultation Paper
- Template for comments

Please send your comments to EIOPA in the provided Template for Comments by email CP-14-004@eiopa.europa.eu by 30 June 2014.

Contributions not provided in the template for comments, or sent to a different email address, or after the deadline, will not be processed.

EIOPA invites comments on any aspect of this paper. Comments are most helpful if they:

- contain a clear rationale; and
- describe any alternatives EIOPA should consider.

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise in the respective field in the template for comments. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with EIOPA's rules on public access to documents[1]. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by EIOPA's Board of Appeal and the European Ombudsman.

**Data protection**

Information on data protection can be found at www.eiopa.europa.eu under the heading 'Legal notice'.

[1] Public access to documents

# 2. Consultation Paper Overview & Next Steps

EIOPA carries out consultations in the case of drafting Implementing Technical Standards in accordance to Article 15 of the EIOPA Regulation.

This Consultation Paper is being issued on the procedures to be used for granting supervisory approval for the use of ancillary own-fund items.

This Consultation Paper presents the draft Technical Standard and explanatory text.

The analysis of the expected impact from the proposed policy is covered under the Annex I Impact Assessment.

The explanatory text is presented for the purpose of the consultation. Any comments should be provided using the template for comments provided by EIOPA.

**Next steps**

EIOPA will consider the feedback received and expects to publish a final report on the consultation and to submit the Implementing Technical Standards for endorsement by the European Commission by 31 October 2014.

# 3. Draft Technical Standard

EUROPEAN COMMISSION

Brussels, XXX
[…](2011) XXX draft

**COMMISSION IMPLEMENTING REGULATION (EU) No …/..**

**of [ ]**

**COMMISSION IMPLEMENTING REGULATION (EU) No …/… laying down implementing technical standards with regard to the procedures to be used for granting supervisory approval for the use of ancillary own-fund items according to Directive 2009/138/EC of the European Parliament and of the Council**

**of [ ]**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2009/138/EC of 25 November 2009 of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)[2] , and in particular Article 92(3) thereof.

Whereas:

(1) This Regulation establishes the procedures to be followed for the supervisory approval of ancillary own-fund items.

(2) Insurance and reinsurance undertakings should prepare applications on a prudent and realistic basis and their administrative, management or supervisory body should approve the submission of the application in order to ensure the appropriateness of the information.

(3) The insurance or reinsurance undertaking should include all relevant facts necessary for an assessment by the supervisory authority, including an assessment by the insurance or reinsurance undertaking of how the item would meet the criteria for an ancillary own-fund item and, on being called up, for classification as a basic own-fund item so that the supervisory authority can make timely decisions based on appropriate evidence.

(4) The information to be included in an insurance or reinsurance undertaking's application should be specified to ensure a consistent basis for decision-making by the supervisory authority.

(5) Supervisory authorities should adopt adequate procedures to manage the approval process.

(6) The provisions shall apply in a consistent manner for groups and solo undertakings.

(7) Article 226 of Directive 2009/138/EC permits a group to apply for ancillary own-fund item approval in respect of an intermediate insurance holding company or an intermediate mixed financial holding company. In such cases this Regulation should apply as though the intermediate insurance holding company or the intermediate mixed financial holding company were an insurance or reinsurance undertaking. This also applies where a group is headed by an insurance holding company or a mixed financial holding company in accordance with Article 235 of Directive 2009/138/EC.

(8) This Regulation is based on the draft implementing technical standards submitted by the European Insurance and Occupational Pensions Authority to the Commission.

(9) The European Insurance and Occupational Pensions Authority has conducted open public consultations on the draft implementing technical standards on which this Regulation is

[2] OJ L 335, 17.12.2009, p.1

based, analysed the potential related costs and benefits and requested the opinion of the Insurance and Reinsurance Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1094/2010.

HAS ADOPTED THIS REGULATION:

*Article 1- Subject Matter*

(1) This Regulation lays down the procedures to be followed for granting supervisory approval of ancillary own-fund items according to Article 90 of Directive 2009/138/EC.

*Article 2 – Definitions*

(1) For the purpose of this Regulation, the following definitions shall apply:

(1) 'material facts' means facts which if known by the supervisory authority could influence its decision whether to approve an ancillary own-fund item; the amount for which approval of an item should be granted; or the time period for which approval of a calculation methodology shall apply.

*Article 3 – General features of the application*

(1) An insurance or reinsurance undertaking shall submit a written application for approval of each ancillary own-fund item.

(2) The application by the insurance or reinsurance undertaking shall seek approval of a specified monetary amount for an ancillary own-fund item or a method to determine the amount of an ancillary own-fund item.

(3) The application shall be submitted in one of the official languages of the Member State in which the insurance or reinsurance undertaking has its head office, or in a language that has been agreed with the supervisory authority.

(4) The application shall be approved by the administrative, management or supervisory body of the insurance or reinsurance undertaking, and documentary evidence of the approval shall be submitted.

(5) The application shall consist of a cover letter and supporting evidence:

(a) the cover letter to the application shall be signed by persons authorised to sign on behalf of the administrative, management or supervisory body of the insurance or reinsurance undertaking;

(b) the supporting evidence must contain sufficient information to allow the supervisory authority to assess whether the application complies with the criteria in Article 90 of Directive 2009/138/EC and [Article 52 AOF2 to Article 55 AOF5].

*Article 4 - Contents of the cover letter*

(1) The insurance or reinsurance undertaking shall submit a cover letter confirming that:

(a) the insurance or reinsurance undertaking believes any legal or contractual terms governing the ancillary own-fund item or any affiliated arrangement are unambiguous and clearly defined;
(b) the insurance or reinsurance undertaking's own assessment of a potential ancillary own-fund item's amount or method, as specified in [Article 52 AOF2] is prudent and realistic;
(c) the economic substance of a potential ancillary own-fund item, including how the item provides basic own funds once called, has been fully reflected in the application;
(d) any factors which restrict the conditions under which the insurance or reinsurance undertaking might seek to call on the item, such as conditions of stress specific to the insurance and reinsurance undertaking or wider market stress, have been fully documented in the application;
(e) taking into account likely future developments as well as circumstances applying as at the date of the application, the insurance or reinsurance undertaking considers that the potential ancillary own-fund item complies with the criteria for the classification of own funds;
(f) no material facts have been omitted.

(2) The cover letter shall also include information of other applications submitted by the insurance or reinsurance undertaking or currently foreseen within the next six months for approval of any items listed in Article 308a(2) of Directive 2009/138/EC, together with corresponding application dates.

*Article 5 - Supporting evidence*

(1) The insurance or reinsurance undertaking shall provide a description of how the criteria specified in [Article 52 AOF2 to Article 54 AOF4] have been satisfied including:

(a) assessments of the specific areas of risk, compliance and legal enforceability in all relevant jurisdictions carried out by relevant experts within the insurance or reinsurance undertaking or on its behalf;
(b) confirmation that national law, in any relevant jurisdiction, does not prevent a call being made or satisfied, including in the event of resolution, administration or insolvency proceedings being initiated in respect of the insurance or reinsurance undertaking;
(c) a description of the circumstances in which the insurance or reinsurance undertaking might seek to call on the item including current expectations as to when the item might

be called prior to or at the point of non-compliance with the Solvency Capital Requirement or Minimum Capital Requirement;

(d) details of arrangements which might enhance the recoverability of the item including the availability of collateral;

(e) details of arrangements or circumstances that might prevent a call being made or satisfied in deteriorating financial conditions including non-compliance with the Solvency Capital Requirement or Minimum Capital Requirement;

(f) how the item will contribute to the insurance or reinsurance undertaking's existing capital structure, including how the item might enable the insurance or reinsurance undertaking to meet its existing or future capital requirements.

(2) The insurance or reinsurance undertaking shall provide a description of the ancillary own-fund item, sufficient to allow the supervisory authority to conclude on the loss absorbing capacity of the basic own-fund item into which the ancillary own-fund item converts on being called up, including:

(a) the item's contractual terms and the terms of any affiliated arrangement together with evidence that the counterparty has entered into the contract and any affiliated arrangement and evidence that the contract and any affiliated arrangements are legally binding and enforceable in all relevant jurisdictions;

(b) confirmation that the ancillary item or its benefits would only be available to the insurance or reinsurance undertaking and would not be transferrable or assignable to any other party, or in any other manner be able to be encumbered, so as to ensure the loss absorbing capacity of the item upon call;

(c) details as to how the item would satisfy the requirement for subordination set out in Article 93 (b) of Directive 2009/138/EC;

(d) the period during which the contract is in effect and, if different, the period during which the insurance or reinsurance undertaking may call upon the item;

(e) whether the insurance or reinsurance undertaking has, or in the future may have, any obligation to, or any expectation or understanding that it will, pay funds or provide any other benefit to the counterparty or to a third party in connection with the item other than in the event of repayment of a basic own-fund item which would satisfy the features in [Article 59 (1) (f) COF2 ], [Article 61 (1) (d) COF4] or [Article 65 (1) (d) COF8];

(f) the period between receipt of own funds by the insurance or reinsurance undertaking and satisfaction by it of any obligation, expectation or understanding referred to in point e).

(3) The insurance or reinsurance undertaking shall confirm that the item's contractual terms do not contain any provision which might create a disincentive for the insurance or reinsurance undertaking to call upon the item or place any constraint upon its ability to be callable on demand, including but not restricted to the call being:

(a) contingent on the occurrence of an event or criteria being met;

(b) subject to the agreement of the counterparty or any third party;

(c) subject to any agreement, arrangement or incentive that means that it is not permitted or is not likely to call up the item; or
(d) subject to any other arrangement or combination of arrangements which has the same effect as points (a) to (c).

(4) The insurance or reinsurance undertaking shall provide the names and a description of all counterparties concerned, including the nature of any relationship between the insurance or reinsurance undertaking and any counterparty, except where agreed by the supervisory authority in accordance with [Article 53 (10) AOF3].

(5) The insurance or reinsurance undertaking shall provide evidence regarding the counterparties' ability and willingness to pay, in order to support the assessments by the supervisory authority specified in [Article 53 AOF3]. Where the counterparty is a member of the same group or subgroup by virtue of Article 213 of Directive 2009/138/EC, the supporting evidence shall include evidence regarding the ability of the counterparty to satisfy multiple calls on ancillary own-funds items at the same time, having regard to the circumstances of the group and its members.

(6) The insurance or reinsurance undertaking shall provide data relating to the insurance or reinsurance undertaking's experience of past calls from the same or similar counterparties in the same or similar circumstances and relevant market data together with an assessment as to the relevance and reliability of such data as regards the likely outcome of future calls by the insurance or reinsurance undertaking.

(7) Where the insurance or reinsurance undertaking seeks approval of a specified monetary amount for the item, the application shall include an explanation for and justification of, such amount.

(8) Where the insurance or reinsurance undertaking seeks approval of a calculation method, it shall provide:

(a) an explanation of that method including a description of any assumptions upon which the method relies;
(b) the item's expected initial amount that has been calculated in accordance with that method and a justification of that amount;
(c) an explanation of how the calculation method reflects the loss-absorbing capacity of the item;
(d) an explanation of the validation processes the insurance or reinsurance undertaking will implement to ensure that the results of the method continue to reflect the loss-absorbing capacity of the item on an on-going basis.

*Article 6 - Procedures for supervisory authorities*

(1) Supervisory authorities shall establish procedures:

(a) for the receipt and consideration of the applications and information provided by insurance and reinsurance undertakings in accordance with Articles 4 and 5;

(b) to review reports received from insurance and reinsurance undertakings of changes to:

(i) the loss-absorbing capacity of approved ancillary own-fund items;

(ii) the ongoing ability of an agreed calculation method to provide results which properly reflect the loss absorbency of items to which it is applied.

*Article 7 - Assessment of the application*

(1) The supervisory authority shall confirm receipt of the application of the insurance or reinsurance undertaking.

(2) An application shall be considered complete by the supervisory authority if the application covers all the matters set out in Article 4 and 5.

(3) The supervisory authority shall confirm if the application is considered complete or not on a timely basis and at least within 30 days of the date of the receipt of the application.

(4) The supervisory authority shall ensure that the period of time within which it decides on an application:

(a) is reasonable;

(b) does not exceed three months from the receipt of a complete application unless there are exceptional circumstances which are communicated in writing to the insurance or reinsurance undertaking on a timely basis.

(5) Where there are exceptional circumstances, the supervisory authority shall not take longer than six months from the receipt of a complete application to decide on an application.

(6) If necessary to its assessment of the ancillary own-fund item, the supervisory authority shall request further information from the insurance or reinsurance undertaking.

(7) The days between the date the supervisory authority requests any further information and the date the supervisory authority receives such information shall not be included within the periods of time stated in paragraphs 4 and 5.

(8) If, due to a request from the supervisory authority for further information, an insurance or reinsurance undertaking makes a change to the details of its application this shall not be considered as a new application.

(9) Where an insurance or reinsurance undertaking advises the supervisory authority of a change to its application (other than as detailed in the paragraph 7) this shall be treated as a new application unless the supervisory authority is satisfied that the change does not significantly affect its assessment of the application.

(10) An insurance or reinsurance undertaking may withdraw an application by notification in writing at any stage prior to the decision of the supervisory authority. Any updated or resubmitted application shall be treated as a new application.

*Article 8 - Communication of the supervisory authority's decision*

(1) The supervisory authority shall communicate its decision on an application, in writing, to the insurance or reinsurance undertaking, on a timely basis.

(2) Where the supervisory authority approves a lower amount than applied for by the insurance or reinsurance undertaking or rejects an application for approval, it shall state the reasons on which the decision is based.

(3) The insurance or reinsurance undertaking shall not consider the ancillary own-fund item or method admissible until its application has been assessed and approved by the supervisory authority.

*Article 9 - Revision of the amount or method approved by the supervisory authority*

(1) The supervisory authority shall notify the insurance or reinsurance undertaking immediately if, in accordance with [Article 57 (3) AOF7], it has considered its assessment of the approved amount of an ancillary own-fund item or amounts calculated by an approved method and decided to:

(a) reduce the amount of an ancillary own-fund item, to a lower amount or to nil; or

(b) reverse its decision to approve a calculation method.

(2) When notifying the insurance or reinsurance undertaking in accordance with paragraph 1the supervisory authority shall state the reasons for their decision.

*Article 10 - Entry into force*

(1) This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

(2) This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, […]

*[For the Commission*

*The President]*

*[On behalf of the President]*
*[Position]*

# 4. Explanatory text

*Article 7 - Assessment of the application*

(1) The supervisory authority shall confirm receipt of the application of the insurance or reinsurance undertaking.

(2) An application shall be considered complete by the supervisory authority if the application covers all the matters set out in Article 4 and 5.

(3) The supervisory authority shall confirm if the application is considered complete or not on a timely basis and at least within 30 days of the date of the receipt of the application.

(4) The supervisory authority shall ensure that the period of time within which it decides on an application:

(a) is reasonable;

(b) does not exceed three months from the receipt of a complete application unless there are exceptional circumstances which are communicated in writing to the insurance or reinsurance undertaking on a timely basis.

(5) Where there are exceptional circumstances, the supervisory authority shall not take longer than six months from the receipt of a complete application to decide on an application.

(6) If necessary to its assessment of the ancillary own-fund item, the supervisory authority shall request further information from the insurance or reinsurance undertaking.

(7) The days between the date the supervisory authority requests any further information and the date the supervisory authority receives such information shall not be included within the periods of time stated in paragraphs 4 and 5.

(8) If, due to a request from the supervisory authority for further information, an insurance or reinsurance undertaking makes a change to the details of its application this shall not be considered as a new application.

(9) Where an insurance or reinsurance undertaking advises the supervisory authority of a change to its application (other than as detailed in the paragraph 7 above) this shall be treated as a new application unless the supervisory authority is satisfied that the change does not significantly affect its assessment of the application.

(10) An insurance or reinsurance undertaking may withdraw an application by notification in writing at any stage prior to the decision of the supervisory authority. Any updated or resubmitted application shall be treated as a new application.

4.1. The time periods described in Article 7 may be illustrated by the following two examples:

Example 1: Start of the time period

| | |
|---|---|
| Day 1 | An insurance or reinsurance undertaking submits an application to a supervisory authority. |

| | |
|---|---|
| Day 31 | The insurance or reinsurance undertaking contacts the supervisory authority. It has not yet received confirmation of receipt or whether the application is complete, despite the 30 day period having elapsed. |
| Day 32 | The supervisory authority and the insurance or reinsurance undertaking resolve the issue of why notification was not received. For example, the application may have failed to arrive at the supervisory authority or the supervisory authority's confirmation may have been sent but not received by the insurance or reinsurance undertaking. |
| | The facts of the case will determine whether or not the period of time for the supervisory authority to decide on the application has started.<br><br>For example, if the insurance or reinsurance undertaking did not receive the confirmation sent by the supervisory authority that the application was complete this will not affect the period of time within which the supervisory authority is working.<br><br>However, if the application went astray and did not reach the supervisory authority then the process would need to restart. |

Example 2: Interruption of the time period

| | |
|---|---|
| Day 1 | An insurance or reinsurance undertaking submits an application to a supervisory authority. |
| Day 2 | The supervisory authority confirms receipt of the application |
| Day 4 | The supervisory authority reviews the application to assess whether it is complete and considers that it is complete. |
| Day 5 | The supervisory authority notifies the insurance or reinsurance undertaking that the application is considered complete.<br><br>The period of time for the supervisory authority to decide on the application runs from Day 1.<br><br>(If the application was incomplete, the period would not have commenced. The supervisory authority would inform the insurance or reinsurance undertaking of this fact instead.) |
| Day 27 | The supervisory authority reviews the substance of the application and requests further details from the insurance or reinsurance undertaking regarding a particular aspect of the application. The time period is suspended. |

| | |
|---|---|
| Day 30 | The insurance or reinsurance undertaking provides the further details requested by the supervisory authority. The supervisory authority confirms that its request has been adequately addressed. The time period resumes. |

# Annex I: Impact Assessment

## Section 1: Procedural issues and consultation of interested parties

According to Article 15 EIOPA conducts analysis of costs and benefits in the policy development process. The analysis of costs and benefits is undertaken according to an Impact Assessment methodology.

*Pre-consultation with stakeholders*

The Impact Assessment incorporates feedback received from an EIOPA pre-consultation exercise finishing in November 2011.

During the pre-consultation EIOPA asked stakeholders to comment on the clarity and scope of the implementing technical standards. The stakeholders commented that the meaning of the text was clear.

EIOPA received no requests for additional articles to the implementing technical standards, but stakeholders proposed the development of a standardised application template. EIOPA considered and rejected this for the reasons given below.

## Section 2: Problem definition

The Directive provides for the prior approval of ancillary own-fund items by supervisory authorities based on specified criteria which are set out in the Directive and [Delegated Acts]. The [Delegated Acts] also set out the requirement for firms to report any matters that may reduce the loss-absorbency of ancillary own-fund items after approval, and for supervisory authorities to consider lowering the amount approved as a result of those changes.

With respect to the principle of prior authorisation provided by the Directive, additional clarification is needed to ensure consistent implementation by Member States, in order to mitigate the risks of divergent practices.

The implementing technical standards seek to ensure that supervisory authorities implement clear and transparent procedures for the prior approval of ancillary own-fund items. It considers only the areas of discretion within the scope of the Directive empowerment that were available to EIOPA when developing its proposal.

*Baseline*

When analysing the impact from proposed policies, the Impact Assessment methodology foresees that a baseline scenario is applied as the basis for comparing policy options. This helps to identify the incremental impact of each policy option considered. The aim of the baseline scenario is to explain how the current situation would evolve without additional regulatory intervention.

The baseline is based on the current situation of the market, which is considered to be composed of:

- The progress towards Solvency II that insurance and reinsurance undertakings have already achieved at this stage, considering the average state of art of EU insurance and reinsurance undertakings;
- Progress for the implementation of Solvency II envisaged by any other elements of its framework.

In particular the baseline for this implementing technical standard includes:

- The content of Directive 138/2009/EC and any amendment already agreed to it,
- Where there is evidence of its public availability at the date of approval of the consultation of these implementing technical standards by EIOPA, any reliable background on the likely content of the draft [Delegated Acts] developing the aforementioned Directive.

*Proportionality*

In the approval process of ancillary own funds, the application of the principle of proportionality is linked to the complexity of the ancillary own-fund item for which approval is sought, which will affect the nature of the information that will need to be provided to the supervisor authority.

## Section 3: Objective pursued

Objective 1: To ensure consistent implementation of procedures for the prior approval of ancillary own-fund items between member states;

Objective 2: To provide clarity for insurance and reinsurance undertakings regarding the combined effect of the Directive and [Delegated Acts].

These objectives correspond to the following specific Solvency II objective "Better allocation of capital" and the Solvency II general objective "Enhances policy holder protection".

## Section 4: Policy Options

With the intention to meet the objectives set out in the previous section, EIOPA has analysed different policy options including their respective expected positive and negative impact.

The degree of detail regarding the criteria within the Directive and [Delegated Acts] is significant. Some of the requirements in the implementing technical standards are necessary to fulfil the intent of supervisory approval, and the ongoing satisfaction of the criteria included in the Directive and [Delegated Acts]. Where this is the case, which includes all of the requirements in Articles 6, 8 and 9, no alternative options were considered, and no incremental costs result. On the other hand, some of the requirements in Articles 3, 4, 5 and 7 in relation to the: structure of the application (Articles 3, 4 and 5); period of time for the supervisory authority to decide on an application (Article 7); and the period of time for the supervisory authority to confirm if the application is complete (Article 7), are the result of policy decisions by EIOPA for which various options were considered and their impacts analysed.

Therefore, the policy options considered in relation to Articles 3, 4, 5 and 7 and their impacts are the focus of this Impact Assessment, including the relevant policy options which have been discarded in the policy development process.

### 4.1 Policy issue 1: Structure of the application

4.1.1 Policy option 1: To specify the required information to be provided in the application, but allow insurance or reinsurance undertakings freedom regarding how the information is documented;

4.1.2. Policy option 2: To provide a template or pro-forma on which the required information should be submitted.

### 4.2 Policy issue 2: The period of time to decide on the application

4.2.1 Policy option 1: To provide only a principle that the period of time for a decision shall be reasonable;

4.2.2. Policy option 2: To provide an absolute maximum period of time within which all applications must be decided;

4.2.3. Policy option 3: Within an absolute maximum period of time, to provide a shorter period of time within which applications must be decided, except in exceptional circumstances.

The selection of policy options 2 or 3 leads to further options regarding the length of the periods of time and, in the case of option 3 whether to provide a definition of when the period of time can be exceeded. These secondary options are addressed below.

### 4.3 Policy issue 3: The period of time to confirm if the application is complete

4.3.1 Policy option 1: To set a single timescale within which supervisory authorities in all Member States should confirm if the application is complete;

4.3.2 Policy option 2: To require supervisory authorities to establish and communicate to insurance and reinsurance undertakings the timescales within which they should expect to receive confirmation of whether the application is complete.

### 4.4 Policy issue 4: Time taken by undertaking to provide further information requested by the supervisory authority

4.4.1 Policy option 1: The time taken by the undertaking to provide the supervisory authority with further information is not included within the overall time period for a decision on the application (automatic 'stop-the-clock' mechanism)

4.4.2 Policy option 2: When the supervisory authority requests further information the undertaking may request a suspension of the time period for a decision on the application ('stop-the-clock' mechanism only at the request of the undertaking).

## Section 5: Analysis of impacts

### Analysis of impact for policy issue 1 (see 4.1): Structure of the application

Article 92 of Directive 2009/138/EC requires that the implementing technical standards specify the procedures for granting supervisory approval of ancillary own-fund items. There is a clear need for the application to be documented, and for it to provide full, clear and accurate information on the application, in order to allow the supervisory authority to assess that application against the required criteria.

The ancillary own-fund item application submitted by undertakings should be fit-for-purpose. To do this the application should provide supervisory authorities with all the details and information which [Article 52 AOF2 to Article 55 AOF5] require them to consider, and to do this in the most efficient and effective manner.

Ancillary own-fund items are likely to be specific to the undertaking concerned. EIOPA did not believe that the applications submitted by undertakings would be fit-for-purpose if this Regulation provided a template or pro-forma on which the information supporting the application should be submitted. Therefore, EIOPA concluded that this option would not deliver the required policy objective. Nevertheless, based on the experiences of supervisory

authorities once the Directive is applicable, EIOPA will review if, contrary to its current expectation, standardised types of ancillary own-fund items arise which would suggest a standard template may be appropriate.

**Analysis of impact for policy issue 2 (see 4.2): The period of time to decide on the application**

In developing these standards EIOPA considered what the timescales for the approval procedure might be. Timescales are needed to ensure proper discipline over the process; these timescales need to ensure that supervisory authorities have sufficient time in which to consider an application but also to ensure that undertakings receive a response in a timely manner.

Both supervisory authorities and undertakings should be clear regarding the timescales and there should be consistency of approach between Member States.

**Analysis of impact – Decision 1**

EIOPA considered the three policy options set out in [section 4.2]. Regarding the principle of a reasonable period of time (policy option 1), EIOPA concluded that this in itself did not deliver clarity since different stakeholders may have different views of what was reasonable.

EIOPA considered whether ancillary own-fund item approval applications were likely to be homogeneous in nature, such that what was reasonable for one application was likely to be reasonable for another. EIOPA concluded that given the detailed and common criteria in [Articles 52 AOF2 to 55 AOF5 of the Delegated Acts], the matters which must be considered before an application can be decided are likely to be similar. This means that applications may be sufficiently homogeneous to be able to define an upper time limit which is reasonable in many cases (policy option 2). However, EIOPA also concluded that it is likely there would be complex applications which fell outside the norm. A particular example of such an outlier is an application for approval of an ancillary own-fund item which, on call, delivered an "item not on the list" (INOL). The decision process for such an application could not be completed until after the item, which was delivered on call, had been considered as part of the INOL process. In such a situation, a reasonable timescale for approving an application in normal circumstances would not apply.

Therefore, EIOPA concluded that policy option 3 was the most appropriate. This led to some secondary decisions which are discussed below (decision 2 and 3).

**Policy options for Decision 2:** A subsequent decision stemming from decision 1 concerned the length of the absolute maximum period of time to decide on an application and the period of time to decide on an application in all but exceptional circumstances. EIOPA considered the merits of one, three and six month periods for approval.

**Analysis of impact – Decision 2**

Since Articles 112 and 115 of the Directive provide that a supervisory authority should decide on the application for approval of an internal model or major change to the internal model within six months of receipt of the complete application, EIOPA considered whether a similar time period would be appropriate for approval of the ancillary own-fund items. EIOPA concluded that this would be too long, bearing in mind the timescale within which the ancillary own-fund item might be required to provide capital. In particular, if an undertaking breaches its Solvency Capital Requirements (SCR) it is required to remedy that breach within six months and in some circumstances the agreement of an ancillary own-fund item may be a realistic capital recovery option for the undertaking. Whilst undertakings will normally be able to identify a potential SCR breach before it occurs, and thus begin the application process before the breach, there will be occasions where this does not occur. In such situations the

effectiveness of an undertaking's response would be assisted by an ancillary own-fund item approval timescale that is shorter than the SCR recovery period.

In addition, there may be occasions where an undertaking wishes to arrange an ancillary own-fund item in order to take advantage of a market opportunity as it arises. The opportunity cost of a six month delay in approval, whilst not quantifiable, is likely to be high.

EIOPA received representation from industry suggesting a one month time period for decisions was appropriate because decisions are likely to be needed at short notice, and close to the year end. EIOPA considered this request, but rejected it on both cost and benefit grounds.

From a cost perspective, many supervisory authorities confirmed that they did not believe it realistic to consider all the matters required by the [Delegated Acts] in a period of one month, even for relatively simple applications. If an inadequate review was conducted, ancillary own-fund items with inappropriate loss-absorbing characteristics might be accepted which would in turn undermine policyholder protection. The only way that this could be mitigated would be to increase regulatory resources, which would need to be justified by the benefits.

From a benefit perspective, Article 45 of the Directive requires undertakings to comply with the capital requirements on a continuous basis. They are required to recalculate their Minimum Capital Requirements (MCR) quarterly and their SCR at least annually; more regularly if the risk profile of their business changes significantly from the underlying assumptions in the annual calculation. The data supporting the quarterly MCR calculation, together with knowledge of significant changes in underlying risk assumptions, should provide advanced notice of a deteriorating capital position which might indicate the need to raise additional own funds. EIOPA therefore does not believe that the approval of ancillary own-fund items would ordinarily need to be achieved within such a short timeframe.

This being so, EIOPA does not believe that a one month period would be either an efficient use of regulatory resource nor an effective way of meeting the overall policy objective of policyholder protection. However, it recognises that in exceptional circumstances situations may arise where agreement of ancillary own-fund items may be desirable within more limited timescales. To reflect this EIOPA considers that it is important to include the principle of reasonableness such that, despite the prescribed time periods, supervisory authorities will have to consider the period of time that is reasonable to decide on the application based on the particular circumstances and nature of the application. Furthermore, there is of course no requirement for the supervisory authority to wait until the prescribed approval periods have elapsed before providing a response to the undertaking, provided that the authority has been able to satisfy itself regarding all the fulfilment of the necessary criteria in a shorter timescale.

Since EIOPA concluded that a reasonable approval period of time for all but exceptional applications was generally greater than one month but less than six months, it proposes that other than in exceptional circumstances supervisory authorities should make a decision within three months of receiving a complete application. EIOPA also concluded that in exceptional circumstances the assessment period shall still not take longer than six months, a time period that is the absolute limit for other approval processes, for example in respect of internal models.

**Policy options for Decision 3**

Decision 3 concerned the use of the term in 'exceptional circumstances'. The choices were to;

a) explicitly define when the period may be longer than the three months proposed in decision 2;
b) do not explicitly define when the period may be longer than three months.

**Analysis of impact – Decision 3**

EIOPA considered whether to define the 'exceptional circumstances' under which supervisory authorities may not be able to respond to an ancillary own-fund item application within three months, as providing such a definition could promote a more consistent approach amongst supervisory authorities.

EIOPA concluded that, since ancillary own-fund items are a new form of regulatory own funds for many types of undertaking, it cannot currently be more definitive about what 'exceptional circumstances' might be. It therefore does not propose to define the term at present, but will revisit the decision once experience has been obtained.

**Analysis of impact for policy issue 3 (see 4.3): The period of time for the supervisory authority to confirm if the application is complete**

EIOPA considered that it is important for undertakings to know on a timely basis whether their application is complete so that they are aware of when they can expect to receive a decision on their application. At the same time, EIOPA considered that it is necessary for supervisory authorities to have sufficient time to review the application and decide if the necessary information has been included.

Against this backdrop, EIOPA considered whether supervisory authorities should be required to set a member state specific timescale within which to confirm the completeness of the application (policy option 2). EIOPA felt that undertakings may be more concerned to know the timeframe adopted by their national supervisory authority for confirming the completeness of the application, rather than whether another member state supervisory authority undertook to confirm completeness in a more, or less, timely manner than in their member state. However, EIOPA thought that it was important to provide a consistent approach and to set a limit for the time that supervisory authorities can take to assess the completeness (policy option 1). EIOPA concluded that this time period should not be longer than the 30 days provided to supervisory authorities to review other applications for approval, for example for the use of an internal model or undertaking specific parameters. Within this time period member states could still decide to confirm the completeness of the application within a shorter member state specific timescale.

**Analysis of impact for policy issue 4 (see 4.4): Time taken by undertaking to provide further information requested by the supervisory authority**

EIOPA considered option 1 to be a practical and workable approach which balances the need for undertakings to have certainty, with the costs associated with the rejection of an application. It was felt that the potential costs of an undertaking having to submit a new application for approval were greater than the costs associated with the fact that the time period for a supervisory authority to decide on an application may be extended. It was also noted that it should be possible for undertakings to manage the uncertainty arising from the possible revisions to the time period. Upon receiving the request from the supervisory authority, the undertaking would know that it needs to readjust its planning based on the nature of the request from the supervisory authority. Furthermore, this approach would only add marginally to the uncertainty that the undertaking will need to manage owing to the fact that the application may not be approved. EIOPA also believed that an automated process was preferable, since it would not require additional communication between undertaking and supervisory authority as to whether the undertaking intends to suspend the time period.

The safeguard to any unjustified delay to the assessment period would be that a request for further information by the supervisory authority has to be necessary for the assessment of the application, such that without such information, they may not be in a position to approve the application. EIOPA considered whether there was a sufficient incentive for undertakings to either provide the information immediately or, where this is not possible, to request a suspension of the time period. EIOPA felt that, whilst in general this incentive would be sufficient, there would be instances where de facto the information is not provided on a timely

basis. This could mean that the supervisory authority would not have time to assess the information and would need to reject the application.

Therefore, EIOPA concluded that Option 1 was the preferred option; the days between a request by a supervisory authority for further and receipt of such information is not included within the overall time period for the application.

## Section 6: Comparison of options

### 4.1 Policy issue 1: Structure of the application

**Comparison and final choice**

| Option | Benefits | Costs | Conclusion |
|---|---|---|---|
| Specify the required information to be provided in the application. | Allows the undertaking-specific nature of the ancillary own-fund item to be fully reflected in the application. | No costs identified. | **Final choice.** |
| Provide a template or pro-forma for the submission of the required information. | Proposed by some stakeholders, but no benefits identified. | Development and maintenance of templates or pro-forma for the submission of the required information would create resourcing costs for EIOPA.<br>Such templates or pro-forma would not reflect the undertaking-specific nature of the ancillary own-fund item. | Since the details of ancillary own-fund items are likely to be diverse and undertaking specific, developing a template or pro-forma for the submission of the required information would be sub-optimal, creating additional cost for EIOPA (and potentially supervisory authorities) and at no benefit for undertakings.<br>Rejected. |

### 4.2 Policy issue 2: The period of time to decide on an application

**Comparison and final choice – decision 1:**

| Option | Benefits | Costs | Conclusion |
|---|---|---|---|
| Provide only a principle that the time period for a decision shall be reasonable. | Does not impose any additional costs or expectations on supervisory authorities. | Does not provide certainty for undertakings. | Provides neither costs nor benefits.<br>Rejected. |
| Provide an absolute maximum period of time within which applications must be decided. | Would provide certainty to undertakings regarding the maximum period of time that the approval process should take. | Given the possibility for particularly complex applications, an absolute maximum period of time would need to be sufficiently long to allow supervisory authorities to properly assess all applications. | EIOPA expects undertakings to welcome certainty regarding the likely maximum approval period. However this option presents several risks depending on the period of time decided upon. First, it risks setting a maximum period of time which is longer than is needed for most applications, thereby creating a risk that decisions take longer than strictly necessary. Second, it risks setting a maximum period of time which is shorter than is needed for supervisors to appropriately assess complex applications. This might in turn lead to one of two costs – the cost of imprudent applications being approved or the cost of prudent applications being rejected. |
| Within an absolute maximum period of time | Would provide a high level of certainty to undertakings regarding when the approval | Some loss of certainty for undertaking regarding whether | **Provides the benefits of a high level of certainty** |

| | | | |
|---|---|---|---|
| to decide on all applications, provide a period of time within which applications must be decided, except in exceptional circumstances. | process will be completed, whilst allowing supervisors time to properly assess complex applications and make decisions where there are dependencies with other regulatory processes.<br>Allows regulatory flexibility to fully consider more complex applications in compliance with Directive requirements. | an application will be decided upon in three or six months. This can be mitigated by discussion between undertakings and supervisory authorities and the fact that the period for decision should only be exceeded in exceptional circumstances. | **regarding when the approval process will be completed for undertakings in the vast majority of cases, whilst allowing supervisory authorities the ability to take longer to consider complex applications or those which are dependent on other regulatory processes.**<br>**Final choice.** |

**Comparison and final choice – decision 2:**

| Option | Benefits | Costs | Conclusion |
|---|---|---|---|
| 6 months | Consistent with time period for other supervisory approval processes (for example internal models)<br>Provides sufficient time for supervisory authorities to assess applications in particular where there are complexities or dependencies with other regulatory processes. | Unless the application is very complex, it is too long to support other aspects of the regime, in particular the six months timescale to address any breach of SCR.<br>Opportunity cost for undertakings of a six month delay in being able to react to market opportunities is likely to be high. | **Due to the large opportunity costs for the industry and the potential weakening of policyholder protection of firms in breach of SCR, a maximum of six months should only be used in exceptional circumstances**<br>**Partially chosen as an absolute maximum time period in exceptional circumstances.** |
| 1 month | EIOPA received representation from industry suggesting a one month time period for decisions was | Risk to policyholder protection of inadequately performed approval procedures because | Large resource cost to supervisory authorities (due to concentration of effort in a small |

| | | | |
|---|---|---|---|
| | appropriate because decisions would likely be needed at short notice, and close to the year end. | of rushed timescales.<br>Cost of supervisory resources greatly increased. | time span).<br>Risk to policyholder protection.<br>Little benefit if undertakings manage own funds according to Solvency II governance requirements as they should be reviewing and managing both their short and medium term capital position and therefore should seldom find they need to raise capital so quickly. Specifically, the quarterly calculation of the MCR means that undertakings should not normally need to obtain additional capital within such timescales.<br>Rejected. |
| 3 months | Supports timescales for recovery on breach of SCR.<br>Unlikely to be opportunity cost as a result of undertakings not being able to react to market opportunities within necessary timescales.<br>Supervisory resource needs limited. | None identified. | **Three months balances the costs and benefits of the other two options.**<br>**Partially chosen. Three month time period prescribed in all but exceptional circumstances.** |

**Comparison and final choice – decision 3:**

| Option | Benefits | Costs | Conclusion |
|---|---|---|---|
| Define when the three | Provides clarity for undertakings. | EIOPA currently does not know what | **Cost to undertakings or** |

| | | | |
|---|---|---|---|
| month period of time for deciding on the application may be exceeded. | | "exceptional" would be, so there is a risk that the definition would be inappropriate | **supervisory authorities of defining "exceptional" in an inappropriate manner could be high whilst benefits are not proven.**<br>**Final choice: Do not define at present, but revisit once experience has been obtained.** |
| Do not define when the three month period may be exceeded, leaving supervisory authorities to decide on a case by case basis. | Allows decision on what is exceptional to be taken on a case by case basis. | Leaves some uncertainty for undertakings. | |

**4.3 Policy issue 3: Time period for supervisory authority to confirm receipt**

| Option | Benefits | Costs | Conclusion |
|---|---|---|---|
| Set a single timescale for supervisory authorities to confirm completeness of the application. | Undertakings have certainty as to when they will receive confirmation from the supervisory authority on the completeness of the application and accordingly when they can expect a decision on the application. | Not consistent with current national law in several member states. To implement such a proposal would therefore require these member states to amend those national laws, which will result in some costs. | **Whilst there may be costs to member states, it is important to provide certainty to undertakings and a convergence approach amongst member state supervisory authorities.**<br>**Final choice** |
| Require supervisory authorities to set a member state specific timescale within which to confirm the completeness of the | Undertakings are informed about the timescales and can therefore plan accordingly. | Small cost to supervisory authorities, which need to implement processes to notify undertakings. | Expected costs to supervisory authorities are lower, but it is important to provide a consistent approach amongst member states and ensure that the assessment of |

| | | | |
|---|---|---|---|
| application. | | | completeness is concluded within a relatively short period of time.<br>Rejected. |

**4.3 Policy issue 4: Time taken for undertaking to provide further information**

| Option | Benefits | Costs | Conclusion |
|---|---|---|---|
| Time taken is not included within the overall time period for a decision on the application | This option would establish an automated process which should be clear to all stakeholders involved and would not require additional discussions between undertakings and supervisory authorities.<br>This option would ensure that an undertaking has adequate time to address the request from the supervisory authority without jeopardising the approval of the application. | The overall time period for a decision on an application would not be fixed and may ultimately be longer than the time allowed for in the regulation, in particular where a supervisory authority needs to request further information on multiple occasions. A fixed time period would be expected to assist undertakings in their planning, in particular if they submit a number of different applications to supervisory authorities simultaneously. | **Final choice, on the basis that it is a clear and practical approach which entails less costs to undertakings and supervisory authorities** |
| Undertaking may request a suspension of the time period for a decision on the application | The undertaking would have certainty that the maximum amount of time that the supervisory authority will take to decide on their application will be fixed, unless the undertaking itself requests a suspension. | The likelihood of an undertaking needing to submit subsequent applications is expected to be increased under this option. Where an undertaking did not request a suspension of the time period, the supervisory authority may not have sufficient time to review the information and be satisfied that the necessary conditions for approval are met. The undertaking would then have to decide if it wishes to submit a new | Rejected due to the increased likelihood of undertakings having to submit additional applications where previous applications were rejected, at high opportunity and administrative costs to undertakings. |

| | | | |
|---|---|---|---|
| | | application.<br><br>Significant additional costs both to undertakings and supervisory authorities from having to submit an additional application where a previous application was rejected. This would entail administrative costs, for example, each application will need to be approved by the administrative, management and supervisory body of the undertaking, and similarly the decision to reject an application will require approval at a senior level within the supervisory authority. More importantly, the need for the undertaking to wait for up to a further six months, before potentially being able to consider the ancillary own fund item as admissible (subject to supervisory approval of the resubmitted application), would present significant opportunity costs to the undertaking.<br><br>As the process would not be automatic, there would need to be additional communication between the supervisory authority and the undertaking, thereby resulting in some minor additional costs to both parties. | |

**Overall conclusion**

The chosen option regarding the structure of the application (Articles 3, 4 and 5) provides benefit whilst generating no costs above the baseline. Of the decisions related to Article 7 and the time periods for supervisory authorities to assess the application, all provide benefit whilst two generate no costs above the baseline and the other three should result in only limited additional costs. The benefits flowing from each of these decisions are permanent and will recur each time an undertaking applies to a supervisory authority for approval of an ancillary own-fund item. Policyholders are always better-off under the chosen options.

Whilst Articles 6, 8 and 9 all set out processes to be used to deliver or support supervisory approval, they neither add requirements nor costs over and above the Directive requirement for such approval. However, by enhancing clarity they improve the understanding and effectiveness of the procedure and thus add benefit.