

REQUEST TO EIOPA FOR A REPORT ON GROUP SUPERVISION AND CAPITAL MANAGEMENT WITH A GROUP OF INSURANCE OR REINSURANCE UNDERTAKINGS AS WELL AS ON FREEDOM TO PROVIDE SERVICES AND FREEDOM OF ESTABLISHMENT UNDER DIRECTIVE 2009/138/EC

With this mandate to EIOPA, the Commission seeks a report from EIOPA on the benefit of enhancing group supervision and capital management within a group of insurance or reinsurance undertakings, as well as on some issues related to freedom to provide service and freedom of establishment.

The mandate follows the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "**290 Communication**")¹, the Regulation of the European Parliament and of the Council establishing a European Insurance and Occupational Pensions Authority (**the EIOPA Regulation**)², the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**")³ and the inter-institutional agreement on better law-making⁴.

The Commission is required by Article 242 (2) of Directive 2009/138/EC to make an assessment of the benefit of enhancing group supervision and capital management within a group of insurance or reinsurance undertakings including a reference to COM(2008)0119 and the report of the Committee on Economic and Monetary Affairs of the European Parliament on this proposal of 16 October 2008 (A6-0413/2008 by the end of 2018). The Commission also intends to assess issues arising from freedom of establishment and freedom to provide services. This review should make use of the experience gained by insurance and reinsurance undertakings during the transitional period and the first years of application of Solvency II. EIOPA is invited to provide a report on specific items that the Commission has identified for the scope of this review.

This report shall be delivered by 1 November 2018.

1. Context

1.1 Scope

Solvency II (Directive 2009/138/EC) entered into application on 1 January 2016. Article 242 (2) of the Directive reads as follows:

2. By 31 December 2018, the Commission shall make an assessment of the benefit of enhancing group supervision and capital management within a group of insurance or reinsurance undertakings including a reference to COM(2008)0119 and the report of the Committee on Economic and Monetary Affairs of the European Parliament on this proposal of 16 October 2008 (A6-0413/2008). That assessment shall include possible measures to enhance a sound cross- border management of insurance groups notably of risks and asset management.

The current request goes beyond the scope of Article 242 (2) of the Directive, and covers other aspects of group supervision, as well as specific topics related to freedom to provide services and freedom of establishment.

¹ Communication of 9.12.2009. COM(2009) 673 final.

² Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), OJ L 331, 15.12.2010, p. 48–83.

³ The Framework Agreement on relations between the European Parliament and the European Commission, OJ L304/47, 20.11.2010, p.47.

⁴ Inter-institutional agreement between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016 on Better Law-Making, OJ L 123, 12.5.2016, p.1.

1.2 Principles that EIOPA should take into account

In providing its report, EIOPA is invited to take account of the following principles:

- It should respect the requirements of the EIOPA Regulation.
- EIOPA will determine its own working methods depending on the content of the issues being dealt with. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different standards of work being carried out.
- While preparing its report, EIOPA should seek coherence within the regulatory framework of the Union, and in particular Directive 2009/138/EC.
- The provided report should contain sufficient and detailed explanations for the assessment done, and be presented in easily understandable language respecting current legal terminology at European level.
- EIOPA should provide sufficient factual data backing the analyses gathered during its assessment. To meet the objectives of this mandate, it is important that the presentation of the report produced by EIOPA makes maximum use of the data gathered and enables all stakeholders to understand the report presented by EIOPA.
- EIOPA should provide comprehensive information on the subject matters described below.
- EIOPA is not invited to formulate proposals for amendment of the Solvency II Directive at this point in time.
- EIOPA should address to the Commission any question it might have concerning the clarification of the text of the legislative act, which it should consider of relevance to the preparation of report.

2. Procedure

The Commission requests a report from EIOPA in view of the preparation of the report to the European Parliament and Council, as is mentioned in Article 242 (2) of Directive 2009/138/EC.

The mandate takes into account the EIOPA Regulation, the 290 Communication and the Framework Agreement.

The Commission reserves the right to revise and/or supplement this formal mandate. The report received on the basis of this mandate will not prejudice the Commission's final decision in any way.

3. EIOPA is invited to provide a report on the following issues

Directive 2009/138/EC sets out various provisions concerning group supervision. The aim of this report is to provide to the Commission the necessary information for the assessment of the benefit of enhancing group supervision and capital management within a group, as well as on the enhanced cross-border management of insurance groups notably of risks and asset management. Other specific topics related to freedom of establishment and freedom to provide services are also included in the scope of this report.

In particular, this report should assist the Commission to identify uncertainties on the interpretation of certain provisions, and divergences in the supervisory practices concerning the following topics:

3.1 Early intervention

Article 218 (4) of Directive 2009/138/EC provides that Articles 136 and 138 (1) to (4) shall apply *mutatis mutandis* at group level. However, Directive 2009/138/EC does not explicitly define measures of early intervention at group level, in contrast to Directive 2014/59/EU on recovery and resolution of credit institutions and investment firms.

EIOPA is asked to provide, *inter alia*, information on the number of notifications of deteriorating financial conditions and communications on non-compliance of the group solvency capital requirement or of a risk of non-compliance with the group solvency capital requirement within the next three months, in compliance with Article 218 (4) of Directive 2009/138/EC, and the main supervisory measures taken.

In its Opinion to Institutions of the European Union on the harmonisation of recovery and resolution frameworks for reinsurers across their Member States, EIOPA provided some data on powers of early interventions.

If new developments have occurred since July 2017, EIOPA is requested to provide updated information on:

- the number of Member States where national supervisory authorities have powers of early intervention at group level, the nature of such powers and the triggers to use them;
- the number of cases of early intervention on group level by national supervisory authorities since the entry into force of Directive 2009/138/EC, and the measures effectively taken in such cases;
- potential difficulties, if any, in applying early intervention measures to an insurance or reinsurance group which is also a financial conglomerate or which belongs to a financial conglomerate.

3.2 Practices in centralised group risk management and functioning of group internal models including stress testing

EIOPA is asked to provide, *inter alia*, information on:

- the number of cases where the regime of centralised risk management is applied, the total number of applications in accordance with Article 237 of Directive 2009/138/EC, a description of practices in centralised group risk management and their impact on the capital allocation within the group;
- any obstacle or challenges related to the use of the regime of centralised group risk management;
- cases where group internal models differ from the ones applied at solo level, including an assessment of the impact of such divergences;
- the number of cases where Article 231 (7) of Directive 2009/138/EC was applied, and an analysis of such cases;
- the number of cases where Article 233 (5) of Directive 2009/138/EC was applied, and an analysis of whether all risks existing at group level are properly covered in such cases;
- supervisory practices to include in the group solvency calculation, undertakings outside the scope of group internal models, including an assessment of the impact of potentially divergent approaches.

3.3 Intragroup transactions and risk concentrations

EIOPA is asked to provide, *inter alia*, information on:

- the scope of intra-group transactions which are reported by insurance and reinsurance groups;
- any gap which may have been identified by national supervisory authorities in the definition of intra-group transactions as provided in Article 13 (19) of Directive 2009/138/EC;

- the nature and volume of the main intra-group transactions and risk concentrations reported by insurance and reinsurance groups;
- the number of cases of application of Article 213 (3) of Directive 2009/138/EC and the impact and challenges of the application of such provisions on the supervision of intra-group transactions within an insurance group;
- potential divergent practices of supervision of intragroup transactions and risk concentrations, and their impact;
- the number of cases where group supervisors applied enforcement measures in accordance with Article 258 (1) of Directive 2009/138/EC, and the triggers and content of such measures.

3.4 Diversification effects between undertakings of a given group

Recital 101 of Directive 2009/138/EC provides that global diversification of risks that exist across all the insurance and reinsurance undertakings in a group should be taken into account when calculating the consolidated Solvency Capital requirement.

EIOPA is asked to provide, *inter alia*, an analysis of:

- the amount and allocation of diversification benefits between insurance and reinsurance undertakings in a given group, which are recognized when calculating group solvency capital requirements both where the standard formula is used and where an internal model is applied;
- divergences of practices on how the solo SCR might be seen as a barrier to transferability of own funds in accordance with Article 330 of the Delegated Regulation (EU) 2015/35 and their impacts.

3.5 Mediation of supervisory disputes

EIOPA is asked to provide, *inter alia*, information on:

- the number of cases where binding and non-binding mediations were requested to EIOPA, and an analysis of such cases;
- how EIOPA monitors the correct application of the decisions made by an EIOPA's mediation panel.

3.6 Barriers to asset transferability

EIOPA is asked to provide, *inter alia*, information on:

- the main barriers in national insolvency and winding-up legislation to asset transferability within insurance and reinsurance groups in the EEA as well as to their efficient capital management;
- the main company or corporate law barriers to asset transferability between insurance and reinsurance undertakings within a group, in particular in a cross-border context;
- the amount and nature of non-available items in accordance with Article 330 of the Delegated Regulation (EU) 2015/35, and of the major legal and regulatory barriers to transferability;
- potential divergences between national supervisory authorities in assessing the availability of any own fund at group level, and their impact;
- potential divergences in assessing whether own-funds can be made available within a maximum of 9 months in accordance with Article 330 (1) (c) of the Delegated Regulation (EU) 2015/35, and their impact;
- the main obstacles to transferability of assets where related insurance or reinsurance undertakings are headquartered in third countries.

3.7 Level of protection of policy holders and beneficiaries of the undertakings of the same group, particularly in crisis situations

EIOPA is asked to provide, *inter alia*, information on:

- the functioning of crisis management groups, the way group supervisors and solo supervisors cooperate in crisis situations, in order to ensure an equivalent level of protection of policyholders and beneficiaries of the same group, and the issues identified that could potentially limit the protection of policyholders and beneficiaries;
- potential problems in crisis situations for cross-border groups arising from national supervisory authorities focusing on the protection of policyholders in their Member States, even when the measures taken may be detrimental to the protection of policyholders in other Member States;
- how recovery and resolution plans, liquidity risk management plans, and systemic risk management plans have been used in practice by National Supervisory Authorities;
- potential divergences in the supervision of the classification of own-fund items of insurance holding companies, mixed financial holding companies, and subsidiary ancillary services undertakings at group level in light of Article 333 and Recital 127 of the Delegated Regulation (EU) 2015/35, and the impact of such divergent interpretations;
- cases of identification of own-funds items which are not considered "free from encumbrances" in accordance with Articles 331 and 332 of the Delegated Regulation (EU) 2015/35.

3.8 Insurance guarantee schemes

In its Opinion to Institutions of the European Union on the harmonisation of recovery and resolution frameworks for reinsurers across their Member States, EIOPA provided some data on existing insurance guarantee schemes.

If new developments have occurred since July 2017, EIOPA is requested to provide updated information on:

- existing national insurance guarantee schemes and the lines of business covered by them in each Member State;
- where applicable, the way of funding of the insurance guarantee schemes in each Member State;
- cases where insurance guarantee schemes have been effectively used, in the context of a group.

3.9 Scope of group supervision

EIOPA is asked to provide, *inter alia*, information on:

- any uncertainties or supervisory divergences in the distinction between insurance holding companies and mixed-activity insurance holding companies as defined in Article 212 (1) (g) and (h), and the impact of any divergent practices;
- the number of cases of application of Article 214 (2), (a), (b) and (c), and an analysis of such cases, in particular when it concerns insurance and reinsurance undertakings which are not headquartered in the same country as the ultimate parent undertaking, and when the application of those articles results in waiving group supervision or waiving the establishment of a college of supervisors;
- the number of cases of application of Article 213 (5) or (6), and an analysis of the uncertainties related to the assessment of the "equivalence" of the Provisions of Directives 2009/138/EC, 2002/87/EC and 2006/48/EC;
- the number of cases of application of Article 217 of Directive 2009/138/EC, and a description of uncertainties related to the application of this article.

3.10 Group solvency calculation and group supervision

EIOPA is asked to provide, *inter alia*, information on:

- uncertainties or divergences of practices in group solvency calculations and supervision between national jurisdictions when using method 1, method 2, or a combination of methods, including cases of third-country insurance and reinsurance undertakings in the scope of group supervision, and the impact of any divergent practices;
- uncertainties or divergences of supervisory practices on group solvency calculation where undertakings from other financial sectors as referred to in Article 335 (1) (e) of the Delegated Regulation (EU) 2015/35 belong to the scope of group supervision in accordance with Article 213 of Directive 2009/138/EC, and the impact of any divergent practices;
- challenges and practices in applying group supervision in accordance with Article 213(2)(c) of the Directive 2009/138/EC,
- cases of application of Article 228 of Directive 2009/138/EC, divergences in supervisory practices and their impact, and issues related to the application of this article;
- how group supervisors take into account at group level, according to Article 242 of Directive 2009/138/EC, the capital add-ons imposed at the level of a solo related undertaking;
- the application *mutatis mutandis* of provisions applicable at solo level, as referred to in Articles 230, 232, 233(6), 243, 246(1), 254(2), 256, 257 and 308b(17) of Directive 2009/138/EC, and, where applicable, the uncertainties or divergences of supervisory practices related to those provisions;
- uncertainties or divergences of supervisory practices in the supervision of group solvency for insurance and reinsurance undertakings that are subsidiaries of an ultimate or intermediate insurance holding company or mixed financial holding company, as provided in Article 236 of Directive 2009/138/EC.

3.11 Freedom of establishment and freedom to provide services

EIOPA is asked to provide, *inter alia*, an assessment of:

- cases where groups transformed related undertakings into branches ("branching out") since the application of Directive 2009/138/EC and two years prior;
- if applicable, a lack of supervisory powers related to insurance activities conducted under freedom to provide services, or omissions of exercising such powers, including the risks of circumvention of prudential or market conduct requirements, of under-reserving, of misleading information in marketing material about compliance with capital requirements, and of lack of clarity about the identify of persons responsible for key functions;
- practices on the cooperation and the information exchange among national competent authorities to ensure proper supervision of freedom to provide services.