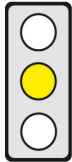


## KEY ISSUES

**Objective of the Regulation:** EIOPA will take on more responsibility for the supervision of insurance companies.

**Affected parties:** Insurance companies, EIOPA and national supervisory authorities (NSAs).



**Pro:** (1) The establishment of an independent Executive Board avoids regulatory arbitrage and facilitates the punishment of EU law infringements committed by the NSAs, as well as the effective resolution of disputes between them.

(2) It is legitimate for the EIOPA Executive Board to be able to examine internal models on its own initiative.

**Contra:** (1) The new, vaguely worded tasks of EIOPA in relation to “environmental and social factors” and consumer protection, increase the risk of over-regulation.

(2) EIOPA should only be permitted to develop guidelines where the Council and Parliament do not object.

(3) Rulings on settlement decisions relating to internal models should not be made by the Executive Board but by the EIOPA Council in which both the Executive Board and the NSAs are represented.

The most important passages in the text are indicated by a line in the margin.

## CONTENT

### Title

**Proposal COM(2017) 536** of 20 September 2017 for a **Regulation** amending Regulations (EU) No. 1093/2010 establishing the European Banking Authority (EBA); (EU) No. 1094/2010 establishing the **European Insurance and Occupational Pensions Authority (EIOPA)** and (EU) No. 1095/2010 establishing the European Securities and Markets Authority (ESMA)

### Brief Summary

#### ► Background

- This Regulation aims to amend the provisions on the three European Supervisory Authorities (ESAs). These are:
  - the European Insurance and Occupational Pensions Authority (EIOPA in Frankfurt; this cepPolicyBrief),
  - the European Banking Authority (EBA, currently in London, soon moving to Paris; see cepPolicyBrief), and
  - the European Securities and Markets Authority (ESMA, in Paris; cepPolicyBrief to follow).
- As EU agencies, these authorities are part of the EU System of Financial Supervision to which the European Central Bank (ECB) and the national supervisory authorities (NSAs) also belong. The ESAs have been operating since 2011.
- By way of their regulatory work, the ESAs help to maintain the stability and effectiveness of the financial system.

#### ► New tasks

- EIOPA is given the task of developing and maintaining an up-to-date “Union supervisory handbook” on the supervision of insurers (Art. 8 (1) (aa)).
- In future, when carrying out its tasks, EIOPA will also take account of (Art. 8 (1a) (c)):
  - environmental, social and governance related factors and
  - technological innovations.
- In future, in addition to protecting policyholders, EIOPA will also foster “consumer protection” and the protection of investors and pension scheme depositors (Art. 8 (1) (h)). This includes:
  - “in-depth thematic reviews of market conduct” in order to recognise problems, and work on “building a common understanding of market practices” (Art. 9 (1) (aa)),
  - developing “retail” risk indicators (Art. 9 (1) (ab)) and
  - developing common disclosure rules (Art. 9 (1) (d)).

#### ► Governance and decision making

- As before, the representatives of the NSAs on the Board of Supervisors decide by way of a qualified majority on regulatory and implementing standards (Art. 44 (1)).
- EIOPA will have an Executive Board (previously: Management Board) made up of a Chairperson and three now full-time members. Executive Board members act independently and in the interest of the EU as a whole. (Art. 45 (1) and (2) and Art. 46)

- The EU Council selects the Executive Board members from a list of qualified candidates that is drawn up by the Commission and approved by the European Parliament. The term of office is five years and can be renewed once by the Council on a proposal from the Commission. (Art. 45 (2) and (4), Art. 48 (2) and (4))
- The Executive Board (previously: Board of Supervisors) decides with a simple majority on dispute settlements, stress tests, violations of EU law by NSAs, the outsourcing of insurance activities to third countries, reviews of the NSAs, the EIOPA Strategic Supervisory Plan and the draft annual work programmes of the NSAs. Where votes are tied, the Chairperson decides. (Art. 45a (1) and Art. 47 (2) and (3))

► **Relationship between EIOPA and the national supervisory authorities (NSAs)**

**EIOPA “Strategic Supervisory Plan” and annual work programmes of the NSAs**

- EIOPA publishes a Strategic Supervisory Plan every three years. By identifying “priorities”, this aims to promote efficient and consistent supervision in line with EU law and to address the risks and vulnerabilities identified by EIOPA. The plan takes the form of a recommendation addressed to the national supervisory authorities. (Art. 29a (1))
- Every year, the NSAs each submit a draft annual work programme containing the objectives and priorities of their supervisory activities in the following year. Where EIOPA is of the opinion that a work programme does not meet the priorities contained in the Strategic Supervisory Plan, it will “recommend” changes. The affected NSA must take these into account. (Art. 29a (2) and (3))
- Every year, the NSAs each send a report to EIOPA on the implementation of the annual work programme. EIOPA provides the NSA with recommendations on how to remedy the “shortcomings in its activities”. (Art. 29a (4) and (5))

**Reviews of the national supervisory authorities by EIOPA**

- EIOPA will establish a review committee, exclusively composed of staff from EIOPA - i.e. not from the NSAs - to review “some or all” of the activities of the NSAs. Until now, a “comparative analysis” was required. As a new measure, the degree of independence of the authorities will be explicitly examined. (Art. 30 (1) and (2) (a))
- EIOPA publishes all review results. This no longer requires the consent of the NSAs. As before, it can “suggest” non-binding guidelines and recommendations and in future also follow-up measures by way of reports. (Art. 30 (3) and (4))
- Where the NSAs fail to take any follow-up measures, EIOPA issues a follow-up report (Art. 30 (3) para. 2).
- If EIOPA considers it necessary, it may, in an opinion, call on the Commission to further harmonise the rules applicable to financial institutions and supervisory authorities (Art. 30 (3a)).

**Internal models: Comments by EIOPA**

In future, EIOPA will contribute to “high-quality common supervisory standards and -practices” for internal models. Insurance companies use such models to calculate their solvency capital requirements. In future, either on its own initiative or at the request of an NSA, EIOPA will be able to comment on applications to the NSA, made by insurance companies, to use internal models. (Art. 21a)

**Powers of EIOPA to settle disputes between the NSAs**

- As before, at the request of an NSA, EIOPA can settle a dispute with another NSA (Art. 19).
- In future, EIOPA will be able to settle disputes on its own initiative (Art. 19 (1)),
  - as soon as it determines, “on the basis of objective criteria”, that a disagreement exists between competent authorities, even before the expiry of the specified time limit for reaching agreement,
  - as soon as NSAs fail to agree on a joint decision within a deadline specified under EU law,
  - two months after an NSA has unsuccessfully requested another authority to take certain action in order to comply with EU law.
- In particular, EIOPA will in future – on its own initiative and on request by an affected company – also be able to settle disputes involving NSA approvals of internal models for insurance companies that operate across borders (Art. 21a).
- EIOPA reaches its decisions by way of a simple majority in the Executive Board (previously: in the Board of Supervisors). The previously applicable blocking minority of four Member States representing 35% of the EU population will no longer apply. (Art. 44 (1))

**Colleges of Supervisors**

As before, EIOPA “promotes and monitors the efficient functioning” of the colleges of supervisors in which several NSAs work together to supervise insurance companies with cross-border operations. In future, EIOPA can, “where appropriate, lead” the colleges of supervisors. (Art. 21 (1))

► **Stress tests**

- In future, EIOPA will decide every year on whether it will carry out an EU-wide stress test and inform the European Parliament, Council and Commission of this (Art. 32 (2a)).
- EIOPA publishes the result of the stress test for every participating insurance company if it considers it “appropriate” to do so (Art. 32 (2a)).

► **EIOPA's tasks in relation to third countries (soon to include the United Kingdom)**

**Equivalence decisions on supervisory regimes in third countries**

- In future, EIOPA will assist the Commission, at its request, in preparing Commission decisions on the equivalence of regulatory and supervisory regimes in third countries (Art. 33 (2)).
- EIOPA will continuously monitor whether regulatory and supervisory practice in third countries continues to meet the criteria of the equivalence decisions. In this regard, it will take into account the “market relevance of the third countries concerned” and cooperate “where possible” with the authorities in the third countries on the basis of administrative arrangements. These two restrictions do not apply in the case of the EBA. (Art. 33 (2a))
- EIOPA will inform the Commission without delay about “developments” in third countries that are relevant for financial stability, “market integrity”, investor protection or the functioning of the internal market (Art. 33 (2b)).
- NSAs must inform EIOPA of any planned cooperation with regulatory authorities in third countries. EIOPA will develop non-binding models for this cooperation. (Art. 33 (2c))

**Supervision of the outsourcing or transfer of insurance activities to third countries**

- EIOPA will converge the supervision of national authorities regarding the delegation and outsourcing of insurance activities in third countries by way of “coordination” (Art. 31a (1)).
- Each NSA notifies EIOPA of their intention to authorise an insurance company that wants to outsource or delegate material activities, risks or key functions to third countries whilst also “benefiting” from the European passport, i.e. it wants to operate in several EU countries (Art. 31a (2)).
- EIOPA “informs” the NSA where the intended authorisation is not compatible with EU law or with EIOPA's guidelines, recommendations or opinions. EIOPA may issue a recommendation to the NSA; if the latter fails to comply with the recommendation, EIOPA may publish the recommendation. (Art. 31a (2) and (4))

► **Adoption and withdrawal of guidelines; financing EIOPA**

The provisions on EIOPA are the same as those applicable to the EBA (cf. cepPolicyBrief).

**Statement on Subsidiarity by the Commission**

The amendment of the EIOPA Regulation serves a “more consistent internal market”. That requires EU action.

**Policy Context**

In the spring of 2017, the Commission held a consultation on the European supervisory authorities.

**Legislative Procedure**

20 September 2017	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

**Options for Influencing the Political Process**

Directorates General:	DG Financial Stability, Financial Services and Capital Markets Union
Committees of the European Parliament:	Economic/Monetary Affairs (leading), Rapporteur: Burkhard Balz (EVP Group, D) and Pervenche Berès (S&D Group, FR)
Federal Ministries:	Federal Ministry of Finance
Committees of the German Bundestag:	Finance Committee
Decision-making mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

**Formalities**

Competence:	Art. 114 TFEU (Internal Market)
Type of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Procedure:	Art. 294 TFEU (ordinary legislative procedure)

**ASSESSMENT**

**Economic Impact Assessment**

**The new, vaguely worded tasks of EIOPA in relation to “environmental and social factors” and consumer protection, increase the risk of the – otherwise appropriate – regulatory activity of EIOPA leading to over-regulation.** The mandate formulated by the European legislator in the respective Directive or Regulation should be the decisive factor for the design of the legally binding technical standards of EIOPA (“Level 2”) and not vague “environmental and social” factors. EIOPA's consumer protection mandate, in particular, may lead to distortions of EIOPA's - de jure non-binding but de facto binding - guidelines (“Level 3”), if a harmonisation of the “common understanding of market practices” is created which was not in fact decreed by the legislator.

Overall, EIOPA's competence to adopt guidelines should be subject to tighter political constraints. It is unlikely that the planned supervision by the Commission - as executive authority interested in integration - will be sufficient. **EIOPA should therefore only be permitted to draft guidelines where the Council and the Parliament do not object** (barrier to exercising the mandate, cf. [cepStudy](#)).

The Single Supervision Mechanism (SSM), as the first pillar of the banking union, introduces into the eurozone, uniform supervision by the ECB of major and systemically relevant banks. Central supervision of similarly large insurance companies does not currently exist. Due to the differences between the business models of banks and insurance companies, the danger of contagion and risks for the stability of financial markets are likely to be much lower than those applicable to banks.

**EU-wide coordinated supervision of insurance companies that operate across borders is, however, urgently required. The planned establishment of an independent Executive Board** is therefore appropriate. It **avoids regulatory arbitrage and** distortions of competition and reduces the influence of national interests, represented by the NSAs, on the work of EIOPA. In addition, it **facilitates the punishment of EU law infringements by NSAs as well as the effective resolution of disputes between them.**

The powers proposed for the Executive Board allow for the convergence of national supervisory practices which has not so far been achievable due to the mutual consideration shown to each other by the NSAs in the Board of Supervisors. That applies not only to supervisory issues where insurance services are offered across borders in the context of the free movement of services - i.e. without an establishment in the host country and with a correspondingly limited capacity for intervention on the part of the NSAs; it also applies, in particular, to internal models. Consistent management of these models is essential for their credibility, for consumer confidence and for the avoidance of distortions of competition. On the other hand, EIOPA decisions about internal models go to the heart of NSA powers.

As proposed, it is therefore **legitimate**, in the case of conflicts between NSAs, **for the EIOPA Executive Board to be able to examine internal models on its own initiative. The final settlement ruling should, however, be made** not by the Executive Board alone but **by the EIOPA Council, in which both the Executive Board and the NSAs are represented.** Equally, the EIOPA Council and not the Executive Board should decide on the Strategic Supervisory Plan, stress tests and supervision of the outsourcing of insurance activities (see [cepPolicyBrief](#) on EBA).

## Legal Assessment

### Legislative Competency

The measures support the functioning of the internal market for financial services. The relevant basis of legislative competency is therefore Art. 114 TFEU, as is also confirmed by the CJEU (Case C-270/12, para. 102 et seq).

### Subsidiarity.

Unproblematic.

### Proportionality with respect to Member States

**The fact that EIOPA – rather than the NSAs – examines the equivalence of regulatory and supervisory regimes in third countries** and thus carries out an important preparatory function on behalf of the Commission, **is appropriate.** Allowing the NSAs to carry out this work, would quickly give rise to a suspicion that they only represent the interests of their local financial centres. **However, the NSAs should continue to be able to work together - bilaterally - with supervisory authorities in third countries** because it may be relevant to their supervisory responsibilities. EIOPA's activities should not therefore be so detailed that the responsible supervisory authorities are no longer capable of effecting reasonable supervision of insurance groups with operations in third countries.

### Compatibility with EU Law in other Respects

Unproblematic.

### Impact on German Law

The Regulation has direct application (Art. 288 TFEU) so that no national transposition measures are necessary.

## Conclusion

The new, vaguely worded tasks of EIOPA in relation to “environmental and social factors” and consumer protection, increase the risk of over-regulation. EIOPA should only be permitted to develop guidelines where the Council and Parliament do not object. EU-wide coordinated supervision of insurance companies that operate across borders is urgent. The establishment of an independent Executive Board avoids regulatory arbitrage and facilitates the punishment of EU law infringements, committed by NSAs, as well as the effective resolution of disputes between them. It is legitimate for the EIOPA Executive Board to be able to examine internal models on its own initiative. The final settlement ruling should, however, be made by an EIOPA Council in which both the Executive Board and the NSAs are represented. The fact that EIOPA – rather than the NSAs – examines the equivalence of regulatory and supervisory regimes in third countries, is appropriate. However, the NSAs should continue to be able to work together - bilaterally - with supervisory authorities in third countries.