

Legal Focus: Eiopa's Covid-19 reaction lays bare convergence challenges

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The European Insurance and Occupational Pensions Authority has published a series of recommendations to help re/insurers tackle the pandemic



EIOPA'S RECOMMENDATIONS FOR RE/INSURERS ARE IN PART AT LEAST A REACTION TO ACTIONS ALREADY TAKEN BY NATIONAL SUPERVISORY AUTHORITIES

The Covid-19 pandemic is affecting the re/insurance sector in many ways. The social distancing/lockdown measures put in place throughout the EU and elsewhere around the world test the operational resilience and business continuity arrangements of re/insurers. These measures also cause a spike in claims under various types of insurance policies, such as event cancellation, travel insurance, directors' and officers' liability, health, product liability and business interruption. Meanwhile, an economy in a coma squeezes insurers' investment portfolios and solvency position.

To tackle the operational, consumer protection and solvency implications of the pandemic, the European Insurance and Occupational Pensions Authority (Eiopa) has published a series of regulatory statements and recommendations. Following a short, initial statement on March 17, emphasising business continuity and the solvency and capital position of insurers, on March 20 Eiopa issued recommendations on supervisory flexibility regarding the deadline of supervisory reporting and public disclosure to provide immediate operational relief to re/insurers.

With certain exceptions, Eiopa recommends national supervisors throughout the EU grant an eight-week delay for the submission of annual supervisory reports and the publication of the solo/group solvency and financial condition reports for 2019 and a one-week delay for the submission of quarterly supervisory reporting templates for the first quarter of 2020.

Eiopa's action was at least in part prompted by unilateral measures taken by some national supervisors. An EU-level response was urgently needed to ensure convergence and consistent supervisory approaches throughout the EU. While Eiopa's recommendations are subject to a "comply or explain" approach, national supervisors appear to be following Eiopa's directions.

As a further operational relief measure, the EU supervisor has reprioritised its work and delayed various projects requiring input from industry/national regulators. One of the delayed initiatives is the holistic impact assessment for the 2020 Solvency II review, which has been postponed to June 1, 2020. This prompted Eiopa to announce on April 30 the delivery of its technical advice to the European Commission will be delayed by six months until end December 2020.

Consumer protection

On April 1, Eiopa turned to consumer protection concerns raised by the pandemic when it issued a further statement urging insurers and intermediaries to mitigate the impact of Covid-19 on consumers. On April 24, Eiopa followed up with a one-page guide for consumers.

The EU supervisor "strongly encourages" insurers and intermediaries to consider various practical implications of Covid-19 for the day-to-day activities of consumers, in particular the impact of social distancing and self-isolation measures.

Eiopa emphasises insurers and intermediaries must continue to act in the best interests of consumers. This includes: providing clear and timely information to consumers on contractual rights and consistent application of policy exclusions; avoiding vague terms in consumer communications, which could be misinterpreted or lead to confusion; and taking into account the impact of the pandemic when applying product oversight and governance arrangements. Insurers and intermediaries must also exercise flexibility in how consumers are treated, where reasonable and practicable.

The Eiopa intervention is largely a reaction to various national measures to ensure convergence throughout the EU. It followed days after several national regulators and insurance industry associations had announced measures and/or guidance to ensure a consistent level of consumer protection during the pandemic. Eiopa's choice of instrument – a statement – to communicate its consumer protection expectations shows Eiopa might not be fully equipped to deal with extreme situations.

The statement is not legally binding and does not create any legal obligations for insurers or intermediaries. It cannot ensure all insurers operating in a particular business line take the expected steps and will treat all policyholders the same way. Instead, the effectiveness of Eiopa's initiative depends on individual member state supervisors reflecting the content of the statement in legally binding texts or in their supervisory practice.

A blatant disregard for the requests set out in the statement would raise reputational risks. In addition, a more proactive national regulator (or policyholder) could argue an insurer's failure to respect the statement no longer acts in the best interests of consumers, as required under Solvency II and the Insurance Distribution Directive.

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Despite the mounting public (and sometimes political) pressure on insurers to cover Covid-19 claims beyond the original policy terms, in its April 1 statement Eiopa takes a robust view, which is favourable for re/insurers. The EU supervisor warns "imposing retroactive coverage of claims not envisaged within contracts could create material solvency risks and ultimately threaten policyholder protection and market stability, aggravating the financial and economic impacts of the current health crisis".

The Eiopa position has been echoed in a statement by France's Autorité de Contrôle Prudentiel et de Résolution (ACPR), which stresses insurers' financial resources cannot be directed to the coverage of risks that have been expressly excluded. Other supervisors have at least indirectly supported Eiopa's opposition to retroactive coverage of claims not provided for in contracts. For example, Germany's BaFin has "welcomed" the Eiopa statement. On May 7 the International Association of Insurance Supervisors warned against initiatives seeking to require insurers to retroactively cover Covid-19-related losses.

The position of Eiopa and the ACPR is encouraging and helps insurers to fend off pressure to pay claims that are outside the scope of policy cover. Eiopa's view is underpinned by solvency concerns; it falls short of the unambiguous, conduct of business statement by the UK's Financial Conduct Authority (FCA) that basic coverage would normally not cover pandemics and the FCA does not see any reason to intervene.

Preserving capital

The Eiopa call of April 2 to suspend dividend distribution and variable remuneration is the latest in Eiopa's responses to the Covid-19 pandemic and tackles the last piece of the Covid-19 puzzle: preserving the capital position of EU re/insurers.

The EU supervisor urges re/insurers to temporarily suspend all discretionary dividend distributions and share buybacks aimed at remunerating shareholders. This also covers intra-group distributions "whenever these may materially influence the solvency or liquidity position of the group or of one of the undertakings involved". Eiopa requests group and solo supervisors to monitor the materiality.

Re/insurers are also asked to set the variable part of remuneration at a "conservative" level and to consider postponing payments of the variable remuneration component altogether.

As with its previous statements, the statement on dividend distribution and variable remuneration is not legally binding on EU re/insurers; it does not create any legal obligations for them. From a strictly legal perspective, the Eiopa statement is not binding on national supervisors either.

Several national supervisors have followed Eiopa's position and adopted the necessary measures to suspend dividend distributions by re/insurers under their supervision. For example, the ACPR and the National Bank of Belgium require local re/insurers to refrain from dividend distributions at least until October 1, 2020. In contrast, BaFin has not (yet) imposed a blanket ban on re/insurers under its supervision.

Eiopa's choice of a non-binding instrument has already caused significant legal uncertainty for EU insurance groups and has drawn criticism for diverging supervisory practices across the EU.

All in all, Covid-19 has sorely tested Eiopa's ability to promote supervisory convergence across the EU. By issuing non-binding statements and recommendations that are not followed up by EU-level legislation (however challenging legislating might be), Eiopa risks scepticism and disparate national supervisory responses.