

Brussels, 5.4.2018
COM(2018) 169 final

**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**on the application of Title III of Directive 2009/138/EC of the European Parliament and
the Council of 25 November 2009 on the taking-up and pursuit of the business of
Insurance and Reinsurance (Solvency II) as regards the supervision of insurance and
reinsurance undertakings in a group, and the assessment of the transitional period for
the occupational retirement provision business of life insurance undertakings**

I. Introduction

Since 1 January 2016, when it entered into application, the Solvency II Directive¹ has provided a sound and robust prudential framework for insurance firms in the EU. Based on the risk profile of individual companies, it promotes comparability, transparency and competitiveness.

Title III of Solvency II concerns the supervision of insurance and reinsurance undertakings in a group. The Directive uses an innovative supervisory model which assigns a key role to a group supervisor, while recognising and maintaining an important role for the solo supervisor.

Solvency II also contains provisions on institutions for occupational retirement provision (IORPs) Directive². In particular, subject to certain conditions, life insurers' occupational retirement provision business is exempt from full application of the solvency capital requirement (SCR) in Solvency II for a transition period. Via an amendment to Solvency II, the IORP II Directive extended this period from the end of 2019 to the end of 2022.

Solvency II requires the Commission to report to the European Parliament and Council on the group supervision provisions in Title III³ and on the transition period for IORPs operated by life insurance undertakings. For the sake of convenience, the present report fulfils these two (unrelated) requirements in a single document.

II. Application of Title III of Solvency II on the supervision of insurance and reinsurance undertakings in a group

Article 242(1) of Solvency II requires the Commission to report on the operation of Title III of Solvency II (group supervision):

‘By 31 December 2017, the Commission shall make an assessment of the application of Title III, in particular as regards the cooperation of supervisory authorities within, and functionality of, the college of supervisors and the supervisory practices concerning setting the capital add-ons, and shall present a report to the European Parliament and to the Council accompanied, where appropriate, by proposals for the amendment of this Directive.’

¹ 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) (OJ L 335, 17.12.2009, p. 1), subsequently amended by Directive 2011/89/EU (Financial Conglomerates Directive), Directive 2012/23/EU, Council Directive 2013/23/EU, Directive 2013/58, Directive 2014/51/EU ('Omnibus II' Directive) and Directive 2016/2341/EU ('IORP II' Directive on Institutions for Occupational Retirement Provision).

² Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (OJ L 354, 23.12.2016, p. 37), which entered into legal force on 12 January 2017 and must be transposed in the Member States by 13 January 2019.

³ Article 242(2) of Solvency II requires the Commission to make an assessment of the benefits of enhancing group supervision and capital management within a group of insurance or reinsurance undertakings by 31 December 2018. The Commission is to present the report to the European Parliament and the Council by the end of 2018.

On 1 June 2017, the Commission asked the European Insurance and Occupational Pensions Authority (EIOPA) for input to the report. Much (but not all) of EIOPA's contribution, as provided on 24 January 2018⁴, was fed into this report.

(a) General issues regarding group supervision

The central issues of Chapter I of Title III of Solvency II are the definition of a group and the scope of group supervision. EIOPA reported certain concerns on the definition of a group under Article 212(1):

- difficulties in assessing whether, through 'centralised coordination', one undertaking effectively exercises a dominant influence on the decisions, including financial, of the other undertakings in the group;
- as regards third-country groups operating in several EEA countries, difficulties in identifying situations that trigger group supervision and the designation of a group supervisor; and
- as regards insurance groups with major non-EEA operations, limited powers for national supervisory authorities (NSAs) to impose additional capital requirements where a material risk from other non-EEA group undertakings is identified, and to restrict intra-group transactions.

EIOPA reported on the emergence in the EU of several non-EEA structures with related investment funds that invest in insurance undertakings across the EEA. These structures do not qualify as groups within the meaning of Solvency II. EIOPA called for the setting-up of 'protocolleges' to exchange information on the basis of which to assess potential risks from activities and uncertainties regarding the strategy of the ultimate parent based in a non-EEA country.

Another potential issue is the lack of consistency between the undertakings in the group and the scope of group supervision in relation to third-country insurance undertakings, the insurance holding company, the mixed financial holding company or the mixed-activity insurance holding company. Although these entities can be part of the group, Article 214 states that 'the exercise of group supervision in accordance with Article 213 shall not imply that the supervisory authorities are required to play a supervisory role', except in the case of the 'fit and proper' requirement in Article 257. This potential lack of supervisory measures against the holding company could be problematic where the valuation of participations is considered inadequate. Furthermore, in delimiting the scope of supervision of group solvency, Article 218 imposes the exercise of this power in the cases of insurance and reinsurance undertakings referred to in Article 213(2) (a) and (b), but Article 214 allows the group supervisor to reduce the scope of group supervision on a case by case basis.

(b) Cooperation of supervisory authorities within, and functionality of, colleges of supervisors

Solvency II strengthens cooperation among supervisory authorities and establishes the rights and duties of the group supervisor and the other supervisors in a college of supervisors. Each college of supervisors includes the group supervisor, the supervisory authorities of all the Member States in which the head offices of subsidiary undertakings are located, and EIOPA.

⁴<https://eiopa.europa.eu/Publications/Consultations/Report%20to%20the%20European%20Commission%20on%20the%20Application%20of%20Group%20Supervision.pdf>

According to EIOPA data, there were 92 colleges in 2016, allowing national supervisors to exchange information regularly and discuss and address divergences in members' approaches.

The overall assessment is that colleges function well, while the main areas of potential divergence are those that involve the exercise of judgment, such as the supervision of the technical provisions calculated by the insurance undertakings. To enhance cooperation, the framework enables joint on-site examinations, in which EIOPA can take part pursuant to Article 21 of Regulation (EU) No 1094/2010⁵ (the EIOPA Regulation). This kind of inspection is becoming more common, demonstrating 'good cooperation [among NSAs] when planning and conducting joint on-site inspections'. The EIOPA report points out one issue as regards the language used during the examinations: 'in some cases, according to the local law, the management of the undertaking only need to answer questions and provide information in the local language'.

(c) Sub-group supervision

Article 215(1) of Solvency II establishes a general rule whereby the system of group supervision at Union level is based on the ultimate parent undertaking⁶. However, by way of derogation from this rule, Article 216(1) provides that Member States may allow their supervisory authorities to decide, after consulting the group supervisor and the ultimate parent undertaking at Union level, to subject the ultimate parent insurance or reinsurance undertaking, insurance holding company or mixed financial holding company at national level to group supervision. This is known as sub-group supervision.

According to EIOPA's data, three EU supervisors conduct sub-group supervision on eight cross-border groups. The immediate effect is the setting-up of an additional college for each sub-group (including a separate coordination arrangement, emergency plan and double information exchange) and overlaps in the group's reporting to supervisors and its sub-groups. These additional complications need to be balanced against the fact that sub-group supervision is of great importance to those Member States that practise it.

(d) Group internal models

In line with the risk-oriented approach to the SCR, Solvency II allows individual insurance and reinsurance undertakings and groups to use internal models for the SCR calculation, rather than the standard formula, subject to supervisory approval. Article 231 defines group internal models and establishes guidelines for the supervisory authorities concerned on how to reach a joint decision on the application. EIOPA reports that 11 NSAs have approved (cross-border and domestic) group internal models and solo internal models are used in 17 Member States.

⁵ 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).

⁶ Where the participating insurance or reinsurance undertaking or the insurance holding company or the mixed financial holding company referred to in Article 213(2)(a) and (b) is itself a subsidiary undertaking of another insurance or reinsurance undertaking or of another insurance holding company or of another mixed financial holding company which has its head office in the Union, Articles 218 to 258 shall apply only at the level of the ultimate parent insurance or reinsurance undertaking, insurance holding company or mixed financial holding company which has its head office in the Union.

NSAs do not consider EIOPA to be one of ‘the supervisory authorities concerned’ (within the meaning of Article 347(3) of Commission Delegated Regulation (EU) 2015/35)⁷ as regards joint decisions on internal models in colleges, with the consequence that EIOPA has not in general received the formal application materials. EIOPA concludes that its limited role in the assessment and approval of cross-border internal models has sometimes hampered its work in assessing and promoting convergence. On the other hand, under Article 248(3) of Solvency II, EIOPA is a member of the college of supervisors and Article 231(1) states that the ‘group supervisor shall inform the other members of the college of supervisors and forward the complete application to them, without delay’.

Although many of the colleges have had difficult discussions, to date they have reached joint decisions on group internal models without requesting EIOPA mediation. Nevertheless, EIOPA refers to several cases of a group choosing to remove one or more countries from the scope of the group internal model application where it had concerns that it would not otherwise reach a joint decision in time for approval before the start of Solvency II application on 1 January 2016.

(e) Group capital add-ons

Where the risk profile of the group is not adequately reflected, a capital add-on to the consolidated group SCR may be imposed. EIOPA reported that this measure was used by one supervisor for four groups in 2016⁸. Three capital add-ons at group level related to a standard formula significant risk-profile deviation; in one case, a capital add-on related to an internal model that did not cover all the material risk-profile deviations.

(f) Other group supervision issues

EIOPA has received no requests to mediate within a college of supervisors under Article 19 of the EIOPA Regulation.

The supervision of group solvency for groups with centralised risk management is laid down in Articles 236 to 239 of the Directive. In this regard, EIOPA indicates that there are so far no centralised risk management agreements among supervisors.

III. Transitional period for life insurance undertakings’ occupational retirement provision business

Article 308b(15) of Solvency II, as amended by Article 63 of the IORP II Directive, requires the Commission to report on the operation of the transitional period referred to in the introduction:

‘15. Where, on the entry into force of this Directive, home Member States applied provisions referred to in Article 4 of Directive (EU) 2016/2341, those home Member States may continue to apply the laws, regulations and administrative provisions that had been adopted by them with a view to complying with Articles 1 to 19, Articles 27 to 30, Articles 32 to 35 and Articles 37 to 67 of Directive 2002/83/EC as in force on 31 December 2015 for a transitional period expiring on 31 December 2022.

[..]

⁷ Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC 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 12, 17.1.2015, p. 1).

⁸ https://eiopa.europa.eu/Publications/Reports/EIOPA-BoS-17-336rev2_EIOPA%202017%20report%20on%20the%20use%20of%20Capital%20Add%20Ons.pdf

By 31 December 2017, the Commission shall submit a report to the European Parliament and to the Council on whether the period referred to in the first subparagraph should be extended, taking account of changes to Union or national law resulting from this Directive.'

While the legislation foresees a report at the end of 2017, the transitional period does not expire until 31 December 2022, so the end of 2017 can be considered somewhat early to draw definitive conclusions on its operation. At this stage, the Commission does not have new elements in its possession that would justify a further extension of the transitional period, but it will continue to monitor the situation from the entry into application of the IORP II Directive on 13 January 2019. The monitoring will contribute to the review of that Directive, which is due by 13 January 2023 (see Article 62 of the IORP II Directive).

IV. Conclusion

Article 242(1) of Solvency II provides that the Commission's report on the application of Title III (group supervision) may be accompanied with legislative proposals.

As Solvency II is due for general evaluation in 2020 and given the importance of a stable regulatory framework, the Commission considers that only one of the areas identified above requires legislative amendment at this stage: the area of group internal models, where divergences among Member States have been identified and EIOPA needs enhanced powers to bring about convergence.

However, given the urgency of the matter and the opportunity provided by the Commission's package of proposals to review the functioning and financing of European supervisory authorities (as adopted on 20 September 2017), action has already been taken on this. The package included a legislative proposal to amend Solvency II⁹ so as to mitigate and prevent divergences in the supervision and approval of group internal models. Article 2 of the proposal includes amendments to Solvency II to:

- give EIOPA a greater role in ensuring supervisory convergence in the area of internal model applications (at solo and group level) and with respect to information-sharing on such applications; and
- allow EIOPA to issue opinions in this regard and assist in the settlement of disputes between supervisory authorities, at their request, on its own initiative or, in certain circumstances, at the request of concerned undertakings.

The amendments also provide that EIOPA should prepare annual reports on this matter. This will allow close monitoring of the situation on internal model applications, including the bringing to light of outstanding concerns as regards supervisory convergence in this area.

As to the transitional period for the occupational retirement provision business of life insurance undertakings, the Commission may take a decision nearer the end of that period (end 2022) concerning its possible extension. If a decision is taken to extend the period, a legislative proposal could be introduced in good time before the end of 2022.

⁹ Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/65/EU on markets in financial instruments and Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (COM(2017) 537 final). See also COM (2017) 536 final (proposal for a Regulation amending various regulations, including the EIOPA founding Regulation).