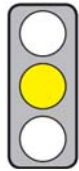


MAIN ISSUES

Objective of the Directive: To substantiate and amend the decision-making powers of the EU supervisory authorities for insurance companies (EIOPA) and securities (ESMA) and of the EU Commission.

Parties affected: Insurance companies, security issuers.



Pros: The Directive provides clarity as to which decisions may be taken by the EU supervisory authorities ESMA and EIOPA and which decisions the Commission may take.

Cons: (1) In terms of the Solvency II Directive, the Commission's powers to adopt delegated acts go too far; in fact, they weaken the EIOPA.

(2) Essential regulatory issues of the Solvency II Directive should be subject to the European Parliament and the Council only, who should substantiate the Directive under the ordinary legislative procedure. Granting the Commission the power to decide on how to shape transitional provisions through delegated acts is worrying.

CONTENT

Title

Proposal COM(2011) 8 of 19 January 2010 **for a Directive** of the European Parliament and of the Council amending Directives 2003/71/EC ("Prospectus") and 2009/138/EC ("Solvency II") **in respect of the powers of the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority**

Brief Summary

Note: Quotations refer to proposed amendments of Directive 2009/138/EC ("Solvency II") unless otherwise indicated.

► Background and content of the Proposal

- On 1 January 2011, the new European supervisory authorities for banks (EBA), insurance companies (EIOPA) and securities (ESMA) took up their work. Their core tasks include the establishment of a consistent European Rulebook through the development of "technical standards" and the arbitration of conflicts between national supervisory authorities (see [CEP Policy Brief](#)).
- Now the Commission wishes to introduce a number of amendments (therefore: "Omnibus"), in particular:
 - to extend the powers of the EU supervisory authorities to develop technical standards to include further issues of the Prospectus Directive (2003/71/EC, see [CEP Policy Brief](#)) and the Solvency II Directive (2009/138/EC, see [CEP Policy Brief](#)); some of the powers were already conferred through the Omnibus I Directive (2010/78/EU) (see: [CEP Overview](#), in German);
 - to adapt to the Lisbon Treaty the powers conferred upon the Commission under the Prospectus and Solvency II Directive – at present, these powers are still based on the legal position of the Treaty of Nice – in that the Commission retains the right to adopt delegated legal acts pursuant to Art. 290 TFEU or implementing acts pursuant to Art. 291 TFEU, rather than implementing measures according to the regulatory procedure with or without scrutiny;
 - to substantiate the arbitration competence of EU supervisory authorities; and
 - to introduce transitional periods for the Solvency II Directive.
- Delegated acts of the Commission (Art. 290 TFEU) are subject to the supervision of the EU Parliament and the Council, while implementing acts of the Commission (Art. 291 TFEU) are subject to the scrutiny of national experts through advisory or examination procedures.

► Powers of ESMA and EIOPA to develop technical standards

- According to the Prospectus Directive, in future the ESMA may, in addition to its existing powers, develop technical regulatory standards in the form of delegated acts (Art. 290 TFEU) concerning the following questions:
 - to which further, simultaneously published documents the prospectus must refer (Art. 11 (3) of the Prospectus Directive 2003/71/EC),
 - according to which procedure prospectuses are approved and under which conditions the approval periods could be adjusted (Art. 13 (7) of the Prospectus Directive 2003/71/EC),
 - how to apply the provisions regarding the obligation to publish prospectuses (Art. 14 (8) of the Prospectus Directive 2003/71/EC),
 - how to apply the provisions on the distribution of advertisements in which the intention to offer securities to the public or the authorization to trade them on a regulated market are announced (Art. 15 (7) of the Prospectus Directive 2003/71/EC),
 - how to ensure that verbal or written information from the issuer or offerer regarding the public offer is in line with the information in the prospectus (Art. 15 (7) of the Prospectus Directive (2003/71/EC).

- According to the Solvency II Directive, in future the EIOPA may develop technical implementing standards in the form of implementing acts (Art. 291 TFEU) concerning (for a complete list see [CEP Overview](#), II.1, in German):
 - how to shape the resolution process relating to the setting, calculation and removal of capital add-ons for insurance companies (Art. 37 (7)),
 - how to integrate the “best estimate” of future cash flows into the calculation of technical provisions (Art. 86 lit. b),
 - how to shape the approval procedure for special purpose vehicles (Art. 211 (4)).
- The Commission adopts these technical standards according to the formal legal basis laid down in Art. 290 and/or Art. 291 TFEU. However, it can only amend the proposals made by ESMA and EIOPA after intensive consultation with ESMA and EIOPA. Similarly, in accordance with Art. 290 and/or 291 TFEU the Commission may adopt their own delegated acts if the basic act (either Prospectus or Solvency II Directives) empowers them to do so.

► **Commission’s powers to adopt delegated acts**

- The Commission wishes to reshape most of the legislative powers granted to it by the Solvency II Directive under the Treaty of Nice in powers to adopt delegated acts (Art. 290 TFEU) (for a complete list of powers see [CEP Overview](#), II.2, in German).
- The European Parliament and Council of Ministers may raise objections to delegated acts within a period of two (Solvency II Directive) or three months (Prospectus Directive); extensions of either one or three months are possible (Art. 301 c and Art. 24c of the Prospectus Directive 2003/71/EC)
- The Commission is calling for new powers to adopt delegated acts with regard to:
 - setting and removing capital add-ons (Art. 37 (6)),
 - the methodology and formulas to be applied by the EIOPA for calculating the risk-free interest-rate term structure and illiquidity premiums (Art. 86 (1)),
 - amendments of internal risk measuring models (Art. 114 (1)),
 - sanctions against the breach of investment obligations relating to securitization (Art. 135),
 - the procedure for granting supervisory approval of ancillary own funds and of special purpose vehicles (Art. 92 (1) and Art. 211 (2)),
 - the criteria for the qualification of external rating agencies and for the equity index serving as a reference tool to calculate the equity risk (Art. 111),
 - the procedures EIOPA must apply in order to determine “an exceptional fall” in financial markets (Art. 143 Abs. 1 und 2),
 - transitional periods for third countries whose solvency regimes are not equal to those of the EU (Art. 172, Art. 227 (7), Art. 260 (5)).
- The Commission’s powers, as stipulated in the Solvency II Directive, to recognize solvency regimes in third countries as being on a par with the EU systems should remain subject to the “regulatory procedure without scrutiny” (for complete list, see [CEP Overview](#), II.3, in German).

► **Specific arbitration powers for EIOPA**

- Within the scope of the Solvency II Directive, EIOPA may bindingly arbitrate the following conflicts between national supervisory authorities:
 - The supervisory authority of a Member State, in which an insurance company or any of their service providers operate, rejects a cooperation in relation to an on-site verification by the supervisory authority of the insurance company’s home Member State (Art. 33 (3) and Art. 38 (2)).
 - The supervisory authority in the home Member State of a (re-)insurance company fails to apply measures that are sufficient to stop the unlawful behaviour of a branch of such (re-)insurance company in another Member State (Art. 155 (3) and Art. 158 (2)).
 - No agreement on the approval of an intra-group risk measuring model of an insurance group (Art. 231 (6)).
 - No agreement between the group supervisor and other supervisory authorities on additional capital requirements for subsidiaries of insurance companies or on recovery plans for those (Art. 237 (6), Art. 238 (5), Art. 239 (4)).
 - No agreement on the question as to who should take the role of the group supervisor (Art. 247 (6)).
 - No agreement on how the cooperation within the college of the supervisory authorities or between group supervisors and national supervisory authorities should be shaped (Art. 248 (2) and Art. 249 (1a)).
 - A supervisory authority rejects the request of another supervisory authority to carry out a verification of information on an insurance company or rejects the request that such a supervisory authority participates in the verification (Art. 255 (2)).
- EIOPA members take arbitration decisions by means of a simple majority of votes. For decisions regarding group supervisors, however, a minority of four Member States suffices to halt a decision (Art. 19 (3) in conjunction with Art. 44 (1.3) and (1.4) of the EIOPA Regulation No. 1094/2010).

► **Transitional provisions for the Solvency II Directive**

- The Commission is to be entitled to suspend certain provisions of the Solvency II Directive for all insurance companies for a limited period of time. This is to be carried out on the basis of delegated acts pursuant to Art. 290 TFEU, which will also determine the concrete duration of the suspension. (Art. 308a)

- Until 2015 at the latest, the Commission may release insurance companies fully or partially from:
 - introducing and using system of governance for risk management and internal controls or revisions (Art. 41 (1) and (3));
 - publishing reports on solvency and the financial situation (Art. 51 (1)).
 - The Commission may suspend the obligation of insurance companies to establish reporting systems for information to be conveyed to supervisory authorities until the end of 2015 or 2017 at the latest (contradictory Art. 308a (1) and Art. 308b lit (a), Art. 35 (5)).
 - Until the end of 2022 at the latest, the Commission may (Art. 308b)
 - reduce the amount of own-funds to be retained and allow for longer time intervals between the calculation of said amount. For this, a “transitional Solvency Capital Requirement” will be developed, which will prescribe that the own-fund items of an insurance company must not be lower than half of the sum consisting of the minimum capital requirement and the own-fund item requirement prescribed in the Directive (Art. 100, Art. 101 (3), Art. 102 and Art. 104);
 - determine the necessity and amount of capital add-ons in accordance with the underlying “transitional Solvency Capital Requirement” (instead of the Solvency II Directive) (Art. 37 (1) and 2);
 - fully or partially release insurance companies from the obligation to mark assets, liabilities and reserves to market; instead the Commission wishes to propose other “methods and assumptions” (Art. 75 (1) and Art. 76 (2), (3) and (5));
 - ease the provisions on the classification of own-fund items into classes (tiers) (Art. 94);
 - reduce the amount of own-fund items to be retained by insurance companies which are subsidiaries of an insurance holding or which hold shares in other insurance companies (Art. 218 (2-3)).
 - The provisions of the Solvency II Directive will be applied as of 1 January 2013.
- **Publication of the risk-free interest-rate term structure by EIOPA**
EIOPA determines and publishes at least once a quarter the risk-free interest-rate term structure to be used to calculate the necessary reserves (Art. 77a).

Changes to the Status Quo

- Originally, it was the “regulatory procedure with scrutiny” laid down in the Treaty of Nice that applied to the above-mentioned areas of the Prospectus Directive, for which in future ESMA will develop technical standards. The Amendment Directive 2010/73/EU provided that the Commission could adopt delegated acts concerning these issues in compliance with Art. 290 TFEU. However, although in so doing it was subjected to the supervision of the Council of Ministers and the European Parliament, ESMA was not involved. This gap is now to be closed.
- EIOPA may develop technical standards within the scope of the Solvency II Directive.
- The Commission’s powers laid down in the Prospectus Directive and Solvency II Directive to adopt implementing measures are being converted into powers to adopt delegated acts (Art. 290 TFEU).
- To date, the Commission has decided on the risk-free interest rate structure; in future, the EIOPA will do this.
- To date, the group supervisor has decided in conflicts between national supervisory authorities; in future, the EIOPA will be in charge of it.
- In future, the Commission may ease or even suspend certain provisions of the Solvency II Directive by virtue of delegated acts.

Statement on Subsidiarity by the Commission

The Commission does not address the issue of subsidiarity.

Policy Context

It is becoming clearer how the abundance of institutional amendments affects the decision process in respect of the European financial market regulation. As well as substituting implementing measures (see [CEP Comment](#) and [CEP Policy Brief](#)) with delegated acts (Art. 290 TFEU) and implementing acts (Art. 291 TFEU), the “Declaration 39” of the Commission on the Article 290 TFEU must also be taken into account, in which it agrees to continue applying the Lamfalussy procedure to delegated acts and – contrary to the provisions of Art. 290 – to continue to involve representatives of Member States in the decision-making process.

[Regulation \(EU\) No. 182/2011](#) on Art. 291 TFEU which entered into force on 1 March 2011, and the planned agreement between the European Parliament, Council of Ministers and the Commission on how to shape Article 290 (“Common Understanding”) – together with the Regulations on EBA, EIOPA and ESMA – shed light on the degree to which the Parliament and the Council wish to exercise controlling powers. It is important to point out the Commission’s limited possibilities to amend technical standards of the supervisory authorities as well as the establishment of the advisory and examination procedure for the adoption of implementing acts. The amendments to the Solvency II Directive must be seen against the background of the controversial dispute on the appropriateness of individual measures of the Directive.

Legislative Procedure

19 January 2011	Adoption by the Commission
Open	Adoption by the EU Parliament and Council, publication, entry into force

Options for Influencing the Political Process

Leading Directorate General:	DG Internal Market and Services
Committees of the EU-Parliament:	Economic Affairs, rapporteur Burkhard Balz (EPP-Group, D)
Committees of the German Bundestag:	N.N.
Decision mode in the Council:	Qualified majority (approval by a majority of Member States and at least 255 out of 345 votes; Germany: 29 votes)

Formalities

Legal competence:	Art. 114 TFEU (Internal Market; ex-Art. 95 TEC)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure; ex-Art. 251 TEC)

ASSESSMENT

Economic Impact Assessment

Omnibus II – like the Omnibus I Directive (2010/78/EU; see [CEP Overview](#), in German) – serves to substantiate the powers of the new EU supervisory authorities. This holds particularly true for **the legally binding technical standards**. They **help reduce transaction costs and improve the quality of supervision**.

However, the proposals made by the Commission give a mixed picture. **The amendments to the Prospectus Directive rightly strengthen the supervisory authority ESMA**, since it assumes several of the powers which have hitherto been subject to the Commission and can develop technical standards in future. However, the amendments to the Solvency II Directive are especially problematic: on the one hand, important powers remain with the Commission, enabling it to adopt delegated acts to a considerable degree and without the participation of EIOPA. Although the **EIOPA** may subsequently specify the Commission's decisions through technical implementation standards, it **is clearly restricted by the Commission's delegated acts**. On the other hand, the Commission is to receive essential new powers for the adoption of delegated acts – e.g. for transitional provisions and a “transitional Solvency Capital Requirement” – which hitherto have been in possession of the legislator. **Essential provisions of the Solvency II Directive, however, are to remain subject to the European Parliament and the Council, which should substantiate the Directive in the ordinary legislative procedure.**

In addition, **the short objection periods of the Parliament and the Council against the Commission's delegated acts** – maximum of three months where the Solvency II Directive is affected – are not acceptable under democratic criteria, for this is too short a period for an effective control of the Commission. As is the case for the Prospectus Directive, the period **should be two months (extendable by two further months)** as proposed by the “Common Understanding”.

Consistent is the fact that in future EIOPA will replace the Commission in calculating the risk-free interest rate term structure for the reserves to be retained by insurance companies.

The arbitration powers of EIOPA relating to group supervisors may well prove ineffective, as a majority of only four Member States suffices to reject a binding arbitration.

Even though the idea of the Solvency II Directive (measuring risks and backing them by retained own-fund items) is in principle right, the Directive may motivate insurance companies to sudden changes in their investment behaviour, thus leading to disruptions which transitional provisions may help to prevent. If and how the individual provisions of the Solvency II Directive are to be adjusted should depend on the results of the latest impact assessment (QIS 5).

Legal Assessment

Legislative Competence

The Commission can base the substantiation of the Prospectus Directive and the Solvency II Directive on Art. 114 TFEU.

Subsidiarity

Unproblematic.

Proportionality

Unproblematic.

Compatibility with EU Law

The Commission's power to determine alone, by virtue of delegated acts (Art. 290 TFEU), the concrete duration of exceptions and **transitional provisions of the Solvency II Directive**, or a „transitional Solvency Capital Requirement“, does not formally infringe Art. 290 TFEU; however, **due to the considerable impact** of such decisions it does **go too far**. The Commission should be at least obliged to consult EIOPA in advance and to convey their opinion statement to the European Parliament and to the Council.

Conclusion

The new powers conferred upon ESMA and EIOPA to develop technical standards are appropriate. The Solvency II Directive should be substantiated within the ordinary legislative procedure. Before stipulating transitional provisions, the Commission should consult EIOPA.