

FEEDBACK STATEMENT

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

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eiopa

European Insurance and
Occupational Pensions Authority

EXECUTIVE SUMMARY

INTRODUCTION

EIOPA would like to thank all the participants in the public consultation for their comments on the draft Supervisory Statement on the use of governance arrangements in third countries to perform functions or activities.

The input received provided important guidance for EIOPA to finalise the supervisory statement. All the comments submitted were given careful consideration by EIOPA.

The individual comments received and EIOPA's response to them will be published as a separate document except those marked explicitly as confidential from stakeholders.

AIM AND RATIONALE OF THE SUPERVISORY STATEMENT

This Supervisory Statement aims to ensure the appropriate supervision and monitoring of the compliance of insurance undertakings and insurance intermediaries with the requirements of the relevant EU legislation in relation to their governance arrangements in third countries.

The Statement is therefore addressed to the national supervisory authorities and sets out supervisory expectations for the supervision of certain third country arrangements.

This Supervisory Statement should be read in the context of Articles 18, 29, 35 and 41 of Solvency II Directive as well as Articles 1(6), 10 and 16 of the Insurance Distribution Directive(IDD). In addition, EIOPA Recommendations for the insurance sector in light of the United Kingdom withdrawing from the European Union (EIOPA-BoS-19/040, 19 February 2019) are also relevant.

The Supervisory Statement does not introduce any regulatory changes or new system/approach of supervision. In its consideration, supervisory authorities should consider proportionality and a risk-based approach.

MAIN COMMENTS RECEIVED AND HOW EIOPA ADDRESSED THEM

LEGAL BASIS

Some stakeholders expressed doubts regarding the legal basis for issuing the Statement. However, it is EIOPA's duty to contribute to high quality common supervisory standards and practices; in particular, by providing statements on the basis of Article 29(2) of Regulation (EU) No 1094/2010.

Although the document sets supervisory expectations which translate ultimately to insurance undertakings and insurance intermediaries, the Supervisory Statement, based on Directive 2009/138/EC (Solvency II) and Directive (EU) 2016/97 (Insurance Distribution Directive, IDD), is addressed to the competent authorities with the aim to foster supervisory convergence in the area of certain arrangements in third countries.

Some stakeholders make the point that there is no legal basis for the inclusion of para. 3.2 in the Statement, especially in the IDD as the IDD does not apply to insurance distribution activities outside the EU. EIOPA considers that there is an adequate legal basis for the inclusion of insurance intermediaries in the Supervisory Statement on the grounds that, even if the IDD does not use the term "*governance arrangements*", it contains "*professional and organisational requirements*" in Article 10. The result of these obligations is very similar, with the aim of ensuring there is sufficient technical expertise amongst the staff of an EU registered insurance intermediary.

In addition, Article 16 of the IDD provides that when using the services of insurance intermediaries, insurers and intermediaries must use the insurance and reinsurance distribution services only of EU registered insurance and reinsurance intermediaries. This requirement is also located in the same chapter on organisational requirements, meaning the obligations contained therein are considered part of the organisational requirements that insurance intermediaries must adhere to.

SCOPE OF THE SUPERVISORY STATEMENT

Some stakeholders claim that expertise, capacity, or products for certain risks are typically accessed elsewhere not in the EEA, and that this is often done via third country branches. Several stakeholders propose to recognise this in the Statement, for example via an exception for certain activities or lines of business which stakeholders claim are inherently international. This would be the case for instance of reinsurance, non-retail/commercial risks, and wholesale distribution activities.

Additionally, some respondents also state that the Supervisory Statement should set a path towards building more capacity or expertise in the EU over the long term.

EIOPA is of the view that the Statement has already embedded proportionality and flexibility considerations that can help to reflect these aspects.

Additionally, there are valid and robust alternatives to the use of third country branches for accessing expertise or capacity. These have been reflected in the final Statement, and include a reference to the fact that NCAs, as part of their existing supervisory practices, can promote relocation or secondment of staff from the third country branch to the EU authorised entity; and/or the ceding of insurance risk by way of reinsurance to a reinsurance undertaking headquartered and authorised in a third country¹.

On the listing of potential activities and or lines of business as exceptions to the scope of the Statement, EIOPA does not consider it a viable solution, as it would be too prescriptive and could be complex to supervise (e.g., a single contract may combine different types of risks, and the contract can evolve over time).

Finally, EIOPA reiterates the fact that the aim of the Statement is to ensure appropriate supervision and monitoring of the compliance of insurance undertakings and intermediaries with the requirements of the relevant EU legislation in relation to their governance arrangements in third countries. This approach ultimately benefits policyholders and supports financial stability.

EXCLUSION OF INTERMEDIARIES

A number of respondents consider that it would be beneficial to exclude insurance intermediaries from the scope of the Statement on the basis their EU clients want, and benefit from, access to international expertise. Alternatively, some propose to issue a separate supervisory statement on insurance intermediaries.

EIOPA remains of the view that intermediaries should be in scope. This is to ensure a level playing field and because some relevant activities in the product lifecycle usually attributed to insurance undertakings, such as underwriting, may be carried out by insurance intermediaries. In addition, an insurance intermediary carrying out underwriting activities for the insurer is not subject to Solvency II requirements on third country branches and rules on equivalence.

¹ 3 In accordance with the position stated in EIOPA Opinion on supervisory convergence in light of the United Kingdom withdrawing from the European Union (EIOPA-BoS-17/141) of 11 July 2017 (point 24).

ROLE AND PURPOSE OF THIRD COUNTRY BRANCHES (PARA. 3.2)

Some stakeholders argue that the current model on third country branches is fit-for-purpose and that it is there to fill a specific and unique need among corporate insurance customers seeking cover. These respondents raise concerns, in particular, regarding paragraph 3.2: *“EIOPA believes that the purpose of a branch, or a similar governance arrangement in a third country, of an insurance undertaking or an insurance intermediary, should be primarily to serve the market in which it was established. As a result, governance arrangements established in third countries with the sole objective of supporting entities based in the EU, should be avoided”*.

From a policy perspective, EIOPA is of the view that it is justified to state that the purpose of a third country branch is primarily to serve the market in which it was established. This would be similar to the approach taken in other external communications by the other ESAs and the European Central Bank.

It must be noted, however, that the word “primarily” introduces already a certain degree of flexibility, and that, as stated above, EIOPA thinks that there are viable alternatives to the use of third country branches to conduct activities or functions such as relocation or secondment of staff or the ceding of insurance risk by way of reinsurance to a reinsurance undertaking headquartered and authorised in a third country.

CONCEPT OF “DISPROPORTIONATELY DEPENDENT”

A number of stakeholders were concerned as to how the expression *“disproportionately dependent on the arrangement in a third country”* used in paragraph 3.4 of the Statement may be interpreted, and, in this context, asked for more clarification on what it means in order to know whether an arrangement is compliant with EIOPA’s position.

EIOPA agrees that this is a relevant concept and has, in fact, amended the Statement which now contains an illustration of what *“disproportionately dependent”* means, namely an entity not being able to demonstrate that in the event of sudden loss of access to their third country branch, it can continue operating fully, and without undermining protection of EU policyholders. A case-by-case assessment on this would always be needed, however.

ADDITIONAL CONSIDERATIONS

During the public consultation, stakeholders submitted additional considerations that in their view can help mitigate the concerns presented in the Statement concerning governance arrangements in third countries. These stakeholders believe the Statement should mention the mitigating role of

issues such as the robustness of the supervisory framework of the third country branch supervisor, an effective governance structure, or the cooperation among supervisors (such as via MoUs).

EIOPA agrees that such considerations are important and can have a positive impact. However, they do not necessarily eliminate the initial concerns that led to the drafting of the statement and EIOPA is, therefore, not in favour of listing explicitly such considerations.

Insurance undertakings' or insurance intermediaries' obligations remain unaffected by the level of cooperation between supervisors, cooperating with many foreign jurisdictions through a formal MoU may not be always feasible, and it is not possible to permanently assess the supervisory framework in every third country.

EIOPA'S FEEDBACK STATEMENT

- EIOPA considers that there is sufficient legal basis to issue the Statement as well as strong grounds to ensure a level playing field between insurers and intermediaries, keeping the latter in the scope of the Statement.

- EIOPA notes stakeholders' concerns as regards the current practice to access capacity and or expertise in third countries via branches. However, EIOPA is of the view that there are other viable alternatives, now mentioned explicitly, and that the Statement already offers flexibility. In addition, EIOPA is of the view that listing concrete lines of business as exclusions would not be viable.

- EIOPA agrees with respondents' request for more clarity on how "*disproportionately dependent*" may be understood. The amended Statement now contains an illustration of what "*disproportionately dependent*" means, but EIOPA also reminds that a case-by-case assessment is always necessary.

- EIOPA also agrees with stakeholders on the key positive role that aspects such as the robustness of the supervisory framework of the third country branch supervisor, the role of an effective governance structure, or the degree of cooperation with third country supervisors can have. EIOPA, however, stresses that such considerations do not eliminate the concerns that led to the drafting of the statement. In any case, these considerations can be taken into account, having regard to the existing flexibility embedded into the Statement.

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