

CRITERIA FOR THE INDEPENDENCE OF SUPERVISORY AUTHORITIES



eiopa

European Insurance and
Occupational Pensions Authority

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INTRODUCTION

The revised EIOPA Regulation introduced new tasks to EIOPA, one of them is to foster and monitor supervisory independence¹. Article 8 (1) of the EIOPA Regulation states that EIOPA “shall contribute to the consistent application of legally binding Union acts, in particular by a common supervisory culture [...] fostering and monitoring supervisory independence”. Furthermore, Article 30 (3) of the EIOPA Regulation sets out that Peer Reviews shall be used as a tool for “the assessment of the degree of independence, and governance arrangements of the competent authority² [...]”.

EIOPA consulted the available global standards set by the BIS, IOSCO and the IAIS. As the standards set by the IAIS are the most elaborate, it was decided to take these IAIS standards as a starting point. The BIS, IOSCO and IOPS all have very similar principles but in a less elaborate form. Also, EIOPA cooperated closely with the other ESAs throughout the process.

THE OBJECTIVE OF INDEPENDENCE

The IAIS objectives for independence of supervisory authorities are set out in ICP 2 as an instrument to enhance the credibility of the supervisory authority. The ICP 2 states that operational independence, accountability and transparency of supervisory authorities contribute to the legitimacy and credibility of the supervisory process.

Supervisory authorities are public bodies serving the public interest on the basis of their respective supervisory tasks. To avoid possible conflicts of interest and support objective supervision and decision making, proper considerations should not only be given to the fulfilment of the main objectives of supervision but also to the governance around the supervisory processes and functioning of the supervisory authority through which these decisions are made. Good governance is therefore required for the way supervisors are managed, assessed and held accountable.

¹The Authority shall have the following tasks: [...] to contribute to the consistent application of legally binding Union acts, in particular by [...] fostering and monitoring supervisory independence [...] (Article 8(1)).

² The peer review shall include an assessment of, but shall not be limited to: a) [...] the degree of independence [...] of the competent authority [...] (Article 30(3)(a)).

Furthermore, adequate independence is a crucial tool to reduce the likelihood of undue influence from industry and of political interference.

4 PRINCIPLES WITH SPECIFIC CRITERIA

ICP 2 of the IAIS states supervisory authorities should be **operationally independent, accountable and transparent** in the exercise of its responsibilities and powers, and have adequate resources to discharge their responsibilities. These three requirements build on ICP1, which states that each authority responsible for insurance supervision should have its powers and the objectives of insurance supervision clearly defined.

Furthermore, ICP 2 requires **financial independence** and **personal independence**.

Article 31 of the Solvency II Directive and Article 51 of the IORP Directive set out requirements for transparency and accountability of supervisory authorities and requests the supervisory authorities to conduct their tasks in a transparent and accountable manner (with due respect to the protection of confidential information). It sets out minimum requirements for the information to be disclosed as well. Where relevant, references to the Solvency II Directive and the IORP Directive are made in the text.

EIOPA used these 4 elements as the main principles. Below each principle detailed criteria are specified for the assessment of the independence of supervisory authorities with the aim to a) provide clarity for supervisory authorities on EIOPA's standards for the level of independence and b) have a set of criteria on the basis of which EIOPA can perform assessments of a supervisory authorities' independence. The set of criteria in this document is not intended to be a mere checklist and any reviewer will need to exercise judgment when using the criteria.

PRINCIPLE 1 - OPERATIONAL INDEPENDENCE

Supervisory authorities should have operational independence.

National laws should assign clear and explicit mandates and objectives to supervisory authorities.

All supervisors in their daily tasks should apply the principles of independence, transparency and accountability.

1.1 Without interfering with the institutional autonomy of the Member States to define the governance structure of their local supervisors, and, at the same time, without prejudicing their independent functioning, any form of political or other stakeholders' influence on the supervisory authority – direct or indirect – should be prohibited.

1.2 To achieve this goal, the supervisory authority should be enabled by primary law to:

- a. fulfil its tasks on the basis of clear objectives and mandate enacted by law;
- b. exercise its responsibilities and powers with adequate numbers of staff and financial resources to fulfil its mandate. This with full discretion to allocate these resources and recruit its own personnel autonomously, including the freedom to set remuneration and contractual conditions applicable to its staff. Staff and board members should possess sufficient supervisory skills and competences to guarantee that, as a whole, they maintain the proper legal and technical knowledge and behavioural skills required to fulfil their tasks. Furthermore, staff and board members should function under the remit of the supervisory authority, and not report to any other authority;
- c. carry out the supervisory process according to high governance standards which are regularly assessed and reviewed and which includes a clear decision-making process as well as written procedures on supervisory measures and sanctions;
- d. take supervisory measures (including sanctions) and other decisions without interference from any part of the government, including other governmental bodies, the legislator and the insurance or pensions sector.

1.3 Staff and members of the governing bodies of supervisory authorities should not seek or take instructions from government institutions or bodies or from sector representatives before taking their supervisory and policy decisions unless legally required for objective reasons. In addition, government institutions or bodies, sector representatives and any other public or private

body, shall not be allowed to influence the members of the decision-making bodies of supervisory authorities and therefore not be a member of the governing board. (see also below The functioning of governing bodies of supervisory authorities).

1.4 The institutional relationships and accountability frameworks between the supervisory authority and the government should be clearly defined in legislation, specifying the circumstances (e.g. where major socio-economic implications of a decision might be expected) and processes for sharing information, consultation or approval processes between the supervisory authority and the government. Daily operations of the supervisory authority should not be subject to consultation with or approval by the government or any other public or private body.

1.5 Supervisory authorities should, within and in compliance with the legal framework applicable, have autonomy in setting technical rules and regulations and practical procedures and instructions for the sectors under their supervision, based on European standards and best practices when available. Examples are information to be submitted for authorisation requests, guidelines on the internal governance of financial institutions, information to be provided to policy holders.

1.6 A clear definition of the supervisory authority's strategy and work plan is requested to allow proper planning and setting of priorities and timelines. In particular, such planning might essentially be 'operational' planning, taking into account impact/probability of risks stemming from supervised entities (following a bottom-up approach), but should also be complemented by 'strategic' planning that defines the strategic priorities set considering overall market developments, risks and vulnerabilities at the macro level and input from other competent national and European authorities.

1.7 Where the supervisory authority has the power to delegate supervisory activities to third parties, it should follow clearly defined, documented and transparent procedures when doing so. The supervisory authority retains the accountability for and oversight of any delegated activities to the same degree as non- delegated activities. Delegation of powers should not adversely affect the supervisor's ability to conduct effective supervision or meet its objectives.

1.8 Supervisory authorities should have access to adequate material resources such as IT (hardware and software), security standards and access to relevant information sources, in order to appropriately implement the supervisory review process.

THE FUNCTIONING OF GOVERNING BODIES OF SUPERVISORY AUTHORITIES³

1.9 Legislation should define the responsibilities of the governing body of the supervisory authority and lay down a clear and independent decision-making process.

1.10 Government institutions or bodies, sector representatives and any other public or private body, shall not be a member of the governing board.

1.11 The supervisory authority should oblige staff and members of its governing body to report conflicts of interest. Staff and members of the governing body of the supervisory authority should exclude themselves from decisions where they have a conflict of interest.

1.12 Supervisory authorities should have adequate internal procedures to help ensure that the authority is consistent in the actions and decisions it takes: supervisory requirements and supervisory procedures need to be applied consistently and equitably, and regularly assessed and reviewed as stated above.

APPEAL AGAINST SUPERVISORY DECISIONS

1.13 The existence of an independent appeal or review mechanism helps ensure that the supervisory decisions are made on the basis of the relevant laws and statutes as consistently as possible and are well reasoned. The independent appeal processes should be specific and balanced to preserve supervisory independence and effectiveness.

1.14 The legislative processes to appeal against supervisory decisions shall not unduly impede the ability of the supervisory authority to make timely interventions in order to protect policyholders' interests or contribute to financial stability. These processes should allow the supervisory authority to exercise its powers quickly in cases where expeditious action is required. The decision of the supervisory authority remains in force until the appeal or review mechanism has produced a final decision on the appeal, if delay comprises the effectiveness of the measure, unless otherwise ordered by a court.

³ This is equally valid for the decision-making body of the authority if its management function is separate from its decision-making function.

OTHER LEGAL ACTIONS AGAINST THE SUPERVISORY AUTHORITY AND ITS STAFF

1.15 Legislation governing the supervisory authority provides the necessary legal protection from legal actions against individual staff members for supervisory actions and decisions taken in good faith while discharging their duties. Staff is adequately protected against the costs of defending their actions.

1.16 Having necessary protection from legal action promotes the independence of the supervisory authority by enabling its staff to make decisions and take actions against a regulated legal entity even though such actions or decisions may be contested by that entity.

1.17 In this context, legislation should protect the supervisory authority and its staff from criminal or civil liability for decisions made and actions taken in the course of discharging their supervisory responsibilities, provided that the actions or decisions were not taken in bad faith or illegally.

PRINCIPLE 2 - ACCOUNTABILITY AND TRANSPARENCY

Supervisory authorities should conduct their tasks in a transparent and accountable manner.

ACCOUNTABILITY

2.1 The accountability of a supervisory authority reinforces operational independence. Article 31 of the Solvency II Directive and Article 51 of the IORP Directive require the performance of supervisory tasks in an accountable manner. Supervisory requirements, supervisory processes as well as information about the supervisor's responsibilities should be publicly disclosed to support the accountability of the authority.

2.2 The supervisory authority should have a well-defined internal governance structure and strong internal governance processes to support the accountability and integrity of the authority.

2.3 The supervisory authority's internal governance includes its organisational structure and management arrangements, lines of responsibility, and systems of risk management and internal controls. In this context, integrity refers to the authority always acting with probity, respectability and lawfulness, and within the bounds of its delegated authority.

2.4 Regardless of the supervisor's governance structure, the responsibilities of the governing body, the responsibilities of Senior Management, communication channels and decision making authorities, including delegation thereof, should be documented in binding procedures to facilitate compliance with internal controls, including proper authorisation of actions taken by or on behalf of the supervisory authority.

2.5 Well-defined communication channels should ensure prompt escalation of significant issues to appropriate levels within the supervisory authority.

2.6 The supervisory authority should identify the individual or group of individuals responsible for the implementation and review of the internal governance arrangements. The internal governance processes and procedures should be subject to regular independent review, for example by an internal audit function or a public auditor.

TRANSPARENCY

2.7 Supervisory authorities should conduct their tasks in a transparent and accountable manner with due respect for the protection of confidential information. Transparency reinforces accountability of supervisory authorities.

2.8 The supervisory authority is transparent to the public, supervised entities and the government about how to exercise its responsibilities. The authority should report on its performance against its strategy and work plan, including the use of its financial resources, to the government and other stakeholders, including insurance industry participants, consumers and the general public, to enhance confidence in their independent status.

2.9 The supervisory authority should publish a report at least annually that contains on the basis of the authorities' objectives and responsibilities:

- ▶ an overview of its activities in the light of its goals and priorities in the year to be reported as well as its plans for the future;
- ▶ an overview of the supervisory measures taken subject to confidentiality considerations and in so far as it does not jeopardise other supervisory objectives;
- ▶ the audited financial statements as well as an overview of its resources (human, technological and financial).

2.10 Supervisory authorities should further disclose at least the following information:

- ▶ the texts of laws, regulations, administrative rules and general guidance in the field of sectorial regulation;
- ▶ the general criteria and methods, including the tools used in the supervisory review process;
- ▶ aggregate statistical data on key aspects of the application of the prudential framework;
- ▶ the objectives of the supervision and its main functions and activities.

2.11 The information referred to in paragraph 2.10 shall be disclosed and made available via the website of the supervisory authority in the official language or languages of the Member State concerned and shall also be disclosed in a language customary in the sphere of international finance. The disclosure shall be made in a common format, as stipulated in article 31(2) of the Solvency II Directive and the Commission Implementing Regulation (EU) 2015/2451, and the information shall be updated at least every year. The disclosure provided shall be sufficient to enable a comparison of the supervisory approaches adopted by the supervisory authorities.

PRINCIPLE 3 - FINANCIAL INDEPENDENCE

Supervisory authorities should have access to sufficient financial resources to fulfil their mandates.

The financing of the supervisory work is organised in such a manner that:

- ▶ *the supervisor's independence is not compromised,*
- ▶ *the method of financing is stable, predictable and transparent,*
- ▶ *influence from the funding source is excluded.*

3.1 Article 27 of the Solvency II Directive and Article 45 of the IORP Directive state supervisory authorities are provided with the necessary means to fulfil their mandate.

3.2 A wide variety of financing models may exist, such as financing by government, levies imposed on supervised entities and combinations thereof.

3.3 The method under which the supervisory authority is financed should be stable, predictable and transparent and not undermine the authorities' independence.

3.4 Authorities should have access to sufficient financial resources to fulfil their mandates. Member States may not put their supervisory authorities in a position where they have insufficient financial resources to carry out their tasks. The conditions for access to and allocation of these resources should not lead to undue interference from other authorities or the sector with the fulfilment of the authorities' tasks.

PRINCIPLE 4 - PERSONAL INDEPENDENCE

The members of the supervisory authority's governing body should fulfil their tasks independently.

Procedures regarding the appointment and dismissal of the head of the supervisory authority and members of its governing body are transparent.

APPOINTMENT AND DISMISSAL OF MEMBERS OF THE MANAGING BODY OF THE SUPERVISORY AUTHORITY

4.1 Clear and comprehensive procedures regarding the appointment and dismissal of the head of the supervisory authority enhance independence, as they limit the potential for government interference in the management of the supervisor. Those procedures should be codified in legislation.

4.2 Legislation should disclose the general criteria for appointing members of a governing body, including that they possess relevant qualifications, knowledge and experience to oversee the activities of the supervisor, as well as the mechanism for their remuneration (for example, salary, daily allowance or voluntary work).

4.3 The procedures for appointment and dismissal of governing body members should be publicly available. The procedures should include who appoints the head of the supervisory authority and members of the governing body, the length of those appointments and the reasons for which the head of the supervisory authority or the members of the governing body can be dismissed before the end of their term.

4.4 The procedures regarding the appointment of the members of the governing body should result in a balance of skills, knowledge and experience amongst the members of the governing body as a whole. The governing body should possess the relevant insurance industry /pension funds or services expertise. Any vacant position should clearly specify the skills, knowledge and expertise required to bring the governing body as a whole in balance. The supervisory authority and its governing body should not be adapted due to changes in government administration or other political reasons.

4.5 Staff and members of the governing body of supervisory authorities should not hold any consultancies, directorships or financial interests, nor expect any future benefit from, or be involved in any capacity in the supervised entities of the authority, other than as a consumer of retail

services. They should not accept gifts or hospitality from these entities in excess of a low monetary value.

4.6 To enable the members of the governing bodies to fulfil their tasks independently:

- ▶ governing-body members should be recruited via an open and transparent call for candidates' procedure;
- ▶ the statutes of the supervisory authority or the national legislation clearly
- ▶ state the appointment criteria as well as the conditions for dismissal;
- ▶ heads of supervisory authorities and members of the governing bodies may be removed from office only on legal grounds as set out in national law.

4.7 Selection criteria should at least include:

- ▶ a level of education which corresponds to completed university studies attested by a diploma;
- ▶ thorough knowledge of the sectors of relevance for the activities of the
- ▶ authority and proven expertise in these areas;
- ▶ proven good knowledge of the National and European regulatory and legal environment;
- ▶ experience in directing an organisation with significant tasks and objectives and steering that organisation to the achievement of its objectives.

4.8 The Head of the authority and the member(s) responsible for the international dialogue with other national and European supervisory authorities should be able to have a proficient level of English, to be able to represent their authority and be involved in international cooperation.

CONFLICT OF INTEREST

4.9 The supervisors' internal policies should prohibit close relationships with the industry, the government and lobbyists and should further include appropriate restrictions in relation to authority senior staff's post-employment, confidentiality and anti-corruption measures, non-prejudice and accountability in the context of authority's decision-making.

4.10 The supervisory authority should have policies and processes or a code of conduct in place to avoid and manage real, potential or perceived conflicts of interests.

4.11 Board and staff members should be subject to a regular procedure which obliges them to declare any interest that might be considered prejudicial to their independence and to declare possible conflicts of interest ad-hoc where necessary. An independent compliance function within the authority with effective authority needs to review these declarations.

4.12 Integrity of the supervisory authorities' day-to-day operation and staff shall be subject to internal audit arrangements and standards for conduct to prevent conflicts of interest.

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