

Recommendation on Independence and Accountability

May 2006

Explanatory text

Background

1. At the beginning of 2005, the European Commission published a draft of its intended third wave of Calls for Advice¹. One of these draft Calls for Advice was focussed on the independence and accountability of supervisory authorities in general, and the independence and accountability of the 'Supervisory Review Process' (SRP) in particular. This Call for Advice was, however, not issued to CEIOPS.

As a result of the new solvency regime, the powers of supervisory authorities will also need to be reviewed and adjusted. In particular, an adjustment is needed for those powers concerning the supervisors' ability to effectively control insurance undertakings' risk management and internal control issues, and the possibility for supervisors to require undertakings to hold supplementary capital. Although supervisors already have this latter power under the current regime, this particular area is to become more important in a more risk oriented supervisory system.

It is crucial that all supervisory powers, including any possible new ones, be exercised transparently, within appropriate limits and subject to due process. The appropriate use of powers concerning prudential issues must be complemented by requirements on independence and accountability of the insurance supervisory authorities. Supervisory action should be foreseeable in order to achieve legal certainty. Indeed, independence and accountability are closely related to transparency and integrity, as well as linked with one another.

Mindful of the points highlighted above, CEIOPS' Members decided that it was important for CEIOPS to address this important subject even though no formal Call for Advice was issued. It was also decided that the CEIOPS consultation paper on these issues would not take the format used to answer the different Calls for Advice.

2. The following survey is to cover, among others, the following questions:
 - Can the independence of the SRP be taken for granted? What are the minimum prerequisites to be provided within supervisory authorities for such independence?
 - To whom is the supervisory authority accountable? What areas of work are affected? Can/should the supervisory authority be held responsible? If so, to what extent and in which way?

¹ Draft Specific Calls for Advice from CEIOPS, Consultative Document, Markt/2501/05-EN, Annex 3 to Framework for Consultation.

Definition of the SRP

3. The purpose of the SRP is to enable the supervisory authority to evaluate, on an ongoing basis, the risk profile, adequacy of financial resources and otherwise prudent conduct (e.g. treatment of policyholders) of insurance undertakings. The primary purpose of supervisory powers is to give the supervisor the ability to achieve its objectives; only by being fully empowered can such goals be achieved. At the same time, it is recognised that power does not come without responsibility, placing demands both on the independence and accountability of the supervisory authority. The SRP should be flexible enough to allow for the prioritisation of future supervisory actions; when necessary, supervisory authorities should have the power to take immediate action to achieve the objectives of regulation, especially to protect policyholders' interests.
4. In its first wave of Calls for Advice, the European Commission in particular draws attention to the IAIS Insurance Core Principles (ICP) and requests CEIOPS to take account of them when preparing its advice and to implement them as soon as possible². The European Commission refers to the IAIS ICP also in its third wave of Calls for Advice.³ In the following discussion, the terms independence and accountability are looked at separately and correlated to each other from the basis of IAIS Core Principles.

Independence in general

5. The importance of the independence of supervisory authorities is acknowledged by the IMF and the World Bank. Both institutions attach great importance to the independence of supervisory authorities in their 'Financial Sector Assessment Programme' (FSAP), which assesses supervisory authorities on the basis of the IAIS ICP.
6. IAIS ICP 3, 'Supervisory Authority', deals with the independence and accountability of supervisory authorities: "The supervisory authority is operationally independent and accountable in the exercise of its functions and powers". Referring to the authority's independence: "The supervisory authority and its staff are free from undue political, governmental and industry interference in the performance of supervisory responsibilities", and "[T]he supervisory authority is financed in a manner that does not undermine its independence from political, governmental or industry bodies."⁴
7. The IAIS requirements are to be interpreted to the effect that the supervisory authority must be free from undue political, governmental and industry interference as far as ongoing work is concerned. Operational independence is not secured, if, for example the

² See footnote 1, page 9 et seq.

³ All remarks relating to IAIS Insurance Core Principles made in this paper refer to the Insurance Core Principles of October 2003.

⁴ IAIS Insurance Core Principles (October 2003), ICP 3 and Essential Criteria g, h.

supervisory authority is required to report regularly to a superior authority, for example submitting individual supervisory actions for approval, or if prior vetting of the public speeches of the head of a supervisory authority takes place on a routine basis by a superior authority.

Regulatory and supervisory independence

8. The supervisory authority must therefore be empowered and able to make free decisions about the supervision of the undertakings within the remit of its ongoing activities, without other authorities or the industry having the right to intervene or being required to give their consent (e.g. no superior authority with legal powers to give instructions to supervisory authorities in individual cases, which also includes the operational business). Such intervention may either be explicit or implicit, interfering in the normal supervisory activities, thus causing unwanted effects in the market, with negative effects that may affect every stakeholder involved in the insurance activity.
9. A comprehensive analysis of the independence of the supervisory authorities needs to take into consideration the link between supervisory measures and procyclical effects that such measures may have. Experience shows how political interference is more likely to happen under stress situations.
10. Another criterion is clear definition and transparency of the institutional relationships between the supervisory authority and the executive and judiciary. The ICP 3 clearly sets out the circumstances under which the executive is permitted to cross this line.⁵ These criteria are necessary to ensure that the scope of authority of the supervisor is clearly defined. Executive and judicial powers should not be permitted unrestricted interference in the work of the supervisory authority. It should be clearly defined where and when such interference is permitted. For this reason, unambiguous rules in respect of the functions (mandate) and the mutual relationships are required.⁶
11. The supervisory authority must operate in a transparent and accountable manner. It needs legal authority to perform its tasks. It should be noted, however, that the possession of authority is not enough to demonstrate observance of a principle. The supervisory authority should exercise its authority in practice. Similarly it is not enough for the supervisory authority to set requirements; it should also ensure that these requirements are complied with. Furthermore, having the necessary resources and capacity is essential for the supervisory authority to effectively implement the requirements.⁷

⁵ ICP 3 Essential Criteria f.

⁶ Cf. footnote 7.

⁷ CEIOPS is aware that, for the time being, there is no harmonisation in Europe on the topic of supervisory powers, in as much as some supervisory authorities lack the power to issue rules, even within their remits, whereas some other authorities enjoy these powers and consider them as necessary to fulfil their mission in a fully efficient and accountable manner. CEIOPS could think about it further in the frame of level 2

12. The legislation should grant sufficient powers for the effective discharge of supervisory responsibilities.
13. This does not mean that supervisory authorities cannot or should not discuss, consult and / or coordinate particular issues with the competent Ministries or with the industry.

Institutional independence

14. Another important point is to define clearly the organisation of the supervisory authority (governance structure). In particular, the existence of internal governance procedures and internal audit are considered important prerequisites for the integrity of supervisory authorities.⁸ The authority's structure has to ensure that it is able to meet its tasks and objectives. In the process, an efficient management control system, which identifies the main risks the authority is subject to and implements an appropriate control system, is of central importance.⁹
15. Another important aspect is the existence of procedures regarding the appointment and dismissal of the head and the members of the governing body of the supervisory authority. Institutional independence is given if a superior authority has e.g. no power to dismiss the head of a supervisory authority e.g. by issuing a directive or decree to this effect. When the head of a supervisory authority is removed from office, the reasons are to be publicly disclosed.¹⁰

Financial independence

16. The financing of the supervisory authority should be designed in a way so as to allow the supervisory authority to fulfil its tasks, duties and objectives, whilst at the same time not permitting politics, government or industry to exert an influence that could erode the independence and competence of the supervisory authority. This means that other authorities or the industry should not be permitted to have undue influence over the decision-making processes in the supervisory authority or on their financial resources. This does not apply to the participation of other authorities and the industry in the administrative councils and advisory bodies of the supervisory authority, and it does not affect the accountability of the supervisory authority to the Parliament and the public.¹¹

and 3, and try to better define what kind of rules should be issued by the supervisor, and what kind of rules should not.

⁸ ICP 3 Essential Criteria d.

⁹ IMF note on Governance of Financial Sector Oversight Agencies, Second draft, by John Dalton, Udaibir Das, Jennifer Elliot, Ceyla Pazarbasioglu and Marc Quintin, Practise 31.

¹⁰ ICP 3, Essential Criteria e.

¹¹ See footnote 5.

17. In addition, the supervisory authority has to have discretion to allocate its resources and staff freely in accordance with its mandate.¹² This is necessary so that supervisors can deploy their resources in line with the work load and, should the situation arise, are able to intervene quickly and efficiently.

Relevance with regard to the SRP

18. The SRP addresses the functions of the supervisory authority within the remit of its operational activities. Since the SRP is part of operational supervision, the rules relevant to the independence of the entire supervisory authority are to be applied without restrictions to the sub-section of the SRP, too. If the pan-European rules as expressed in the future Solvency II Framework Directive are to comply with the IAIS ICP, the independence of the SRP along the lines set out above will be a prerequisite. A detailed description of this independence is necessary if its significance is to be understood correctly. A general pointer to independence being required is not sufficient.

Accountability in general

19. The IAIS ICP 3 refers to 'accountability' as follows: "The supervisory authority is operationally independent and accountable in the exercise of its functions and powers". ICP 4 states: "The supervisory authority conducts its functions in a transparent and accountable manner." The fact that accountability is mentioned in one sentence together with 'independence' in ICP 3 and stated together with 'transparency' in ICP 4 shows that these terms are closely connected. Accountability cannot be looked at without considering independence and transparency as well, because the accountability and transparency of duties within a supervisory authority are closely connected to its level of independence.
20. According to the ICP, the accountability of the supervisory authority is defined as accountability to the government, the supervised undertakings and the public. The supervisory authority has to inform the parties concerned about its actions and policy and provide the rationale for decisions taken.¹³ This requires a combination of concrete rules concerning the supervisor's approaches, disclosure and executive oversight. In addition, the supervisory authority needs to have internal instructions and rules in place for ensuring that it meets its objectives and complies with legislation.¹⁴
21. The criteria (essential and advanced criteria) for accountability are specified in detail in ICP 4. In general, the supervisory authority has to draw up clear, transparent and consistent supervisory processes and

¹² ICP 3 Essential criteria i.

¹³ ICP 4, Explanatory note No. 4.3.

¹⁴ ICP 4, Explanatory note No. 4.4.

rules.¹⁵ As far as undertakings and the public are concerned, it should be ensured that the decisions of the supervisory authority are subject to judicial review.¹⁶ This, however, applies solely to legal actions in relation to administrative procedures.¹⁷ On the other hand, the process to appeal supervisory decisions should not curtail the supervisory authority's independence or reduce its efficiency.¹⁸ The IAIS does not call for more detailed regulations. These are, after all, not required, since the right to take legal actions offers sufficient protection. As a matter of principle, all regulations and administrative procedures are to be applied to all supervised undertakings equally, though this can clearly be within the context of a risk-based approach to supervision.

22. Accountability and transparency are also interlinked. To provide transparency in respect of its actions, the supervisory authority should make information on its role publicly available and publish a regular report in which the objectives and the substance of its work are described.¹⁹ In this context, the request to the executive of the authority to explain its objectives publicly and describe its performance in pursuing them is to be considered. The supervisory authority is to provide information about its official actions²⁰ concerning failed undertakings. Furthermore, the supervisory authority should publish information about the general financial situation of the insurance industry.²¹ However, accountability and transparency have to be in balance. To avoid losing sight of other interests, e.g. data protection or the interests of the undertaking in distress and its policyholders, for the sake of mere transparency, the extent of transparency should be commensurate with the situation at hand.
23. Accountability means that the supervisory authority is accountable to the Parliament and/or government, the industry and the public, although not to the same extent. The accountability required by the Ministry is different from the accountability towards supervised undertakings or the public. The supervisory authority's accountability to the government is based on the fact that the authority is not permitted to act contrary to existing laws. Its actions must be within the framework of the law, and it must not apply its scope for discretion unduly (Rule of Law). If necessary and requested, the supervisory authority must explain its actions to the Parliament or the Ministry.
24. The accountability to undertakings comprises the entire range of supervisory activities. The authority has to explain its reasons for taking specific measures (e.g. a regular, close and continuous dialogue is required in the process of validation of internal models). At the same time, the undertakings can rely on the consistency of the rules applied.

¹⁵ ICP 4 Essential criteria a.

¹⁶ ICP 4 Essential criteria c, sentence 1.

¹⁷ See 'Liability of the supervisory authority'.

¹⁸ ICP 4 Essential criteria f.

¹⁹ ICP 4 Essential criteria d + g.

²⁰ ICP 3 Advanced criteria l + m.

²¹ ICP 4 Advanced criteria h.

The supervisory authority must treat all undertakings alike, although according to their individual risk profile, and has to apply its discretion in accordance with the laws. Hence, depending on the circumstances, an ailing undertaking has to come under closer scrutiny than a sound one.

25. The accountability to the public consists in informing the public about the work and objectives of the supervisory authority in the form of public statements, reports, etc. Besides, appropriate and well-balanced information should be provided about the situation of the insurance industry and failed insurers.
26. The right to appeal supervisory decisions applies also to measures taken within the SRP.

Liability of the supervisory authority

27. It is explicitly stated in ICP 4 - essential criteria c (cf. above) - that the administrative decisions of the supervisory authorities have to be subject to judicial review. However, this must not unduly impede the authority's capacity to act. Appeals of supervisory decisions must be possible without independence and efficiency of the supervisory authority being thereby curtailed.²² This implies that persons affected by an administrative decision have a right to take legal action against this decision.
28. However, the fact that supervisory decisions are subject to judicial review does not imply that all persons concerned may automatically sue for damages. This is made clear for instance in individual national laws, according to which the supervisory authority performs its functions and exercises its powers exclusively in the public interest. This provision is not to be interpreted to the effect that the obligations arising from official duties towards groups of persons or persons who are only indirectly protected by the actions of the supervisory authority (e.g. policyholders) do not have to be accounted for. However, the supervisory authority's general liability arising from erroneous decisions made against directly concerned undertakings and other persons affected by supervisory powers will remain unaffected.
29. As official liability requires a breach of 'an official duty towards a third person', that is a duty towards an individual, third parties are not entitled to claim compensation should a breach of an official duty towards the public on the part of the supervisory authority have occurred. That supervisory authorities have duties towards individuals can be ruled out by national laws. But generally, there should be in place protection (normally in law) from personal and institutional liability for supervisory actions taken in good faith in the course of performing supervisory duties (as also elaborated in ICP 3 and Basel Core Principles). National legislation (or, eventually Solvency II) should provide for this, although CEIOPS is aware that in some Member States

²² ICP 4 Essential criteria f.

the national legal system already protects persons or organisations who deserve protection (if reasonably acted) and therefore a legal protection from liability for supervisory actions in good faith is not necessary.

30. What this means for the supervisory authorities and with regard to the decisions made under the future SRP, is that supervisory authorities may be sued for damages in relation to erroneous supervisory actions taken directly against undertakings or persons, if the future Framework Directive or – failing that - the national law decrees this. Official liability would pose a significant risk for supervisory authorities as by their nature supervisory actions can have a considerable financial impact on undertakings or affect the financial interests of a large number of people with the outcome of possible lawsuits mostly uncertain. It is only reasonable to expect that facing this risk would influence the decision-taking process of a supervisory authority and make it less prepared to take action where this could result in getting sued for a high amount of damages.
31. The conclusion drawn from this with regard to the SRP within the framework of Solvency II is that those directly concerned must have a right to appeal the decisions or acts of public administration.

CEIOPS' Recommendation

32. In its ongoing operational activity the supervisory authority must be free from undue political, governmental and industry interference.
33. The financing of the supervisory authority should be designed in such a way as not to permit any undue interference by politicians, government or industry, and as to enable effective supervision.
34. The supervisory authority must have appropriate internal governance procedures, including internal audit arrangements, in place.
35. The institutional relationships between the supervisory authority and the executive and the judicial are to be transparent and clearly defined.
36. The supervisory authority should have discretion to freely allocate its resources and staff so that it can act appropriately in accordance with its mandate and fulfil its objectives.
37. There must be transparent procedures regarding the appointment and dismissal of the head and the members of the governing body of the supervisory authority. When the head of a supervisory authority is removed from office, the reasons are to be publicly disclosed.
38. The supervisory authority must operate in a transparent and accountable manner. The supervisory authority must also in practice exercise its authority itself.
39. The supervisory authority must perform its functions within the

framework of the law; it must not apply its scope for discretion unduly (Rule of Law).

40. The supervisory authority has to adopt clear, transparent and consistent supervisory processes and rules. The procedures should be made available.
41. The administrative decisions of the supervisory authority must be subject to judicial review. Those directly concerned should have the right to appeal against these decisions.
42. This approach will be applied to all supervised undertakings equally, though this can clearly be within the context of a risk-based approach to supervision.
43. The supervisory authority discloses its objectives and the essence of its functions and activities to the public.
44. Legal protection to the supervisory authorities and their officers against lawsuits for action taken in good faith while discharging their duties must be provided.
45. The supervisory authority should have the power to issue the complementary rules necessary to meet the supervisory objectives.
46. The supervisory authority should consult interested parties before introducing new rules.

**Summary of comments on CEIOPS-CP 08/05
Draft Recommendation on Independence and Accountability**

CEIOPS-SEC-24/06

CEIOPS would like to thank the Association of British Insurers (ABI), AISAM and ACME, Investment & Life Assurance Group (ILAG), and Verband der Versicherungsunternehmen Österreichs (VVO), for their comments on the *Draft Recommendation on Independence and Accountability*. All comments and suggestions have been considered. Our response to the comments and suggestions are presented below.

The numbering of the paragraphs refers to Consultation Paper No. 11 (CEIOPS-CP-08/05), except new paragraphs.

Name	Reference	Comment	Resolution on comment
ABI	General Remarks	<p>3. In order to carry on their business our members must be authorised by and are subject to the appropriate supervisory authorities. Our members, therefore, have a strong interest in ensuring that regulatory authorities are themselves subject to an appropriate regime which ensures both their independence and their accountability.</p> <p>4. The ABI agree with CEIOPS' draft advice as set out in paragraphs 32 to 44 of the consultation document. These proposals appear to us to be the necessary minimum requirements to ensure the proper independence and accountability of supervisory authorities. Given the increasingly pan-European nature of insurers it is essential that all member states meet these criteria in order to ensure that insurers and policyholders can be satisfied that they will receive appropriate treatment and protection across all member states.</p> <p>5. There are a number of additional items which we suggest should be added to CEIOPS' advice. These relate to the procedures which</p>	<p>Noted.</p> <p>Noted.</p> <p>Bringing forward proposals for new rules is not an insurance specific</p>

		<p>should be adopted by supervisors in bringing forward proposals for new rules. These procedures form part of the new supervisory regime in the UK and serve to give comfort to regulated firms that the need for new rules has been properly justified, explained and the costs and benefits assessed - this helps to ensure the acceptance of new rules.</p> <p>6. The suggested additional procedures are that the supervisory body:</p> <ul style="list-style-type: none"> a. Should only issue new rules where it can be demonstrated that these are necessary to meet the regulator's clearly defined objectives and that the required outcome cannot reasonably be achieved by other means including guidance or industry-led initiatives; b. Should consult interested parties before introducing new rules (this is set out as one of the essential criteria for supervisory independence and accountability in ICP3 of the IAIS – Insurance Core Principles); and c. Should carry out a full cost-benefit analysis or impact assessment before issuing any new rules so as to ensure that the costs to regulated entities (both compliance and consequential) do not exceed the expected benefits to 	<p>topic. Since there are national rules for the process in the different jurisdictions it would be difficult to introduce a common set of rules just for the insurance sector. It goes without saying that no regulator would suggest introducing new rules unless they thought these were really necessary and justifiable from a cost-benefit point of view, nor would any sensible regulator choose to introduce new rules without some form of prior industry consultation. See also revised text.</p> <p>Noted.</p> <p>The supervisory body would not introduce new rules unless it thought they are really necessary. See also revised text.</p>
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		policyholders.	
AISAM/ ACME	General Remarks	<p>General Comments on CP 11</p> <p>AISAM and ACME welcome the fact that CEIOPS is integrating the question of the independence of supervisory authorities in its work related to Solvency 2, and broadly support the proposals and reflections set out in the Consultation Paper. In this respect, the mutual insurance sector expects CEIOPS to issue recommendations aimed at confirming and guaranteeing such independence at a European level and in a harmonised way.</p> <p>Harmonisation of supervisory authorities' independence and accountability should not lead to uniform legal statutes: each supervisory authority should retain its legal form in order to best meet the requirements of the environment in which it operates.</p> <p>The powers and competences conferred on supervisory authorities must however be exercised in similar conditions throughout the European Union so as to ensure an equal playing field for all market operators.</p> <p>The areas which should be harmonised at the European level relate to the powers, Board composition and staff, operation and accountability of supervisory authorities. Some flexibility should however remain to allow these matters to evolve over time.</p>	CEIOPS fully agrees. These aspects should be left to the national laws.
AISAM/ ACME	General Remarks	<p>Finally, we propose that the supervisory authority be subject to a periodical evaluation by public authorities at a European level with the aim of updating their missions, governance and powers.</p>	CEIOPS proposes to achieve the aim of updating the missions, governance and powers of the EU supervisory authorities by way of peer reviews and increased communication and cooperation between supervisory authorities. Any need to alter the existing directives established through

			these processes would then be communicated to the EU Commission. A peer review system (see CEIOPS' Answer to Call for Advice 17) will secure the objectives of the comment.
ILAG	General Remarks	We support in general the CEIOPS recommendation and would add the following comments from our own experiences in the UK and by reference to the paragraph numbers in the paper:	Noted.
VVO	General Remarks	The VVO supports the views of CEIOPS on Independence and Accountability of Supervisory Authorities. The VVO also supports the view that administrative decisions by the supervisor must be subject to judicial review. As any other institution or person in our system of a constitutional state is liable for its action the supervisory authority cannot be exempt from it.	Noted.
AISAM/ ACME	Para 10	<ul style="list-style-type: none"> ■ Public authorities must ensure that their actions are consistent, in particular between closely related sectors of activities, e.g. by ensuring their representation within the supervisory authority. Public authorities should have the means to efficiently supervise the independent authority. 	CEIOPS is committed to enhancing transparency of supervisory actions. As supervisory authorities make the rules they apply and their expectations more accessible to stakeholders, the supervised entities will be able to see for themselves that supervisory actions are consistent. Convergence is ensured by level 3 Committees.
AISAM/ ACME	Paras 10, 32	<ul style="list-style-type: none"> ■ Independence should imply a separation of roles and powers of legislative and supervisory authorities in relation to insurance 	Having regulatory powers does not diminish a supervisory authority's

		<p>supervision: legal uncertainty must be avoided to prevent any discrimination of treatment between insurers within a same country and between insurers from different Member States. Should the need for reactivity vis-à-vis market developments justify the granting of regulatory powers to a supervisory authority, this should not lead to any arbitrary decisions. Another way to ensure such reactivity could be to better formalize the supervisory authority's participation in the preparation of standards applied to its sector of activity, along the lines of the Lamfalussy procedure at European level. In this respect, the multiplication of regulatory levels (national, European, even global) constitutes a real challenge for supervisory authorities and public authorities, as well as for supervised entities</p>	<p>independence. It is a responsibility that needs to be performed carefully without taking arbitrary decisions and with due regard to the impact of any rulemaking on the industry. In order to promote a level playing field, national supervisory authorities will have to make sure that any new rules do not have a discriminatory effect with regard to national insurers or insurers from different Member States.</p>
AISAM/ ACME	Paras 15, 37	<ul style="list-style-type: none"> ■ In order to reinforce the independence of supervisory authorities, it could be envisaged to prohibit or limit the renewal of mandate of the Board members of the supervisory authority, in line with good governance and transparency practices. 	<p>CEIOPS does not believe that putting a time limit on the mandate of the governing body of the supervisory authority is necessary in order to reinforce the authority's independence. It is a matter of domestic rules.</p>
AISAM/ ACME	Paras 16, 33	<ul style="list-style-type: none"> ■ The functional independence of supervisory authorities implies that they have sufficient human (resources) and material means combined with a real material and financial autonomy of management. These principles can however be damaged when the financial resources of these supervisory authorities derive from government funding: the annual allocation can be called into question when government budgetary priorities are set elsewhere, and is often calculated to the minimum; this can prevent the supervisory authority from performing its missions efficiently and completely. The same is often true with regard to human resources. 	<p>Agreed.</p>

AISAM/ ACME	Paras 19- 26	<ul style="list-style-type: none"> ■ The supervisory authority must be accountable for its actions in a transparent and regular way with the public and political authorities, as well as with market operators and consumers, either through an annual activity report, a website or other publications. Such publication must however be compatible with the necessary confidentiality of certain information held by the supervisory authority in order to avoid damaging consequences, for example, to the reputation of an insurance undertaking. 	CEIOPS' opinion on the issue is in line with this view.
AISAM/ ACME	Paras 21, 41	<ul style="list-style-type: none"> ■ With regard to supervision of insurance undertakings, the rights and obligations of each party should be clarified to serve as a common reference for the supervisor and the supervised alike. This should for example include the right of rebuttal. 	CEIOPS agrees. The right of insurance undertakings to be heard before supervisory action is taken is already common practice.
AISAM/ ACME	Paras 21, 40	<ul style="list-style-type: none"> ■ In return (for the independence of supervisory authorities), the supervisory procedures must guarantee fair treatment among insurance undertakings during controls by supervisory authorities, in line with the proportionality principle. This requires the adoption of clear criteria and rigorous supervisory procedures applied in the same fair way to all supervised entities. Although supervisory authorities do not have the status of a court of law, they do have the power to sanction; it would therefore be highly desirable to ensure that the rights of the defence are preserved. 	<p>All insurance undertakings have to be treated fairly and equally. Equal treatment does not however mean that all undertakings are to be treated exactly the same way. It requires that material differences are to be taken into account. Where there are objective reasons for this, differences in treatment are necessary. For example it is justified to supervise an ailing undertaking more rigorously than a sound one. However, the applicable principles and criteria are the same for all undertakings and should be clearly stated.</p> <p>CEIOPS agrees that where the</p>

			supervisory authority has the power to sanction, the undertakings should have adequate rights of defence.
ILAG	Para 32	<p>There have been instances of where HM Treasury (the responsible government department) has exercised influence over The Financial Services Authority (FSA), especially with regard to consumer issues, and have required the FSA to take on new responsibilities such as general and mortgage business without fully committing the necessary resource.</p> <p>The House of Commons Treasury Select Committee also exposes the FSA to severe and often unfair criticism that must have an effect on senior management at the FSA to take actions that they might otherwise not take.</p>	Noted.
ILAG	Para 33	Financing should not jeopardise independence of the FSA and we believe that this is achieved in practice.	Financing is clearly an issue with regard to supervisory independence.
ILAG	Para 34	The FSA must have appropriate internal governance and we believe that this is also achieved in practice.	All supervisory authorities need to have appropriate internal governance.
ILAG	Para 35	The relationships between the FSA and judiciary and executive are clearly defined at least in theory. In practice, however, we believe that the executive and the legislature exercise more influence over the FSA than is allowed for in theory, as per paragraph 32.	Noted.
AISAM/ ACME	Para 36	<ul style="list-style-type: none"> ■ The multidisciplinary composition of the staff of the supervisory authority can also contribute to its independence: this should be ensured at all levels as well as during on-the-spot checks. The latter 	CEIOPS agrees that multidisciplinary composition of supervisory staff is desirable as it

		could be carried out by a small team having all the necessary skills, e.g. actuary, accountant, legal advisor, auditor, so as to limit any arbitrary supervision by a single person or by a too large a group of persons whose skills do not cover all the supervised fields. The multidisciplinary composition of the team and the complementarity in the skills of its members would constitute an initial level of guarantee of the quality of supervision.	contributes to the quality of supervision. It is already common practice for supervisory authorities to have staff with different training and education.
ILAG	Para 36	We believe that, in practice, the FSA has the discretion to allocate its resources to meet its mandate and objectives.	Noted.
ILAG	Para 37	We believe that, in practice, there are transparent procedures for the appointment and dismissal of the Head and Senior Management of the FSA.	Noted.
ILAG	Para 38	We believe that the FSA does operate in a transparent and accountable manner and exercises its authority itself.	Noted.
ILAG	Para 39	<p>Whilst the FSA must perform its functions within the law and must not apply its scope for discretion unduly it can give rise to problems of interpretation over what is meant by unduly. With a very large number and wide range of regulated firms and individuals, and the requirements to act proportionately and in a cost effective manner, the FSA must exercise a good measure of discretion, be it by means of formal and informal guidance, and pragmatic solutions to breaches and other problems. Overall, we believe that the FSA does not abuse its discretion.</p> <p>Care needs to be taken that this paragraph is not used to make the FSA more bureaucratic and legalistic.</p>	<p>Supervisory authorities need a certain scope for discretion which must not be used arbitrarily. It is naturally not always easy to decide when the scope available to the supervisor is breached. To safeguard the rights of the supervised undertakings the question of whether the supervisory authority has acted within its scope for discretion should be subject to judicial review.</p> <p>Paragraph 39 is meant to stress the obligations of supervisory</p>

			authorities. CEIOPS does not consider that the paragraph could actually be turned to work against the supervised undertakings by making supervisory authorities less flexible.
AISAM/ ACME	Para 40	<ul style="list-style-type: none"> ■ In order to guarantee the independence of the supervisory authority in the exercise of its competences and the transparency of its procedures and working methods, it seems desirable that rules of procedure be systematically adopted within the supervisory authority and made publicly available. Moreover, in performing its discretionary functions such as future approval of internal models under Solvency II, the supervisory authority should maintain the same discipline in checking and applying principles regardless of the entity so as to guarantee a level playing field. This will be even more important in a group supervisory approach. Proportionality and adequacy principles should also be applied. 	CEIOPS agrees that general rules of procedure need to be made publicly available in order to enhance transparency. The rules will have to be applied regardless of the entity and having regard to proportionality (which includes adequacy). See also revised paragraph.
ILAG	Para 40	In general, the FSA has adopted clear transparent and consistent supervisory processes and Rules; instances of failure are often due to inexperienced staff and inadequate communication procedures.	Noted.
ILAG	Para 41	<p>FSA administrative decisions are not subject to judicial review as they enjoy legal immunity. The question arises as to whether the checks and balances, which exist within the UK system, are sufficiently robust for the UK to argue that they achieve the same result that a right to judicial review would achieve.</p> <p>Firms and individuals persons subject to the FSA disciplinary procedures have the right to have their cases heard by the Regulatory Decisions Committee, and ultimately by the Financial Services and Markets Tribunal.</p>	Having a judicial review does not preclude a system where firms or individuals additionally have a right to have their cases heard by a committee or tribunal.

		<p>The former is an FSA Committee and strictly speaking cannot be held out as independent, although the members apart from the Chairman are independent. The costs of taking cases to the Tribunal are prohibitive but that could also be true of judicial review. The Tribunal also hears cases afresh whereas a judicial review can only say whether any reasonable regulator could have acted as FSA did and not that the decision was right.</p> <p>The Regulatory Decisions Committee's procedures have recently been reformed and it would be reasonable to give the new system time to work before coming to a final decision about judicial review.</p> <p>For cases not involving discipline, the FSA is responsible ultimately to the Government who must answer to Parliament and unacceptable practices could be resolved there. This would be very much a last resort as it would jeopardise FSA's independence as discussed in paragraph 32.</p> <p>In essence, we are not convinced that a judicial review right is appropriate but if the FSA began to act very unreasonably, or started using principle - based regulation to <i>enforce</i> practices not laid down by Rules, the issue could be reopened.</p>	
ILAG	Para 42	We doubt that if the FSA was subject to judicial review, it might well be less willing to adopt a risk-based approach to supervision.	Noted.
ILAG	Para 43	We believe that public disclosure of the FSA's objectives and the essence of its activities to the public have been achieved.	Noted.
ILAG	Para 44	We believe that legal protection for the FSA against lawsuits brought against actions carried out in good faith is safeguarded by their having legal immunity. This requirement seems inconsistent with the requirement to allow judicial review.	A lawsuit against the decisions of a supervisory authority is a separate issue from legal protection for actions taken in good faith while discharging its duties. Paragraph 44

			refers to the second.
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