



BOA 2015 001

Decision

of the Board of Appeal of the European Supervisory Authorities given under Article 60 of Regulation (EU) No 1094/2010 and the Board of Appeal's Rules of Procedure (BOA 2012 002)

Appeal by

**Onix Asigurari SA
and
Simone Lentini
[appellants]**

against

**European Insurance and Occupational Pensions Authority
[respondent]**

Decision

Ref. EIOPA 24 November 2014

William Blair (President)
Juan Fernández-Armesto (Vice-President)
Noel Guibert (Rapporteur)
Beata Maria Mrozowska
Katalin Mero
Marco Lamandini

Place of this decision: Paris
3 August 2015

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I. The appeal

1. This is an appeal by Mr Simone Lentini who is domiciled in Romania, and Onix Asigurari SA which is a Romanian insurance company. According to the material before the Board of Appeal, Mr Lentini is the sole shareholder in Onix. The appeal is brought against what is said to be a decision of the respondent, European Insurance and Occupational Pensions Authority (EIOPA), dated 24 November 2014. The Board notes at the outset that the respondent contests that this is a decision in respect of which an appeal lies.
2. The appellants' representative is Mr Simone Lentini. The respondent's representative is Mr Szabolcs Dispiter, Senior Legal Expert.
3. The appeal is brought under Article 60 of Regulation No. 1094/2010 (the "EIOPA Regulation"). The EIOPA Regulation establishes EIOPA. It provides in Article 6(5) for the Board of Appeal to exercise the tasks set out in Article 60.
4. Article 60(1) of the EIOPA Regulation provides for the right of appeal as follows:

"Any natural or legal person, including competent authorities, may appeal against a decision of the Authority referred to in Articles 17, 18 and 19 and any other decision taken by the Authority in accordance with the Union acts referred to in Article 1(2) which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person."

II. The background facts

5. The Board's understanding is that Onix is an insurance company authorised by the Romanian authorities. It appears that in about October 2012, it began to provide certain insurance services in Italy under provisions of article 35 (and following) of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance. It appears to have done so providing in particular suretyship insurance to public entities.
6. On 20 December 2013, Onix was prohibited from continuing business in Italy by IVASS. For the purposes of this decision, it is not necessary to state the reasons, and the Board has not seen the operative instrument. In summary, it appears that IVASS had become concerned as to the standing of Onix's sole shareholder, Mr Lentini.
7. Onix was dissatisfied with this decision, and complained to the respondent about it on 5 February 2014. Onix contends that under the applicable European rules, it is for the Romanian regulator, not the Italian regulator, to conduct the prudential evaluation of an insurance company including suitability of persons.

8. The complaint against IVASS was pursued by Onix with the respondent in subsequent correspondence. It was treated by the respondent as a complaint which could give rise to an investigation regarding a breach of Union law under Article 17 of the EIOPA Regulation.
9. Article 17 (Breach of Union law) provides that:
 - “1. Where a competent authority has not applied the acts referred to in Article 1(2) or has applied them in a way which appears to be a breach of Union law, including the regulatory technical standards and implementing technical standards established in accordance with Articles 10 to 15, in particular by failing to ensure that a financial institution satisfies the requirements laid down in those acts, the Authority shall act in accordance with the powers set out in paragraphs 2, 3 and 6 of this Article.
 2. Upon a request from one or more competent authorities, the European Parliament, the Council, the Commission or the relevant stakeholder group, or on its own initiative and after having informed the competent authority concerned, the Authority may investigate the alleged breach or non-application of Union law.”
10. Two decisions of EIOPA’s Chair dated 6 June 2014 and signed by him regarding the initiation of an investigation under Article 17 of the EIOPA Regulation were sent to Mr Lentini on 12 June 2014.
11. By decision EIOPA-14-266, the Chair decided that the complaint was admissible under Article 17 regarding alleged breaches of the third non-life insurance Directive (Solvency I), that is Directive 92/49.
12. By decision EIOPA-14-267, the Chair decided not to initiate an investigation regarding a possible breach of EU law. The recitals show that the reasoning was that supervisory authorities of a host state have the power to adopt emergency measures under article 40 (6) of Directive 92/49 to remedy irregularities in their territory, and that there was no ground upon which to allege a breach of the Directive.
13. Onix was dissatisfied with this decision, and sent communications to the respondent stating why, in its view, IVASS had no right to evaluate the reputation of a shareholder of an insurance company in another member state.
14. On 24 November 2014, the respondent sent Onix a letter EIOPA-14-653, signed by two lawyers within the respondent, to the effect that EIOPA’s position in relation to the Chair’s decision number EIOPA-14-267 remained unchanged. It said that although under the Directive assessment of reputation was the responsibility of the home state regulator, the host state regulator has certain powers in order to protect local policy holders. The emergency powers could be appropriate against any sort of irregularities.
15. The letter also stated that if Onix disagreed with the decision, it could seek legal remedy as provided for in the Regulation. The Board notes (and the appellants point out) that despite this statement, in fact the respondent’s position as shown in the material it has filed is that it regards any appeal against decision number EIOPA-14-267 as by then being out of time.

III. Matters relating to the appeal

16. Up until 24 November 2014, communications between Onix and the respondent had been in the English language, as were the decisions.
17. On 22 December 2014, Mr Lentini and Onix sent EIOPA an appeal document against what was described as EIOPA Decision 14-653 of 24 November 2014.
18. Unlike the previous communications between Onix and EIOPA, and the various documents issued by EIOPA, this document was in the Italian language. It was sent to the Board of Appeal secretariat by EIOPA on 7 January 2015.
19. On 12 January 2015, the appellants sent electronically a package of correspondence to the Board of Appeal secretariat.
20. On 13 January 2015, the Board of Appeal asked the appellants to provide a translation of the letter dated 22 December 2014.
21. On 15 January 2015, the appellants sent a further form of notice of appeal similar to, but not identical to, that sent on 22 December 2014.
22. On 15 January 2015, the appellants requested that the language of the appeal should be Italian.
23. On 2 February 2015, the respondent responded to the effect that since all correspondence was in the English language, including the decision or decisions appealed against, it would be burdensome to translate all the documents, and that “the overall costs of the appeal due to the use of Italian language more likely will be much higher”. The respondent requested the Board of Appeal to allow for the partial use of the English language in the appeal proceedings for written communications between the parties and the Board of Appeal.
24. On 3 February 2015, the appellants objected.
25. Having considered the matter, the Board of Appeal reached so far as relevant the following decision which was sent to the parties on 17 February 2015.

“The Board of Appeal notes the appellant’s request to conduct the appeal in the Italian language, and thanks the parties for their emails on this subject. The Board has carefully considered the request taking account of Article 73 of Regulation (EU) No 1094/2010, Council Regulation No 1 determining languages to be used, and rulings of the Court of Justice of the European Union.

The Board notes that the complaint by Onix Asigurari S.A. (a Romanian company) to EIOPA, and the decision of EIOPA against which the appeal is brought, were in the English language (“the language of the decision”). The Board considers that written communications concerning the appeal against the decision (including the Notice of Appeal) should also be in the language of the decision. If there is a hearing, the Board will discuss with the parties beforehand the question of translation so that appropriate arrangements can be made for participants to be heard. “

26. Having received no response from the appellants, on 26 February 2015, the Board of Appeal sent a further message repeating its request to the appellants for the Notice of Appeal in the language of the decision appealed against.
27. There was no response from the appellants until 20 April 2015, when they asked about the situation on the appeal. A copy of the Notice of Appeal in the language of the decision appealed against was not provided.
28. On 30 April 2015, the Board gave the parties notice that it was considering dismissing the appeal, and asked the parties for their comments.
29. Having received further representations from the parties, on 1 June 2015 the Board of Appeal notified them as follows:

“The Board of Appeal has considered carefully the representations which have been made to it. Although the appellant asked to conduct the appeal in the Italian language, the Board decided on 17 February 2015 that since the complaint by the appellant, Onix Asigurari S.A. (a Romanian company), to EIOPA, and the decision of EIOPA against which the appeal is brought, were in the English language (“the language of the decision”), written communications concerning the appeal against the decision (including the Notice of Appeal) should also be in the language of the decision. Despite a further request (that the appellant says was not received), the Notice of Appeal has still not been provided in the language of the decision.

The Board of Appeal reiterates that there is no obligation on the appellant to provide translations of such of the documents it provided with the Notice of Appeal that are not in the language of the decision — as would be expected, most of them are. It also reiterates that if there is a hearing, the Board will discuss with the parties beforehand the question of translation so that appropriate arrangements can be made for participants to be heard, so that if (for example) Mr Lentini wishes to represent the appellant he can do so in Italian.

In the light of the respondent’s response sent on 29 May 2015, it considers that it should give the appellant a further opportunity to comply with its direction. The appellant must provide the Notice of Appeal in the language of the decision appealed against within seven days from today, i.e. 1 June 2015. If it does so, the appeal will proceed. Subsequent written communications concerning the appeal must also be in the language of the decision.

If it does not do so, the Board of Appeal will dismiss the appeal in accordance with Article 14 of the Rules of Procedure.”

30. On 4 June 2015, the appellants sent a copy of the Notice of Appeal in the language of the decision.
31. On 25 June 2015, the respondent sent a Response to the effect that the appeal was inadmissible.
32. On 29 June 2015, the appellants sent a response stating their contentions as to why the appeal was admissible, and asked for a hearing.

33. On 2 July 2015, the respondent said that it could not support a hearing in relation to the preliminary question of admissibility.
34. Having regard to Article 60(4) of the EIOPA Regulation, on 6 July 2015, the Board of Appeal notified the parties that, "Subject to any other matters the appellant wishes to raise (which should be raised now), the Board does not consider that it would be appropriate to have a hearing on the admissibility question, and will now proceed to consider the arguments it has received on admissibility and issue its decision".
35. No other matter has been raised by either party, and the Board of Appeal consequently considers the admissibility of the appeal on the basis of the written arguments it has received.

IV. The parties' contentions

36. The respondent's contentions are as follows. It submits that the document numbered EIOPA-14-653 and dated 24 November 2014 is a letter communicating an opinion and not a decision. By the letter, the respondent confirmed that EIOPA's position in relation to EIOPA's Chair Decision No. EIOPA-14-267 remained unchanged. The document does not communicate any other decision. Further, the respondent contends that the appellants did not consider it as a decision, because they had requested an "opinion" in their letter of 8 October 2014 to which the letter of 24 November 2014 was a response.
37. The respondent also contends that the appeal should be dismissed because the Notice of Appeal did not comply with the mandatory requirements of Article 5(3) of Rules of Procedure because it did not state why the appeal was admissible under Article 60 of the EIOPA Regulation, and did not state what remedy was being sought.
38. Further, the respondent contends that any challenge to EIOPA's Chair Decision No. EIOPA-14-267 should also be rejected as inadmissible, since that decision was issued on 6 June 2014, and by Article 60(2) of the EIOPA Regulation, an appeal together with a statement of grounds is to be filed within 2 months of the date of notification of the decision to the person concerned. The original appeal was received on 22 December 2014, more than 6 months after notification of the decision.
39. In support of the admissibility of the appeal, the appellant contends as follows. By Article 39 of the EIOPA Regulation ("Decision-making procedures") the respondent had to inform any named addressee of its intention to adopt the decision setting a time limit within which the addressee might express its views on the matter. Before taking EIOPA Decision-14-267 of 6 June 2014, the respondent did not inform the appellants of its intention to adopt the decision or set a time limit within which the appellants might address their views on the matter.
40. Further, Article 39(2) required the respondent to state its reasons, and Article 39(3) required the respondent to inform addressees of the legal remedies available under the Regulation. The appellants contend that neither of these procedures was followed.

41. Further, the appellants submit that the respondent further revised its earlier decision, and that only the letter EIOPA-14-653 of 24 November 2014 showed the reasons on which the earlier decision was based. It was only that letter that referred the appellants as addressees to their legal remedies under the Regulation, and specifically that it was possible to appeal.
42. Taking account of these matters, the appellants submit that it is clear that the procedure relating to the appeal to the Board of Appeal began on 24 November 2014. Accordingly, the appellants contend that the appeal is admissible.
43. In its additional response of 2 July 2015 the respondent states that “It is important to outline that not just the contested letter N° EIOPA 14-653, but EIOPA’s Chair Decision N° 14-267 is not a decision either mentioned per se by Article 17 of the EIOPA Regulation, thus the decision making rules of Article 39 are also not applicable for this case”.

V. The Board of Appeal’s reasons and conclusion

44. Having considered the parties’ contentions, the Board of Appeal’s reasons and conclusion is as follows.
45. In the judgment of the General Court (Fourth Chamber) of 4 March 2015 in *UK v ECB* it was stated as follows:

59 It is settled case-law that an action for the annulment of a decision which merely confirms a previous decision not contested within the time-limit for bringing proceedings is inadmissible (order of 21 November 1990 in *Infortec v Commission*, C-12/90, ECR, EU:C:1990:415, paragraph 10, and judgment of 11 January 1996 in *Zunis Holding and Others v Commission*, C-480/93 P, ECR, EU:C:1996:1, paragraph 14). The purpose of that case-law is to prevent an applicant from being able, indirectly, to challenge the legality of a decision which he did not contest in good time and which has accordingly become definitive.

60 However, according to that case-law, a decision is a mere confirmation of an earlier decision where it contains no new factors as compared with the earlier measure and is not preceded by any re-examination of the situation of the person to whom the earlier measure was addressed (judgment of 26 October 2000 in *Ripa di Meana and Others v Parliament*, T-83/99 to T-85/99, ECR, EU:T:2000:244, paragraph 33; see order of 7 December 2004 in *Internationaler Hilfsfonds v Commission*, C-521/03 P, EU:C:2004:778, paragraph 47 and the case-law cited).

46. In the light of these principles, the Board reasons as follows. The issue is whether the communication EIOPA-14-653 sent to Onix on 24 November 2014 is, or is not, a “decision”. Unless it is a “decision”, the Board of Appeal has no jurisdiction to admit the appeal against it.

47. No appeal is brought in respect of EIOPA-14-267 of 6 June 2014, and the Notice of Appeal of 22 December 2014 would in any case be outside the 2 month time period stipulated in Article 60(2) of the EIOPA Regulation.
48. In the Board's view, the following matters are of particular relevance. The Board considers that EIOPA-14-267 is in the form of a decision being described as a "Decision", and signed by the Chair of EIOPA.
49. On the other hand, the Decision is not specifically addressed to either Onix or Mr Lentini.
50. Although the appellants contend to the contrary, the Board considers that the decision does identify its reasoning in the recitals. Also, it followed various expressions of views by Onix on the matter over a period of some months. No valid grounds of complaint appear to exist under Article 39(2) and (3) of the EIOPA Regulation.
51. It is correct that it did not inform the addressee of the legal remedies available under the Regulation, but contrary to the appellant's contentions the Board does not consider that this affects the validity of the decision as such. However, this is not central to the issue that the Board must decide, since the appellants bring no appeal against that decision.
52. With respect to the later communication EIOPA-14-653 of 24 November 2014, the Board notes that this is a letter from EIOPA in response to an earlier letter from Onix. It is not in the form of a "decision". It states that, "We hereby confirm again that EIOPA's position in relation to EIOPA's Chair Decision No. EIOPA-14-267 (the "Decision") remains unchanged".
53. It is correct to say that the letter goes on to discuss various issues relating to the responsibilities of the host and home state regulators, and the scope of the emergency powers in the Directive, but this does no more than engage with matters that had been raised by Onix in correspondence. It is not based on new factors and was not preceded by a re-examination of the situation.
54. In summary, and applying the above case law, the Board considers that the letter of 24 November 2014 is merely confirmatory of the earlier decision. It is not in itself a decision. Accordingly Article 17 of the EIOPA Regulation does not apply, and the Board has no jurisdiction. That being so, the Board upholds the respondent's contention that this appeal is inadmissible.
55. In these circumstances, the Board need not address other ground raised by the respondent.

VI. Decision

56. For the reasons given above, the Board of Appeal unanimously decides that the appeal is inadmissible.
57. The Secretariat is instructed to forthwith send a certified copy of this Decision to the parties, informing them of the right of appeal under Article 61 of the EIOPA Regulation, and to file the original in the Secretariat's records.

58. The original of this decision is signed by the Members of the Board in electronic format, as authorized by Article 22.2 of the Rules of Procedure, and countersigned by hand by the Secretariat.

William Blair (President)

Juan Fernández-Armesto (Vice-President)

(SIGNED)

(SIGNED)

Noel Guibert (Rapporteur)

Beata Maria Mrozowska

(SIGNED)

(SIGNED)

Katalin Mero

Marco Lamandini

(SIGNED)

(SIGNED)

On behalf of the Secretariat

Jakub Michalik

(SIGNED)

In accordance with Article 23 of the Rules of Procedure, the Board of Appeal decided on 13 August 2015 at the request of the respondent to rectify the decision by correcting the date in paragraph 10, the reference to the regulation in paragraph 23 and including a quotation from the respondent's communication of 2 February 2015 in place of the paraphrase.

The decision is published as corrected.

A signed copy of the decision is held by the Secretariat.