

FEEDBACK STATEMENT FROM COMMENTS RECEIVED ON THE OPINION ON THE SUPERVISION OF CAPTIVE (RE)INSURERS

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INTRODUCTION

EIOPA would like to thank all the participants in the public consultation for their comments on the draft Opinion on the supervision of captive (re)insurers with a focus on intra-group transactions, the prudent person principle and governance.

The input received provided important guidance for EIOPA to finalise the Opinion. All the comments submitted were given careful consideration by EIOPA. The individual comments received and EIOPA's response to them are published as a separate document except those marked explicitly as confidential from stakeholders.

AIM AND RATIONALE OF THE OPINION

The Opinion aims at facilitating a risk-based and proportionate supervision of captive (re)insurance undertakings and further harmonise, in the context of creating a level playing field within the EU, supervisory expectations in the topics touched upon. While further convergence of supervisory practices is needed, National Competent Authorities (NCAs) should be able to take into account national specificities of the captive (re)insurance sector when implementing the principles included in the Opinion. Hence, the aim of the Opinion is not to introduce 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.

It aims at supporting the implementation of the regulatory framework with a focus on intra-group transactions (especially cash pooling), on the consistent application of the Prudent Person Principle and on governance-related aspects in connection with key functions and outsourcing requirements, taking into account the proportionality principle.

The Opinion is addressed to the competent authorities, as defined in Article 4(2) of Regulation (EU) No 1094/2010.

MAIN COMMENTS RECEIVED AND HOW EIOPA ADDRESSED THEM

Alignment with Solvency II Review

Several stakeholders recommended aligning the Opinion with the outcome of the Solvency II review process.

EIOPA responded highlighting the Opinion is drafted on the basis of the current Solvency II framework and takes into account the captive-specific business model. In order to ensure appropriate follow-up

to what is stated in the Opinion, EIOPA emphasised in the comments resolution table that a review of the Opinion in due course is envisaged.

Furthermore, it should be highlighted that the proportionality measures introduced as part of the Solvency II review do not intersect the topics of the Opinion, namely cash pooling arrangements, the Prudent Person Principle, as well as governance aspects other than the fit and proper conditions.

Importance of proportionality & avoidance of gold-plating

Multiple stakeholders highlighted the significance of the fundamental principle of proportionality and advocated for more proportionality in the supervision of captives. In this context some stakeholders stressed that the additional proportionality measures introduced by the Solvency II review are appreciated. Some stakeholders also referred to a “one size fits all” approach, which should be avoided considering the unique features of captives.

The general importance of proportionality in the context of captives is stressed in paragraph 2.1 of the Opinion. In the comments resolution table EIOPA further explains that it is important to remember that proportionality is about how to apply requirements, and not whether to apply them (unless the requirements are specifically waived). Furthermore, EIOPA highlights in the Opinion and in the comments resolution table that the Opinion is not about introducing new supervisory requirements (no gold plating), but to improve the European Union supervisory culture and consistent supervisory practices, as well as to ensure uniform procedures and consistent approaches throughout the Union. This fact is also emphasised in paragraph 1.9 of the Impact Assessment together with a statement highlighting that the Opinion rather complements and clarifies the Solvency II provisions considering the specific business models of captives. Finally, it should be noted that 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.

Regulatory and supervisory arbitrage

Some stakeholders expressed uncertainty about how NCAs can consider national specificities without promoting supervisory or regulatory arbitrage.

In this context EIOPA clarified that recognising and accommodating national specificities is crucial for public authorities and national competent authorities to tailor regulations effectively. This nuanced approach does not necessarily translate into regulatory arbitrage.

Relevance of captives for the industry

Some stakeholders argued that captives play an increasingly important role in today’s business world. It was reported that captives support companies in such cases where other insurance undertakings are not willing to cover the risks, allow companies to increase the efficiency level of their risk management, ultimately enhancing the industry’s awareness of their risk management activities.

To emphasise the relevance of captives for the industry, paragraph 2.1 of the Opinion has been amended, highlighting that captives are of relevance to the industry as a method of risk transfer.

Look through facility

Several stakeholders expressed that a general 'look through' facility for captives should be allowed, enabling them to use the rating of the parent company.

EIOPA responded that in line with the objective of a risk-based and proportionate supervision and as set out in the Solvency II rulebook, 'look through' is only permitted where a letter of credit, a guarantee or an equivalent arrangement is provided by the parent, satisfying the requirements of Article 199 (10) of the Delegated Regulation (see paragraph 3.9 of the Opinion).

Intragroup transactions & cash pooling arrangements

Multiple stakeholders emphasised the importance of considering the parent or group rating for intragroup transactions. It was also suggested that, in the Standard Formula SCR calculation of counterparty default risk for cash pooling arrangements with unrated intra-group entities like Group Treasury, the probability of default should be calculated using the rating of the parent to which the captive belongs.

EIOPA replied to this remark in the comments resolution table highlighting that the rules in the Solvency II rulebook is 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.

Arm's length principle

One stakeholder questioned the requirement that NCAs should ensure that captives are able to provide evidence supporting the arm's length price of cash pooling transactions given that international tax law is 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.

In response to this comment, EIOPA adapted paragraph 3.15 of the Opinion in order to clarify that evidence is only to be provided "on request". If there is already a requirement in international tax law that the transaction should be at arms' length, then the evidencing of this fact is not expected to be onerous.

Conflicts of interest

One stakeholder argued that because for "pure" captives the policyholder is the company's owner, the element of conflict of interest is less relevant (paragraph 3.14 (e)).

Based on the observations of EIOPA and the NCAs, it is not always the case that the policyholder is the company's owner, particularly where there are multiple group entities involved. In EIOPA's view 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).

Oversight of outsourced key functions

Having in mind the specific nature of captives, some stakeholders advocated that allocating an employee solely for overseeing outsourced arrangements would be disproportionate. For this reason, it was recommended to clarify that any of the three options presented in paragraph 3.19 of the Opinion are appropriate for overseeing outsourced key functions.

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 of the Opinion. Furthermore, "or" was added to the first and second bullet point of paragraph 3.19.

Member of the AMSB as designated person responsible for outsourced key function

One stakeholder advocated for 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 of a captive.

Based on this comment, footnote 14 has been introduced. This footnote highlights that such an appointment is indeed possible, but only if potential conflicts of interest are properly managed, if the member possesses sufficient knowledge and experience to be able to challenge the performance and the outcome of the services provided, and if the member has sufficient time to properly carry out all duties.