

Report on the cross-border cooperation mechanisms between Insurance Guarantee Schemes in the EU

1. Introduction

This report is prepared as EIOPA's input to the European Commission's policy making on Insurance Guarantee Schemes (IGSs). The purpose of the report is to summarise the findings of a mapping exercise of the existing mechanisms for cross-border cooperation between Insurance Guarantee Schemes of Member States and/or between Insurance Guarantee Schemes and national supervisory authorities, and to provide general recommendations to the European Commission in the area of cooperation between IGSs as well as between supervisors and IGSs.

This exercise is part of the work programme specified in the mandate of the EIOPA Task Force on Insurance Guarantee Schemes. The Task Force was formed in 2009 and is chaired by Ole-Jørgen Karlsen of the Finanstilsynet of Norway.

According to the 2011 EIOPA Regulation:

Article 26 – Development of a European network of national Insurance Guarantee Schemes

The Authority may contribute to the assessment of the need for a European network of insurance guarantee schemes which is adequately funded and sufficiently harmonised.

Article 27 – Crisis prevention, management and resolution

The Authority (...) may report on any new developments and progress concerning:

...

- (g) a harmonised and adequately funded Union-wide solution for insurance guarantee schemes.

The mandate has specified that the deliverable for the first half of 2011 is a report of existing cooperation mechanisms among insurance guarantee schemes with regard to cross-border activities, including possible recommendations to the Commission.

Methodology

For the purpose of this exercise, the following tasks were undertaken:

- i) the design and use of a questionnaire with 7 questions to collect relevant IGS data from Member States; and

For the purposes of comparison and any lessons learnt that could be of benefit to our exercise, the following regimes were analysed:

- ii) existing motor insurance regime in the EU;
- iii) banking sector deposit guarantee scheme in the EU; and
- iv) the insurance guarantee regime in the US.

2. Main findings

This section summarises the main findings of the EIOPA IGS Task Force. Section 2a below contains the conclusions with regards to the questionnaire on the existing cooperation mechanisms between national insurance guarantee schemes. Section 2b focuses on the motor insurance regime and lessons that can be learnt from it. The deposit guarantee regime is analysed in Section 2c. Finally, Section 2d looks at the cooperation mechanisms in the US under their existing guaranty model.

a. Summary of the results from the questionnaire

Question 1:

Other than for compulsory motor insurance, is there an IGS for your jurisdiction?

Conclusion 1:

The majority, or 17 Member States (60%), have at least one IGS in place. Of the ones with an IGS, **6** are operated on a home State basis, **7** as host State schemes and **4** operate on both home and host State basis.

Question 2:

Does your authority have a role with respect to this IGS?

Conclusion 2:

The main role of the national authority in respect of its IGS is to provide information. This is followed by the role of general oversight of the guarantee scheme, including suspending activity or imposing fees should undertakings fail to fulfil their obligations towards the scheme. A significant number of national authorities also issue early warnings of the potential failure of insurance undertakings.

Question 3:

Does this IGS have formal cooperation arrangements with other IGS or supervisory authorities?

Conclusion 3:

There are no formal cross-border cooperation arrangements in place with other IGSs or supervisory authorities.

The majority (**10**) of IGS exchange information informally, compared to **7** with formal arrangements with national supervisors.

Formal arrangements with national supervisory authorities are generally on:

- i) Regular communication such as updating of contact details, basic financial and passporting information; and
- ii) In cases of insolvency, ad-hoc communication of the following information – company name, type of IGS intervention and the contact point for policyholders.

For consumers, a minority of IGS provide practical assistance or advice such as translation services when an IGS has to compensate policyholders.

Question 4:

Does your compulsory motor guarantee scheme cover the insolvency of insurance undertakings?

Conclusion 4:

A vast majority of compulsory motor guarantee schemes (MGS) (78%) cover the insolvency of insurance undertakings.

Of those schemes, 8 operate as home State schemes, 5 as host State schemes and 8 operate as both home and host State schemes.

Question 5:

Does your authority have a role with respect to this motor guarantee scheme in cases of insolvency?

Conclusion 5:

The vast majority (88%) of national authorities play a role in their motor guarantee scheme by mainly acting in a supervisory capacity followed by providing information.

Question 6:

Does this motor guarantee scheme have formal cooperation arrangements regarding insolvency cases?

Conclusion 6:

Where national authorities play a role in the MGS, the vast majority exchange information on an informal basis, compared to formal arrangements.

Conclusion 6A:

Under the formal arrangements, the majority (80%) are with cross-border MGS and 7 MGS (46%) cooperate with their supervisory authorities.

Only one competent authority has formal arrangements with cross-border supervisory authorities.

The areas of formal cooperation by the majority of competent authorities are with cross-border MGS and the national supervisory authorities in the following areas:

- i) Regular communication such as updating of contact details, basic financial and passporting information;

- ii) In cases of insolvency, ad-hoc communication of the following information company name, type of IGS intervention and the contact point for policyholders;
- iii) Representation – each scheme dealing with third parties in its jurisdiction on behalf of other schemes, if requested; and
- iv) Claims handling by one scheme on behalf of another scheme.

Other areas of formal cooperation are towards customers by giving practical assistance or advice such as translation services when an MGS has to compensate policyholders.

Conclusion 6B:

Under informal arrangements, the majority areas of cooperation are for similar activities as above but mainly via the national supervisory authorities.

Question 7:

Please provide any comments you might have, regarding existing cooperation arrangements, or potential future cooperation needs, with respect to insurance guarantee schemes and how they could cooperate in the future.

The comments received in question 7 are incorporated under the conclusions part of this report.

b. Motor insurance regime

This section describes the existing agreements on cross-border cooperation for the motor insurance guarantee scheme. The “Agreement¹ (concluded on 6 November 2008) between compensation bodies and guarantee funds in the event of the insolvency of an insurance undertaking providing civil liability motor insurance in the Single Market” (hereafter Agreement) covers the cooperation mechanisms between compensation bodies and guarantee funds in cases when, despite the protection provided by the provisions of Directive 2009/103/EC, parties are left without compensation, as the insurance company covering the civil liability becomes insolvent.

The Agreement covers road accidents involving vehicles insured by an insolvent insurance undertaking that occurred in the territory of a Member State of the European Economic Area.

¹ <http://www.4directive.org/en/index-module-orki-page-view-id-7-deploy-1.html>

It is voluntary and the signatories are both the guarantee funds and compensation bodies.

There is a central administrative body known as the Council of Bureaux Secretariat (hereafter Secretariat). The law applicable for the process should be the law of the Member State where the accident occurred.

The objectives of the Agreement are to define the tasks and obligations of signatory entities, describe the method of cooperation and communication between the parties involved and to determine the method of the reimbursement procedure.

The guarantee funds provide information to the Secretariat about the circumstances linked to the insolvency of the undertaking(s) that obliges them to proceed with the compensation to the injured parties. A special document is used for the communication.

The compensation body set up in the Member State of the injured party who received claims for compensation will:

- a) inform the guarantee fund of the Member State where the accident happened;
- b) request the necessary information about the whole situation to ensure all details are correct and to justify the payment of the claims.

The guarantee fund will provide, within 2 months, all the necessary information and documentation of the claims to the compensation body involved.

The compensation body which has compensated the injured parties shall be reimbursed by the guarantee fund where the vehicle that caused the accident is normally based. The compensation body is entitled to a handling fee, covering costs arising from the participation in the compensation process. Reimbursement can be disputed by the guarantee fund if the communication was not adequate. The request for reimbursement must be sent by fax or e-mail.

There is a separate agreement², entered into on 24 July 1995, "Insolvency of a motor liability insurer operating in the Single Market Convention on recourse between Guarantee Funds" (hereafter Convention).

The voluntary nature of any agreement and potential underlying conflicting principles and differences in national laws exist on which the national MGSs are based, leads to a potential for lack of clarity and disputes. The lesson to be learnt should be that a future IGS directive should aim at aligning the scope and principles to avoid contradictory positions being adopted between national IGSs and to create clearer legal certainty for which areas of cross-border cooperation is foreseen.

² <http://www.4directive.org/en/index-module-orke-page-view-id-235.html>

c. Deposit guarantee scheme in the EU

This section discusses the key issues covered in the European Forum of Deposit Insurers' ('EFDI') Multi-lateral Memorandum of Understanding ('the Memorandum') agreed by members of EFDI. The members of EFDI are deposit guarantee schemes, many of which are established in the European Union and subject to the Deposit Guarantee Schemes Directive ('DGSD'). This Directive requires Member States to ensure that deposit guarantee schemes cooperate with each other. All schemes subscribing to the Memorandum accept a responsibility to cooperate with each other.

This is also a summary of the requirement in Principle 7 of the Core Principles for Effective Deposit Insurance Systems ('the Core Principles') in relation to the exchange of information between deposit insurers and other foreign financial safety-net participants on cross-border issues.

The key issues covered in the Memorandum and in the requirement in Principle 7 of the Core Principles appear relevant with regard to cooperation between insurance guarantee schemes. However, a lender of last resort, one of the participants in the financial safety net with which deposit insurance guarantee schemes may need to cooperate, does not appear to be relevant in the case of insurance guarantee schemes.

An additional key issue relevant to insurance guarantee schemes which is not covered in the memorandum, is the need for schemes to cooperate where a scheme is seeking to secure continuity of insurance cover by a transfer of the business to another insurance company ('portfolio transfer'), rather than to pay compensation.

Under the Memorandum, schemes will give each other a summary of the scheme, material changes to the scheme and current contact details. At least every 12 months, schemes will give each other a report of their activities for the period including claims experience and funding position. When a scheme in one country (the home State) becomes aware of a potentially insolvent or an insolvent firm with a material number of claims from claimants located in another country (the host State), the home State scheme will give information about the firm and the claims against it to the host State scheme.

At the request of the home State scheme the host State scheme will, so far as legally and practically possible, act as a point of contact for the firm's customers located in the host State and provide assistance to the home State scheme. This could include identifying claimants and distributing information to claimants.

At the request of the home State scheme, the host State scheme will provide or assist in arranging practical assistance and advice which is needed to deal with claims for compensation. This could include assistance in relation to legal advice, method of payment to claimants and media communications.

Each scheme will, at the request of the other scheme, use its reasonable endeavours to deal with third parties in its own jurisdiction on the other scheme's behalf. Representation of one scheme by another will be on terms to be agreed between the

two schemes. In the absence of an agreement to the contrary, the host State scheme will have no authority to commit or bind the home State scheme.

Where the home State scheme is responsible for the handling and/or payment of claims, at the request of the home State scheme the host State scheme may agree to give practical claims handling, payment or other assistance to the home State scheme. This will be on terms to be agreed between the two schemes.

Schemes (either those with high levels of cross-border business or for contingency planning generally) may agree more detailed bilateral agreements. These could cover whether portfolio transfer will be an objective, if this is possible in a particular case, rather than the payment of compensation. Schemes will need to agree more detailed and practical cooperation arrangements in the light of the circumstances of a particular failure.

Provided confidentiality is ensured, all relevant information should be exchanged when appropriate between deposit insurers in different jurisdictions and other financial safety-net participants on a routine basis as well as in relation to particular banks. The financial safety-net usually includes the functions of prudential regulation and supervision, resolution authority and guarantee schemes.

d. Insurance guarantee in the US

This section describes the existing cooperation mechanisms in place under the US insurance guarantee schemes. The content is based on input and assistance from the National Organization of Life and Health Insurance Guaranty Associations (NOLHGA) and the National Conference of Industry Guaranty Funds (NCIGF).

The cooperation between guaranty associations (GAs) impacted by a multi-state insurer's insolvency is organized and coordinated through the two private national associations of all the state GAs – the National Organization of Life and Health Insurance Guaranty Associations (NOLHGA) for life and health (L/H) insurance business and the National Conference of Insurance Guaranty Funds (NCIGF) for property and casualty (P/C) business.

The two national associations facilitate the coordinated handling of the GA function in each respective state.

There is a very active informal system of "pre-warning" between GAs of probable insolvencies of insurers which could have a multi-state impact.

When a state GA is notified by its state insurance department of a troubled life or health insurance company that could affect policyholders in multiple states, that association typically informs NOLHGA, which, with the permission of the regulator, confidentially passes the information on to all its potentially affected member associations. In some cases, NOLHGA will establish a task force of potentially affected associations to do more extensive work in advance of a possible liquidation.

The same can be said regarding the flow of information between the GA and Commissioners: these often notify the GA in their state when their department encounters a financially troubled domestic insurer. This notification usually comes before the rehabilitation stage, and there is often a confidentiality agreement between the GA and the insurance department so that no sensitive information about the company and its financial status is released until the department deems it necessary. If the insurer in question is likely to affect policyholders in multiple states, the association would typically notify NOLHGA so that this information can be shared confidentially with its member guaranty associations.

NCIGF also emphasizes the importance of pre-liquidation planning and state regulators have acknowledged the need and are cooperating in providing notice and coordination to prepare for liquidation. In this regard, a statute has been added to the NAIC Model calling for this. NCIGF makes available the relevant information between its associates through a secure server operated by NCIGF in order to address privacy concerns.

During the receivership proceedings (normally liquidation):

1. The principle is the nomination, by the national association, of the ad hoc Task Force (NOLHGA)/Coordination Committee (NCIGF) with representatives of some of the most impacted GAs by the insolvency. Such TF/CC assembles and sometimes hires experts to help each of the GAs involved perform its functions (reducing the costs and improving the efficiency of the coordinated action for the fulfilment of each GA's responsibilities).
2. How, in concrete terms, the TF/CC helps and assists the GAs involved:

In general:

- a) presents a plan of action for fulfilling GA statutory obligations (which the GAs decide whether to adopt);
- b) coordinates information and delivers communications support (data transfer to GAs through a secure server);
- c) presents recommendations, at each major step of the insolvency (which the GAs decide whether to adopt);

In particular:

- d) analyses the commitments to policyholders;
- e) helps ensure that covered claims are paid and that coverage is continued, consistent with GA statutory obligations in the case of a L/H insolvency arranging for transfer of portfolio; in the case of a P/C insolvency, provide GAs with information which will help them determine whether an assessment is necessary - it is each GA's responsibility to ensure that covered claims are paid;
- f) coordinates with the receiver the initial communications with the policyholders;
- g) in L/H, "To the extent policies and claims are being administered by the GAs going forward (e.g, where no acceptable assuming carrier could be

found for the business), communications with policyholders will typically be handled by the TF or by a contracted claims administrator with direction from the TF.”

- h) in L/H, may represent the GAs in state court; if so, TF recommends and the GAs involved accepts; in P/C cases sometimes multiple guaranty associations will form a “joint defense group” if there is a large matter with claims liability in many states;
- i) regarding claims administration, one should distinguish between L/H and P/C: while in L/H, NOLHGA’s TF typically centralizes and coordinates the performance of such tasks (eventually through a contract with an outside firm, a “third-party administrator”, TPA) – but it is up to each of the GAs involved to accept such recommendation, or to choose its own TPA, or to administer the claims itself; in P/C, on the contrary, it is always up to each of the GAs involved to handle the claims by itself.

Note that in both L/H and P/C, the payment of claims and assessment of member companies are strictly the responsibility of each GA. But in the L/H case, notwithstanding that the funding is provided by the individual GAs, it is also typically coordinated through NOLHGA so that aggregate funding for all state GAs can be transferred to the TPA to fund each claim batch.

There is, of course, within the 2 national associations, a historic knowledge of the procedures taken to fulfill their tasks, as well as various documents, to form agreements on matters such as confidentiality and early distribution of standard agendas for the meetings, communication plans, etc.

NOLHGA maintains records of the GA’s actions in all multi-state receiverships in which they have been triggered. Such records are confidential.

3. Conclusions and Recommendations

Following the previous work of CEIOPS on IGSs and in line with the recommendations made at the end of 2010, this section summarises the conclusions and proposals of the Task Force to the European Commission on cross-border cooperation for future insurance guarantee schemes.

i) Clear cooperation procedures for consumer protection

Cooperation³ between home and host state IGSs and between IGSs and supervisors is vital to ensure that policyholders are protected effectively if an insurance undertaking fails. The IGSD needs to set the framework for cooperation and also ensure that IGSs have cooperation arrangements in place in practice and operate in accordance with these arrangements.

Examples of cooperation include, as far as legally and practically possible:

- acting as a point of contact for policyholders so that they can deal with a body in their own country;
- providing details of the identity and whereabouts of claimants;
- distributing information to claimants; and
- providing other practical assistance and advice to deal with claims for compensation.

The parties to the cooperation arrangements will need to agree the procedure and method for reimbursement of all administration costs which an IGS has incurred in providing assistance under the cooperation arrangements.

ii) Exchange of information by IGSs as prerequisites for effective policyholder protection

Insurance guarantee schemes will require access to information from supervisors, both during the handling of an insolvency situation and on an on-going regular basis, to enable the IGS to prepare for its involvement in potential cases.

In the case of an undertaking operating in multiple jurisdictions, the IGSs will need to exchange information across national borders, both with other IGSs and with supervisors of other jurisdictions. IGS should communicate general information on their own schemes, such as any coverage offered beyond the minimum according to the proposed IGSD, material changes to this and contact details on a regular basis so that in the event of a failure, IGSs already hold this basic information.

It is important that the financial safety net of players, including supervisors and IGSs,

³ In this section we have assumed that the IGSD will adopt a home state basis so that an IGS in one member state will cover all the EEA business of insurers authorised in that state including their EEA branch business and EEA services business. However cooperation will be vital whatever geographic basis is adopted for the scope of the IGSD.

can give early warnings about potential failures to other supervisors and IGSs, so that the relevant parties can begin preparations as early as possible to handle the failure efficiently. This early warning will be needed, whether policyholders will be receiving cash compensation or getting continuity of their insurance contracts secured through the transfer of portfolio(s) to another insurer.

Insurance guarantee schemes should be able to receive confidential information. This may be problematic, for example, where the organisation of national guarantee schemes are left to industry organisations, and particular attention must be given to this.

In the case of life insurance, continuity of insurance, rather than cash compensation, is likely to be the better form of protection. Compensation may not enable policyholders who are older, and may be in worse health than when they took out the insurance contract, to purchase equivalent benefits from another insurer.

iii) Provision of legal certainty for purpose of confidentiality

Exchange of information will not take place if the parties involved are at risk of breaching national or community confidentiality law when communicating with other IGSs or supervisors. Such information may include the financial position of the undertakings, personal, health and financial data on individual policyholders.

IGSs must treat as confidential all information which they receive in the course of carrying out their mandate in relation to failures of insurance undertakings.

As soon as supervisory authorities and IGSs become aware of a potential failure of an insurance undertaking, they will have to consider the duties to safeguard information relating to the undertaking, both in civil and criminal law. To prevent the flow of information being hindered by legal obstacles, the directive should include specific requirements on the part of supervisors and IGSs to exchange information prior to, and during a winding-up procedure or other insolvency event, and should explicitly relieve the parties from their general duty to protect information.

The voluntary and best-effort nature of a Memorandum of Understanding or similar arrangement may prove to be insufficient, as parties could opt to withdraw from the arrangement, particularly during a crisis but also during normal situations. The exchange of information during normal situations is a prerequisite for the efficient handling of a failure.

Future community legislation on insurance guarantee schemes will have to allow supervisors to provide sensitive information to IGSs without fear of breaching current provisions on professional secrecy. Furthermore, insurance guarantee schemes must be allowed to exchange such information between each other again, without fear of breaching professional secrecy rules. The party receiving such information, should in turn be obliged to respect the instructions from the provider on the use of the information, and in both a practical as well as a legal way, should be able to guarantee the safekeeping of it. Thus, restrictions on onward recipients should also be

included.

The Solvency II directive includes relevant language on exchange of information, professional secrecy, etc, in Articles 64-70, and could serve as a model for provisions relating to exchange of information. The scope of the information to be exchanged should be broadened, to include the purpose of fulfilling the needs of an insurance guarantee scheme.

iv) Provision of infrastructure for exchange of information

For effective exchange of information to take place, in the event of a failure of an insurance undertaking, there must be a common understanding of what cooperation IGSs and supervisors can expect from the other IGSs and supervisors with whom they are sharing information. Colleges of supervisors should therefore discuss, in conjunction with IGSs, how cooperation arrangements should work, both in normal times and in the event of a failure. This would lead to the development of a common understanding which would form the basis of discussions on a particular failure.

v) Need for a mechanism to solve disputes

The parties involved should take all necessary steps to create a common position on how to best deal with a particular undertaking in financial difficulties. Nevertheless, one cannot exclude the possibility of disputes occurring. A future directive should provide a mechanism to settle such disputes. To the extent supervisory authorities are part of the disputes, the use of EIOPA's mediation regime could be considered.