

Resolution of comments

Public consultation on the supervision of captive (re)insurance undertakings: Cash pooling, Prudent Person Principle and Governance

1. General comments

No	Stakeholder	Response to the public consultation question	Eiopa's comments
1	Coburg University (Mirko Kraft)	<p>General comment: The opportunity to provide feedback on Eiopa's "Draft Opinion on the Supervision of Captive (Re)Insurance Undertakings – cash pooling, Prudent Person Principle and Governance" (Eiopa 2023a) accompanied by an impact assessment (Eiopa 2023b) is welcomed.</p> <p>Literature: Bujakowski, Douglas; Kievits, Rick (2023): Weathering the Storm: Evaluating Captive Insurance for Iowa Cooperatives in Crisis. In: Drake Management Review, Volume 13, Issue 1, April 2023, p. 11 – 14. https://escholarshare.drake.edu/server/api/core/bitstreams/20f42267-d41a-4bfd-b56e-36bfcab4658a/content [05/01/2024]. European Insurance and Occupational Pensions Authority (Eiopa) (2023a): Draft Opinion on the Supervision of Captive (Re)Insurance Undertakings – cash pooling, Prudent Person Principle and Governance. Eiopa-BoS-23/363. Frankfurt (Main). https://www.eiopa.europa.eu/system/files/2023-</p>	Noted.

No	Stakeholder	Response to the public consultation question	EIOPA's comments
		<p>10/Draft%20Opinion%20on%20the%20supervision%20of%20captives.pdf [05/01/2024].</p> <p>European Insurance and Occupational Pensions Authority (EIOPA) (2023b): Impact Assessment - Draft Opinion on the Supervision of Captive (Re)Insurance Undertakings. EIOPA-BoS-23/364. Frankfurt (Main). https://www.eiopa.europa.eu/system/files/2023-10/Impact%20Assessment%20-%20Draft%20Opinion%20on%20the%20supervision%20of%20captives.pdf [05/01/2024].</p> <p>PricewaterhouseCoopers GmbH Wirtschaftsprüfungsgesellschaft (PwC) (2023): Moderne Risikotransferlösungen: Captives im Fokus. Eine Analyse mit Handlungsempfehlungen – Status quo, Herausforderungen und Chancen. https://www.pwc.de/de/finanzdienstleistungen/versicherungen/industrie-und-ruckversicherungsberatung/moderne-risikotransferloesungen-captives-im-fokus.html [05/01/2024].</p> <p>Solvency II-Directive (S2D) (2023): Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast) (Text with EEA relevance), latest consolidated version 19/10/2021: https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=CELEX:02009L0138-20211019 [05/01/2024].</p> <p>In the European Union many captives are located. EIOPA's aim to strengthen supervisory convergence where it can be further developed and enhance a level playing field given its mandate to build a common supervisory culture and consistent supervisory practices across the EU is appreciated. It is not in the interest of the European single market to force captives to be outside the EU, because of unclear and unharmonized supervisory practices.</p> <p>There is still and there will be a need for additional measure of risk transfer other than</p>	

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		<p>traditional (re)insurance (see PwC 2023). For example, in 2022, industry companies established a mutual MIRIS (“Mutual Insurance and Reinsurance for Information Systems”) especially for parts of their cyber risk exposure (see https://www.miris-insurance.com/), licenced in Belgium. Another example where captives were discussed is the case of IOWA’s agricultural cooperatives facing a crisis in obtaining affordable and comprehensive property and casualty insurance due to the withdrawal of major carriers and significant increases in premiums and deductibles (see Bujakowski/Kievits 2023). There might be also other industries that could benefit from captives in the future,</p> <p>e. g. hospitals.</p> <p>The implementation of the final opinion can help level the playing field across Member States where divergent approaches have been adopted than required under the Solvency II Directive (S2D 2023).</p> <p>It is recommended that EIOPA aligns its opinion with the outcome of the Solvency II Review process.</p>	<p>Noted. EIOPA’s Opinion is drafted on the basis of the current Solvency II framework and takes into account the captives specific business model. A review of the Opinion in due course is envisaged, but it is important to note that the proportionality measures introduced as part of the Solvency II review do not cover the topics of the Opinion (cash pooling, prudent person principle, governance aspects other than the fit and proper conditions).</p>
2	Coburg University (Mirko Kraft)	<p>General comment: It is unclear how National Competent Authorities (NCAs) can take into account national specificities of the captive (re)insurance sector when implementing the principles included in this Opinion without setting incentives for supervisory or regulatory arbitrage. A level playing field has to be insured across the European Union and differences cannot be based on just claiming national specificities by a NCA.</p>	<p>Noted. EIOPA decided to publish an Opinion to recommend good supervisory practices to NCAs and ensure a level playing field. Having said that, recognizing and accommodating national specificities is crucial for public authorities to tailor regulations effectively. This nuanced approach doesn't necessarily translate into regulatory</p>

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			arbitrage. As stated in paragraphs 2.3 and 2.4 of the Impact Assessment, supervisory convergence is the objective of the Opinion. Nevertheless, as specifics of the risk profile and business model of an undertaking need to be considered, national specificities e.g. from local provisions other than insurance supervision need to be respected.
3	ECIROA	<p>General comment: As this consultation is aimed at the national supervisory authorities, we would also like to limit ourselves to a few comments that directly affect our members, the owners of or the captives in Europe, respectively.</p> <p>We see the position paper as a measure to harmonize the behaviour of NCAs as far as possible.</p>	Noted.
4	ECIROA	<p>General comment: We emphasize our request to apply the Principle of Proportionality in accordance with the European Treaty of Lisbon. On the basis of this EC definition, the POP must be applied in all cases and situations where its application is not expressly excluded.</p> <p>This should be the main guideline for NCAs when assessing the need to apply the principle of proportionality in each case and for each request.</p> <p>The Principle of Proportionality (PoP) is incorporated in the EU Lisbon Treaty under Article 3 b : “Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principle of subsidiarity and proportionality.”</p> <p>In the Protocol on the Application of the Principle of Subsidiarity and Proportionality, Article 5 determines:</p>	<p>Noted. The principle of proportionality was taken into account when drafting the Opinion. Against this background, it is important to remember that proportionality is about how to apply requirements, and not whether to apply them (unless requirements are specifically waived). In this context, the principle of proportionality is valid in general for any approaches presented in the opinion (cf. paragraphs 2.1-2.5).</p> <p>Finally, it should be noted that following a request for Advice, EIOPA advised the European Commission to introduce in the review of the Solvency II Directive a new framework to apply proportionality as well as new proportionality measures.</p>

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		<p>“Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal’s financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved</p> <p>More specifically, the PoP means that any measure by a public authority that affects a basic human right must be:</p> <ul style="list-style-type: none"> - fit for a particular purpose, (Zweck / purpose or aim, legitimate?) - suitable, i.e. the person concerned can reasonably be expected to accept the measure in question, (Geeignetheit / suitability or qualification) - necessary in order to achieve the objective, which is intended, i.e. there are no less severe means of achieving the objective, (Erforderlichkeit / Necessity or necessary arrangements) - appropriate in order to achieve the objective, which is intended, (Angemessenheit / adequacy, fair and reasonable) <p>“The individual risk profile should be the primary guide in assessing the need to apply the proportionality principle.”</p> <p>The PoP refers to the nature, scale and complexity of the individual Insurer:</p> <ul style="list-style-type: none"> - Nature of the risk sensitive activities means all single risks (per line of insurance, per market risk etc.) following the requirement of Pillar 1 (for bigger insurance 	

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		<p>undertakings the number of formulas and distribution curves is growing with the size of a corporation or Group).</p> <ul style="list-style-type: none"> - Scale is the necessary information on quantity. - Complexity is the aggregate quantified view of an insurance undertaking once the potential diversification effects and risk mitigation have been offset against the number of individual risks (aggregated in a model). Complexity is the final result of a combination and addition of the variety of risk types weighted differently (based on the inherent risk sensitivity within each and every Insurance Undertaking) to reflect and distinguish its risk profile from competitors. <p>Insurers (and their actuaries) need to know where, in a holistic view of the insurance market, their corporation is placed to understand what is a) appropriate, b) necessary and c) reasonable to factor in the "proportionality".</p>	
5	FERMA	<p>General comment: "FERMA appreciates the opportunity to comment on EIOPA's draft Opinion on the Supervision of Captive (re)insurance undertakings. As a Federation, we represent nearly 5000 risk and insurance managers, of which, roughly a third use a captive of some sort to cover certain insurable risks of their enterprise.</p> <p>We steadfastly maintain our position that more proportionality is needed in the prudential regulation framework. Simpler and clearer rules are vital to ensure captives operating in the EU can continue to be a good option for risk transfer.</p> <p>In view of the fact we await the full text of the amendments to Solvency II, it is important for captives that signals sent out both at the political and supervisory level point towards a simplification, which would also be in line with the European Commission's commitment to reducing reporting requirements by 25%. The UK Government is considering introducing a captive regulatory regime in the UK, and there is also the ever-present and competitive domiciles outside of the EU. We strongly believe there should be competitive solutions in the EU for companies, too.</p> <p>We take this opportunity to make the general comment that the business case for captives has maybe never been clearer, since, among other things, they help businesses to find coverage for risks that the private (re)insurance market is not willing</p>	<p>Noted. For the part on "proportionality", please see EIOPA's comment above.</p> <p>Noted. To emphasise the relevance of captive insurance and reinsurance undertakings to the industry, paragraph 2.1 has been amended,</p>

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		<p>to take on—important, if not vital in this VUCA/Polycrisis environment. Captives allow enterprises an opportunity to increase the efficiency of their risk management. Furthermore, they also help companies to maintain a closer awareness of cost of risk and loss control with central accountability for risk management.</p> <p>Since captives form part and are backed by – normally – major enterprises we appreciate EIOPA expressly acknowledging their specific business model. However, we are uncomfortable matters such as (un)level playing field come up time-again around captives (ref. to paragraph 2.3). FERMA is not clear on what is meant by this. We also see an implication behind the reference to ‘regulatory and supervisory arbitrage’ (ref. to paragraph 2.3) that it might also therefore be relatively straightforward for enterprises to shift their captive from one MS to another. This is not the case. Getting the institutional backing to set-up a captive can be at least a decade-long process and investment requiring inter alia the right infrastructure, human resources, and inherent knowhow. It is also a choice that is part of an overall enterprise risk management strategy.</p> <p>With these more general comments in mind, we move to the more specific in our answers below and underline our commitment to continuous open and constructive dialogue with EIOPA.</p>	<p>highlighting that captive insurance and reinsurance undertakings are of relevance to the industry as a method of risk transfer.</p>
6	FERMA	<p>General comment: FERMA has no comment at this stage of its analysis. However, we may contact EIOPA in the case something arises in the course of our regular dialogue with Members.</p>	Noted.
7	Insurance Europe	<p>General comment: Insurance Europe welcomes the opportunity to give feedback to EIOPA's draft Opinion on the Supervision of Captive (Re)Insurance Undertakings. Insurance Europe acknowledges EIOPA's overall aim which is to play an active role in building a common Union supervisory culture and consistent supervisory practices across the European Union (EU). Insurance Europe further recognises the Opinion's goal of ensuring uniform procedures and consistent approaches throughout the Union by providing opinions to competent authorities.</p> <p>While the implementation of the Opinion could contribute to a level playing field</p>	Noted.

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		<p>among Member States that have deviated from Solvency II requirements, it is equally important that National Supervisory Authorities (NSA) maintain this balance when overseeing captives.</p> <p>Furthermore, in addition to the clarifications provided by EIOPA on governance and outsourced key functions, Insurance Europe welcomes the draft Opinion's overarching aim of refraining from introducing new regulatory requirements, ensuring a level-playing field in the supervision of captives and other (re)insurance undertakings, and its purpose of providing clarity to facilitate a risk-based and proportionate supervision of captive (re)insurance undertakings, taking into account their specific business models and expectations related to Solvency II.</p>	
8	Insurance Ireland	<p>General comment: Insurance Ireland (II) welcomes the opportunity to provide feedback on EIOPA's Draft Opinion on the Supervision of Captive (Re)Insurance Undertakings – cash pooling, Prudent Person Principle and Governance. Ireland is a major domicile for Captive undertakings, and we note EIOPA's aim to strengthen supervisory convergence where it can be further developed and enhance a level playing field given its mandate to build a common supervisory culture and consistent supervisory practices across the EU. Our view is that the Draft Opinion is generally consistent with the existing supervisory approach of the Central Bank of Ireland regarding supervision of Captive (Re)Insurance undertakings and welcome that National Competent Authorities (NCA's) can take into account national specificities of the captive (re)insurance sector when implementing the guidance included in this Opinion. The implementation of the finalised Opinion can help level the playing field across Member States where divergent approaches have been adopted than required under Solvency II.</p> <p>Captive (Re)insurance undertakings do not typically underwrite third party risks and do not service external policyholders directly, serving the Re(Insurance) needs of the parent company and unlikely to put external parties at risk. Captive (Re)insurance undertakings allow their parent to increase the overall efficiency of its risk</p>	Noted.

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		<p>management and financing processes. It is welcome that the overarching aim of the Draft Opinion is not introducing any new regulatory requirements and its purpose is to provide clarity on facilitating a risk-based and proportionate supervision of captive (re)insurance undertakings in light of their specific business models, and expectations in relation to Solvency II. It is important that captive (re)insurance undertakings have a supervisory framework based on the principle of proportionality to reflect the nature, scale and complexity of their business and the proposed additional proportionality measures being introduced by the Review of Solvency II is also a welcome and positive development as in the absence of additional proportionality measures, there is very limited recognition of the different operating model and the disproportionate regulatory burden placed on Captive (Re)Insurers under the current Solvency II regime. Proportionality is also important for Captive (Re)Insurers who are in run off given the different business models and inherent risks.</p> <p>Overall, II would recommend EIOPA align the final Opinion with the adoption of additional proportionality measures as discussed by the co-legislators under the review of Solvency II.</p>	<p>Noted. Please see EIOPA's comment above.</p>
9	Insurance Ireland	<p>General comment: It is critically important that captive (re)insurance undertakings have a supervisory framework based on the fundamental principle of proportionality to reflect the nature, scale and complexity of their business. We have not identified the Opinion as going further than simply providing clarity on already existing supervisory expectations that would not enforce new supervisory requirements for captive (re)insurance undertakings.</p>	<p>Noted. Please see EIOPA's comment above. We believe that the importance of proportionality in the context of captive (re)insurance undertakings is sufficiently highlighted in the Opinion, and in particular in paragraph 2.1.</p> <p>Furthermore, EIOPA would like to highlight that indeed this Opinion is not about introducing new supervisory requirements, but to improve the common Union supervisory culture and consistent supervisory practices, as well as to ensure uniform procedures and consistent approaches throughout the Union.</p>

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10	IRSG	<p>General comment: The IRSG welcomes any EIOPA effort to strengthen a convergent interpretation of the EU insurance regulation between the supervisory authorities. These efforts, however, cannot lead to introducing new rules, especially in matters falling into the review of Solvency II, and must be consistent with the EU law principles, including the principle of proportionality. EIOPA acknowledge that those undertakings only cover risks associated with the industrial or commercial group to which they belong. Although is important not to mis appreciate the prudential valuations and monitoring of captives with understated requirements on diversification of investments and their adequate fitting to the nature of the liabilities, appropriate approaches should be provided in line with the principle of proportionality to reflect the captives business's nature, scale, and complexity. Furthermore, while the draft opinion states that captives as defined in articles 13(2) and 13(5) of the Solvency II directive are in scope, the IRSG notes that in the draft opinion itself there is no explicit distinction between pure captives and captive affiliates, i.e. those that cover the insured against the risks incurred in offering a non-insurance service to the customer, e.g. an extension of warranty. Therefore, EIOPA should rephrase some clauses in the draft to consider the affiliate and pure captives' specificities.</p> <p>Although the IRSG agree with the EIOPA's statement under which National Competent Authorities (NCAs) may consider national specificities of the captive (re)insurance sector when implementing the principles included in this Opinion, the aim of a convergent interpretation should lead EIOPA to identify the aspects to harmonize if and solely they are common to the Member States.</p>	<p>Noted. See EIOPA's comment above.</p> <p>As emphasised in paragraph 1.9 of Impact Assessment, this Opinion doesn't introduce any new regulatory requirements, but rather complements and clarifies the Solvency II provisions in light of the specific business model at stake.</p> <p>The scope of this Opinion, which covers insurance captives and reinsurance captives, is compliant with the existing Solvency II framework. Therefore, the definition of captives shall be aligned with article 13 (2) and 13 (5) of the Solvency II Directive (see paragraph 2.2 of the Opinion).</p>
11	MARSH CAPTIVE SOLUTIONS	<p>General comment: While we do have specific comments to add, we generally concur with the expressed opinion. We wish to underscore the significance of intercompany loans for captives, as they do not deplete the capital base, unlike dividend distributions. Captive owners aspire to maintain a well-capitalized entity that serves both as a robust risk management tool and as a foundation for the industrial and commercial groups' expansion. Ultimately, captives assure competitive insurance pricing and capacity, thereby mitigating risks to the broader economy and our group's customers.</p>	<p>Noted. For the specific comment on "intercompany loans" please see the respective comment below.</p>

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12	MARSH CAPTIVE SOLUTIONS	General comment: The consistent application of regulatory supervision across the European Union is of paramount importance.	Noted and agreed.
13	NORIMA	<p>General comment: EIOPA's opinion and clear guidance is strongly needed to build a common supervisory culture and consistent supervisory practices in the European Union and EEC-area to create a level playing field for companies under the same regulations.</p> <p>NORIMA supports the importance of recognizing the specific nature of captives, the need to apply the regulations proportionally and welcomes this opportunity to provide our opinion.</p> <p>NORIMA hopes EIOPA will create clearer and more specific guidance for the National Competent Authorities (NCA) for similar practices in Europe to ensure equal conditions of competition for all, regardless of country and National Competent Authorities. NORIMA experiences that there are deviant supervisory practices in Norway in several fields.</p> <p>NORIMA OPINION: NORIMA recommends that EIOPA provides clear detailed guidance for the NCA's regarding captives / low risk entities. Captives should have a right to operate according to Solvency II and EIOPA's guidelines regardless of the country of their licence.</p> <p>The local NCA's should be obligated to publicly document the deviations in their supervisory practices in comparison with EIOPA's guidance and other NCA's to make an open and transparent playing field in Europe for captives.</p>	<p>Noted.</p> <p>EIOPA has taken note of the observations made and is committed to examine and discuss these through discussions with the relevant authorities. In this context it should also be highlighted that in order to ensure appropriate follow-up to what is stated in the Opinion, EIOPA will monitor the application of the Opinion by the supervisory authorities, but also whether any parts of the Opinion require an update.</p>
14	NORIMA	<p>General comment: It is NORIMA's opinion that the supervisory practice in Norway (strongly) deviates from practices in Sweden and other European countries and is neither sufficiently proportional nor risk based.</p> <p>OWN STAFF:</p>	See EIOPA's comment above.

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		<p>For example, the Norwegian NCA urges/forces captives to employ their own staff instead of utilizing the possibility to (?) hire from the group/ establish insourcing agreements with the group, and thereby creating additional unnecessary operational costs and activities for the captives, resulting in distortion of competition. For instance, as a result, the captives need to establish new separate pension schemes with compulsory actuarial calculations continuing through the lifespan of the pensioned personnel from the captive, must accept a higher tax rate, etc.</p> <p>KEY FUNCTIONS:</p> <p>Another example is the possible combination of the two key functions, e.g., Risk Management and Compliance, which the Norwegian Financial Authority has not been accepted in on-site inspections.</p> <p>AML:</p> <p>The Anti-Money Laundering act is made valid for Non-Life Insurance companies in Norway. Swedish captives are exempt from the local AML-law and do not need to have the same governing documents and procedures in place.</p> <p>IDD:</p> <p>According to the IDD-practices in Norway, the entities must pre-apply the compulsory education to the Norwegian NSA. This is not the practise by the NSA in Sweden.</p> <p>NCA-RESPONSE:</p> <p>The response time of the Norwegian Supervisory Authority for clarifications and licence applications or practices is excessive long in comparison with other countries in Europe. This makes it difficult /more time consuming to establish captives in Norway in comparison with other countries.</p>	

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		<p>NORIMA</p> <p style="text-align: right;">OPINION:</p> <p>These divergences of practices between the Norwegian NCA and other countries are creating an uneven playing field for companies in different countries, but under the same legal framework of Solvency II. EIOPA should provide clearer and compulsory guidance to local NCA's.</p>	

2. Cash pooling arrangements and application of the Prudent Person Principle

No	Stakeholder	Response to the public consultation question	EIOPA's comments
15	ECIROA	<p>General comment: "As mentioned in the EC Treaty/Protocol on the Application of the Principle of Subsidiarity and Proportionality, Article 5 / above: Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators, and citizens, to be minimised and commensurate with the objective to be achieved. and: The individual risk profile should be the primary guide in assessing the need to apply the proportionality principle.</p> <p>all following paragraphs (3.1 - 3.15.) should be structured according to this basic principle"</p>	Noted. See EIOPA's comment above. The principle of proportionality was taken into account when drafting the opinion and it applies to any item of the Opinion.
16	FERMA	<p>General comment: As FERMA has previously stated in the context of proposed amendments to Solvency II, we assert the vast majority of captive (re)insurance undertakings do not have risky investments. On the contrary, many have only cash equivalents or monetary funds. This means that the treatment under SCR calculations of intragroup loans and cash pooling is absolutely fundamental to the economics of</p>	Noted. Regarding the first part of the comment and as specifically highlighted in paragraph 3.3, "NCAs should ensure that (re)insurance captive undertakings recognise and classify in the Solvency II Balance Sheet the asset and liability

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		<p>captives. Tying this to the general comments we have made in Q1, it is important no changes be made that would result in a more costly operation of captives.</p> <p>Captives regularly take part in cash pooling with their Parent company. FERMA takes the view therefore that the 'look through' facility for captives would be welcome, enabling them to use the rating of the Parent.</p>	<p>descriptions according to the economic substance of the cash pooling arrangement and also apply the proper calculation of the SCR." The Opinion does not aim to introduce new, more costly requirements for captive (re)insurance undertakings. Its purpose is to facilitate a risk-based and proportionate supervision and further harmonise supervisory expectations toward captive (re)insurance undertakings.</p> <p>Regarding the second part of the comment and in line with the objective of a risk-based and proportionate supervision, 'look through' is only permitted in very specific circumstances, which are laid out in paragraph 3.9 of the Opinion.</p>
17	FERMA	Par. 3.3. our comment here is a question: is it that they are NOT doing this currently?	<p>Paragraph 3.3 does not say that captive (re)insurance undertakings currently do not recognise and classify in the Solvency II Balance Sheet the asset and liability descriptions according to the economic substance of the cash pooling arrangement.</p> <p>As per paragraph 1.5 of the Impact Assessment, the recommendations have been put together as a result of observed divergence in practices.</p>
18	FERMA	Par. 3.7. FERMA would make the comment here that when referring to counterparty we are pushing for a particular treatment that is sensitive to the business model of captives, whereby the counterparty could in theory be a Group Treasury and we would therefore wish for a 'look-through' approach that would allow the company to apply the rating of the Parent.	See EIOPA's comment above. The Solvency II rulebook is clear about when the parent rating can be used – look through is only permitted in very specific circumstances, which are laid out in paragraph 3.9 of the Opinion.
19	FERMA	Par. 3.8. we would push for EIOPA to consider moderating the language here to possibly even state that:	See EIOPA's comment above. The Solvency II rules are clear about when the parent rating can be

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		<p>In the Standard Formula SCR calculation of counterparty default risk, which applies only if the arrangement does not classify as a loan, where the cash pooling arrangement is with an unrated intra-group entity, such as Group Treasury, then the probability of default of that counterparty can be calculated using the rating of the parent to which the captive belongs.</p> <p>We would ask the question of: why would cash pooling agreements with the Parent company, with overnight availability of funds be treated under the Market Risk module in SCR calculation? The treatment of intragroup loans and cash pooling has a significant impact on the Concentration risk sub-module, and therefore too on the gross Market risk module. See below for more on 3.8</p>	<p>used. Look through is not permitted in the case described in paragraph 3.8 of the draft opinion.</p> <p>The Solvency II rules are clear about the treatment of loans, including intragroup loans, in the Standard Formula. Any cash pooling arrangements, if structured as loans, have to be treated under the Market Risk module, even if they have overnight availability of funds.</p>
20	FERMA	<p>Par. 3.9. Positive that there would be some leeway to use rating of the Parent. In terms of practice, some Captive owners might be reluctant to guarantee the liabilities of the captive as it can create tax issues. Perhaps there could be dialogue between FERMA and EIOPA on what an 'equivalent arrangement [provided] by the parent' might look like.</p>	<p>As per Article 199 (10) of the Delegated Regulation, an equivalent arrangement would need to fully secure an exposure and also to comply with Articles 209 to 215 of the Delegated Regulation. Individual arrangements can be discussed with the appropriate national competent authority, or alternatively the EIOPA Q&A mechanism could be used.</p>
21	Insurance Ireland	<p>General comment: Captive (Re)Insurers are part of groups and as such, they benefit from the financial resources and other supports that a group can provide and reduces an entity's recourse to external financing. Many Captive (Re)Insurers rely on group treasury arrangements or have cash pooling arrangements in place to optimise and achieve operational efficiency. These arrangements vary considerably, and they may have different implications on liquidity, counterparty risk and the SCR calculation of a Captive (Re)Insurer, and our members have a clear understanding of how the cash pooling arrangement should be treated in the SCR calculation with Solvency II also containing simplifications for the calculation of the SCR for Captive (Re)Insurers. II note</p>	<p>Noted.</p>

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		Cash pooling arrangements must follow legal and economic substance, with two main types of cash pooling arrangements noted in the Draft Opinion.	
22	Insurance Ireland	Par. 3.13. In relation to section 3.13, EIOPA asks that in cases of material reliance on intra-group transactions, the assessment of all risks should be reflected solely in the ORSA. However, any stress testing of intra-group loan arrangements needs to be proportionate, recognising the exposures arising from such concentrations and the purpose of the stress testing. Such stress testing should be included in the ORSA if relevant for the assessment of the overall solvency needs of the undertaking, having regard to its risk profile, which will differ across undertakings	Noted. However, it is unclear as to how there could be a “material reliance” on an intra-group transaction without the stress-testing of the transaction being relevant for the assessment of the overall solvency needs of the undertaking. Paragraph 3.13 follows the same reasoning as Guideline 7 (paragraphs 1.19 and 1.20) of EIOPA’s Guidelines on the ORSA https://www.eiopa.europa.eu/system/files/2022-10/eiopa_guidelines_on_orsa_en.pdf The aim of this stress testing is to inter alia capture potential contagion effects between the parent company and captive undertakings that may arise from cash pooling/intra-group loan in the case where the financial situation of the parent is deteriorating, which is especially relevant if intragroup arrangement covers a material part of the captive’s assets (as emphasized in paragraph 3.2 of the draft opinion).
23	Insurance Ireland	Par. 3.15. In section 3.15, EIOPA asks that NCA should ensure that captive (re)insurance undertakings are able to provide at any time information about cash pool arrangements in sufficient detail. Moreover, NCAs should also ensure that captive (re)insurance undertakings are able to provide evidence supporting the arm’s length price of cash pooling transactions. It would question if this requirement is appropriate from a NCA perspective given that international tax law is already in existence with the requirement that the price agreed in a transaction between two related parties must be the same as the price agreed in a comparable transaction between two unrelated parties. Nonetheless, II believes that this requirement should be proportionate and not	Noted. Paragraph 3.15 has been changed to make it clearer that evidence is only to be provided “on request”. As noted by Insurance Ireland, if it is already part of international tax law that the transaction should be at arms’ length then the evidencing of this fact (on request) is not expected to be onerous.

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No	Stakeholder	Response to the public consultation question	EIOPA's comments
		highly burdensome, with undertakings having responsibility for relevant information and making it available to NCA's on request to minimise the administrative burden.	
24	IRSG	Par. 3.8. "EIOPA refers to cash pooling and intercompany loans with unrated entities. A distinction must be made between the parent's rating and the group. Where the rated entity/parent supports the group entity, this should suffice to take the group's rating. Also, more clarity should be included in the EIOPA's document regarding public and private ratings, specifying that the latter must be considered as the public rating. Indeed, the specificity of pure captives - which do not address the public - should be adequately considered.	See EIOPA's comment above. The Solvency II rules are clear about when the parent/group rating can be used. Look through to the parent or group is not permitted in the case described in paragraph 3.8 of the draft Opinion. As noted in EIOPA Q&A 2288, private credit ratings as referred to in Article 2(2)(a) of Regulation (EC) No 1060/2009 cannot be used for the calculation of the Solvency Capital Requirement in accordance with the standard formula.
25	IRSG	Par. 3.9. Furthermore, clause 3.9. should be amended to ensure that NCAs may require ANY of the three options listed, i.e. a letter of credit, or a guarantee, or an equivalent arrangement provided by the parent. The choice is to be left to the operating entity. It is essential to maintain that the core role of NCAs is safeguarding policyholders. In the case of a pure captive, there are no third-party policyholders, and the captive insures related / group parties. Therefore, any loss to the investments would not affect the public. On the contrary, it is in the best interest of the shareholder and policyholders (which are the same entities) to safeguard the investment or utilize the free cash/group investments in line with group direction.	Noted. It is not clear how an amendment to paragraph 3.9 of the Opinion could make it clearer as to the existing rules – the use of “or” in the wording already gives the choice to the operating entity.
26	IRSG	Par. 3.14. "EIOPA calls NCAs to ensure captive(re)insurance undertakings' compliance with the Prudent Person Principle, considering the portfolio as a whole. However, EIOPA seems to favour a "one size fits all" approach without considering the peculiarities of the captives and, ultimately, the principle of proportionality. In assessing such compliance, NCAs should ensure that are considered, among other: Conflict of Interest (3.14(e)). Concerning pure captives, the policyholder is the company's owner. Therefore, the element of conflict of interest has less relevance. We understand that captives and intercompany contractual arrangements would still be required to be at arm's length but putting such emphasis on supervising this area and	Noted. The Prudent Person Principle should generally apply, regardless of the Principle of Proportionality. Based on the observations of EIOPA and the National Competent Authorities, it is not always the case that the policyholder is the company's owner, particularly where there are multiple group entities involved.

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		<p>potentially requiring statutory external auditor's support "if needed" goes against the very proportional nature of a captive as a risk management tool.</p> <p>Diversification (3.14(f)). About pure captives, the element of diversification is less relevant. In addition to excluding third-party policyholders, captives should be able to invest in line with group direction, being a key part of their risk management tool. Furthermore, most captives heavily reinsure their business, mitigating the retained exposure."</p>	<p>Conflicts of interest may appear even in the case of captives in which the policyholder is the company's owner (e.g. such as where the group chief financial officer is at the same time president of the financial committee of the captive, which potentially leads to conflicts of interest when taking decisions on cash pooling).</p> <p>Regarding the second point, captives are required to invest in accordance with the Prudent Person Principle and ensure an appropriate diversification (notably regarding the proportion of intragroup investments). In this context it is to be highlighted that there are also examples of captive insurance and reinsurance undertakings where exposures are not "heavily" reinsured.</p>
27	MARSH CAPTIVE SOLUTIONS	<p>Par. 3.2. We have reservations regarding your statement that pool members receiving remuneration that does not adhere to the arm's length principle. Based on our experience, captives diligently conduct ongoing analyses to ensure that transactions are conducted at arm's length. A substantial shift in profits is highly improbable, as each client unit is meticulously managed and assessed based on their performance. It is unlikely that any unit's performance would be detrimentally undermined.</p>	<p>Noted. As per paragraph 1.5 of the Impact Assessment, the recommendations have been put together as a result of observed divergence in practices.</p>
28	MARSH CAPTIVE SOLUTIONS	<p>Par. 3.8. The rating of the group should be applied for intragroup loans or intragroup cash poolings. In case this would not be acceptable, a guarantee from the entity having the rating should be sufficient to have the rating applied for the SCR computation</p>	<p>See EIOPA's comment above. The Solvency II rules are very clear about when the parent rating can be used. Look through is not permitted in the case described in paragraph 3.8 of the draft opinion.</p>
29	MARSH CAPTIVE SOLUTIONS	<p>Par. 3.9. this ties with our previous comment. A parental guarantee should suffice to avoid complexities and costs associated with letter of credits.</p>	<p>See EIOPA's comment above. Paragraph 3.9 of the draft opinion is a faithful reflection of the existing rules – the use of "or" in the wording gives the choice to the operating entity as to whether to rely</p>

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No	Stakeholder	Response to the public consultation question	EIOPA's comments
			on a parental guarantee or a letter of credit or an equivalent arrangement.
30	MARSH CAPTIVE SOLUTIONS	Par. 3.10.-3.12. – Physical and notional cash pooling as two main types of cash pooling agreements: yes we agree	Noted.
31	MARSH CAPTIVE SOLUTIONS	Par. 3.12. yes we agree	Noted.
32	MARSH CAPTIVE SOLUTIONS	Par. 3.13. yes we agree	Noted.
33	MARSH CAPTIVE SOLUTIONS	Par. 3.14. Based on our experience, the majority of our clients adhere to the prudent person principle. It is the responsibility of the board to evaluate the investment strategy, which includes considerations such as cash pooling and intercompany loans. It's important to note that our directors have a vested interest and are obligated to exercise prudence in their decision-making. Many of our clients also take into account their insurance liabilities and the coverage of these liabilities through highly rated investments. It's worth mentioning that a significant portion of our clients are publicly listed entities with excellent credit ratings. Several directors believe that investing intra-group is a more prudent choice due to their familiarity with the group, as opposed to external investments. Those investing in external investments primarily choose straightforward and secure holdings, as highlighted in your opinion. Their main purpose is to cover insurance liabilities and preserve capital, rather than seeking high-risk returns often associated with complex investments	Noted. Please see paragraph 1.7 of the Impact Assessment which states that room for supervisory convergence was identified regarding the implementation of the Prudent Person Principle. Furthermore, paragraph 3.2 of the Opinion highlights that contagion effects between the parent company and captive undertakings may arise from cash pooling in the case where the financial situation of the parent is deteriorating.
34	MARSH CAPTIVE SOLUTIONS	Par. 3.15. agreed	Noted.

3. Governance: Administrative, Management, Supervisory Board (AMSB) composition and outsourcing of key functions

No	Stakeholder	Response to the public consultation question	EIOPA's comments
35	Coburg University (Mirko Kraft)	Par. 3.16. It is agreed that captives should ensure that the AMSB as a whole possesses the necessary seniority, qualifications, competency, skills and professional experience and that there is no exception from this Solvency II requirement for captive (re)insurance undertakings.	Noted.
36	ECIROA	Par. 3.16. -fully agreed-	Noted.
37	ECIROA	Par. 3.17 Article 49 agreed / Guideline 14 (EIOPA-BoS-14/253) based on the application of PoP in all relevant cases	Noted.
38	ECIROA	Par. 3.18. -fully agreed-	Noted.
39	ECIROA	Par. 3.19. agreed based on PoP - no "gold-plating" of individual NCA with additional burdens for the captive/captive owner	Noted. As emphasised in paragraph 1.9 of the Impact Assessment, the Opinion doesn't introduce any new regulatory requirements, but rather complements and clarifies the Solvency II provisions considering the specific business model at stake.
40	ECIROA	Par. 3.20 -fully agreed-	Noted.
41	ECIROA	Par. 3.21. -agreed-	Noted.
42	ECIROA	Par. 3.22. agreed based on PoP - No "gold plating" of individual NCAs with additional burdens for the captive/captive owner, but waiver of unnecessary, non-risk-relevant requirements	Noted. Please see EIOPA's comment above.
43	FERMA	<p>General comment: "FERMA believes the Opinion could be improved by stating somewhere here more explicitly that the role of a Professional Captive Manager is important in this context. We note it is referenced to in paragraph 2.7 but nowhere else in the document. To our knowledge, professional captive managers operate in many jurisdictions and therefore play an important role in governance.</p> <p>Here FERMA makes an overall comment that we would welcome proportionality from NCAs on this matter. FERMA is in total agreement that key functions require pre-</p>	<p>Noted. The intent of the Opinion is not to impose a single approach (use of a Professional Captive Manager) on all undertakings. Nor is it desirable to place restrictions on all undertakings based on prejudicial assumptions, rather than assessing the situation on a case-by-case basis.</p> <p>Regarding the second point, please see EIOPA's comment above. The principle of proportionality</p>

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No	Stakeholder	Response to the public consultation question	EIOPA's comments
		approval based on fit and proper standards from the relevant NCA, however we do thoroughly stress that this assessment when done for a captive should be sure to take into account that it is for a captive (re)insurance undertaking. In particular it is reasonable to restrict group internal staffing for key functions risk management and actuarial, because it is a fair assumption that these particular insurer qualifications will probably not be available in industrial companies. Regarding Audit and Compliance the situation is likely to be different and a softer approach can be justified."	is valid in general for any approaches presented in the Opinion.
44	Insurance Ireland	Par. 3.16. "I note the importance of undertakings having prudent governance arrangements in place in connection with key functions and outsourcing requirements and the expectations regarding governance ensuring the necessary seniority, qualifications, competency, skills and professional experience for its Board." "	Noted.
45	Insurance Ireland	Par. 3.19. With regard to point 3.19, due to the nature of their business model, captive (re)insurance undertakings tend not to have employees, and it would be disproportionate to allocate an employee to a captive (re)insurance undertaking solely for the purpose of oversight of outsourced arrangements. In general, those persons designated as having responsibility for oversight of outsourced operations tend to hold a senior position either on the AMSB of the captive (re)insurance undertaking, or through the holding of a head of key function position. Such persons are also subject to the relevant fitness and probity processes. <u>Point 3.19 should clarify that either of the three options presented here are appropriate for the oversight of outsourced key functions.</u>	Noted. In order to improve the wording and to underpin that multiple approaches are available for the designated person to be considered the person responsible for the outsourced key function for the captive, "subject to national provisions" has been added to paragraph 3.19. Furthermore, "or" was added after the first and second bullet point of paragraph 3.19.
46	Insurance Ireland	Par. 3.20. Section 3.20 says that NCAs should ensure that adequate safeguards are in place to mitigate any conflict of interest. This goes beyond the PPP, which merely refers to how conflicts of interests are managed (i.e. in the best interests of policyholders). This is foremost in the mind of any (re)insurance undertaking.	Rather than the Prudent Person Principle, the main references in paragraph 3.20 are to <ul style="list-style-type: none"> Article 268(1) of the Delegated Regulation whereby the undertaking must ensure that each function is free from influences that may compromise the function's ability to undertake its duties in an objective, fair and independent manner. The requirement to be

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No	Stakeholder	Response to the public consultation question	EIOPA's comments
			<p>“free from influences” is better described as a need to mitigate, rather than merely to manage.</p> <ul style="list-style-type: none"> Article 274(3)(b) of the Delegated Regulation whereby the undertaking must ensure that “the service provider has adopted all means to ensure that no explicit or potential conflict of interests jeopardize the fulfilment of the needs of the outsourcing undertaking”.
47	IRSG	<p>Par. 3.19. "The IRSG agrees with the statements under which the captive undertaking should designate a person within the undertaking with the overall responsibility for the outsourced key function who is fit and proper and possesses sufficient knowledge and experience regarding the outsourced key function to be able to challenge the performance and results of the service provider.</p> <p>In line with this approach, the IRSG advice that clause 3.19 should include specific reference to the possibility of appointing a member of the AMSB (Board of Directors) as the designated person considered to be the person responsible for the outsourced key function for captive (re)insurance undertakings. The fit and proper requirements of AMSB members and the related assessment procedures are sufficient to ensure the selection of a member with the required skills. Therefore, no reason justifies this member's exclusion from being a designated person.</p> <p>Moreover, EIOPA's document should make specific reference to Board Meetings besides 'membership in a dedicated committee'. So, a suggested wording could be: "... a person under NCA supervision regardless of the employee status within the captive undertaking having a link to the undertaking via its membership to the AMSB or in a dedicated committee set up specifically by the undertaking ..."."</p>	<p>Noted. Regarding the proposal to include specific reference to the possibility of appointing a member of the AMSB as the designated person considered to be the person responsible for the outsourced key function, footnote 14 has been added. This footnote highlights that such an appointment is indeed possible, but only if the designated person complies with some existing safeguards.</p>
48	MARSH CAPTIVE SOLUTIONS	Par. 3.16. agreed	Noted.
49	MARSH CAPTIVE SOLUTIONS	Par. 3.17. agreed	Noted.

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No	Stakeholder	Response to the public consultation question	EIOPA's comments
50	MARSH CAPTIVE SOLUTIONS	Par. 3.18. agreed	Noted.
51	MARSH CAPTIVE SOLUTIONS	Par. 3.19. agreed	Noted.
52	MARSH CAPTIVE SOLUTIONS	Par. 3.20. agreed	Noted.
53	MARSH CAPTIVE SOLUTIONS	Par. 3.21. We concur with this perspective. To uphold specific standards within the captive management industry, it is imperative that captive managers maintain the essential infrastructure, including both IT resources and a skilled workforce. This should be accompanied by robust governance practices, a resilient internal control system rooted in principles like segregation and the 'four-eye' principle, and a well-defined business continuity procedure, reinforced by routine testing. Emphasizing risk-based supervision is pivotal for captive managers."	Noted.
54	MARSH CAPTIVE SOLUTIONS	Par. 3.22. same as above.	Noted. Please see EIOPA's comment above. The intent of the Opinion is not to impose a single approach (use of a Professional Captive Manager) on all undertakings.
55	NORIMA	Par. 3.19. "We interpret this paragraph to the extent that it according to Solvency II is no direct requirement for a captive to employ/hire own staff and that a person employed by the group parent and insourced/hired to the captive can perform the task of outsourcing and follow up key functions as long as the role is properly defined, documented, and relevant conflicts of interest identified. NORIMA OPINION: EIOPA should provide clearer guidance to local NSA's that there is no direct demand for a captive to employ its own staff, but that insourced personnel can perform core activities such as outsourcing. "	Noted. Please see EIOPA's comment above.
56	NORIMA	Par. 3.20. "NORIMA agrees with this paragraph and believes that this is relevant for all intra group agreements and activities. As long as potential conflicts of interest are identified and managed, the collaboration in the group is beneficial for all parties for	Noted. The main reference here is to Article 268(1) of the Delegated Acts whereby the undertaking must ensure that each function is free from

No	Stakeholder	Response to the public consultation question	EIOPA's comments
		<p>example sustainability reporting, information security (Digital Operational Resilience) ie.</p> <p>NORIMA OPINION: EIOPA should provide clear guidance to local NCAs that the captives can rely on group functions provided prudent management of conflicts of interest. "</p>	<p>influences that may compromise the function's ability to undertake its duties in an objective, fair and independent manner. The requirement for each function to be "free from influences" is better described as a need to mitigate, rather than merely to identify and manage.</p>

4. Impact assessment

No	Stakeholder	Response to the public consultation question	EIOPA's comments
57	ECIROA	<p>General comment: "We will not comment on the Impact Assessment Paper - we expect a fair and proper application of the PoP to reduce working time and costs without reducing the information required to assess each captive and/or without impacting the solvency of the captives.</p> <p>We firmly believe that reduced audit work by an NCA is sufficient to fully understand and assess a captive in order to achieve the required objective of Solvency II "</p>	<p>Noted. See also EIOPA's comment above. It is important to remember that proportionality is about how to apply requirements, and not whether to apply them (unless requirements are specifically waived).</p>
58	FERMA	<p>General comment: "1) FERMA does not find any evidence presented in the Impact Assessment of actual detrimental prudential or consumer protection impacts of any documented practices by captives as a preliminary reason for any intervention or provision of Opinion by EIOPA.</p> <p>2) We note EIOPA's consideration of current "unpredictable and ad-hoc administrative costs" but do not find any evidence presented that this Opinion would bring about Economies of Scale for captives. Further, we contend that these perceived Economies of Scale might vanish where an outcome to be that there would be an automatic use of "unrated" calculations in SCR per paragraph 3.8 in the Opinion. "</p>	<p>Noted.</p>
59	FERMA	<p>General comment: FERMA was happy to have an exchange with EIOPA prior to submitting its feedback.</p>	<p>Noted.</p>

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No	Stakeholder	Response to the public consultation question	EIOPA's comments
60	NORIMA	<p>Section 1.4. "EIOPA has identified a need to clarify the governance context to the specific business model of captives. NORIMA strongly supports this and observes that the operational practices and supervisory practices deviate between the different countries in Europe. It is important to create a level playing field for captives independent of the national supervisory resources and capacity to apply practices. For example, the number of captives in Sweden is close to 10 times the number in Norway. When establishing a new captive, it would be cost efficient to do so in any other country than Norway due to application of the Solvency II regulation by the Norwegian supervisory authority where the supervisory practices not being sufficiently proportional, or risk based.</p> <p>NORIMA OPINION: EIOPA should provide clear guidance to local NCAs of the business model of captives ensuring the captive's right to operate according to Solvency II and EIOPA's guidelines regardless of the country of their licence."</p>	<p>Noted. Further harmonising a risk-based and proportionate supervision of captive (re)insurance undertakings, in the context of creating a level playing field within the EU, is indeed the primary objective of the Opinion. Addressees of EIOPA Opinions in general are national competent authorities.</p>