

Survey on EIOPA Consultation Paper on Supervisory Statement on the use of governance arrangements in third countries to perform functions or activities

Fields marked with * are mandatory.

Introduction

The European Insurance and Occupational Pensions Authority (EIOPA) is running a public consultation relating to a draft supervisory statement on the use of governance arrangements in third countries.

EIOPA's aim with the supervisory statement is to enhance the supervision and monitoring of insurance undertakings' and intermediaries' compliance with relevant EU legislation concerning governance arrangements in third countries.

The supervisory statement recalls that EIOPA has previously underlined the need for insurance undertakings to not display the characteristics of an empty shell company, and instead demonstrate an appropriate level of corporate substance, including the presence of key decision-makers, function holders and staff to an extent proportionate to the nature, scale and complexity of the entity's business in the European Economic Area (EEA).

Specifically, governance arrangements raise concerns when they are used to conduct certain regulated functions and activities for undertakings and intermediaries that ultimately serve policyholders in EEA. This has the potential to impair risk management and effective decision making, and impact the ability of supervisory authorities to conduct proper supervision.

To achieve clarity of supervisory expectations, the principle of substance over form is used to ensure that similar risks are treated in a similar way, irrespective of the legal form of the governance arrangement and their location.

Stakeholders are kindly invited to provide their feedback on the draft supervisory statement until **31 October 2022** by responding to the questions included in the survey below. Contributions not provided using the survey or submitted after the deadline will not be processed and therefore considered as they were not submitted.

Comments are most helpful if they:

- respond to the question stated, where applicable;
- contain a clear rationale;
- and describe any alternatives EIOPA should consider.

Publication of responses

Your responses will be published on the EIOPA website unless: you request to treat them confidential, or they are unlawful, or they would infringe the rights of any third party. Please, indicate clearly and prominently in your submission any part you do not wish to be publicly disclosed. EIOPA may also publish a summary of the survey input received on its website. Please note that EIOPA is subject to Regulation (EC) No 1049/2001 regarding public access to documents and EIOPA's rules on [public access to documents](#).

Declaration by the contributor

By sending your contribution to EIOPA you consent to publication of all information in your contribution in whole/in part – as indicated in your responses, including to the publication of your name/the name of your organisation, and you thereby declare that nothing within your response is unlawful or would infringe the rights of any third party in a manner that would prevent the publication.

Data Protection

Please note that personal contact details (such as name of individuals, email addresses and phone numbers) will not be published. EIOPA, as a European Authority, will process any personal data in line with Regulation (EU) 2018/1725. More information on how personal data are treated can be found in the privacy statement at the end of this material. www.eiopa.europa.eu/privacy-statement_en

Remarks on completing the survey

Choice of internet browsers

Please use preferably Firefox or Chrome for best speed of the online survey whilst ensuring use of the latest version of the browser.

Saving a draft survey

After you start filling in responses to the survey there is a facility to save your answers. HOWEVER, PLEASE NOTE THAT THE USE OF THE ONLINE SAVING FUNCTIONALITY IS AT THE USER'S OWN RISK.

As a result, it is strongly recommended to complete the online survey in one go (i.e. all at once).

Should you still proceed with saving your answers, the online tool will immediately generate and provide you with a new link from which you will be able to access your saved answers.

It is also recommended that you select the "Send this Link as Email" icon to send a copy of the weblink to

your email - please take care of typing in your email address correctly. This procedure does not, however, guarantee that your answers will be successfully saved.

Uploading document(s)

In the last section of the survey, you can also share additional material by clicking on "Select file to upload". Several documents (e.g. Word, Excel, Pdf) can be uploaded. However, note that each document / file is limited to 1MB or less in size.

Printing the completed survey

You will have the possibility to print a pdf version of the final responses to the survey after submitting it by clicking on "Download PDF".

You will automatically receive an email with the pdf file. Do not forget to check your junk / spam mailbox.

Limit of characters for the answer of each question

There is a limit of 5,000 characters for the answer of each question, including spaces and line breaks. If your answer exceeds the limit, you can upload your answer as additional material (see "Uploading document(s)" mentioned above).

Contact details

* Name of your institution

Insurance and Reinsurance Stakeholder Group

* Your name

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Your member state

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czechia
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece

- Hungary
- Iceland
- Ireland
- Italy
- Latvia
- Liechtenstein
- Lithuania
- Luxembourg
- Malta
- Netherlands
- Norway
- Poland
- Portugal
- Romania
- Slovak Republic
- Slovenia
- Spain
- Sweden
- Other

Survey on Supervisory Statement on the use of governance arrangements in third countries to perform functions or activities

Q1: Do you agree that the use of arrangements by undertakings or intermediaries in a third country to conduct regulated functions or activities poses the risks identified in 2.10 and 2.11?

While we recognise that there is the potential for such risks, we stress that EIOPA should take care not to exaggerate such risks or to imply that they could only materialise through the use of arrangements by undertakings or intermediaries in third countries.

In this context, we note guidance in EIOPA's Opinion on supervisory convergence in light of the United Kingdom withdrawing from the European Union (EIOPA-BoS-17/141, 11 July 2017) and its Recommendations for the insurance sector in light of the United Kingdom withdrawing from the European Union (EIOPA-BoS-19/040, 19 February 2019)). We also welcome the proposal that this guidance is equally relevant for any third country, despite having been raised arising from the UK withdrawal from the EU.

Where an EEA insurance undertaking meets the recommendations set out in the documents noted above, use of a branch in a third country to conduct regulated functions or activities such as underwriting does not necessarily give rise to the risks in paragraphs 2.10 and 2.11.

Arrangements which ensure that the head office of any EEA insurance undertaking is able to exercise adequate and proportionate governance, oversight and control of operations carried on in their establishments outside the EEA should adequately mitigate these risks.

What is "adequate and proportionate" in this context will depend on the specific circumstances of the arrangement, including the third country jurisdiction in which the branch is situated. The level of control required for arrangements involving branches established (for example) in the UK may differ from the level of control required in relation to jurisdictions which do not apply a supervisory framework based on Solvency II and have not entered into specific arrangements to facilitate co-operation between their national competent authorities and competent authorities in the EEA. Also, where EU supervisors have agreements in place with third country supervisors and can share information and conduct their own on-site inspections of the branch, the use of branches in third countries to house expertise does not present material additional risk or indicate that there is not sufficient substance in the EU.

We consider that EIOPA's comments in paragraphs 2.9 to 2.11, more generally, should be reframed to focus on the context and circumstances of use of resources outside the EEA and the governance, oversight and control arrangements that EEA insurance undertakings should consider implementing in order to mitigate the risks identified in paragraphs 2.10 and 2.11.

Q2: Do you agree with the scope of the Supervisory statement?

We believe that the scope of the Supervisory Statement should exclude reinsurance, intermediaries and commercial business. Reinsurance activities and commercial business are inherently international. Third country intermediaries provide international expertise and can provide potential cost savings to European undertakings.

More generally, Article 15(1) of the Solvency II Directive provides that: “An authorisation pursuant to Article 14 shall be valid for the entire Community. It shall permit insurance and reinsurance undertakings to pursue business there, that authorisation covering also the right of establishment and the freedom to provide services”. EEA insurance undertakings have the right to pursue insurance business throughout the EEA. Solvency II does not limit that right to insurance business carried on from an establishment within the EEA.

In this regard, we note also “General Principles of Supervision” set out in Article 29 Solvency II, including “proportionality”.

Therefore EIOPA should not seek to constrain rights provided by the Solvency II Directive through non-legislative means and any supervisory expectations should be consistent with this right.

EEA insurance undertakings should be free to adopt structures that are consistent with the scope of their authorisation, and with the need to operate in a dynamic global insurance environment, provided that those arrangements adequately mitigate the risks identified in the consultation paper.

While an EEA insurance undertaking’s activities (including those conducted through a branch in a third country) must be capable of effective governance, oversight and control from that undertaking’s head office, and also capable of proper supervision by the undertaking’s home state supervisor, we also consider that it is important that any constraints on such activity are proportionate, and do not prevent EEA insurance undertakings from competing effectively in the global market and appropriately deploying their resources to allow them to do so.

Q3: Do you agree with the objectives of the Supervisory statement?

Yes, these appear broadly reasonable. See relevant comments above, in particular EIOPA should consider limiting the supervisory statement to retail business, given the inherently international nature of reinsurance and commercial business.

Q4: Do you agree on the need for an undertaking to have an appropriate level of corporate substance, proportionate to the nature, scale and complexity of their business, within the EEA?

Yes, although the use of third country branches does not necessarily prevent an undertaking from having an appropriate level of corporate substance within the EEA when there is sufficient governance, controls and management oversight exercised in the EEA. Where sufficient governance, controls and management oversight is exercised in the EEA, the performance of expert functions from third country branches should not be considered as posing material additional risk.

See relevant comments above.

Q5: Do you agree with the purpose of a branch, or a similar governance arrangement in a third country identified in 3.2?

No, there is no need to specify the exact purpose of a branch in this way. It is not necessary to specify this to achieve the objectives of the supervisory statement to ensure that there is sufficient corporate substance present in the insurer.

In fact, if the purpose of a branch was specified in this way, it could have unnecessary negative impacts on consumers, businesses, insurers and reinsurers in the EEA.

As noted above, 3.2 does not reflect the scope of an EEA insurance undertaking's authorisation under Article 14 of Solvency II.

The legislative basis on which EIOPA has suggested that this should be the primary purpose of a branch established in a third country is not clear; this position could unnecessarily constrain EEA insurance undertakings from exercising the rights conferred to them by Article 15(1) of Solvency II.

At a practical level, restricting the ability of EEA insurance undertakings to establish operations in third country markets in this way will limit their ability to compete, and provide their services to customers, in an increasingly global insurance market, in particular for reinsurance and commercial business. It would also fail to take account of the dynamics of that market, and the requirements of EEA and other policyholders.

There is the potential for considerable benefit to accrue to customers and insurers from being able to fully utilise specialist resources outside the EEA. For example, for a multinational corporation which may have operations and assets in several countries, the ability of insurers to operate a co-ordinating "one stop shop" hub can be critical to providing a joined-up global insurance programme, minimising risks of cover gaps or duplication and reducing administrative costs for the insurer and the customer alike.

As above the key to protecting policyholders' interests in this context is the development and implementation of appropriate governance arrangements to ensure effective governance, oversight and control of any activities undertaken by branches outside the EEA.

Q6: Do you agree with the role of a branch, or a similar governance arrangement in a third country identified in 3.3?

The stated role of a branch identified in 3.3 appears reasonable but as a general rule EIOPA should refrain from unnecessarily interfering in corporate structuring.

We are concerned as to how the expression “disproportionately dependent” may be interpreted in this context.

For example, in a scenario in which specialised underwriters in a non-EEA branch of an EEA insurance undertaking are deployed to underwrite risks that are situated in the EEA, this structure may have been adopted in part because those underwriters have capabilities in the global market that do not exist in the insurer’s home market. We note that this is the case in relation to much London market business involving EEA risks.

In this scenario, the EEA insurance undertaking is dependent, to some extent, on the expertise of underwriters in the branch, and it would be therefore necessary and appropriate for that insurance undertaking to ensure that it is able to exercise appropriate governance, oversight and control from its head office.

This situation does not differ from a situation in which an EEA branch underwrites risks; it is no less important in this situation to ensure that appropriate governance, oversight and control are exercised than would be the case if that branch were established outside the EEA.

This paragraph could more usefully emphasise the need to exercise and demonstrate appropriate governance, oversight and control from the EEA head office in situations where there is delegation to and reliance on resources based outside the EEA, but within the same legal entity.

Q7: Do you agree with the mentioned role and objectives for supervisory authorities?

Yes.

See relevant comments above.

Q8: Which other measures could be established to ensure that arrangements in third countries do not have a detrimental impact for consumers?

We note EIOPA's use of the word "consumers" in this context and note that consumers are not generally the focus of insurance operations carried out by insurers in the global market.

Where EEA insurance undertakings rely on resources in third countries (including within branches established in those third countries) in order to provide insurance services to consumers rather than commercial customers, greater internal oversight and external supervision are likely to be appropriate.

EIOPA should improve cross-border supervision in relation to third countries by facilitating Memoranda of Understanding between EU national authorities and third country supervisors that allow sufficient cooperation in supervisory review processes to facilitate the demonstration of appropriate governance, oversight and control from the EEA head office.

The evidence for the responses should be provided in the textboxes below the respective questions. However, if you have evidence in a format other than text (e.g. Excel file), please upload the file here.

The maximum file size is 1 MB. If the file size exceeds 1 MB, please send it to RetInvStrat@eiopa.europa.eu

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