

Insurance Quarterly Legal and Regulatory Update

1 July 2024 - 30 September 2024



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1 SOLVENCY II

1.1 EIOPA publishes opinion on the supervision of captive insurers

On 2 July 2024, the European Insurance and Occupational Pensions Authority (**EIOPA**) published an opinion on the supervision of captive (re)insurance undertakings.¹ It also published an impact assessment for the opinion.

The aim of the opinion is to facilitate a risk-based and proportionate supervision of captive (re)insurance undertakings and to harmonise supervisory expectations in the topics considered. EIOPA is concerned that the business model of these firms creates the potential for regulatory and supervisory arbitrage arising from the need for specific supervisory expectations and the proportionate application of regulation.

The opinion sets out supervisory expectations concerning:

- Cash pooling arrangements and application of the prudent person principle (**PPP**). EIOPA considers issues including the implications of classifying an asset under the cash pooling arrangement as a loan or cash and firms' compliance with the PPP considering the portfolio as a whole. Firms should be able to provide at any time information about cash pool arrangements in sufficient detail to clearly identify the related asset classification and the legal basis of the arrangement.
- Governance. Among other things, national competent authorities (**NCA**s) should ensure that the administrative, management, supervisory board of a captive (re)insurance undertaking possesses the necessary seniority, qualifications, competency, skills and professional experience. EIOPA also sets out its expectations concerning the outsourcing of key functions by these firms and, in particular, the role of the individual designated within the firm with the overall responsibility for the outsourced key function.

The opinion relates to the interpretation of Articles 40, 41, 42, 44, 49, 132 and 245 of the Solvency II Directive² and of Articles 258, 260, 266, 268 to 274, 275a, 295(2), 308(3) and 309(2) of Commission Delegated Regulation (EU) 2015/35.

EIOPA consulted on a draft version of the opinion in October 2023. It has published a feedback statement³ on the comments received to the consultation, together with a table showing how individual comments from respondents have been resolved.⁴

The opinion can be viewed [here](#).

1.2 EIOPA consults on implementing new proportionality framework

On 2 August 2024, EIOPA published a consultation paper⁵ on implementing the new proportionality framework under the Solvency II Directive.

The consultation is in response to the European Commission's request for EIOPA's technical advice on the review of specific items in the Solvency II Delegated Regulation⁶.

The consultation covers:

¹ (EIOPA-BoS-24/176).

² (2009/138/EC).

³ (EIOPA-BoS-24/178).

⁴ (BoS-24-179).

⁵ (EIOPA-BoS-24-293).

⁶ Commission Delegated Regulation (EU) 2015/35 (Solvency II Delegated Regulation).

- Fine-tuning the methodology for classifying insurance undertakings as small and non-complex. According to EIOPA's assessment, the methodology for the classification of undertakings and groups as small and non-complex is clear and comprehensive. It does not believe that further specifications will be needed. EIOPA holds the view that any further specification will depend on the practical implementation of the framework at national level and it should be addressed in the transposition of amendments to the Solvency II Directive.
- The conditions for granting similar proportionality measures (that is, certain reduced requirements) to insurers that do not, by default, fall in the small and non-complex category. As set out in the consultation paper, EIOPA proposes to introduce a set of conditions with the objective of guiding the supervisory assessment on approving or withdrawing the approval to use the proportionality measures. Some of the conditions should be of a more general nature and aim to ensure that the nature, scale and complexity of undertakings' risk justify a proportionate application of a certain requirement. Other conditions should be more tailored to the type of proportionality measure that the undertaking intends to apply.

Comments can be made until 25 October 2024. After considering the feedback received, EIOPA will prepare its final advice, which it will submit to the Commission by the 31 January 2025 deadline.

The press release can be viewed [here](#) and the consultation paper can be viewed [here](#).

2 EIOPA

2.1 EIOPA amendment to facilitate cross-border cooperation between supervisors when (re)insurers relocate within the EU

On 1 July 2024, EIOPA supplemented its Decision of 10 June 2021 on collaboration between supervisory authorities with a new annex dedicated to supervisory cooperation for when a (re)insurance undertaking relocates within the EU. The annex intends to facilitate an effective transition when undertakings move their registered office within the Single Market (i.e. cross-border conversion), applying the provision of the so called 'Mobility Directive'.⁷

The supplement puts emphasis on active and early engagement between supervisors in the departure and destination countries. This proactive approach ensures that the relocating entity can continue to provide its services without interruption and under continuous, consistent and sound supervision. It promotes a structured transfer of supervisory information and knowledge regarding the relocating (re)insurance undertaking and aims to safeguard the interests of policyholders and beneficiaries throughout and after the transition.

EIOPA may provide supervisory authorities with technical assistance and expertise during the transition, particularly in complex cases or where specific guidance is required.

The original 2021 Decision can be viewed [here](#).

The annex to the Decision can be viewed [here](#) and the press release can be viewed [here](#).

2.2 EIOPA consults on capital requirements for insurers' direct exposures to CCPs

On 31 July 2024, EIOPA published a consultation paper on the standard formula capital requirements for insurers' direct exposures to qualifying central counterparties (**QCCPs**).

⁷ Directive (EU) 2019/2121.

The consultation paper responds to the European Commission's April 2024 request for technical advice on its review of the Solvency II Delegated Regulation.⁸

EIOPA notes that, so far, insurers in the European Economic Area (**EEA**) have only used central clearing facilities indirectly as clients (that is, through the intermediation of a clearing member) for their derivatives transactions. The Solvency II Directive⁹ includes a specific treatment for these indirect clearing arrangements, though there is no specific treatment for direct clearing. As a result, direct clearing would be treated as a bilateral exposure, resulting in higher capital requirements than indirect clearing.

EIOPA explains that clearing houses have evolved their access models. For example, under the "sponsored model", insurers can now become direct members of a CCP with a sponsor handling default fund contributions and default management obligations on their behalf. The sponsor is also a clearing member at the CCP, usually a credit institution. Several EEA insurers have been identified as using the sponsored model, particularly for repurchase transactions (**repos**).

EIOPA has assessed these developments together with the implications of different access models on insurers' risk exposures, liquidity needs and the complexity of their risk assessment calculations. It proposes the following three policy options:

- No change to the existing regime (that is, no recognition of the risk specificities of new access models and direct exposures).
- Extending the treatment of indirect exposures to direct exposures (that is, more risk sensitivity but without capturing the particularities of default fund contributions).
- Further aligning the treatment of default fund contributions with the Capital Requirements Regulation (**CRR**)¹⁰. This is EIOPA's preferred option as it also extends risks sensitivity to default fund payments.

Section 2.7 of the consultation paper sets out EIOPA's draft advice to the Commission. In it, EIOPA provides concrete and specific standard formula requirements for derivative exposures to QCCPs when insurers become clearing members.

Comments can be made on the proposals until 23 October 2024.

After considering the feedback received, EIOPA will prepare its final advice, to be submitted to the Commission by the 31 January 2025 deadline.

The press release can be viewed [here](#).

The consultation paper can be viewed [here](#).

3 CENTRAL BANK OF IRELAND

3.1 Guidance on Completing and Submitting (Re)Insurance Authorisation Applications

On 22 July 2024, the Central Bank of Ireland published a document providing guidance in relation to its requirements for obtaining authorisation as an insurance or reinsurance undertaking in Ireland.

⁸ Commission Delegated Regulation (EU) 2015/35.

⁹ 2009/138/EC.

¹⁰ 575/2013.

The Central Bank points to Regulations 12-26 of the European Union (Insurance and Reinsurance) Regulations 2015¹¹ which set out the authorisation provisions and principal information which must be provided as part of the authorisation application. These include:

- Applicant's legal structure;
- Applicant's ownership structure;
- Applicant's business plan (scheme of operations);
- Applicant's system of governance including key and critical functions, fitness and probity of key personnel, risk management and internal control.

These Regulations also set out the relevant authorisation checklists containing information requirements for the entity. These will differ depending on the nature of the proposal.

The Central Bank provides a summary of how the application and accompanying documentation is processed. Once the application is reviewed, the Central Bank issues comments advising the applicant of any further information or clarification(s) it requires. The expected timeline to authorisation once the application has been fully received is approximately three months but can take up to six months. The Central Bank sets out several factors which may slow down the processing of the application such as its quality and complexity, the time taken by the applicant to respond to comments raised, the quality of the responses and time taken by relevant third parties to respond to queries concerning the application. Once the applicant's capital has been introduced and all other pre-authorisation requirements are met, the applicant receives a Certificate of Authorisation as proof of formal authorisation.

When the application has been fully examined, reviewed and approved in principle, the successful applicant will receive confirmation of "authorisation in principle". This occurs prior to formal authorisation and the applicant is required to confirm that it will be in a position to comply with its conditions of authorisation within 21 days of the date of the authorisation in principle letter.

The guidance paper can be viewed [here](#).

4 MISCELLANEOUS

4.1 IAIS consults on operational resilience objectives

On 8 August 2024, the International Association of Insurance Supervisors (**IAIS**) published for consultation a [draft application paper](#) on operational resilience objectives. The consultation period will last until 11 October 2024.

The objectives strive to support supervisory authorities in their approach to supervising insurers' operational resilience. They do not impose new requirements but clarify the application of existing supervisory materials. They address:

- The relationship between operational resilience, governance and operational risk management.
- Key elements of an approach to operational resilience that encourages the effective and holistic management of insurers' people and processes.
- Objectives for insurance supervisors.

¹¹ (EU) 2015/35.

The objectives constitute the first phase of a two-part consultation. The second phase will set out relevant supervisory practices to assist in the development of a draft toolkit to support the objectives. This is expected to progress before the end of 2024 and the IAIS plans to consult on the toolkit in the first half of 2025. Once complete, the two phases of the work will be integrated into a single application paper.

The press release can be found [here](#).

4.2 Industry Letter - Consumer Protection Risk Management Frameworks

On 29 August 2024, the CBI issued a “Dear CEO” letter outlining that it had recently completed a targeted Consumer Protection Risk Assessment (**CPRA**) of insurance firms’ consumer protection risk management frameworks. The appropriateness of the risk management frameworks and how firms identify, manage and mitigate the risks posed to consumers formed the basis of the assessment.

The CBI emphasised the importance of having a strong focus on culture and effective management of consumer risk in creating a stable, well-governed and trusted insurance sector. It stated that all firms are required to review and consider the expectations, findings and notable practices set out in the letter. Firms should complete a gap analysis and put in place a plan to mature their frameworks and remedy any gaps or weaknesses. The CBI stated that plans should be presented to the Board no later than 30 November 2024 and required changes must be implemented before 30 June 2025.

The CBI also noted that it is currently in the process of updating the Consumer Protection Code to ensure firms are securing customers’ interests and delivering positive consumer outcomes.

The letter can be found [here](#).

4.3 European Union (Insurance Distribution) (Amendment) Regulations 2024 [S.I. No. 466 of 2024]

On 13 September 2024, the European Union (Insurance Distribution) (Amendment) Regulations 2024 were published in the Official Journal of the European Union. The primary purpose of the Regulations was to amend the European Union (Insurance Distribution) Regulations 2018 [S.I. No. 229 of 2018] in relation to the requirements for ring fenced professional indemnity insurance or other comparable guarantees against liability arising from professional negligence.

Regulation 2 of the 2024 Regulations amends Regulation 21(1) of the 2018 Regulations to reduce the minimum threshold value to signal liability arising from professional negligence from €1,564,610 to €1,300,380 per year for all claims and to reduce the maximum liability threshold from €2,315,610 to €1,924,560 per year for all claims. As stated in the 2018 Regulations, the only exception to these limits occurs if the insurance or comparable guarantee is already provided by an insurance undertaking, reinsurance undertaking or other undertaking, “on whose behalf the insurance or reinsurance intermediary is acting or for which the insurance or reinsurance intermediary is empowered to act or such undertaking has taken on full responsibility for the intermediary’s actions.”

The Regulations came into effect on 9 October 2024.

The Regulations can be found [here](#).

4.4 ESAs announce implementation of new EU systemic cyber incident co-ordination framework

On 17 July 2024, the ESAs announced plans to establish a framework to strengthen co-ordination in response to systemic cyber incidents, referred to as the EU systemic cyber incident co-ordination framework (**EU-SCICF**). This follows on from a recommendation from the European Systemic Risk Board (**ESRB**) in January 2022 that the ESAs should expand upon their role in DORA and develop the EU-SCICF on a gradual basis.

The new framework aims to facilitate an effective financial sector response to cyber incidents which pose a risk to financial stability.

Participating members will be alerted and will share information on potential systemic cyber incidents or threats. The EU-SCICF will serve as forum for relevant authorities to communicate and co-ordinate on any necessary action and on the tools required to counter the crisis from a macroprudential perspective.

Over the coming months, the ESAs will establish the following entities to implement the framework:

- **The EU-SCICF Secretariat:** supporting the functioning of the framework.
- **The EU-SCICF Forum:** working on testing and maturing the functioning of the framework.
- **The EU-SCICF Crisis Co-ordination:** facilitating the co-ordination of actions by the participating authorities when a crisis arises.

The ESAs will report any legal or operational hurdles encountered in the initial set up to the European Commission. Further development of the framework will depend on the findings in that report, other measures taken by the Commission and the availability of resources.

The ESA press release can be found [here](#).

A factsheet providing an overview of the EU-SCICF can be found [here](#).

4.5 **ESAs publish final report on RTS on subcontracting of critical or important functions**

On 26 July 2024, the Joint Committee of the ESAs published its final report on draft RTS to specify the elements a financial entity needs to determine and assess when sub-contracting ICT services supporting critical or important functions, as mandated by Article 30(5) of DORA.

The RTS addresses requirements for when the use of sub-contracted ICT services supporting critical or important functions (or material parts of such functions) by ICT third-party service providers is permitted by financial entities. The revised RTS helpfully clarifies that financial entities are expected to focus on subcontractors that “*effectively underpin*” the ICT service supporting critical or important functions.

The consultation paper can be found [here](#).

The EBA press release can be found [here](#).

The final report can be found [here](#).

4.6 **Senior Executive Accountability Regime (SEAR) - Systems “How To” Guide**

On 1 July 2024 the CBI published the “Senior Executive Accountability Regime (**SEAR**) Systems “How To” Guide”. The Guide aims to support regulated financial service providers (**RFSPs**) subject to the SEAR Regulations when submitting Statement of Responsibilities and Management Responsibilities Maps through the CBI portal or the European Central Bank (**ECB**) Information Management System (**IMAS**) Portal.

The Guide can be found [here](#).

4.7 EU-US Data Privacy Framework-FAQ Document for European Individuals

On 16 July 2024, the European Data Protection Board (**EDPB**) adopted a FAQ document for European individuals relating to the EU-US Data Privacy Framework (**EU-US DPF**) in place since July 2023. The EU-US DPF applies to any type of personal data transferred from the EEA to the US, including data processed for commercial or health purposes, and human resources data collected in the context of an employment relationship.

The FAQ document outlines how EU individuals benefit from the DPF. These include the right to be informed of such a transfer and its purpose, the right to access personal data and the right to correct or delete any incorrect or unlawfully handled data. A Data Privacy Framework List is provided on the US Department of Commerce website to check whether a US company has a valid certification under the EU-US DPF.

In cases where an individual believes that their rights under the EU-US DPF have been violated, or where a company in the US has violated its rights, the FAQs provide information about how to lodge a complaint with a national data protection authority.

The Data Privacy Framework List can be found [here](#).

The EU-US Data Privacy Framework Principles, issued by the US Department of Commerce, can be found [here](#).

The EDPB FAQ document can be found [here](#).

4.8 European Commission launches call for evidence on first review of EU-US Data Privacy Framework

On 9 August 2024, the European Commission launched a call for evidence seeking the views of stakeholders on any relevant aspect of the functioning of the EU-US Data Privacy Framework (**EU-US DPF**). Having launched in July 2023 with the aim of ensuring safe and trusted EU-US data flows, the EU-US DPF implemented the following changes:

- Introduction of new binding safeguards to address concerns raised by the European Court of Justice
- Limitation of access to EU data by US intelligence services to what is necessary and proportionate
- Establishment of a Data Protection Review Court (**DPRC**) for EU individuals.

Under Article 45(4) of the GDPR¹² the European Commission must produce a report assessing the effectiveness of the EU-US DPF one year after it has entered into force. This report is then submitted to the European Parliament and Council of the EU and made publicly available.

The call for evidence monitors the continued provision of adequate protection for the personal data of EU individuals transferred to the US.

The feedback window closed on 6 September 2024.

The Call for Evidence is available [here](#).

¹² (EU) 2016/679

Key contacts

If you have any questions in relation to the content of this update, to request copies of our most recent newsletters, briefings or articles, or if you wish to be included on our mailing list going forward, please contact any of the team members below or your usual contact in Dillon Eustace.

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