

CONSULTATION PAPER

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

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RESPONDING TO THIS PAPER

EIOPA welcomes comments on the Consultation paper on Supervisory Statement on the use of governance arrangements in third countries to perform functions or activities.

Comments are most helpful if they:

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

Please send your comments to EIOPA via the EU Survey [[link](#)], by **31 October 2022**.

Contributions not provided via the EU Survey or after the deadline will not be processed.

In case you have any questions please contact Statementgovernance@eiopa.europa.eu.

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 documents¹.

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.

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¹ [Public Access to Documents](#)

1. OBJECTIVE

- 1.1. The European Insurance and Occupational Pensions Authority (EIOPA) provides this Supervisory Statement on the basis of Article 29(1)(a) of Regulation (EU) No 1094/2010²). This Article mandates EIOPA to play an active role in building a common Union supervisory culture and consistent supervisory practices, as well as in ensuring uniform procedures and consistent approaches throughout the Union.
- 1.2. EIOPA delivers this Supervisory Statement on the basis of the Solvency II Directive³, in particular Articles 18, 29, 35 and 41 thereof, and the Insurance Distribution Directive⁴, in particular Articles 1(6), 3, 10 and 16 thereof.
- 1.3. The aim of this Supervisory 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.
- 1.4. This Supervisory Statement is addressed to the competent authorities, as defined in Article 4(2) of Regulation (EU) No 1094/2010⁵.
- 1.5. The Board of Supervisors has adopted this Supervisory Statement, after a public consultation procedure, in accordance with Article 2(8) of its Rules of Procedure⁶.

² Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).

³ Directive 2009/138/EC of 25 November 2009 of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1–155).

⁴ Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) (OJ L 26, 2.2.2016, p. 19–59).

⁵ Specific points of this Supervisory Statement describe supervisory expectations for insurance and reinsurance undertakings and intermediaries, as they are required to comply with as part of the regulatory and supervisory framework applied by their competent authority based on Union or national law. N.B. Although Article 4(2) of Regulation (EU) No 1094/2010 refers to the Insurance Mediation Directive (2002/92/EC), this Directive has been repealed and replaced by Directive (EU) 2016/97.

⁶ Decision adopting the Rules of Procedure of EIOPA's Board of Supervisors, available at: https://www.eiopa.europa.eu/sites/default/files/publications/administrative/bos-rules_of_procedure.pdf.

2. CONTEXT OF THE STATEMENT

Introduction

- 2.1. EIOPA has stressed in the past the need for insurance undertakings to demonstrate an appropriate level of corporate substance, proportionate to the nature, scale and complexity of their business⁷.
- 2.2. Undertakings should not display the characteristics of an empty shell that could arise, among others, from situations where the undertakings use third country branches, or similar governance arrangements, to perform disproportionately functions or activities.
- 2.3. Corporate substance includes an appropriate presence of the administrative, management or supervisory board (AMSB) members and key function holders in the Head Office Member State who dedicate sufficient time to fulfil their duties, as well as a level of staff established in the European Economic Area (EEA) commensurate to the nature and amount of regulated business being underwritten or undertaken by the entity in the EEA.
- 2.4. The presence of an appropriate level of corporate substance applies to both insurance undertakings that are conducting business and those that are planning to launch operations.
- 2.5. The presence of an appropriate level of corporate substance should allow for an appropriate oversight and assessment of undertakings' governance to guarantee effective decision-making and risk management and to allow for proper supervision.
- 2.6. These issues were initially identified in the context of the discussion on the risks arising from the UK withdrawal from the EU. However, they are equally relevant for any third country and it is, therefore, important to address them in a convergent manner as regards any establishment of a governance structure (such as a branch) in any third country jurisdiction.
- 2.7. EIOPA considers it important to also include intermediaries⁸ in the scope of this Supervisory statement since some relevant activities in the product lifecycle usually

⁷ For example, recommendation 9 of EIOPA Recommendations for the insurance sector in light of the United Kingdom withdrawing from the European Union (EIOPA-BoS-19/040, 19 February 2019).

⁸ N.B. The term "intermediaries" is used in this Supervisory statement to collectively capture insurance intermediaries, reinsurance intermediaries, ancillary insurance intermediaries, which are legal persons and take up or pursue the activity of

attributed to insurance undertakings, such as underwriting, may be carried out by insurance intermediaries. Therefore, this Statement aims to facilitate the supervision of situations where an intermediary registered in the EU is, or becomes, disproportionately dependent on services such as underwriting provided by a branch in a third country in order to carry out distribution activities “which target EU27 policyholders and coverage of EU27 risks falling under the scope of the IDD”⁹ (e.g. the potential for direct underwriting of insurance contracts for EU27 policyholders taking place outside the EU).

- 2.8. Although the system of governance concept is not formally replicated in the IDD, the registration requirements¹⁰ and professional and organisational requirements¹¹ for insurance intermediaries in the IDD provide a corresponding basis for including intermediaries in this Statement. Furthermore, the IDD provides for restrictive direct access (via freedom to provide services and without recourse to an EU registered intermediary) for insurance intermediaries established in third countries to the EU market based on compliance with each local Member State’s laws¹². On this basis, the legislative intention of the IDD can arguably be understood as not providing unfettered direct access for third country insurance intermediaries to EU markets.

Governance arrangements that deserve particular attention with respect to the adequacy of the corporate structure

- 2.9. A particular governance arrangement where the required corporate substance may not be sufficiently present, and raises concerns, is where the undertakings or intermediaries use a branch, or a similar arrangement, in a third country to conduct regulated functions or activities (such as underwriting). The branch or similar

insurance distribution under the IDD. The term “undertaking” used in this Supervisory statement is also intended to capture insurance and reinsurance undertakings that take up or pursue insurance and reinsurance distribution.

⁹ In line with the approach taken in Recommendation 9 of EIOPA Recommendations for the insurance sector in light of the United Kingdom withdrawing from the European Union (EIOPA-BoS-19/040, 19 February 2019)

¹⁰ The IDD sets down a specific procedure of registration in the home Member State, which enables an intermediary to exercise its right to operate in other Member States in accordance with the principles of freedom of establishment and freedom to provide services, provided that appropriate notification procedures have been followed between the competent authorities (Article 3 and Recital 20, IDD). The validity of the registration is also subject to a regular review by the competent authority (Article 3(4), 5th sub-para.) Use of a third country branch and triangular schemes should not lead to a situation where this registration procedure and subsequent use of the EU passport is rendered superfluous as that process can be simply circumvented.

¹¹ The IDD states that insurance and reinsurance distributors and employees of insurance and reinsurance undertakings carrying out insurance or reinsurance distribution activities possess appropriate knowledge and ability in order to complete their tasks and perform their duties adequately (Article 10(1)). Dependence on a third country branch by an EU registered intermediary should not lead to a situation where the staff of the EU registered intermediary do not possess appropriate knowledge and ability in order to complete their tasks and perform their duties adequately.

¹² Article 1 (6)), IDD 2nd sub-para. The IDD has no equivalence framework or third country branch regime.

arrangement performs that role for the undertaking or the intermediary, which ultimately serves policyholders in the EEA.

2.10. These governance arrangements may impair risk management and effective decision making, and have the potential to pose financial, operational and reputational risk and ultimately impair policyholder protection.

2.11. Furthermore, the use of these governance arrangements can affect materially the ability of the supervisory authorities to conduct proper supervision. Supervisory authorities may not have sufficient visibility of the functions performed in a third country if, for example, rights to carry out on-site inspections are impaired.

Objectives

2.12. This Supervisory statement sets out supervisory expectations to address supervisory practices in relation to such governance arrangements.

2.13. To achieve clarity of supervisory expectations, the principle of substance over form is used to ensure similar risks are treated in a similar way, irrespective of the legal form of the governance arrangement, with the objective of appropriate supervisory oversight of activities and functions performed by the undertakings and intermediaries.

2.14. Although these governance arrangements do not qualify as outsourcing, similar risks need to be addressed and therefore supervisory actions aimed at addressing concerns related to outsourcing¹³ might also be considered, as relevant and appropriate.

Questions to stakeholders:

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?

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

¹³ Article 49 of the Solvency II Directive.

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

3. SUPERVISION OF THE GOVERNANCE ARRANGEMENTS

- 3.1 EIOPA and the supervisory authorities expect that the use of a third country branch, or similar governance arrangement, should not compromise the undertaking having an appropriate level of corporate substance, proportionate to the nature, scale and complexity of their business, within the EEA.
- 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.
- 3.3 These arrangements should neither perform regulated functions or activities for the insurance undertaking in such a way that leads to the undertaking or intermediary being disproportionately dependent on the arrangement in a third country for its activities in the EEA, nor should the arrangement materially impair the system of governance, increase operational risk or undermine policyholder protection.
- 3.4 Supervisory authorities should ensure that regulated functions or activities are appropriately overseen by and controlled from the undertaking, and distribution activities are performed by the intermediary, in a manner which ensures that the undertaking or intermediary is in a position to take full responsibility for effective decision-making and risk management, in going concern and emergency situations.
- 3.5 Regulated functions or activities should not be structured or conducted in such a way that they impair the ability of the supervisory authorities to monitor the compliance of the undertaking with all its obligations stemming from the relevant EU legislation.
- 3.6 When authorising business, and as part of ongoing supervision, supervisory authorities should request that the undertakings considering or operating such governance arrangements provide sufficient justification and rationale why the proposed structuring of their activities can safeguard the ability of the supervisory authority to undertake proper supervision. This information should enable supervisory authorities to assess properly the planned operations, to conduct proper supervision and to monitor the compliance of the undertakings with their obligations as a whole and in relation to their third country entity. The same principle applies, as appropriate, for intermediaries, which are legal persons, in the

context of their registration and as part of ensuring continuous compliance with professional and organizational requirements under the IDD.

3.7 This Supervisory statement will be published on EIOPA's website.

Questions to stakeholders:

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?

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

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

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

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

4. ANNEX I: IMPACT ASSESSMENT

In view of the schemes presented before (where the undertakings or intermediaries use a branch, or a similar arrangement, in a third country to conduct regulated functions or activities), costs and benefits for the main options considered for stakeholders are presented below:

- 1) Policy option 1: No action (maintain status quo)
- 2) Policy option 2: Issue a detailed supervisory statement
- 3) Policy option 3: Issue a principles-based supervisory statement

Policy option 1: No action (maintain status quo)

No action would rely on the fact that EIOPA has issued in the past communications on the need for insurance undertakings to demonstrate an appropriate local level of corporate substance, proportionate to the nature, scale and complexity of their business.

This however does not tackle clear and directly the arrangements identified in this document.

Policy option 1: No action (maintain status quo)		
Stakeholder group	Benefits	Costs
Policyholders	No benefit (potential risk)	The arrangements may ultimately impair policyholder protection
Industry	No benefit	No material impact
Supervisory authorities	No benefit	Significant. Supervisory authorities may not have sufficient visibility of the functions performed in a third country if, for example, rights to carry out on-site inspections are impaired No action may also exacerbate the issue by

		promoting further externalisation, outside the EEA, of functions
Other	N/A	N/A

Policy option 2: Issue a detailed supervisory statement

Under this option, EIOPA would build on previous communications, to propose a supervisory statement specifying the specific functions or activities that should be held locally and not outside the EEA.

Policy option 2: Issue a detailed statement		
Stakeholder group	Benefits	Costs
Policyholders	A detailed supervisory statement would address the potential risks that the arrangements may pose on policyholder protection.	Could be too prescriptive and potentially impact continuity of existing contracts and policyholder protection.
Industry	A detailed Statement would provide clarity to the industry on which activities and or functions should be conducted in the EEA.	A detailed Supervisory Statement risks offering not enough flexibility. It could be too prescriptive and would constrain the activities of European insurers and insurance intermediaries.
Supervisory authorities	A detailed supervisory statement would provide clarity on which activities and or functions should be conducted in the EEA.	A detailed supervisory statement may not allow for the necessary flexibility in certain cases.
Other	N/A.	N/A.

Option 3: Issue a principles-based supervisory statement

Under this option, EIOPA would build on previous communications, to propose a principles-based supervisory statement which would not detail the specific functions or activities that should be held locally and not outside the EEA.

Option 3: Issue a principles-based supervisory statement		
Stakeholder group	Benefits	Costs
Policyholders	A principles-based supervisory statement would address the potential risks that the arrangements may pose on policyholder protection	No relevant costs
Industry	A principles-based Statement would state supervisory expectations, while allowing for enough flexibility	A principles-based Statement would not list which activities and or functions should be conducted in the EEA
Supervisory authorities	A principles-based Statement would specify supervisory expectations, while allowing for enough flexibility	No relevant costs
Other	N/A	N/A

5. ANNEX I: COMPARISON OF THE DIFFERENT POLICY OPTIONS

The Policy option 3: Issue a principles-based supervisory statement is the preferred option.

First of all, issuing a supervisory statement is not expected to create new costs or regulatory burden for undertakings as it would only further clarify further EIOPA's previous positions.

Similarly , issuing a supervisory statement would not introduce a change of regulation nor any new system/approach of supervision.

From the two proposed policy options which concern the issuance of supervisory statements, a principles-based supervisory statement offers several points in favour such as the flexibility, the room for discretion left to supervisory authorities, and it also would be line with the communications issued in other European financial sectors.

It would also avoid constraining the activities of European insurers and insurance intermediaries, and putting at risk continuity of existing contracts and therefore policyholder protection.

6. ANNEX II SUMMARY OF QUESTIONS TO STAKEHOLDERS

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?

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

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

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?

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

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

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

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

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Contact details of EIOPA's Data Protection Officer
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¹⁴ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC

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