



EIOPA REGULAR USE  
EIOPA-BoS-18-279

## OPINION OF EIOPA'S MEDIATION PANEL

### Background

- 1.1 EIOPA received a request from the Autorité de contrôle prudentiel et de résolution (**ACPR**) on 31 May 2017 for a non-binding mediation under Article 31 of Regulation (EU) No 1094/2010<sup>1</sup>. The disagreement at stake concerns the determination of the correct insurance class for the insurance policy known as "statutory risks". In its request, ACPR invited the Central Bank of Ireland (**CBI**), the National Bank of Belgium (**NBB**) and the Gibraltar Financial Services Commission (**GFSC**) to the mediation given that insurance undertakings from their jurisdictions offer this policy on a freedom to provide services basis in France.
- 1.2 While the ACPR is of the view that based on the original risks the "statutory risks" insurance policy should fall under non-life classes 1 (accident) and 2 (sickness) of Annex I of Directive 2009/138/EC<sup>2</sup> (**Solvency II Directive**) and under life classes I (life insurance) and II (marriage, birth assurance) of Annex II thereof, the CBI argues that this product can be within class 16 (miscellaneous financial loss) of Annex I.

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<sup>1</sup> 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), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48)

<sup>2</sup> Directive 2009/138/EC of 25 November 2009 of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1)

## **“Statutory risks” - product description**

- 1.3 Local civil servants do not fall under the general social security scheme in France but benefit from a special social security scheme paid by the employer, as provided by their status.
- 1.4 There is an obligation for local authorities and for some French regional public institutions to pay civil servants in active employment cash benefits to maintain their salaries in case of sickness, maternity, work incapacity or disability and to pay death benefits to their beneficiaries.
- 1.5 The local authority may choose to provide these benefits on its own or buy an insurance coverage, a “statutory risks” policy. In this latter case the policyholder is the contracting local authority and the underlying risks include sickness, maternity, incapacity or disability and death.

## **The mediation proceedings**

- 1.6 EIOPA’s Mediation Panel’s competence is based on Article 31(c) of Regulation (EU) No 1094/2010 which sets forth that EIOPA shall carry out non-binding mediation upon a request from a competent authority. The rules of the mediation proceedings have been laid down in the Decision of the Board of Supervisors concerning the Rules of procedure of the Mediation Panel (EIOPA-BoS-12-032) (**Rules of Procedure**)<sup>3</sup>.
- 1.7 The Mediation Panel invited the parties on 15 June 2017 to express their views and to react to ACPR’s request.
- 1.8 The **NBB** advised the Mediation Panel on 15 June 2017 that the Belgian insurance undertaking concerned had already asked for an extension of its authorisation to classes 1 and 2 to sell “statutory risks” policies, while another company from the same group has already the authorisation for class 16. The NBB declared that whatever the position of the Mediation Panel had, they would comply with it.
- 1.9 The **GFSC** confirmed on 10 July 2017 that the Gibraltar insurance undertaking concerned has an authorisation for classes 1 and 2 and has accounted for “statutory risk” insurance under classes 1 and 2. In their view authorisation for class I (life insurance) is not necessary since, based on Article 16 of the Solvency II Directive, the payment of death benefits is ancillary to classes 1 and 2 in the case deriving from an accident or occupational disease, taking into account that this risk is covered for the local authority and not for the official.
- 1.10 In its submission of 14 July 2017 the **CBI** considers that it is appropriate to allow Irish insurers to provide this insurance policy under class 16. In the lack of specific rules for classification of insurance policies in Union law, they classified the insurance by reference to the terms of the policy including,

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<sup>3</sup> [Rules of Procedure of the Mediation Panel](#)

among other things, the identity of the policyholder/beneficiary. Furthermore, the CBI noted that this classification does not breach any provision of French law based on the advice from a French counsel. Lastly, the CBI underlined that the provisioning to be applied to the risks undertaken by the insurers is not dependent on the classification applied to the business undertaken.

- 1.11 In its reaction to the CBI's submission dated 8 August 2017, the **ACPR** acknowledged that the Solvency II Directive does not prescribe any rules for classification of insurance products. On the other hand they called for harmonisation of the interpretation of classes to allow proper mutual recognition of authorisations. They do not share the GFSC's view on the lack of need for authorisation of life insurance since as they argue the death risk is not always consecutive to accident and health insurance triggers, i.e. it can be the consequence of an unrelated event. Moreover, for the Mediation Panel's query the ACPR confirmed that classification of insurance products has little or no impact on provisioning and the capital requirements under the Solvency II Directive.
- 1.12 The Mediation Panel invited the parties for a settlement meeting on 28 September 2017 in Frankfurt am Main. The ACPR and the CBI attended the meeting and presented their views and arguments to the Mediation Panel. Based on this discussion the Mediation Panel prepared a memorandum, dated 16 October 2017, with a view to providing the basis of a settlement. The CBI did not challenge the conclusions therein, while the ACPR did not agree with all the conclusions.
- 1.13 With regard to the lack of settlement between the parties the Mediation Panel decided to propose this opinion for adoption by the Board of Supervisors in accordance with Article 7(3) of the Rules of Procedure.
- 1.14 In line with Article 7(5) of the Rules of Procedure the Mediation Panel informed the parties of its intention to propose an opinion and provided them the opportunity to express their views on the draft opinion.
- 1.15 In its response, the ACPR confirms that they generally concur with the reasoning and the conclusion reached, i.e. classes 1 and 2 are appropriate for the "statutory risks" policy as long as these contracts do not include insurance coverage for death. In addition, they note that as long as these contracts also cover death, which appears to be often the case, insurance undertakings should be authorised in life class I of Annex II. Consequently, undertakings only authorised in classes 1 and 2 of Annex I cannot provide insurance on "statutory risks" if contracts include death coverage.
- 1.16 In its response, the CBI welcomes the views of the Mediation Panel, however, the CBI would like to stress that it is its view that the business specified above may be covered under different classes of business depending on the terms of the contract. For example, if the local authority is the policyholder, the beneficiary and also the insured party, the CBI believes that class 16 is an appropriate class of business. There is no guidance in the Solvency II Directive or under EU law on the appropriate

classification of insurance policies. Therefore, it is possible for a policy to have features that may relate to multiple classes under the Solvency II Directive. The CBI is also of the view that there is no connection between the classes of business and provisioning. Provisions need to be established on the basis of the risks faced by the undertaking irrespective of the classes of business involved. However, the CBI acknowledges that the ACPR is entitled to make a supervisory judgement in respect of the classification of the "statutory risks" policy.

Lastly, the CBI added that in their approach, an authorisation under class 16, no additional authorisation for life insurance activity would be required, because the policy reimburses the employer under a range of situations, rather than providing disability, sickness, maternity or death cover.

## Analysis

- 1.17 Firstly, it must be acknowledged that the Solvency II Directive does not prescribe explicit rules for the determination of insurance classes. The appropriate classification is reviewed and considered solely by the home supervisory authority during the authorisation process. These conclusions were acknowledged by all parties.
- 1.18 Secondly, the classification of the insurance products also does not have an impact in terms of the Solvency II provisioning and capital requirements as these are based on the underlying risk drivers rather than on the legal terms of the insurance policy. As far as the minimum capital requirement absolute floors are concerned under Article 129 of the Solvency II Directive, the classification may have an immaterial impact depending on the transposition. The parties also acknowledged these conclusions.
- 1.19 Commission Delegated Regulation (EU) 2015/35<sup>4</sup> ("**Delegated Regulation**") laid down some principles confirming the above conclusion.
- 1.20 Recital 24 of the Delegated Regulation provides that "*the segmentation of insurance and reinsurance obligations into lines of business and homogeneous risk groups should reflect the nature of the risks underlying the obligation. The nature of the underlying risks may justify segmentation which differs from the allocation of insurance activities to life insurance activities and non-life insurance activities, from the classes of non-life insurance set out in Annex I of Directive 2009/138/EC and from the classes of life insurance set out in Annex II of Directive 2009/138/EC*".
- 1.21 Article 55 of the Delegated Regulation declares that "*the assignment of an insurance or reinsurance obligation to a line of business shall reflect the*

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<sup>4</sup> Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 12, 17.01.2015, p. 1)

*nature of the risks relating to the obligation. The legal form of the obligation shall not necessarily be determinative of the nature of the risk”.*

- 1.22 Thirdly, the characteristics of risks require from insurance undertakings different capacities in regards for example to resources and qualifications, pricing expertise, risk management, administrative services and organisation. Undermining the importance of the system of governance may lead eventually to underestimation of risks.
- 1.23 This risk is especially relevant in the case of cross-border activities namely for freedom to provide services where the notification does not include the scheme of operations with information on organisational aspects.
- 1.24 Some differences exist between supervisory authorities on how they challenge authorisation and notification information received from the undertakings.
- 1.25 Against this background, one may argue that having more convergence in terms of the interpretation of classes could eventually prevent some issues arising out of passporting.
- 1.26 The “statutory risk” insurance policy aims at covering the maintenance of the civil servants’ salary in case of sickness, maternity, work incapacity or disability, and the payment of death benefits to the civil servant’s beneficiaries. The risks relate to events that occur to and directly affect the civil servant, although the civil servant is not the policyholder.
- 1.27 This insurance product shows similarities with workers’ compensation schemes. Looking at workers’ compensation lines of business (e.g. in Portugal) the policyholder is the employer and the beneficiary is the employee, since employers are legally liable for the restoration of consequences from work accidents suffered by their employees. The policyholder of the Irish insurance contract is also the employer, although the employees have no legal rights under the contract and the employer has the same obligations to the employees irrespective of whether or not the employer has taken out an insurance contract.
- 1.28 Annex I of the Solvency II Directive clearly states that class 1 “Accident” includes industrial injury and occupational diseases. An approach that classifies the “statutory risks” policies as class 1 would be consistent with classifying workers’ compensation policies under the same class. The latter is the established practice adopted in a number of countries.
- 1.29 Lastly, it must be mentioned that the ACPR underlined that the death cover cannot be regarded as an ancillary risk in the meaning of Article 16 of the Solvency II Directive, thus authorisation for life insurance is necessary to provide this insurance coverage.
- 1.30 This interpretation is in accordance with Article 16 of the Solvency II Directive, which only allows for the recognition of ancillary risks for non-life

insurance classes. This provision cannot be a legal basis for a non-life insurance undertaking to pursue life insurance activity. Pursuant to Article 73(1) of the Solvency II Directive insurance undertakings authorised to pursue non-life insurance activities in classes 1 and 2 cannot provide "statutory risk" insurance if the insurance policy include life insurance risks such as death coverage. This is without prejudice to the derogation laid down in paragraph 2)(b) which provides the option for the Member States to authorise non-life insurance undertakings to pursue life insurance activity if they have authorisation solely for the non-life classes 1 and 2.

## **Conclusions**

1.31 Based on the above the Mediation Panel is of the opinion that:

### *Classification*

- i) it is the sole responsibility of the home authority to verify in the authorisation process the classification of insurance policies and if there is indication in the scheme of operation for cross-border business due consideration should be given to the supervisory guidance of the host authority which should be checked and obtained proactively by the home authority;
- ii) on the request of the home authority the host authority should provide the home authority with all the necessary information during the authorisation process;

### *Proposal from the Mediation Panel*

- iii) in a specific case, different classifications of an insurance policy can result depending on the relative weight assigned to the substance of the policy against its legal form. The aim of the mediation process is to promote a consistent Union approach. In line with the risk-based spirit of Solvency II, supported by the principle of substance over form used in several places within the Delegated Regulation, the Mediation Panel's view is that classification should reflect the nature of risk of the given insurance policy rather than its actual legal form. Accordingly, the Mediation Panel supports on balance the classification of "statutory risk" insurance policies in classes 1 and 2. This approach should be implemented for new authorisations;

If the insurance policy contains death or any other life coverage, an authorisation for life insurance activity is also required according to Article 73(1) of the Solvency II Directive. This article also includes a derogation which provides that a Member State may allow undertakings to obtain authorisation for life insurance activity if they have authorisation solely for the risks listed in non-life classes 1 and 2;

### *On-going supervision*

- iv) the insurance undertaking should be required to have relevant expertise to ensure appropriate pricing, adequate provisioning and claims

management practices relevant to the risks to be covered and to the target market in the host Member State;

- v) regardless of classification but focusing on underlying risks, risk-based supervision needs to be ensured on a going concern basis and due consideration should be given to the supervisory guidance of the host authority;
  - vi) the home and the host authority should cooperate on the basis of the Decision of the Board of Supervisors on the collaboration of the insurance supervisory authorities (EIOPA-BOS-17/013) in order to ensure that insurance undertakings have relevant expertise to provide insurance policies in other jurisdictions on a freedom to provide services and freedom of establishment basis.
- 1.32 Considering that the matter in question may be subject to other disputes the Mediation Panel recommends EIOPA to undertake an initiative in order to bring more convergence among supervisory authorities as regards authorisation practices, including classification of insurance policies, and to monitor cross-border cases in this regard on a risk-based approach.
- 1.33 This opinion is addressed to the ACPR and the CBI. They shall report to the Chairperson of the Mediation Panel on how they comply with this opinion within six months upon its adoption by the Board of Supervisors.
- 1.34 EIOPA shall report to the Board of Supervisors within six months on the actions taken with regard to the recommendation of the Mediation Panel in paragraph 1.34.
- 1.35 The Mediation Panel recommends EIOPA to publish this opinion on its website since there is no conflict with the legitimate interests of any financial institution in the protection of their business secrets. Moreover, the publication cannot seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system of the Union as referred to in Article 7(7) of the Rules of Procedure.

Done at Frankfurt am Main, 25 June 2018

[signed]

Gabriel Bernardino

Chairperson

For the Board of Supervisors