CONSULTATION
PAPER

CONSULTATION PAPER

on the proposal for Regulatory Technical Standards to specify the criteria for the identification of exceptional sector-wide shocks

EIOPA-BoS-24/322
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European Insurance and
Occupational Pensions Authority

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RESPONDING TO THIS PAPER

EIOPA welcomes comments on the Consultation Paper on the proposal for Regulatory Technical Standards to specify the criteria for the identification of exceptional sector-wide shocks.

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 provide your comments to EIOPA via EU Survey (link) by 2 January 2025 23:59 CET.

Contributions not provided via EU Survey or after the deadline will not be processed. In case you have any questions please contact SolvencyIIreview@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 documents.[1]

Declaration by the contributor

By sending your contribution to EIOPA you consent to publication of all non-confidential information in your contribution, in whole/in part – as indicated in your responses, including to the publication of 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.

Next steps

EIOPA will revise the proposal in view of the stakeholder comments received. EIOPA will publish a report on the consultation including the revised proposal and the resolution of stakeholder comments.

1. BACKGROUND AND RATIONALE

AMENDMENTS TO THE SOLVENCY II DIRECTIVE

The European Commission proposed amendments to Directive 2009/138/EC[2] (Solvency II Directive) in September 2021.[3] The provisional agreement of the European co-legislators on the amendments to the Solvency II Directive[4] provides supervisory authorities in Article 144c with measures to preserve the financial position of insurers with a particularly vulnerable risk profile in case of an exceptional sector-wide shock. These measures include the restriction or suspension of dividends, share buybacks and bonuses.

The provisions incorporate the major elements from EIOPA's technical advice for the review of Solvency II which reflected the experience with restrictions on payouts to shareholders and managers and the associated discussions during the early phase of the COVID pandemic.[5]

MANDATE FOR DRAFT REGULATORY TECHNICAL STANDARDS

According to paragraph 7 of Article 144c, EIOPA shall, after consulting the ESRB, develop draft regulatory technical standards (RTS) to specify the criteria for the identification of exceptional sector-wide shocks in order to ensure a consistent application of Article 144c.

This consultation paper sets out the EIOPA proposal for those draft RTS.

APPROACH TO THE RTS

The RTS should strike a balance between ensuring the consistent application of the supervisory measures in Article 144c and the necessary flexibility of the criteria. Past experience shows that the specific form of future crises is unpredictable. Very specific criteria create the risk that the measures, although necessary, cannot be applied because the particular form of crisis was not anticipated. Such an outcome would cause very severe consequences and should be avoided.

Article 144c has the objectives to protect both financial stability and policyholders. While these objectives overlap there could be events that may endanger one but not the other. This should be reflected in the criteria. Some exceptional sector-wide shocks may pose a risk to policyholder protection but not endanger financial stability. Therefore, different criteria should be introduced for both objectives. One of them covers the risk that insurance and reinsurance undertakings cause or

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[2] 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. 1–155

[3] Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/138/EC as regards proportionality, quality of supervision, reporting, long-term guarantee measures, macro-prudential tools, sustainability risks, group and cross-border supervision

[4] See the corrigendum of the text of the provisional agreement as adopted by the European Parliament on 23 April 2024.

[5] See section 11.2 in: EIOPA's Opinion on the 2020 Review of Solvency II.

contribute to financial instability while the other is concerned with the risk that the claims of policyholders cannot be paid in full.

The measures are part of the macroprudential tools and the shock has to be sector-wide. For these reasons the proposed criterion with the objective to protect policyholders captures only shocks which create a danger for a significant part of the insurance cover provided by the sector. This does not prevent supervisory authorities from taking actions for specific insurance and reinsurance undertakings in accordance with Articles 136a, 138, 139 or 141 of the Solvency II Directive where the respective conditions are met.

The criteria should reflect the high degree of uncertainty what form a future crisis may take. Therefore instead of describing specific events that could cause exceptional sector-wide shocks, the criteria focus on possible consequences of the shocks.

The proposed draft RTS sets out different factors that supervisors should consider in their decision. The factors are not meant to be necessary or sufficient conditions for the existence of an exceptional sector-wide shock.

The factors include the declaration of an exceptional adverse situation in accordance with Article 138(4) of of the Solvency II Directive and any measures which the supervisory authority has taken in accordance with Article 144b(3) of the Solvency II Directive. The fact that these measures were necessary can indicate a situation in which it is necessary to preserve the financial position of undertakings with a particular vulnerable risk profile. But this would be only one piece of evidence and the supervisor would need to assess how much weight it has for the decision on the existence of an exceptional secto-wide shock.

Proportionality is an overarching principle of Solvency II. In case of an exceptional sector-wide shock supervisory authorities need to decide for each insurance and reinsurance undertaking with a particularly vulnerable risk profile whether to use any of the measures set out in Article 144c(2). The proportionality principle can therefore best be implemented at the level of individual undertakings where all the relevant information is available instead of being incorporated in the decision whether there is an exceptional sector-wide shock.

2. DRAFT TECHNICAL STANDARDS

EUROPEAN COMMISSION

Brussels, dd.mm.yyyy
C(20..) yyy final

COMMISSION DELEGATED REGULATION (EU) No …/..

of [ ]

COMMISSION DELEGATED REGULATION (EU) No …/… supplementing Directive 2009/138/EC of the European Parliament and of the Council with regard to regulatory technical standards on criteria for the identification of exceptional sector-wide shocks

of [ ]

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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)[6], and in particular Article 144c(7), second subparagraph thereof,

Whereas:

(1) The criteria for the identification of exceptional sector-wide shocks should strike a balance between ensuring consistent application of the supervisory measures to preserve the financial position of undertakings and the necessary flexibility in times of crisis. Without flexibility there is the risk that the supervisory measures, although necessary, cannot be applied during a crisis of a new and unanticipated type.

(2) Some exceptional sector-wide shocks may pose a risk to policyholder protection but not endanger financial stability. Therefore, different criteria should be introduced for both objectives. One of them covers the risk that insurance and reinsurance undertakings cause or contribute to financial instability while the other is concerned with the risk that the claims of policyholders cannot be paid in full.

(3) The criteria should reflect the high degree of uncertainty what form a future crisis may take. Therefore instead of describing specific events that could cause exceptional sector-wide shocks the criteria focus on possible consequences of the shocks.

(4) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Insurance and Occupational Pensions Authority.

(5) The European Insurance and Occupational Pensions Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Insurance and Reinsurance Stakeholder Group established by Article 37 of Regulation (EU) No 1094/2010.

6 OJ L 335, 17.12.2009, p. 1–155.

HAS ADOPTED THIS REGULATION:

Article 1

Criterion for exceptional sector-wide shock

(1) Supervisory authorities shall consider one or more events to be an exceptional sector-wide shock if that event or those events significantly increase one or both of the following risks:

(a) insurance and reinsurance undertakings of a sector in their Member State cause or contribute to financial instability in one or more Member States; or

(b) insurance and reinsurance undertakings which represent a significant part of the insurance or reinsurance cover provided by a sector in their Member State are unable to meet their insurance or reinsurance obligations.

(2) For the assessment of the condition set out in paragraph 1, the supervisory authority shall take into account the following factors to the extent they are relevant:

(a) the nature, scale and scope of the event or events both in absolute terms and compared with any historical precedents;

(b) the relevance of the insurance and reinsurance undertakings in the sector for financial stability;

(c) the effect of the event or events on insurance and reinsurance undertakings in the sector;

(d) the declaration of an exceptional adverse situation in accordance with Article 138(4) of Directive 2009/138/EC in the Member State of the supervisory authority or a request to EIOPA for such a declaration;

(e) any supervisory measures which the supervisory authority has taken in accordance with Article 144b(3) of Directive 2009/138/EC.

Article 2

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

[For the Commission

The President]

[For the Commission

On behalf of the President]

[Position]

ANNEX: IMPACT ASSESSMENT

OBJECTIVES

In accordance with Article 29 of the EIOPA Regulation[7], EIOPA carries out, where relevant, analyses of costs and benefits during the policy development process. The analysis of costs and benefits is undertaken according to an impact assessment methodology.

This impact assessment concerns the EIOPA draft RTS to specify the criteria for the identification of exceptional sector-wide shocks. It is based on a qualitative assessment done by EIOPA.

In drafting these technical standards, EIOPA sticks to the general objectives of the Solvency II Directive, as agreed by the legislators in 2009. These general objectives are:

- adequate protection of policyholders and beneficiaries, being the main objective of supervision;
- financial stability;
- proper functioning of the internal market.

In view of the specific purpose of these technical standards, the following more specific objectives were identified:

- ensuring sufficient loss-absorbency capacity and reserving;
- ensuring a level playing field through sufficiently harmonised rules.

POLICY ISSUES

POLICY ISSUE A: POSSIBILITY TO USE QUANTITATIVE CRITERIA

The criteria used for the identification can be quantitative or qualitative (or a combination of them). Examples for quantitative criteria would be “a decrease in the 10-year government bond yield of at least 150 basis points” or “a drop in the aggregate solvency ratio of the sector below 100 %”. Qualitative criteria could be “a significant drop in interest rates” or “a significant increase in the risk that insurance undertakings cannot meet their obligations to policyholders”. Quantitative criteria have the advantage to require no or only a very limited degree of judgement.

[7] 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. 48–83.

The policy issue is whether any quantitative criteria should be used in determings the existence of an exceptional sector-wide shock.

POLICY OPTIONS

POLICY ISSUE A: POSSIBILITY TO USE QUANTITATIVE CRITERIA

Policy option A.0: No change

This option means that no RTS are in place. It is a hypothetical baseline that is only introduced as a benchmark against which the impact of the other policy options is compared.

This option is not considered as a viable option given the specific mandate to EIOPA in Article 144c of the Solvency II Directive.

Policy option A.1: Use of quantitative criteria

The criteria for the identification of exceptional sector-wide shocks are all or at least in part quantitative.

Policy option A.2: No use of quantitative criteria

For the identification of exceptional sector-wide shocks only qualitative criteria are used.

IMPACT OF THE POLICY OPTIONS

POLICY ISSUE A: POSSIBILITY TO USE QUANTITATIVE CRITERIA

The main advantage of quantitative criteria is that it ensures an identical approach in identifying exceptional sector-wide shock across Member States. This reduces the risk that – faced with the same crisis – supervisors in some Member State identify an exceptional sector-wide shock while others do not.

The main drawbacks of quantitative criteria are their inflexibility, the lack of quantitative inputs and varying thresholds: First, experience has shown the impossibility to anticipate the form of future crises. This means the developed quantitative criteria might not be relevant for the specific crisis at hand. Second, at the outset of a crisis the supervisor will be confronted with a lot of uncertainty regarding the effect of events and the possible further developments. Focussing in this situation exclusively on easily available quantitative information creates the risk of missing essential elements. Third, the thresholds for quantitative criteria will probably vary over time. For example, a sudden drop in interest rates of a fixed number of basis points would be less of a problem for life insurers with guarantees in times of high than in times of low interest rate environment.

In summary, there is the risk that quantitative criteria are not met in a severe crisis where Article 144c measures are necessary. At the same time there might be cases where quantitative criteria provide a “false positive”, i.e they are met even though there is no need for Article 144c measures. Quantitative criteria do not necessarily result in the identification of exceptional sector-wide shocks more or less often than qualitative ones.

Policy option A.0: No change

Policy option A.0		
Costs	Policyholders	No material impact
	Industry	High risk that criteria are interpreteted differently by supervisors
	Supervisors	High risk that criteria are interpreteted differently by supervisors
	Other	No material impact
Benefits	Policyholders	No material impact
	Industry	No material impact
	Supervisors	No material impact
	Other	No material impact

Policy option A.1: Use of quantitative criteria

With this option there is a higher risk that criteria are not met in a severe crisis where the Article 144c measures are necessary. The resulting risks for financial stability might undermine the competitive position of the EU vis-à-vis other jurisdictions. The resulting risks for policyholders would also damage the reputation of EU insurers relative to non-EU competitors.

Policy option A.1		
Costs	Policyholders	Higher risk that criteria are not met in a severe crisis where the Article 144c measures are necessary. This would affect policyholders directly through higher risk for their benefits and indirectly through risks for financial stability.
	Industry	Higher risk that criteria are not met in a severe crisis where the Article 144c measures are necessary. This would affect insurance and reinsurance undertakings directly through higher risks for financial stability. In addition, the reputation of the whole sector would suffer if some insurance and reinsurance undertakings were unable to meet their obligations to policyholders.
	Supervisors	Higher risk that criteria are not met in a severe crisis where the Article 144c measures are necessary. Supervisors are negatively affected due to higher risks for financial stability and policyholders. There is also a higher

		risk for reputational damages which would arise if the supervisor could not take the measures in Article 144c during a severe crisis.
	Other	Higher risk that criteria are not met in a severe crisis where the Article 144c measures are necessary. The higher risk for financial stability affects real economy and financial markets negatively.
Benefits	Policyholders	No material impact
	Industry	Identical approach in identifying exceptional sector-wide shock across Member States
	Supervisors	Identical approach in identifying exceptional sector-wide shock across Member States
	Other	No material impact

Policy option A.2: No use of quantitative criteria

With this option there is a lower risk that criteria are not met in a severe crisis where the Article 144c measures are necessary.

Policy option A.2		
Costs	Policyholders	No material impact
	Industry	Higher risk that criteria are interpreted differently across Member States
	Supervisors	Higher risk that criteria are interpreted differently across Member States
	Other	No material impact
Benefits	Policyholders	Reduced risk that criteria are not met in a severe crisis where the Article 144c measures are necessary. This would affect policyholders directly through higher risk for their benefits and indirectly through risks for financial stability.
	Industry	Reduced risk that criteria are not met in a severe crisis where the Article 144c measures are necessary. This would affect insurance and reinsurance undertakings directly through higher risks for financial stability. In addition, the reputation of the whole sector would suffer if some insurance and reinsurance undertakings cannot meet their obligations to policyholders. Smaller and medium-sized insurance and reinsurance undertakings might be more affected by financial instability to the degree that they are less diversified in terms of jurisdictions and lines of business and have more difficulties to access capital markets.
	Supervisors	Reduced risk that criteria are not met in a severe crisis where the Article 144c measures are necessary. Supervisors benefit indirectly due to the

		benefits for policyholders and industry. There is also a reduced risk for reputational damages which might arise if the supervisor could not take the measures in Article 144c during a severe crisis
	Other	The real economy and financial markets benefit from the reduced risk that that criteria are not met in a severe crisis where the Article 144c measures are necessary with the resulting risks for financial stability.

COMPARISON OF POLICY OPTIONS

POLICY ISSUE POSSIBILITY TO USE QUANTITATIVE CRITERIA

Policy Option A.2 is clearly better in terms of protecting policyholders and preventing financial instability. With Option A.1. there would be a much higher risk that the Article 144c measures cannot be applied during a severe crisis because the specific form of crisis was not anticipated when drafting the criteria. There would also be the risk that an exceptional-sector wide shock is identified unnecessarily.

Option A.1. reduces the risk of different interpretations of the criteria. This is potentially helpful for the objective of a level-playing field. But it is not clear whether this is a substantial risk with Option A.2.

EFFECTIVENESS (0,+,++)			
	Financial stability	Policyholder protection	Level-playing field
Policy option A.0	0	0	0
Policy option A.1	0	0	++
Policy option A.2	++	++	+

It is somewhat easier to evaluate quantitative criteria than qualitative ones. But the associated costs are negligible. As a consequence the assessment for cost effectiveness mirrors the one for effectiveness.

EFFICIENCY (0,+,++)			
	Financial stability	Policyholder protection	Level-playing field
Policy option A.0	0	0	0
Policy option A.1	0	0	++
Policy option A.2	++	++	+

PREFERRED OPTION

The preferred option is option A.2.

If it was impossible to take the measures in Article 144c during a severe crisis because the particular kind of crisis was not anticipated when developing the quantitative criteria, there could be grave consequences. It is conceivable that quantitative criteria might have some advantages in terms of achieving a level-playing field. But it is clear that the associated risks outweight the benefits.

There are no direct costs for policyholders or industry associated with option A.1 or option A.2 as they are not involved in the application of the criteria. For supervisor it would be more burdensome to evaluate qualitative criteria. However, the higher effectiveness in identifying exceptional sector-wide shocks outweigh the higher burden. Option A.2 is therefore proportionate.

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fausto.parente@eiopa.europa.eu

Contact details of EIOPA's Data Protection Officer

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Legal basis of the processing and/or contractual or other obligation imposing it

7. EIOPA Regulation, and more precisely Article 10, 15 and 16 thereof.

8. EIOPA's Public Statement on Public Consultations.

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[8] 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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