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Keeping watch on giants: The supervision of insurance group and of insurance undertakings within financial conglomerates in European law

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Scientific debate

Abstract

Nowadays, ever more insurers are part of groups which may be based in many countries around the world and may also include other financial intermediaries or commercial and industrial entities. The growingly complex and international character of insurance groups stands in contrast with the fact that insurance supervision is essentially conducted on a legal entity basis by national authorities. Though supplementary supervision at the group level is carried out, solo supervision, indeed, is the norm. In this context, the financial crisis has highlighted the need for a more effective group-wide supervision.

This paper deals with the European legal framework concerning the organizational form of supervision on a group-wide basis of (re)insurance undertakings that belong to insurance groups and financial conglomerates. To this end, the relevant provisions of the Insurance Groups Directive, Solvency II Directive and Financial Conglomerates Directive are considered. The importance of the European regulation on this point emerges when we take into account the fact that Europe occupies a leading position as the home country of the largest insurance groups.

In particular, the work highlights the evolution of insurance group supervision. Compared to the supervisory system under the Insurance Groups Directive, the Solvency II's system, indeed, seems

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more efficient and adequate to ensure effective group supervision. Solvency II provides for uniform and detailed rules at the Community level, allowing for a more level playing field; it also takes in due account the need for a tailor-made approach to group supervision. Further, appropriate tasks are assigned to the group supervisor and to the college of supervisors.

The organizational form of group supervision under the Solvency II Directive is aligned to that set out by the Financial Conglomerates Directive with regard to financial conglomerates. Both the Directives establish the appointment of a supervisory authority responsible for the exercising of the supervision respectively at the level of the insurance group (group supervisor) and of the financial conglomerate (coordinator) and they both provide for supervisory colleges. The group supervisor and the coordinator ensure that relevant supervisory activities and information are coordinated at the group-wide level, reducing duplicative efforts among both the supervisors and the entities subject to supervision. The functioning of the college of supervisors, then, facilitates a coordinated approach to supervision and fosters cooperation between supervisors.

The regulatory systems of supervision considered enable the competent authorities to adjust the exercise of the supervisory powers to the complexity of the entities subject to supervision, providing for a proper application of the proportionality principle.

Key words: Insurance groups, financial conglomerates, supervision, multinational, equivalence, Solvency II, Directive

1. THE PHENOMENON OF TRANSNATIONAL INSURANCE GROUPS

The growth of insurance groups has been substantial since the 1990s, mainly as a consequence

of a growth in mergers and acquisitions.¹ In an increasingly globalized world, insurance companies may belong to multinational groups, which may also include other financial intermediaries or commercial and industrial entities. Groups operate through a series of legally separate corporations, each of which, although economically linked and subject to the group's management decisions, has its own legal personality and is incorporated under the law of its local jurisdiction.

and more sophisticated expertise that might be useful, for example, for asset management and rate setting.⁴

In order to give a picture of the phenomenon of cross-border insurance entities (both subsidiaries and branches), the following table presents for the year 2008 the percentage of foreign controlled subsidiaries on the overall number of domestic companies as well as the percentage of branches of foreign companies on

Table 1 – Foreign controlled subsidiaries and branches of foreign companies for some OECD countries, year 2008

	Market share (life and non life) in OECD percentage	Total number of companies	Domestic companies (DC)			Branches of foreign companies (BFC)	Percentage of FC on DC	Percentage of BFC on total number of companies
			Total	National controlled	Foreign Controlled (FC)			
Canada	2.8	444	331	277	54	113	16.31	25.45
France	6.85	359	359	349	10	N/a	2.79	N/a
Germany	7.43	511	419	356	63	92	15.04	18.0
Ireland	2.14	355	311	N/a	N/a	44	N/a	12.39
Italy	3.53	247	163	99	64	84	39.26	34.01
Japan	10.55	97	72	55	17	25	23.61	25.77
Korea	2.61	52	37	30	7	15	18.92	28.85
Spain	2.25	295	293	262	31	2	10.58	0.68
United Kingdom	9.85	347	318	N/a	N/a	29	N/a	8.36
United States	39.93	4,489	4,477	3,967	510	12	11.39	0.27

Source: Data based on OECD. (2010), *Insurance Statistics Yearbook 1999–2008*, pp. 55.

Multinational groups have become a common structure in the insurance industry, because insurers benefit indeed, from international diversification and broader market opportunities.² Risks are better diversified within a group and the financial soundness of the entities may be strengthened by financings from the holding company or other group entities.³ Moreover, in particular for the smallest insurers, group structure permits access to greater technical resources

the total number of companies for the OECD countries with the largest total shares of the OECD insurance market.⁵

Although the percentages of foreign controlled companies on domestic companies in table 1 above sometimes vary considerably among the countries considered,⁶ in general, the data suggest a trend in the insurance sector towards international diversification

¹ International Association of Insurance Supervisors (IAIS) (2009). "Issues Paper on Group-Wide Solvency Assessment and Supervision", p. 8 (hereinafter: IAIS 2009 Paper); Outreville, J. François. (2008) "Foreign Affiliates of the Largest Insurance Groups: Location-Specific Advantages", *The Journal of Risk and Insurance*, Vol. 75, p. 464.

² Darlap, Patrick et Mayrm Bernhard. (2006) "Group Aspects of Regulatory Reform in the Insurance Sector", *The Geneva Papers*, Vol. 31, pp. 96–97; Outreville, J. François *Ibidem*, pp. 463–464.

³ Darlap, P. et Mayrm B. *Ibidem*, pp. 104–105; IAIS 2009 Paper, p. 10.

⁴ IAIS 2009 Paper, p. 10.

⁵ Calculations made with data collected from the OECD. (2010), *Insurance Statistics Yearbook 1999–2008*. The indicator in the first column of the table [Market share (life and non life) in OECD] measures the importance of the national insurance market of some OECD countries as compared to the whole OECD insurance market.

⁶ Compare, for example, the percentage in Italy, where foreign controlled companies account for almost 40 per cent of the domestic companies, with that in France, where they account just for almost 3 per cent. For the definition of "foreign controlled companies" adopted in the different countries considered. – *Insurance Statistics Yearbook 1999–2008, Ibidem*, p. 114.

Table 2 – 2008 Market share of foreign controlled companies and branches of foreign companies in the domestic market of some OECD countries

	Market share of foreign controlled companies in the domestic market – Life per cent	Market share of foreign controlled companies in the domestic market – Non-life per cent	Market share of branches of foreign companies in the domestic market – Life per cent	Market share of branches of foreign companies in the domestic market – Non-life per cent
Canada	20.29	37.52	6.22	12.56
France	N/a	0.28	N/a	0.28
Germany	24.26	18.58	1.18	1.66
Ireland	2.14	7.36	2.14	7.36
Italy	31.19	33.24	2.78	9.40
Japan	20.09	6.63	7.43	5.37
Korea	22.08	1.53	3.96	1.53
Spain	5.57	21.45	0.29	0.18
United Kingdom	32.45	52.57	12.45	18.44
United States	22.33	12.42	Nil or negligible value	0.08

Source: OECD. (2010), *Insurance Statistics Yearbook 1999–2008*, pp. 49–52.

and expansion in foreign markets.⁷ This trend is confirmed by the figures in table 2 below that shows the market share of foreign controlled companies and of branches of foreign companies in the domestic market of the OECD countries just considered, both for life and non-life insurance. In particular, it can be noted that the market share of foreign controlled companies is quite significant in almost all the domestic markets selected, reaching percentages of about 33 in the Italian non-life insurance market and of about even 53 in the non-life insurance market of the United Kingdom.

The growingly complex and international character of insurance groups stands in contrast with the fact that supervision is essentially conducted on a legal entity basis by national authorities. Though supplementary supervision at the group level is carried out, solo supervision, indeed, represents the core of insurance supervision. In this context, the financial crisis has highlighted the need for a more effective group-wide supervision.

The traditional justification for economic regulation is to protect the public interest by correcting market failures and improving economic efficiency and equity. With regard to insurance, regulation aims to protect policyholders by ensuring the solvency of the insurance companies.⁸ Considering the special character of an

insurance contract, in which the policyholder pays an upfront premium in exchange for the insurer's promise to indemnify in case a loss occurs, the need is clear to assure the solvency of the insurance companies and their ability to pay possible future claims.

Being part of an international insurance group, however, carries with it additional risks for the solvency of member companies.⁹ Conflicts between the general interest of the entire group and that of the individual subsidiaries may arise, for example, with regard to the distribution of financial resources within the group. Insurers that belong to a group, indeed, are subject to group policy that may be favorable for the group but not for the entities taken individually.¹⁰ Further the management of a group can be difficult because of the group's complex structure.¹¹ The size of the group may also incentivize morally hazardous behavior based on a "too-big-to-fail" perception.¹²

Kahn, E. Alfred. (1988) *The Economics of Regulation, Institutional Issues*, Vol. 2, p. 11; Manghetti, Giovanni. (2006) "Multinational Insurance Groups: The Main Problems for Supervisors", *The Geneva Papers on Risk and Insurance*, Vol 27, p. 311.

⁹ Darlap, P. et Mayrm B. *Ibidem*, p. 99; Manghetti, G. *Ibidem*, p. 311.

¹⁰ IAIS 2009 Paper, p. 10; Manghetti, G. *Ibidem*, pp. 311–312.

¹¹ IAIS 2009 Paper, p. 10.

¹² Darlap, P. et Mayrm B. *Ibidem*, pp. 99, 101 (stating that managers may engage in riskier activities because they are confident of a government's bailout).

⁷ Outreville, J. F. *Ibidem*, p. 464.

⁸ Breyer, Stephen. (1982) *Regulation and Its Reform*, pp. 15–16; Darlap, P. et Mayrm B. *Ibidem*, p. 96; Harrington, E. Scott. (2000) *Insurance Deregulation and the Public Interest*, p. 15;

Table 3 – 2003 Top 30 largest insurance groups in the world by foreign insurance income

	Group Name	Home country	Insurance income		Number of host countries
			Foreign	Total	
1	Allianz	Germany	75,230	107,180	62
2	AXA	France	65,120	84,800	46
3	ING	Netherlands	47,990	57,350	58
4	Zurich Financial Services	Switzerland	44,520	48,920	46
5	AssicurazioniGenerali	Italy	38,155	62,500	42
6	AIG	United States	32,718	70,319	92
7	Munich Re	Germany	27,900	50,900	36
8	Aviva	United Kingdom	26,180	53,480	32
9	Swiss Re	Switzerland	25,540	26,940	28
10	Winterthur	Switzerland	19,680	27,060	16
11	Aegon	Netherlands	19,650	24,530	12
12	Prudential	United Kingdom	12,980	24,480	18
13	Fortis	Belgium/Netherlands	12,940	26,230	48
14	Hannover Re	Germany	12,000	14,290	22
15	Royal and Sun Alliance	United Kingdom	10,600	19,800	30
16	Swiss Life	Switzerland	8,944	15,160	6
17	Skandia	Sweden	8,650	10,035	20
18	Prudential Financial	United States	5,655	13,233	18
19	Berkshire Hathaway	United States	5,484	22,454	21
20	GE-Employers Re	United States	4,071	9,729	22
21	Standard Life	United Kingdom	4,058	16,910	8
22	Ergo	Germany	3,800	20,330	21
23	Liberty Mutual	United States	3,671	18,319	11
24	Groupama	France	2,780	13,010	11
25	Mapfre	Spain	2,010	9,475	36
26	Chubb	United States	1,975	11,338	16
27	Metlife	United States	1,950	23,170	11
28	Millea Holdings	Japan	1,302	23,736	48
29	Legal and General	United Kingdom	1,196	9,965	4
30	CNP Assurances	France	1,005	24,520	5

Source: Outreville, J. François (2008) "Foreign Affiliates of the Largest Insurance Groups: Location-Specific Advantages", *The Journal of Risk and Insurance*, Vol. 75, p. 469.

Regulatory inconsistencies across countries might permit multiple gearing of capital within a group, hence the same capital is used to meet the solvency requirements of more than one insurer.¹³ Moreover, there are risks related to intra-group transactions since they may become a means of distracting resources from an insurance entity to the advantage of other group's entities, in particular in case of groups with non-homogeneous activities.¹⁴ Excessive intra-group

¹³ Darlap, P. et Mayrm B. *Ibidem*, p. 100; IAIS 2009 Paper, p. 11; Manghetti, G. *Ibidem*, p. 313.

¹⁴ Darlap, P. et Mayrm B. *Ibidem*, p. 100; IAIS 2009 Paper, p. 11; Manghetti, G. *Ibidem*, p. 312; Sangiorgio, Giorgio. (1996) "Il

transactions, in turn, increase contagion risk, which is the risk that financial troubles of an individual entity adversely impact the financial solidity of another entity within the group due to direct or indirect relationships between them. Contagion may spread from one group subsidiary to another.¹⁵ Insurers may also take on reputational risk, by association with the group as a

gruppo assicurativo nell'esperienza dell'ISVAP", in *I gruppi di società*, Atti del convegno internazionale di studi, Venezia, 16-18 novembre 1995, *Rivista delle società*, vol. 1, p. 542.

¹⁵ IAIS 2009 Paper, p. 9 (emphasizing the possibility that contagion risk may cause systemic risk); Darlap, P. et Mayrm B. *Ibidem*, p. 100 (highlighting that direct exposures, like an investment in or a loan to a primary entity, or an obligation to

whole or with other group members, so that financial problems of an insurance company within a group may be transmitted to other entities in the group.¹⁶

Supervisors may face challenges as a consequence of the possible complexity and lack of transparency of the organization and, in order to ensure the protection of policyholders, they need to acquire a deep knowledge of the entire structure of the group.¹⁷

Although the phenomenon of insurance groups raises different issues as described above, this paper will consider the European legal framework applying to the supervision of insurance groups focusing, in particular, on the organizational form of group supervision and on the role played by the supervisory authorities to ensure adequate and effective supervision at the group level.

The relevance of the European regulation on this point emerges taking also into account the fact that Europe occupies a leading position as the home country of the largest insurance groups.¹⁸ According to Table 3 below, that identifies the top 30 global insurance groups in the year 2003 ranked by foreign insurance income, indeed, as many as 22 groups are from European countries (18 with their home country in EU Member States), while only 7 from the United States and 1 from Japan.

The initial part of the article deals with the rules currently in force set out by Directive 98/78/EC (Insurance Groups Directive) on the supplementary supervision of insurance undertakings,¹⁹ while the rest of the work deals with the model for group supervision

provide financial support to a primary entity, are particularly relevant in the context of groups).

¹⁶ IAIS 2009 Paper, p. 9 (pointing out that reputational risk may also have a positive impact, depending on the circumstances of the specific cases). For insurance companies, reputational risk is related, in general, to the policyholder expectations with respect to the insurer's payment of a claim.

¹⁷ Darlap, P. et Mayrm B. *Ibidem*, p. 99; Manghetti, G. *Ibidem*, p. 311; IAIS 2009 Paper, p. 11.

¹⁸ Outreville, J. F. *Ibidem*, p. 464 (highlighting that recently the home country composition of the largest insurance groups has considerably changed and that European transnational corporations have the lead compared to U.S. and Japanese firms); Outreville, J. François. (2007) "Players and driving forces in world insurance services: locations and governance", in UNCTAD, *Trade and development aspects of insurance services and regulatory frameworks*, pp. 48–49, available at: http://unctad.org/en/docs/ditctncd20074_en.pdf, accessed on 20. 6. 2012. For data on the top 10 global insurance and reinsurance companies by revenues for the year 2010, see the Insurance Information Institute's statistics available at: http://www.iii.org/facts_statistics/international.html, accessed on 20. 6. 2012.

¹⁹ European Parliament and Council Directive 98/78, 1998 O.J. (L78) 1 (hereinafter: Insurance Groups Directive).

under Directive 2009/138/EC (Solvency II)²⁰ that establishes an innovative model for group supervision. The supervision on a group-wide basis of insurance undertakings that are part of a financial conglomerate is covered as well.

2. THE SUPPLEMENTARY SUPERVISION OF INSURANCE GROUPS IN THE INSURANCE GROUPS DIRECTIVE

To address the problem of the supervision of insurance undertakings that belong to an insurance group, the Insurance Groups Directive was introduced.²¹ Directives 92/49/EEC (Third Non-Life Insurance Directive) and 92/96/EEC (Third Life Assurance Directive), indeed, do not contain provisions for the supervision of insurance groups since they limit the scope of insurance supervision to the financial situation of the individual companies as such ("solo supervision.") The Insurance Groups Directive, currently in force, establishes the supplementary supervision of insurance entities within an insurance group in order to enable supervisory authorities to have a more accurate assessment of their financial situation ("solo-plus supervision").²² This does not mean, however, supervision of the group itself as a whole. Supplementary supervision, indeed, does not substitute the supervision of individual insurance undertakings by the competent authorities. Solo supervision remains the essential principle of insurance supervision.²³

The Preamble of the Directive acknowledges the need to eliminate divergences between Member States

²⁰ European Parliament and Council Directive 2009/138, 2009 O.J. (L138) 1 (hereinafter: Solvency II Directive.)

²¹ Article 22 of Directive 92/49/EEC and Article 22 of Directive 92/96/EEC just consider the case of insurance subsidiaries with regard to the application of the Directives' rules on the diversification of assets backing the technical provisions.

²² Insurance Groups Directive, paragraph 3 of the Preamble and Article 2; Insurance Groups Directive, paragraph 3 of the Preamble and Article 2; Commission of the European Communities (1995) "Proposal for a European Parliament and Council Directive on the supplementary supervision of insurance undertakings in an insurance group", p. 2, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1995:0406:FIN:EN:PDF>, accessed on 20. 6. 2012, (hereinafter Commission Proposal for Insurance Groups Directive).

²³ Commission Proposal for Insurance Groups Directive (stating that "solo supervision remains the most important approach towards prudential supervision of insurance undertakings. Any new requirements to take account of the effect an insurance group may have on an insurance undertaking's financial position should be regarded as additional to existing solo supervisory requirements.")

as regards the prudential rules to which insurance companies within a group are subject and it clarifies that the criteria applied to determine supplementary supervision cannot be left solely to the discretion of Member States.²⁴ To this end, the Directive provides for minimum measures of harmonization to achieve the mutual recognition of prudential control systems.²⁵ The adoption of common basic rules is considered in the best interest of the Community since it should favor the achievement of an internal insurance market and it should permit to prevent distortion of competition and protect policyholders.²⁶ The measures aim to strengthen the prudential supervision of insurance companies, which in turn contributes to the stability of financial market and to the development of a firm economy in general.²⁷ In this regard, the Directive contains provisions for group solvency,²⁸ intra-group transactions and groups' internal control mechanisms.

According to Article 2, the Insurance Groups Directive applies, under various rules, to:

(1) any (re)insurance undertaking, which participate in at least one (re)insurance undertaking or non-member country (re)insurance undertaking;

(2) any (re)insurance undertaking the parent²⁹ of which is an insurance holding company,³⁰ a mixed

²⁴ Insurance Groups Directive, paragraph 4 of the Preamble; Commission Proposal for Insurance Groups Directive, p. 3.

²⁵ Insurance Groups Directive, paragraph 5 of the Preamble. Member States may apply stricter rules to companies authorized by its own competent authorities.

²⁶ Insurance Groups Directive, paragraph 4 of the Preamble. Commission Proposal for Insurance Groups Directive, p. 4.

²⁷ Commission Proposal for Insurance Groups Directive, p. 5.

²⁸ The Insurance Groups Directive requires an adjusted solvency calculation in order to avoid double gearing within an insurance groups according to one of three methods approved (see Article 9 and Annexes I and II).

²⁹ Article 1(d) of the Insurance Groups Directive refers to Article 1 of Directive 83/349/EEC for the definition of "parent undertaking". In addition, pursuant to the Insurance Groups Directive, a parent undertaking is also any undertaking which, in the opinion of the competent authorities, effectively exercises a dominant influence over another undertaking (subsidiary undertaking).

³⁰ According to Article 1(i) of the Insurance Groups Directive, an insurance holding company is a parent undertaking which is not a mixed financial holding company and the main business of which is to acquire and hold participations in subsidiary undertakings. These subsidiaries should exclusively or mainly be (re)insurance undertakings or non-member country (re) insurance undertakings, at least one of such subsidiaries being an (re)insurance undertaking.

financial holding company,³¹ a non-member country (re)insurance undertaking;

(3) any (re)insurance undertaking the parent of which is a mixed activity insurance holding company.³²

Supplementary supervision, however, does not entail that the competent authorities have to exercise supervision of non-member country (re)insurance undertaking, insurance holding company, mixed financial holding company or mixed-activity insurance holding company taken individually.³³

Supplementary supervision should include (i) related undertakings of the (re)insurance undertaking; (ii) participating undertakings in the (re)insurance undertaking; (iii) related undertakings of a participating undertaking in the (re)insurance undertaking.³⁴ Member States may decide not to take into account in the supplementary supervision undertakings based in a non-member country where there are legal hindrances to the transfer of the necessary information. Moreover the competent authorities for the exercise of supplementary supervision can decide on a case-by-case basis not to include in the supplementary supervision undertakings of negligible interest or the inclusion of which would be inappropriate or misleading

³¹ Article 1(m) of the Insurance Groups Directive refers to Article 2(15) of Directive 2002/87/EC for the definition of "mixed financial holding company". Thus, a "mixed financial holding company" means a parent undertaking, other than a regulated entity, which, together with its subsidiaries (at least one of which is a regulated entity which have its registered office in the EU) and other entities, constitutes a financial conglomerate.

³² According to Article 1(i) of the Insurance Groups Directive, a mixed-activity insurance holding company means a parent undertaking (that is not a (re)insurance undertaking, a non-member country (re)insurance undertaking, an insurance holding company or a mixed financial holding company) which has at least one (re)insurance undertaking among its subsidiaries.

³³ Insurance Groups Directive, Article 3(1).

³⁴ Insurance Groups Directive, Article 3(2). According to Article 1(g) of the Insurance Groups Directive, a participating undertaking is either a parent undertaking or other undertaking that holds a participation, or an undertaking linked with another one by a relationship within the meaning of Article 12(1) of Directive 83/349/EEC (i.e. (i) the undertakings are managed on a unified basis pursuant to a contract or provisions in the memorandum or articles of association of those undertakings; (ii) the administrative, management or supervisory bodies of the undertakings consist for the major part of the same persons in office during the financial year and until the consolidated accounts are drawn up). As to the definition of "related undertaking", Article 1(h) of the Insurance Groups Directive states that it means either a subsidiary or other undertaking in which a participation is held, or an undertaking linked with another one by a relationship within the meaning of Article 12(1) of Directive 83/349/EEC.

with respect to the objectives of the supplementary supervision.³⁵

Leaving aside the measures for calculating an adjusted solvency situation for (re)insurers within a group – that are not the focus of this study – it should be highlighted that the Insurance Groups Directive deals with the definition of the competent authorities for the exercise of supplementary supervision, the availability and quality of supervisory information between competent authorities and intra-group transactions, all of which are relevant to the purpose of this paper. The analysis of these issues is valuable in order to then trace the evolution of group supervision under the Solvency II's regime.

Article 4 of the Directive defines the authority responsible for the supplementary supervision. In general, the competent authority is that of the Member State in which the (re)insurance company has received official authorization. In case of insurance undertakings authorized in more than one Member State that have, as their parent undertaking, the same insurance holding company, non-member country (re)insurance undertaking, mixed financial holding company or mixed-activity insurance holding company, the competent authorities of the Member States concerned may make an arrangement as to which of them has to be responsible for the supplementary supervision.³⁶

The competent authorities should have access to any information relevant to the supplementary supervision. The information may be requested directly to the relevant undertakings included in the supplementary supervision only if such information has not been given by the (re)insurance undertaking subject to the supplementary supervision.³⁷ Further, the supervisory authorities can carry out within their respective territory on-the-spot verification of relevant information.³⁸ Where the competent authority of one Member State wants to verify relevant information on an undertaking situated in another Member State which is included in the supplementary supervision it has to ask the competent authority of that other Member State to carry out the verification.³⁹ In order to gather

³⁵ Insurance Groups Directive, Article 3(3).

³⁶ In case a Member State has more than one authority responsible for the prudential supervision of (re)insurance undertakings, such Member State has to take measures to organize coordination between those authorities.

³⁷ Insurance Groups Directive, Article 6(1).

³⁸ Insurance Groups Directive, Article 6(2).

³⁹ Insurance Groups Directive, Article 6(3) (specifying that the authority of that other Member State may then carry out the verification itself, allow the authorities making the request to carry it out or allow an auditor or expert to carry it out).

any data and information necessary for supplementary supervision, every (re)insurance undertaking subject to the supplementary supervision must have adequate internal control mechanisms in place.⁴⁰

The importance of cooperation between competent authorities is recognized in the Directive. In case (re)insurance undertakings established in different Member States are directly or indirectly related or have a common participating undertaking, the supervisory authorities of the Member States involved have to cooperate in exchanging relevant information. Thus, each competent authority has to convey to one another on request all relevant information that may allow or facilitate the supplementary supervision and it has to convey on its own initiative any information that seems to it to be essential for the other competent authorities.⁴¹

Further, in case of EU (re)insurance undertakings which have subsidiaries or hold participations in non-member country insurance undertakings or, conversely, in case of non-member country (re) insurance undertakings which have subsidiaries or hold participations in EU insurance undertakings, the Commission may submit proposals to the Council, also at the request of a Member State, for the negotiation of agreements with one or more third countries concerning the means of exercising supplementary supervision. The agreement should aim to ensure the availability of the information necessary for the supervision.⁴²

Finally, the competent authorities have to exercise general supervision over transactions between an insurance company and participants of the insurance group.⁴³ The Directive provides for monitoring and disclosure requirements. Indeed, (re)insurers must

⁴⁰ Insurance Groups Directive, Article 5. Member States have to take the appropriate measures to eliminate any legal impediments within their jurisdiction preventing the undertakings that are subject to the supplementary supervision and their related undertakings and participating undertakings from exchanging the information necessary for the supplementary supervision.

⁴¹ Insurance Groups Directive, Article 7 (specifying that any exchange of information in compliance with the Directive is subject to the obligation of professional secrecy).

⁴² Insurance Groups Directive, Article 10a.

⁴³ Insurance Groups Directive, Article 8 (considering, as particular examples of these transactions, loans, guarantees and off-balance-sheet transactions, elements eligible for the solvency margin, investments, reinsurance and retrocession operations, agreements to share costs). General supervision is exercised over transactions between: (re)insurance undertakings and (i) their related undertakings, (ii) participating undertakings and (iii) the related undertakings of undertakings participating in them and between (re)insurance undertakings and a natural person who holds a participation in (i) the (re)insurance undertakings or any of their related undertaking, (ii) participating undertakings

have in place adequate risk management processes and internal control mechanisms in order to identify, measure, monitor and control the transactions adequately. The above-mentioned process and mechanisms are subject to overview by the competent authorities. In addition, (re)insurance undertakings must report significant transactions to the competent authorities, at least annually. The competent authorities should take action at the level of the (re)insurance undertaking if it appears that its solvency is, or may be, jeopardized.

As emphasized above, the solvency of an insurance company that is part of a group may be affected by the group's policy and financial resources. Therefore, in the context of insurance groups, it is necessary to provide supervisory authorities with the means for taking appropriate measures to ensure the solvency of the insurance companies. The Insurance Groups Directive has the merit of having required the supervisory authorities not to exercise just solo supervision on individual insurance entities, but also to consider the link between an insurance company and other entities within a group. It introduces a common framework for the supplementary supervision of insurance undertakings within an insurance groups, thus enhancing the mutual confidence between authorities responsible for prudential supervision.⁴⁴

In order to ensure optimal supplementary supervision, a high level of cooperation between the supervisory authorities involved is needed, in particular with regard to EU insurance groups based in several (member) countries. The Directive, however, does not provide for specific rules on this point.

Indeed, although the Directive establishes the supervisors' duty to cooperate and exchange information relevant to the supplementary supervision, it does not give any reference to the methods for achieving such a cooperation and to the type of information to be communicated. It devolves on the discretionary power of supervisors involved to define, for example, the information that may be essential for the other authorities. The broad formulation of the Directive in this respect may lead to a system of cooperation not strictly interpreted and applied and to differences between the cooperation approach adopted by the different supervisory authorities.

Further, with regard to the competent authorities for exercising supplementary supervision, it should be pointed out that in case of insurance undertakings authorized in more than one Member States which

in the (re)insurance undertaking, (iii) related undertaking of participating undertakings in the (re)insurance undertakings.

⁴⁴ Commission Proposal for Insurance Groups Directive, p. 5.

have the same parent undertaking as described above, the Directive merely states that the competent authorities of the Member States involved may make an arrangement as to which of them is responsible for the supplementary supervision but it does not provide for any objective criteria to use for reaching the agreement, with the possible consequence of having more than one authority competent for the supplementary supervision. The absence of an authority responsible for the coordination of supervision at the group level may result in a system of supervision that is inefficient and burdensome for both the supervisors and undertakings included in the supplementary supervision.

3. THE HELSINKI PROTOCOL AND THE CEIOPS'S GUIDELINES FOR COORDINATION COMMITTEES

It should be remarked that, after the adoption of the Insurance Groups Directive, in order to enhance and facilitate the cooperation between supervisors, supervisors from all EU Member States agreed in 2000 the Helsinki Protocol on the collaboration of the supervisory authorities of the EU Member States with regard to the supplementary supervision.⁴⁵ Further, CEIOPS's Guidelines for Coordination Committees (Co-Co Guidelines) followed in 2005.⁴⁶ Thus, when assessing the Directive's system of supervision, we should take into account the convergence in supervisory methods achieved in practice as a consequence of these two documents.⁴⁷

The Helsinki Protocol was signed since insurance supervisory authorities of EEA Member States acknowledged the need to arrange a common

⁴⁵ Protocol relating to the collaboration of the supervisory authorities of the member states of the European Union with regard to the application of Directive 98/78/EC on the supplementary supervision of insurance undertakings in an insurance group, 11 May 2000, available at: https://eiopa.europa.eu/fileadmin/tx_dam/files/Colleges/14.pdf, accessed on 20. 6. 2012. (hereinafter Helsinki Protocol.)

⁴⁶ CEIOPS (2005) "Guidelines for Coordination Committees in the Context of Supplementary Supervision as Defined by the Insurance Groups Directive (98/78/EC)", available at: https://eiopa.europa.eu/fileadmin/tx_dam/files/Colleges/11.pdf, accessed on 20. 6. 2012. (hereinafter CEIOPS Guidelines for Coordination Committees).

⁴⁷ CEIOPS (2005) "Recommendation on possible need for amendments to the Insurance Groups Directive", p. 4, available at: https://eiopa.europa.eu/fileadmin/tx_dam/files/consultations/consultationpapers/DOC0504.pdf, accessed on 20. 6. 2012. (hereinafter CEIOPS Recommendation on Insurance Groups Directive).

supervisory approach in order to create a more level playing field for those insurance groups based in more than one EEA Member State and reduce the possible regulatory arbitrage.⁴⁸ The Protocol specifies how the relevant authorities should cooperate for exercising supplementary supervision. It requires that supervisory authorities create a Coordination Committee (Co-Co) for each insurance group operating in more than one EEA-country. The Co-Co consists of supervisor authorities from every Member State involved in the supplementary supervision.⁴⁹ According to the Helsinki Protocol, the supervisors have a mutual responsibility to cooperate in supplementary supervision. The Co-Co decides on the organizational form of supplementary supervision and on the methods for collecting necessary information from the insurance groups. The Co-Co has to produce an overview of the groups in terms of its formal and operational structure, identifying the most relevant undertakings and the most important relationships in the group. In this way it may become clear which supervisors are most involved, which information should be gathered and exchanged and which organizational form of cooperation is most practical. The Co-Co decides on the information which should at least be exchanged by all its members. In this regard, it is worth noting that the Protocol specifies a list of information which may be important for supervisors and which includes any granting or withdrawal of authorization, changes on the management board of any undertakings involved, measures considered or taken by a supervisor which can have an influence on other group members, solvency concerns regarding members of the group, major acquisitions by one of the members of the group.⁵⁰ The Co-Co also agrees on how

the information gathered shall be exchanged and how often and it discusses and coordinates any measures to be carried out by the supervisory authorities against insurance undertakings within a group.⁵¹

The Committee may then appoint one or more supervisors as key coordinator(s). The key coordinator chairs the meetings of the Co-Co and has to arrange and manage the coordination of the activities necessary for the supplementary supervision.⁵² The Helsinki Protocol highlights that in practice it may also be useful to assign authority to one of the supervisors to carry out most or all of the supplementary supervision, whenever the Directive leaves a choice in that respect. This supervisor, called the lead supervisor and appointed unanimously by the members of the Co-Co, should be the supervisor of the Member State where the dominant insurance undertaking of the group is established.⁵³ According to the Protocol, it is preferable if the lead supervisor is responsible to chair the Co-Co and act as key coordinator as well.⁵⁴

To ensure consistency concerning supplementary supervision among Member States and increase the efficiency of the work of the Co-Cos, CEIOPS issued the Guidelines for Coordination Committees.⁵⁵ The Guidelines acknowledge that many groups have complex structures and simply adding individual or country risks together does not make it possible to assess the complete risk profile of the whole group. Thus, the role of the Co-Cos to conduct some additional qualitative consolidated supervision at the level of the group holding company is emphasized.⁵⁶ According to the Guidelines, the Co-Co has to exchange information and coordinate efforts in order to assess the overall financial situation of the group; it has to anticipate or find out possible financial problems within the insurance group and find prompt solutions. In this

⁴⁸ CEIOPS Recommendation on Insurance Groups Directive, p. 9. The Protocol was extended to the new EEA Member States in 2004.

⁴⁹ The Helsinki Protocol states that the Co-Co should convene an initiating meeting, unless otherwise agreed and that it should meet as often as the members deem necessary. The type of cooperation varies depending on the size of the insurance group and, thus, for smaller groups, it may not be necessary to convene an initial meeting of the Co-Co. According to CEIOPS Recommendation on Insurance Groups Directive, typically, the Co-Co of a major insurance group meet face-to-face once a year and exchange information by telephone or email during the year, while the Co-Co of a smaller group may just have one initial meeting and then exchange information by telephone or email.

⁵⁰ Helsinki Protocol, pp. 11–12. Other information listed includes: (i) communication of a negative result on the inquiry into the good repute, competence and professional experience of managers and (ii) the granting of declarations of no objection or licences to one of the members of the group in order to allow a major acquisition leading to a qualified participation in another insurance undertaking, or other financial undertaking

⁵¹ Helsinki Protocol, pp. 8–9 (highlighting that in case of large groups it will be necessary to limit the amount of information gathered and exchanged and that it may be useful to have a small number of key supervisors have more intensive supervisory contacts).

⁵² Helsinki Protocol, p. 8.

⁵³ The Protocol does not provide for a definition of “dominant insurance undertaking”, but it merely suggests that a possible dominant insurance undertaking within a group may be defined in terms of premium income.

⁵⁴ Helsinki Protocol, p. 8 (adding that depending on the group structure, the Co-Co may decide to appoint two or more joint lead supervisors); CEIOPS Guidelines for Coordination Committees, p. 5–6 (considering that if a lead supervisor is appointed, it should, for reasons of good order, also be chosen to act as key coordinator).

⁵⁵ CEIOPS Guidelines for Coordination Committees, p. 3.

⁵⁶ CEIOPS Guidelines for Coordination Committees, pp. 4–5.

regard, communication between supervisors is essential. The members of the Co-Co should rely on updated information and exchange information as frequently as needed.⁵⁷ The Guidelines encourage the appointment of either a key coordinator or a lead supervisor. In particular, the lead supervisor has a central role in gathering and analyzing relevant information and he communicates his conclusions to the other members of the Co-Co. So, the evaluation of the overall strength of the Group should be facilitated.

The Helsinki Protocol and the CEIPOS's Guidelines aim at an optimal rather than minimalist implementation of the Insurance Groups Directive⁵⁸ and correctly emphasize the need for cooperation among the supervisory authorities in order to ensure effective and efficient supervision. Supervision of transnational insurance groups, indeed, inevitably requires the cooperation and exchange of information between the supervisory authorities of the different countries. To assess the financial soundness of insurance companies within a group, it is essential that the national supervisors take into account the influence of the whole group on the individual company they supervise. So, the two documents represent important steps towards the enhancement of convergence in the way supervisory coordination is realized.

The legal framework analyzed is distinguished by a certain degree of flexibility since the cooperation achievable through the Co-Cos may permit to carry out a tailor-made form of supervision in connection with the peculiarity of each insurance group.⁵⁹ As to the lead supervisor, although the Protocol and CEIOPS Guidelines have the merit of highlighting his central role, it should be emphasized nevertheless that his appointment is not mandatory under the rules currently in force. A lead supervisor may, indeed, facilitate the spirit of mutual trust and cooperation that should permeate the activity of group supervisors. The effectiveness of supervision, would otherwise depend on the extent each individual supervisor really makes all reasonable efforts to exercise the cooperation as provided for in the Protocol and CEIOPS Guidelines. According to the Protocol, ideally, individual supervisors should promptly reply to requests for necessary information and provide any relevant information at their own initiative. In this regard, a lead supervisor may play a role of impulse and

coordination. The introduction at the European level of a mandatory system with a lead supervisor who has the power to coordinate and decide the organization of group supervision as well as to carry out most aspects of the supervision itself after consultation with the other authorities would reduce the regulatory burden for both insurance companies and supervisors.⁶⁰

Although it may be considered that the issue has no relevance in practice since a lead supervisor has already been appointed for almost all insurance groups with EU activities⁶¹, it seems that the establishment of harmonized rules that make the appointment of a lead supervisor mandatory under fixed criteria and which lay down his powers along with those of the other supervisory authorities may contribute to a more adequate and efficient organization of insurance group supervision. No specific provisions on this point are contained either in the Protocol or in the CEIOPS Guidelines.

4. THE SUPERVISION OF INSURANCE GROUPS UNDER SOLVENCY II

Solvency II Directive sets out rules on the supervision of (re)insurance undertakings within a group. The Preamble of the Directive points out the need for substantial changes, *inter alia*, to the Insurance Groups Directive,⁶² the provisions of which will be entirely repealed when Solvency II will entry into force.⁶³ Coordinated rules concerning the supervision of insurance groups should be established to favor

⁶⁰ CEIOPS Recommendation on Insurance Groups Directive, p. 12 (suggesting that reporting may be centralised to one supervisory authority).

⁶¹ CEIOPS. (2010) "List of groups for which a College of supervisors is in place", available at: https://eiopa.europa.eu/fileadmin/tx_dam/files/Colleges/6.pdf, accessed on 20. 6. 2012. *But see* KPMG (2012) "Solvency II and Insurance Groups: Making it real for the business", p. 20, available at: <http://www.kpmg.com/Ca/en/IssuesAndInsights/ArticlesPublications/Documents/SII-Making-it-real-for-the-business.pdf>, accessed on 20. 6. 2012. (highlighting that the Co-Co model has not been so developed across Europe) (hereinafter: KPMG Report.)

⁶² Solvency II, paragraph 1 of the Preamble.

⁶³ The so-called "Omnibus II" Directive (Proposal for a Directive of the European Parliament and of the Council amending Directives 2003/71/EC and 2009/138/EC in respect of the powers of the European Insurance and Occupational Pensions Authority and of the European Securities and Markets Authority) will set the date of entry into force of the Solvency II Directive. EIOPA strongly supports the entry into force of Solvency II from 1 January 2014 and, to date, the new regime is likely to be applicable from this date. Information available at: http://ec.europa.eu/internal_market/insurance/solvency/future/

⁵⁷ CEIOPS Guidelines for Coordination Committees, p. 5 (pointing out the importance of thorough preparation for meeting in order to have fruitful discussions and decisions).

⁵⁸ Helsinki Protocol, p. 7.

⁵⁹ CEIOPS Recommendation on Insurance Groups Directive, p. 12.

the proper functioning of the internal market.⁶⁴ The Directive acknowledges the increasing cross-border nature of insurance business and the need for authorities supervising a (re)insurance undertaking within a group to be able to form more soundly based judgments of its financial situation.⁶⁵

Similarly to the Insurance Groups Directive, the supervision of individual (re)insurance undertakings represents the essential principle of insurance supervision. However, Member States have to ensure the supervision, at the level of the group, of (re)insurance undertakings which are part of a group pursuant to the provisions laid down by the Directive.⁶⁶

According to Solvency II, a group of undertakings may be formed through capital ties or formalized strong and sustainable relationships, based on contractual or other material recognition that ensures a financial relationship between those undertakings.⁶⁷ For the purposes of group supervision, the definition of a parent undertaking also includes any undertaking which, in the opinion of the supervisory authorities, effectively exercises a dominant influence over another undertaking. Likewise, “subsidiary undertaking” also means any undertaking over which, in the opinion of the supervisory authorities, a parent undertaking effectively exercises a dominant influence.⁶⁸

Group supervision applies, under different rules, to:

(1) any (re)insurance undertaking, which participate in at least one (re)insurance undertaking or non-member country (re)insurance undertaking and, under different rules,

(2) any (re)insurance undertaking the parent of which is an insurance holding company or a mixed financial holding company that has its head office in the Union;

[index_en.htm](#) and <https://eiopa.europa.eu/activities/insurance/solvency-ii/index.html>, accessed on 20. 6. 2012.

⁶⁴ Solvency II, paragraph 3 of the Preamble.

⁶⁵ Solvency II, paragraphs 93 and 95 of the Preamble.

⁶⁶ Solvency II, paragraph 97 of the Preamble and Article 213(1).

⁶⁷ Solvency II, paragraph 98 of the Preamble and Article 212(1)(c) (specifying for the latter case that one of those undertakings (i.e. the parent undertaking) exercises, through centralized coordination, a dominant influence over the decisions of the other undertakings (i.e. subsidiaries). Further, the establishment and dissolution of the relationships, for the purpose of group supervision, are subject to prior approval by the group supervisor). Article 212(1)(c) also states that a group of undertakings may include undertakings linked to each other by a relationship within the meaning of Article 12(1) of Directive 83/349/EEC.

⁶⁸ Solvency II, Article 212(2).

(3) any (re)insurance undertaking the parent of which is an insurance holding company or a mixed financial holding company which has its head office in a third country or a third-country (re)insurance undertaking;

(4) any (re)insurance undertaking the parent of which is a mixed activity insurance holding company.⁶⁹

Supervisory authorities, however, are not entitled to play a supervisory role with regard to the third-country (re)insurance undertaking, the insurance holding company, the mixed financial holding company or the mixed-activity insurance holding company taken individually.⁷⁰

Group supervision applies at the level of any ultimate parent undertaking which has its head office in the Community. Where a participating (re)insurance undertaking or an insurance holding company or a EU mixed financial holding company does not have its head office in the same Member State as the ultimate parent undertaking at Union level, Member States may, however, allow their supervisory authorities to decide to apply group supervision also at the lower national levels, if they deem it necessary.⁷¹ In that case, Member States may allow their supervisory authorities to reach an agreement with supervisory authorities in other Member States where another related ultimate parent undertaking at national level is established, in order to carry out group supervision at the level of a subgroup covering several Member States.⁷²

Of particular relevance to this paper, it should be noted that Solvency II establishes an innovative model of group supervision where a central role is assigned to a group supervisor. The other supervisory authorities, however, maintain an important role as well and operate through a supervisory college.⁷³ The overall organizational form of group supervision provided by the Solvency II Directive seems adequate.

⁶⁹ Solvency II, Article 213(2).

⁷⁰ Solvency II, Article 214(1) (except that, according to Article 257, with regard to insurance holding companies and mixed financial holding companies, Member States require that all persons who effectively run these entities are fit and proper to perform their duties).

⁷¹ Solvency II, Article 216 (adding that the Commission may adopt implementing measures defining the circumstances under which such a decision can be taken).

⁷² Solvency II, Article 217 (specifying that in that case group supervision should not be carried out at the level of any ultimate national parent undertaking present in Member States other than the Member State where the subgroup is located). The Commission may adopt implementing measures defining the circumstances under which such a decision can be taken.

⁷³ Solvency II, paragraph 104 of the Preamble (specifying that supervisors' powers are linked with their accountability).

The supervisory tasks are detailed and well balanced between the group supervisor, which should play a role of impulse and coordination and the college of supervisors that should ensure effective cooperation and consultation among the supervisory authorities.

The group supervisor, designated from among the supervisory authorities of the Member States involved, is responsible for coordination and exercise of group supervision.⁷⁴ In general, where the same supervisory authority is competent for all (re)insurance undertakings within a group, the task of group supervisor is exercised by that supervisory authority. In all the other cases, the Directive sets out specific criteria for the appointment of the group supervisor, depending on whether the group is headed by a (re)insurance undertaking or not.⁷⁵

It is worth noting that, in particular cases, the supervisory authorities concerned may, at the request of any of them, make the joint decision to derogate from the Directive's appointment criteria where their application would be inappropriate, in light of the group's structure and the relative importance of the (re)insurance undertakings' activities in different countries. The supervisory authorities may thus designate a different supervisory authority as group supervisor.⁷⁶ The waiver option, where properly used, represents a valuable means of avoiding possible regulatory arbitrage deriving from the attempt to take advantage of the fixed criteria set out by the Directive for the appointment of the group supervisor. When assessing the relative importance of the (re)insurance activities in different markets, however, both internal group transactions and group reinsurance should not be double counted.⁷⁷ The supervisory authorities involved make every effort to reach a joint decision on the choice of the group supervisor within three months from the request for discussion and may also request that EIOPA is consulted. EIOPA's advice, if requested, should be duly taken into account by the supervisory authorities. The authorities' joint decision has to state the full reasons and, eventually, explain any significant deviation from EIOPA's advice. If the supervisory authorities cannot reach a joint decision, the group supervisor is appointed according to the criteria set out by the Directive.⁷⁸ The insurance group is involved as

⁷⁴ Solvency II, Article 247(1).

⁷⁵ Solvency II, Article 247(2).

⁷⁶ Solvency II, Article 247(3).

⁷⁷ Solvency II, paragraph 112 of the Preamble.

⁷⁸ According to the Omnibus II Directive proposal, however, where at the end of the three-month period, any of the supervisors concerned have referred the matter to EIOPA, they have to await EIOPA's decision. The task of group supervisor will

well in the process since it has the possibility to state its opinion on the appointment.⁷⁹

Unlike the Helsinki Protocol that, merely states that the lead supervisor carries out most or all of the supplementary supervision, Solvency II lays down in detail the powers of the group supervisor. In particular, his responsibilities include: (i) coordination of the gathering and dissemination of relevant information for going concern and emergency situation; (ii) the assessment of the financial situation of the group; (iii) planning and coordination, through at least annual regular meetings or through other appropriate means, of supervisory activities both in going-concern and in emergency situations, in cooperation with the supervisory authorities.⁸⁰

In addition, a group supervisor may, for example, decide on a case-by-case basis not to include an undertaking in the group supervision if (i) the undertaking is based in a third country where there are legal impediments to the transfer of the necessary information; (ii) the undertaking is of negligible interest with respect to the objectives of group supervision; (iii) the inclusion of the undertaking would be inappropriate or misleading with respect to the objectives of the group supervision. Before taking the decision to not include an undertaking because of its negligible interest or because its inclusion would be inappropriate, the group supervisor must consult the other supervisory authorities concerned.⁸¹

The group supervisor also has a significant role in the supervision of risk concentration at group level and intra-group transactions, representing the only supervisory interface of the insurance group.⁸² Indeed, (re)insurance undertakings or insurance holding companies or mixed financial holding companies have to report on a regular basis and at least annually to the group supervisor any significant risk concentration at the level of the group and any significant intra-group transactions by (re)insurance undertakings within a

be then exercised by the supervisory authority identified in the decision of the EIOPA. The decision has to be submitted to the group and to the college of supervisors.

⁷⁹ Solvency II, Article 247 (stating that in the event of major difficulties in applying the appointment criteria, the Commission may adopt implementing measures specifying those criteria).

⁸⁰ Solvency II, Article 248.

⁸¹ Solvency II, Article 214 (specifying that where several undertakings of the same group, considered individually, may be excluded because they are of negligible interest, they must nevertheless be included, if, collectively, they are not of negligible interest).

⁸² The Solvency II Directive provides for rules on both concentration of risks and intra-group transactions, unlike the Insurance Groups Directive that only sets out rules on the latter.

group. Risk concentrations and intra-group transactions are then subject to review by the group supervisor. Moreover, the group supervisor, after consulting the other supervisory authorities involved and the group, identifies the type of risks and intra-group transactions that must be reported in all circumstances.⁸³ It should be highlighted that Solvency II lays down minimum harmonization rules on risk concentration and intra-group transactions, allowing a tailor-made approach of supervision, to the detriment, however, of a more level playing field.

In addition, the group supervisor reviews the risk management and internal control systems and reporting procedures adopted within the group. Undertakings belonging to a group have to seek ways to maintain consistency in the risk management and internal control system and reporting procedures across the entities in the group in order to permit that those systems and reporting procedures can be controlled at the level of the group. The group internal control systems have to include at least (i) adequate mechanisms as regards group solvency to identify all material risks and to adequately relate eligible own funds to risks and (ii) sound reporting and accounting procedures to monitor and manage the intra-group transactions and the risk concentration.⁸⁴

According to Solvency II, a college of supervisors, chaired by the group supervisor, assists the group supervisor himself in exercising group supervision. The aforesaid college is composed of the group supervisor and the supervisory authorities of all the Member States in which the subsidiary undertakings have their head office.⁸⁵ The college of supervisors has the task of ensuring that the processes of cooperation, exchange of information and consultation among the supervisory authorities are effectively applied. In particular, the college of supervisors has to promote the convergence of the respective decisions and activities of its members. In order to permit the effective functioning of the supervisory colleges, the Directive allows the option

⁸³ Solvency II, Articles 244 and 245. Very significant intra-group transactions should be reported as soon as practicable. According to Article 265, where the parent undertaking of (re) insurance undertakings is a mixed activity insurance holding company, the supervisory authorities responsible for the supervision of those (re)insurance undertakings exercise general supervision over the transactions between those (re)insurance undertakings and the mixed activity holding company and its related undertakings.

⁸⁴ Solvency II, Article 246.

⁸⁵ Solvency II, Article 248 (adding that the supervisory authorities of significant branches and related undertakings may participate in the college of supervisors to the extent that the participation permits an efficient exchange of information).

to assign some activities to a reduced number of supervisory authorities.

The group supervisor and the other supervisory authorities coordinate the establishment and functioning of the college of supervisors. In particular, the coordination arrangements have to set out the procedures for the decision-making process among the supervisory authorities with regard, for example, to the appointment of the group supervisor not in accordance with the Directive's criteria set out for the nomination. The coordination arrangements may also establish procedures for consultation among the supervisory authorities required for the exclusion of an undertaking from the group supervision according to Article 214(2), the application of group supervision at lower national levels and at the level of a subgroup covering several Member States according to Articles 216 and 217, the supervision of risk concentration, intra-group transactions and the system of governance according, respectively, to Articles 244, 245 and 246. Procedures for the cooperation with other supervisory authorities may be included as well in these coordination arrangements. Without prejudice to the responsibilities given by the Directive to the group supervisor and the other supervisory authorities, coordination arrangements may assign additional tasks to the group supervisor or the other supervisory authorities if this would increase the efficiency of the group supervision. The Commission may adopt guidelines for the operational functioning of the colleges of supervisors and implementing measures for the coordination of group supervision.⁸⁶ In practice, the number and the form of meetings of a supervisory college will depend on the complexity and international character of the group subject to supervision.⁸⁷ As of January 2011 EIOPA is a member of the supervisory colleges, fostering the convergence of supervisory best practices and promoting the efficient and consistent functioning of the colleges.⁸⁸

⁸⁶ Solvency II, Article 248 (adding that EIOPA will elaborate guidelines for the operational functioning of colleges of supervisors in order to assess the level of convergence between them). As to the Commission's task of adopting implementing measures under Solvency II, the Omnibus II Directive proposal that will amend Solvency II introduces rules on the power of the Commission to adopt delegated acts for a period of 5 years following the entry into force of the Solvency II Directive. Further, according to Omnibus II, the Commission will adopt implementing technical standards concerning the operational functioning of colleges.

⁸⁷ KPMG Report, p. 22 (stating that there will be a number of "core" supervisors, namely the supervisors of significant insurers in the group, that is likely to convene more often).

⁸⁸ Article 21 of Regulation (EU) No. 1094/2010 of the European Parliament and of the Council establishing a European

Solvency II emphasizes the importance of cooperation and exchange of information between supervisory authorities. It requires that the group supervisor and the other supervisory authorities cooperate closely, in particular when a (re)insurance undertaking has financial difficulties. The supervisory authorities and the group supervisor have to provide one another promptly with the relevant information available to them in order to permit and facilitate the exercise of the supervisory tasks. The Commission will adopt implementing measures specifying the information necessary for supervision at group level aiming to enhance convergence of supervisory reporting. It will also adopt implementing measures determining the items that are to be gathered by the group supervisor and communicated to the other authorities or to be transmitted to the group supervisor by the other supervisory authorities.⁸⁹ As to the information to be gathered, it seems that the group supervisor should define the requirements in light of the complexity of the affected insurance groups. According to the Preamble, indeed, the Directive should not be too burdensome for small and medium-sized insurance companies. The proportionality principle should apply both to the requirements imposed on the (re)insurance undertakings and to the exercise of the supervisory powers.⁹⁰

Member States ensure that their authorities responsible for the exercise of group supervision have access to any relevant information regardless of the nature of the undertaking concerned.⁹¹ As to the verification of information by the supervisory authorities, the rules are the same as those set out by the Insurance Groups Directive.

Further, before taking a decision that is of importance for the supervisory tasks of other authorities, the supervisory authorities consult each other in the college of supervisors about: (i) changes in the shareholder, organizational or management structure of (re)insurance undertakings within a group, which require the approval of supervisory authorities; (ii) major sanctions or exceptional measures taken by supervisory authorities. The supervisory authorities

Supervisory Authority (European Insurance and Occupational Pensions Authority), 2010 O.J. (L331) 48.

⁸⁹ Solvency II, Article 249.

⁹⁰ Solvency II, paragraph 19 of the Preamble.

⁹¹ Solvency II, Article 254 (specifying that the supervisory authorities concerned may request the necessary information directly to the undertakings in the group only where such information has been requested from the (re)insurance undertaking subject to group supervision and has not been supplied by it within a reasonable time).

also consult each other when a decision to be taken is based on information received from other supervisory authorities.⁹² However, in order to ensure the efficiency of the group supervision, the Directive wisely establishes that a supervisory authority may decide not to consult in cases of urgency or where the effectiveness of the decision may be hampered by the consultation. In that case, the supervisory authorities must inform the other supervisory authorities involved without delay.⁹³

The group supervisor and supervisory authorities cooperate in applying the enforcement measures where (re)insurance undertakings do not comply with the requirements set out for group solvency, intra-group transactions, risks concentrations and the system of governance or where, although these requirements are met, the solvency of the (re)insurance undertakings may be jeopardized the same. Therefore, in order to promptly rectify the situation, the group supervisor and the supervisory authorities adopt the necessary measures, respectively, against the insurance holding companies and mixed financial holding companies and against the (re)insurance undertakings. To this end, the group supervisor and the supervisory authorities involved coordinate their measures.⁹⁴

Finally, with regard to the supervision of groups that have as parent undertaking a third country's insurance holding company or mixed financial holding company or a third country's (re)insurance undertaking, Solvency II's rules on the equivalence assessment of third countries' group supervisory systems should be considered.⁹⁵ Supervisory recognition will facilitate the global business of (re)insurance, aiming to remove regulatory barriers and inconsistencies in cross-border insurance business and to provide adequate international supervision.⁹⁶ The equivalence assessment is intended to verify that the third-country's supervisory regime provides a similar level of policyholder

⁹² Solvency II, Article 250.

⁹³ Solvency II, Article 250.

⁹⁴ Solvency II, Article 258 (stating that where the group supervisor is not one of the supervisory authorities of the Member State in which the insurance holding company or mixed financial holding company or the (re)insurance undertaking has its head office, the group supervisor has to inform those supervisory authorities of its findings in order to enable them to take the necessary measures).

⁹⁵ Solvency II Directive requires the assessment of third countries' supervisory system under Article 172 of the Directive (reinsurance supervision), Article 227 (calculation of the group capital) and Article 260 (group supervision).

⁹⁶ Geiger, Hermann, "Transnational supervisory recognition: a macro-jurisdictional overview", in *Research Handbook on International Insurance Law and Regulation* (edited by Burling, Julian and Lazarus, Kevin), pp. 308-309, Edward Elgar, 2011.

protection as the one provided under the Solvency II Directive.⁹⁷

According to Article 260 of the Directive, the Commission, after consultation of the European Insurance and Occupational Pension Committee may adopt a decision as to whether the prudential regime for group supervision in a third country is equivalent to that laid down by Solvency II.⁹⁸ Supervisory authorities may play, as well, a role in the verification of equivalence since, in case the determination of equivalence is not undertaken by the EU Commission, the verification is devolved on the supervisory authority which would be the group supervisor if the criteria set out by the Directive for the appointment of a group supervisor were to apply. Before taking a decision, that supervisory authority has to consult the other supervisory authorities concerned and EIOPA. The Commission may adopt implementing measures specifying the criteria to carry out the verification of equivalence.⁹⁹ If the parent undertaking mentioned above is itself a subsidiary of a third country's insurance holding company or mixed financial holding company or of a third country's (re)insurance undertaking, Member States make the equivalence assessment only at the level of the ultimate parent undertaking. In the absence of equivalence supervision, supervisory authorities may, however, make a new equivalence assessment at the level of a lower parent undertaking.¹⁰⁰

⁹⁷ CEIOPS. (2010) "Advice for Level 2 Implementing Measures on Solvency II: Technical criteria for assessing 3rd country equivalence in relation to art. 172, 227 and 260", p. 3, available at: https://eiopa.europa.eu/fileadmin/tx_dam/files/consultations/consultationpapers/CP78/CEIOPS-L2-Advice-Equivalence-for-reinsurance-activities-and-group-supervision.pdf, accessed on 20. 6. 2012. (providing, *inter alia*, technical criteria for ensuring consistency in the way group supervision regime equivalence is assessed. The document acknowledges that group supervision is a fundamental part of Solvency II and that it is therefore essential to ensure that third-countries' group supervision regime is at least equivalent to that under Solvency II before exempting a group from that supervision at European level) (hereinafter CEIOPS Technical Criteria for Equivalence Assessment).

⁹⁸ As to date, EIOPA delivered advice on the assessment of the Solvency II equivalence of the Swiss supervisory system (under Articles 172, 227 and 260 of the Directive), of the Bermudan supervisory system (under Articles 172, 227 and 260 of the Directive) and of the Japanese reinsurance supervisory system (under Article 172). EIOPA's advice to the European Commission are available at: <https://eiopa.europa.eu/publications/submissions-to-the-ec/index.html>, accessed on 20. 6. 2012.

⁹⁹ Solvency, II, Article 260. CEIOPS Technical Criteria for Equivalence Assessment, p. 29.

¹⁰⁰ Solvency II, Article 263.

In general, where the verification shows that there is equivalent supervision, Member States rely on the equivalent group supervision exercised by the third country supervisory authorities and Solvency II's rules on the cooperation between supervisory authorities apply, *mutatis mutandis*, to the cooperation with third-country supervisory authorities.¹⁰¹ On the contrary, in the event of no equivalent supervision, Member States apply Solvency II's rules on group supervision to the (re)insurance undertakings in the group headed by the insurance holding company, mixed financial holding company, third country's (re)insurance undertaking. Alternatively, Member States may allow their supervisory authorities to apply other methods that ensure appropriate supervision of the (re)insurance undertakings within a group. The group supervisor should agree on these methods, after consulting the other supervisory authorities. In particular, the supervisory authorities may require the establishment of an EU insurance holding company or mixed financial holding company and apply group supervision according to Solvency II to the (re)insurance undertakings in the group headed by that insurance holding company or mixed financial holding company.¹⁰² In this regard, it should be noted that the discretionary power granted to Member State's supervisory authorities may cause groups uncertainty about how they will be supervised.

Further, where the EU Commission does not determine whether the prudential regime for group supervision in a third country is equivalent to that laid down by Solvency II, it is possible that a third country's regulatory regime may be differently assessed by different group supervisors to the competitive disadvantage of some insurers compared to others.¹⁰³ Besides, the question whether a EU supervisory authority has the competence and resources to carry out an equivalence assessment arises, also considering that the decisions on the equivalence assessment are regularly reviewed to take account of any changes both

¹⁰¹ Solvency II, Article 261; CEIOPS Technical Criteria for Equivalence Assessment, p. 29 (specifying that this means that EEA supervisors would expect to play a role in the cooperation arrangements of the third country group supervisor).

¹⁰² Solvency II, Article 262. As regards the cooperation with third country supervisory authorities, according to Article 264, the Commission may submit proposals to the Council for the negotiation of agreements with one or more third countries concerning the means of exercising group supervision.

¹⁰³ CEIOPS Technical Criteria for Equivalence Assessment, p. 29 (noting the risk of inconsistency in the treatment of third country regimes and the calculation of group solvency in the absence of a Commission's decision on equivalence).

to the Solvency II's regime and to the third country's prudential regime. The ongoing review of an equivalence decision, indeed, may require a considerable outlay of efforts and resources.

In this context, transitional relief measures as established by the "Omnibus II" Directive proposal will be essential pending full equivalence assessments.¹⁰⁴ According to "Omnibus II", indeed, Member States may, for a transitional period, rely on the group supervision exercised by the third-country supervisory authorities. The transitional period may last 5 years at most. The Commission may adopt delegated acts that specify the length of the exact transitional period which may be shorter than the maximum of 5 years and the conditions which are to be met by the third country. Those conditions should include commitments given by the supervisory authorities, their convergence to an equivalent regime over a certain period of time, the existing or intended content of the regime, matters of cooperation, exchange of information and professional secrecy obligations.¹⁰⁵ Still the question remains whether the Commission will be able to conduct equivalence assessments of all the third countries granted transitional relief measures before the measures will expire. Moreover, the problem of obtaining third countries' consensus on replacing their existing rules with new ones according to Solvency II's supervisory system should not be underestimated.¹⁰⁶

¹⁰⁴ As to date, the following third countries have expressed an interest in being part of a transitional regime: Australia, Chile, Hong Kong, Israel, Mexico, Singapore, South Africa, Brazil, China and Turkey seem also interested in inclusion in a transitional regime; February 2012 Letter from Jonathan Faull, Director General Internal Market and Services, to Gabriel Bernardino, Chair of EIOPA, available at: http://ec.europa.eu/internal_market/insurance/docs/solvency/letter201202_en.pdf, accessed on 20. 6. 2012. (acknowledging the need to take a different approach for equivalence in relation to the United States, in light of the fact that the prudential regulation of insurance undertakings is a State competence in the US).

¹⁰⁵ The amendment to Article 260 of the Solvency II Directive according to Omnibus II.

¹⁰⁶ For example, the statement of the State of Connecticut Insurance Commission, Thomas Leonardi, who said that the United States needs to "stop apologizing" for its regulatory regime which performed "remarkably well" over time, and highlighted, on the contrary, that Solvency II remains a work in progress which "has not been tested in the real world". The statement is available at: <http://www.propertycasualty360.com/2011/08/16/leonardi-defends-us-regulation-as-execs-weigh-in-o>, accessed on 20. 6. 2012.

5. THE SUPERVISION ON A GROUP-WIDE BASIS OF INSURANCE UNDERTAKINGS WITHIN A FINANCIAL CONGLOMERATE

The Community legislation analyzed above deals with the supervision of (re)insurance undertakings which are part of an insurance group. The paper will now handle the supervision of (re)insurance undertakings within a financial conglomerate.

Financial conglomerates are groups providing services and products in different sectors of the financial markets. They usually result from cross-sectoral mergers and acquisitions.¹⁰⁷ Such groups, in particular those combining banking and insurance, have become ever more important in Europe over time and some of them are among the largest financial groups and provide services on a global basis.¹⁰⁸ Although financial conglomerates permit the diversification of risk and efficiencies of scale, however, they pose risks related to their complex structure that may reduce transparency and to harmful intra-group transactions which may lead to regulatory arbitrage and contagion risk.¹⁰⁹ Further, the necessity of cooperation between different supervisory authorities both from a territorial and sectoral point of view may create additional challenges for the supervision.¹¹⁰

Considering the need for the development of appropriate supervision with regard to financial

¹⁰⁷ Dierick, Frank (2004) "The Supervision of Mixed Financial Services Groups in Europe", European Central Bank, Occasional Paper Series No. 20/2004, p. 4, available at: <http://www.ecb.int/pub/pdf/scpops/ecbocp20.pdf>, accessed on 20. 6. 2012.

¹⁰⁸ Dierick, F. *Ibidem*, pp. 4-9 (providing data on the most important M&A bank-insurance deals in the EU in the period 1990-2003 and on the major bancassurance groups in the EU in the period 2001-2004). European Parliament and Council Directive 2002/87, 2002 O.J. (L87) 1 (hereinafter: Financial Conglomerates Directive), paragraph 2 of the Preamble. For a list of groups that have been identified as financial conglomerates updated up to 30 June 2010, see the document available at: http://ec.europa.eu/internal_market/financial-conglomerates/docs/201007_conglomerates_en.pdf, accessed on 20. 6. 2012. (counting 57 financial conglomerates with head of group in the EU, 2 with the head of group in Switzerland and 2 with the head of group in the United States).

¹⁰⁹ Dierick, F. *Ibidem*, p. 4; Gatzert, Nadine, Schmeiser, Hato. (2011) "On the risk situation of financial conglomerates: does diversification matter", *Financial Markets and Portfolio Management*, Vol. 25, No. 1, p. 3.

¹¹⁰ IAIS. (2011) "Insurance and Financial Stability", p. 7, available at: <http://www.iaisweb.org/Issues-papers-and-other-reports-48>, accessed on 20. 6. 2012. (emphasizing that "there is little evidence of traditional insurance either generating or amplifying systemic risk within the financial system or in the real economy.")

conglomerates, Directive 2002/87/EC (Financial Conglomerates Directive) on the supplementary supervision was adopted.¹¹¹ The Directive establishes a supplementary supervision of regulated entities which are part of a financial conglomerate, without prejudice to the provisions on supervision contained in the sectoral rules.¹¹² A regulated entity is a credit institution, a (re)insurance undertaking, an investment firm, an asset management company or an alternative investment fund manager.¹¹³ The Directive aims to enable competent authorities to assess at a group-wide level the financial situation of regulated entities which belong to a financial conglomerate, by providing, in particular, measures on the elimination of multiple gearing of own funds instruments and on risk concentration and intra-group transactions.

¹¹¹ The Financial Conglomerates Directive has been influenced by the work of the Joint Forum on Financial Conglomerates, established in 1996 under the auspices of the Basel Committee on Banking Supervision (Basel Committee), the International Organisation of Securities Commissions (IOSCO) and the International Association of Insurance Supervisors (IAIS); Dierick, F. *Ibidem*, p. 4. Considering the actual financial crisis, the Commission evaluated the effectiveness of the Financial Conglomerates Directive in 2008. The Directive has been amended in December 2011 by Directive 2011/89/EU (so-called "Quick Fix" review). In April 2011 the Commission issued a Call for Advice on the fundamental review of the Financial Conglomerates Directive addressed to the Joint Committee. The European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA) launched on May 14, 2012 a three-month public consultation on the proposed response to the Commission's call for technical advice. The consultation covers the scope of application, the group wide internal governance requirements and sanctions and supervisory empowerment. In particular, it should be noted that the Joint Committee issued a series of recommendations for the review of the Directive, suggesting that the groups of entities that can be included in the identification of a financial conglomerate should be enlarged, including, for example, insurance ancillary services undertakings. Further, mixed financial holding companies, even if unregulated, should be made subject to supplementary supervision. According to the Joint Committee, the supervisor's actual use of their powers should be enhanced and, in order to ensure that the group wide requirements are enforceable, the Commission should develop an enforcement regime towards the ultimate responsible entity and its subsidiaries, implementing a dual approach with enforcement powers towards the top entity for group wide risks and towards the individual entities for their respective responsibilities. The 2012 "EBA, EIOPA and ESMA's Joint Consultation Paper on its proposed response to the European Commission's Call for Advice on the Fundamental Review of the Financial Conglomerates Directive" is available at: <https://eiopa.europa.eu/consultations/consultation-papers/index.html>, accessed on 20. 6. 2012.

¹¹² Financial Conglomerates Directive, Articles 1 and 5(1).

¹¹³ Financial Conglomerates Directive, Article 2(4).

According to the Directive, a financial conglomerate means a group with at least one regulated entity either as parent undertaking or as subsidiary.¹¹⁴ If the regulated entity is at the head of the group, that entity has to be a parent undertaking of an entity in the financial sector,¹¹⁵ an entity participating in an entity in the financial sector, or an entity linked with an entity in the financial sector because of a unified management pursuant to a contract or provisions in the articles of association or because most of the members of their corporate bodies are the same persons.¹¹⁶ If, on the contrary, there is no regulated entity at the head of the group, the group's activities have to occur mainly in the financial sector.¹¹⁷ Further, a financial conglomerate under the Directive has at least one of its entities operating in the insurance sector and at least one operating in the banking or investment services sector. The consolidated activities of the entities in the group within the insurance sector and of the entities within the banking and investment services sector must both be significant.¹¹⁸ In order to ensure the convergence of supervisory practices in identifying a financial conglomerate, the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA) (hereinafter, collectively, ESA) will issue common guidelines through the Joint Committee of the ESA.¹¹⁹ The Joint Committee has to ensure coherent cross-sectoral and cross-border supervision and compliance with EU legislation.¹²⁰

¹¹⁴ Financial Conglomerates Directive, Article 2(14). Article 2 paragraph 9 and 10 refers to the Consolidated Accounts Directive for the definition, respectively, of a parent undertaking and of a subsidiary undertaking. In addition, a parent undertaking is any undertaking that, in the opinion of the competent authorities, effectively exercises a dominant influence over another undertaking that is conversely considered a subsidiary undertaking.

¹¹⁵ Article 2(8) of the Financial Conglomerates Directive for a definition of "financial sector".

¹¹⁶ Articles 2(14)(a)(i) of the Financial Conglomerates Directive refers to Article 12(1) of Directive 83/349/EEC.

¹¹⁷ Quantitative criteria based on balance sheet data are used to determine whether the activities of a group mainly occur in the financial sector. See Financial Conglomerates Directive, Article 3(1).

¹¹⁸ Quantitative criteria are used to determine whether activities in different financial sectors are significant. See Financial Conglomerates Directive, Article 3(2).

¹¹⁹ Financial Conglomerates Directive, Article 3(8).

¹²⁰ Financial Conglomerates Directive, Article 9a. According to Article 54 of Regulation (EU) no. 1093/2010, Article 54 of Regulation (EU) no. 1094/2010 and Article 54 of Regulation (EU) no. 1095/2010, the Joint Committee of the ESA is established in

Supplementary supervision at the level of the financial conglomerate is applied to: (i) every regulated entity that is at the head of a financial conglomerate; (ii) every regulated entity, the parent undertaking of which is a EU mixed financial holding company; (iii) every regulated entity linked with another financial sector entity by a relationship according to Article 12(1) of Directive 83/349/EEC. In case a financial conglomerate is a subgroup of another financial conglomerate, supplementary supervision is exercised at the level of the latter group.¹²¹ Supplementary supervision at the level of the financial conglomerate does not imply that the competent authorities have to play a supervisory role with regard to mixed financial holding companies, third-country regulated entities in a financial conglomerate or unregulated entities in a financial conglomerate, taken individually.¹²²

For the purposes of this paper, it is worth noting that the supplementary supervision under the Financial Conglomerates Directive is carried out by the so-called “relevant competent authorities”, namely a coordinator and the competent authorities responsible for the sectoral group-wide supervision of any of the regulated entities. Other competent authorities concerned may be involved in the supplementary supervision where the coordinator and the competent authorities consider this appropriate.

Particularly important is the role played by the coordinator responsible for adequate supplementary supervision. The coordinator is appointed from among the competent authorities of the Member States concerned. Like Solvency II with regard to the group supervisor, the Financial Conglomerates Directive provides for criteria for the appointment of the coordinator. In general, if the financial conglomerate is headed by a regulated entity, the coordinator should be the competent authority which has authorized that regulated entity. Instead, where the financial conglomerate is not headed by a regulated entity, the Directive sets out specific criteria for the appointment distinguishing between the case of a financial conglomerate headed by a mixed financial holding company and the case of a financial conglomerate without a parent undertaking at the top.¹²³ However, competent authorities may appoint a different coordinator by unanimously derogate

order to ensure regular and close cooperation and cross-sectoral consistency between the European Supervisory Authorities, with regard, *inter alia*, to financial conglomerates.

¹²¹ Financial Conglomerates Directive, Article 5(2).

¹²² Financial Conglomerates Directive, Article 5(5).

¹²³ Article 10(2) of the Financial Conglomerates Directive for the appointment criteria.

from the Directive’s criteria if their application would be inappropriate in light of the structure of the conglomerate and the relative importance of its activities in different countries. The financial conglomerate should have the opportunity to state its opinion before the decision is taken.¹²⁴

According to the Directive, the coordinator has the power to (i) coordinate the gathering and distribution of essential information both in going concern and emergency situations, even with regard to information relevant to a competent authority’s supervisory task under sectoral rules; (ii) assess the financial situation of a conglomerate and its compliance with the rules on capital adequacy; (iii) assess the financial conglomerate’s structure, organization and internal control system; (iv) plan and coordinate supervisory activities in cooperation with the other relevant competent authorities.¹²⁵ Further, like the group supervisor under Solvency II, a coordinator has to exercise supervisory overview over risk concentrations and intra-group transactions, monitoring, in particular, the possible risk of contagion, the risk of a conflict of interest between the regulated entities, the risk of circumvention of sectoral rules and the level of risks. Regulated entities or mixed financial holding companies, indeed, report on a regular basis and at least annually to the coordinator any significant risk concentration at the level of the financial conglomerate as well as all significant intra-group transactions of regulated entities within a financial conglomerate.¹²⁶ The coordinator, the other relevant competent authorities and, if necessary, the other competent authorities concerned may make coordination arrangements to facilitate and establish supplementary supervision on a broad legal basis. The coordination arrangements may assign other tasks to the coordinator and may set out the procedures for the decision-making process among the relevant competent authorities.

The Directive specifies that is the duty of the coordinator and the competent authorities responsible for the supervision of regulated entities in a financial conglomerate to cooperate closely each other. These

¹²⁴ Financial Conglomerates Directive, Article 10(3).

¹²⁵ Financial Conglomerates Directive, Article 11.

¹²⁶ Financial Conglomerates Directive, Articles 7 and 8 and Annex II. (both adding that the ESA issue common guidelines aimed at the convergence of supervisory practices with regard to the supplementary supervision of risk concentration and intra-group transactions). According to Annex II, the coordinator, after consultation with the other relevant competent authorities, identifies the type of transactions and risks that regulated entities have to report. To this end, the coordinator, after consultation with the other relevant authorities and the conglomerate itself, defines appropriate thresholds.

authorities, indeed, have to provide one another with any information relevant for the exercise of the other authorities' supervisory tasks under both the sectoral rules and the Directive. A detailed list of minimum information that should be gathered and exchanged is provided. The list includes, in particular, information on: (i) identification of the group's legal structure and governance, including all regulated entities, non-regulated subsidiaries and significant branches; (ii) the financial situation of the conglomerate; (iii) the financial conglomerate's major shareholder and management; (iv) the organization, risk management and internal control system at the level of the financial conglomerate; (v) financial troubles of both regulated entities and non-regulated entities within the financial conglomerate which could seriously affect the regulated entities; (vi) major sanctions and exceptional measures taken by competent authorities according to sectoral rules of the Directive.¹²⁷ Competent authorities should ask the entities in a financial conglomerates, whether regulated or not, for any information which may be relevant for supplementary supervision.¹²⁸ However, the collection of information from a non-regulated entity within a financial conglomerate does not imply that the competent authority is required to play a supervisory role with regard to this entity taken individually.¹²⁹

Further, before taking a decision that is of importance for the tasks of other competent authorities, the competent authorities themselves consult each other with regard to (i) changes in the shareholder, organizational or management structure of regulated entities, which require the approval of competent authorities; (ii) major sanctions or exceptional measures taken by competent authorities. In case of urgency or where the consultation may jeopardize the effectiveness of the decision, a competent authority may decide without consultation, immediately informing the other competent authorities.¹³⁰

The required cooperation between the coordinator and the competent authorities is fulfilled through colleges established according to Directive 2006/48/EC on the taking up and pursuit of the business of credit institutions and to the Solvency II Directive. The coordinator chairs the college and decides which other

competent authorities participate in a meeting or in the activities of that college.¹³¹

As to regulated entities the parent undertaking of which has its head office in a third country, it is devolved on the competent authorities to verify whether those entities are subject to equivalent supervision by the competent authorities of that third country. Unlike Solvency II's rules where the equivalence verification of a third country's system of insurance group supervision may be conducted also by the EU Commission, the equivalence assessment pursuant to the Financial Conglomerates Directive should be carried out only by the competent authority that would be the coordinator if the Directive's criteria set out for the coordinator appointment were to apply. To perform this task, the competent authority consults the other relevant authorities.¹³² The question whether a competent authority can fulfill an equivalence (ongoing) assessment arises, as highlighted above with regard to Solvency II's equivalence assessment of third countries' group supervision. An assessment of the equivalence with third countries on a Community-wide basis undertaken by the EU Commission would be advisable, to avoid also possible inconsistencies in the treatment of third countries' supervisory regimes.

Where the verification shows that there is no equivalent supervision, Member States apply to the regulated entities the Directive's system of supplementary supervision. Alternatively, competent authorities may apply other methods ensuring appropriate supplementary supervision of the regulated entities within a financial conglomerate. The coordinator should agree on these methods, after consulting the other competent authorities. In particular, the competent authorities may require the establishment of a EU mixed financial holding company and apply supplementary supervision to the regulated entities in the financial conglomerate headed by that mixed financial holding company.¹³³

¹³¹ Article 11(4) of the Financial Conglomerates Directive, that refers to Article 131a of Directive 2006/48/EC and Article 248(2) of Directive 2009/138/EC. On the supervisory colleges, see also CEBS and CEIOPS (2010) "Recommendations on the supplementary requirements of the Financial Conglomerates Directive for supervisory colleges of financial conglomerates", available at: https://eiopa.europa.eu/fileadmin/tx_dam/files/aboutceiops/Recommendations.pdf, accessed on 20. 6. 2012.

¹³² Financial Conglomerates Directive, Article 18 (specifying that the competent authority makes every effort to comply with any relevant guidelines prepared through the Joint Committee of the ESA).

¹³³ Financial Conglomerates Directive, Article 18. As provided for by Solvency II, according to Article 19 of the Financial Conglomerates Directive, the Commission may submit

¹²⁷ Financial Conglomerates Directive, Article 12; Article 12a of the Directive, specifying that the competent authorities have to cooperate with the Joint Committee.

¹²⁸ Financial Conglomerates Directive, Article 14.

¹²⁹ Financial Conglomerates Directive, Article 12(4).

¹³⁰ Financial Conglomerates Directive, Article 12(2).

It may be worthwhile to point out that the organizational forms of supervision under the Financial Conglomerates Directive and under Solvency II are closely aligned. Unlike the supervisory system set out by the Insurance Groups Directive, indeed, both the Solvency II and the Financial Conglomerates Directives establish the appointment of a supervisory authority responsible for the exercising of the supervision respectively at the level of the insurance group and of the financial conglomerate and they both provide for supervisory colleges. The responsibilities of the coordinator are similar, *mutatis mutandis*, to those of the group supervisor.

Given the central role played by the coordinator in the exercise of supplementary supervision of a financial conglomerate, the application of the Directive's criteria for his appointment should be carefully considered on a case-by-case basis and the competent authorities should make any effort to reach a common agreement to derogate from the fixed criteria when their application would be inappropriate. According to the Directive's criteria, for example, where a financial conglomerate is headed by a mixed activity financial holding that is based in the same Member State as that of a regulated entity, the coordinator would be the competent authority of this regulated entity regardless of the relative importance of the activities of this regulated entity. In a similar case, it may be advisable that relevant competent authorities consult each other and seek to appoint a different competent authority as coordinator, taking into account the entire structure of the conglomerate.¹³⁴ This would reduce the risk of regulatory arbitrage originating from the attempt to organize the structure of the group in order to determine the appointment of a certain competent authority as the coordinator.¹³⁵ This issue is of relevance taking into account, for example, the coordinator's responsibility for assessing compliance with the rules on capital adequacy, intra-group transactions and risk concentration and for defining even the type of intra-group transactions and risks that regulated entities have to report.

The coordinator should serve as the only interface with the financial conglomerate in gathering and disseminating to the other competent authorities relevant information. Thus, the burden related to supervisory activities would be reduced for both the

proposals to the Council for the negotiation of agreements with one or more third countries concerning the means of exercising supplementary supervision of regulated entities within a financial conglomerate.

¹³⁴ Dierick, F. *Ibidem*, p. 39.

¹³⁵ Dierick, F. *Ibidem*.

financial conglomerate and the relevant competent authorities. In the perspective of avoiding overlapping requirements to the advantage of the supervisory authorities and of the undertakings subject to supervision, it is worth noting that the Solvency II Directive advisably permits the application of waivers from some rules on insurance group supervision. According to Article 213(2), indeed, where a participating (re)insurance undertaking or an insurance holding company or mixed financial holding company which is based in the Union is either a related undertaking of, or is itself a regulated entity or a mixed financial holding company, that is subject to supplementary supervision pursuant to the Financial Conglomerates Directive, the group supervisor, after consulting the other supervisory authorities concerned, may decide not to exercise the supervision of risk concentration and intra-group transactions at the level of those entities.¹³⁶ Further, in case a mixed financial holding company is subject to equivalent provisions under the Solvency II Directive and the Financial Conglomerates Directive, the group supervisor, after consulting the other supervisory authorities concerned, may apply only the relevant provisions of the Financial Conglomerates Directive to that mixed financial holding company.¹³⁷ Still with regard to mixed financial holding companies, the ESA, through the Joint Committee, issue common guidelines that aim to develop supervisory practices allowing for supplementary supervision of those entities to appropriately complement the group supervision under Directives 98/78/EC and 2009/138/EC.¹³⁸

Finally, considering the complex structure of financial conglomerates and the risks they pose, a high level of cooperation between the competent supervisory authorities in the exercise of supplementary supervisions is necessary. The importance of establishing coordination arrangements for the

¹³⁶ Moreover, according to Article 215(2) of the Solvency II Directive, if the ultimate parent (re)insurance undertaking or insurance holding company or mixed financial holding company which is based in the Union, is a subsidiary undertaking of an undertaking that is subject to supplementary supervision pursuant to the Financial Conglomerates Directive, the group supervisor, after consulting the other supervisory authorities concerned, may decide not to conduct the supervision of risk concentration and intra-group transactions at the level of that ultimate parent undertaking or company.

¹³⁷ Solvency II, Article 213(4). As to the Insurance Groups Directive, see Article 2a(1).

¹³⁸ Financial Conglomerates Directive, Article 12b(2); Solvency II, Article 213(6) and Insurance Groups Directive, Article 2(3) stating that the ESA, through the Joint Committee, develops guidelines aimed at converging supervisory practices.

proper functioning of the college of supervisors has to be emphasized. The competent authorities and the coordinator should promptly exchange any relevant information and consult each other in order to ensure adequate supervision. To this end, the competent authorities should also seize the opportunity granted by the Directive to share relevant information with central banks, the European System of Central Banks, the European Central Bank and the European Systemic Risk Board.¹³⁹ Cooperation with these institutions, indeed, may facilitate the supervision of financial conglomerate reducing contagion and systemic risks.

6. CONCLUSION

This paper explored the organizational form of supervision on a group-wide basis of (re)insurance undertakings that belong to insurance groups and financial conglomerates. In particular, it has examined the evolution of the supervision of insurance groups from the Insurance Groups Directive, currently in force, to the future regime set out by the Solvency II Directive. Although the model of group supervision based on a group supervisor operating along with a supervisory college already exists in the form of Coordination Committees and of lead supervisors pursuant to the Insurance Groups Directive as implemented by the Helsinki Protocol and the CEIOPS Guidelines, that the need for further improvement in the functioning of Co-Cos has been highlighted.¹⁴⁰ Solvency II introduces a more adequate and accurate regulatory framework which seems well developed to ensure effective group supervision. This directive provides for uniform detailed rules at the Community level, allowing for a more level playing field. The need of a tailor-made approach to group supervision, however, is also taken in due account.¹⁴¹ In this regard, suffice is to consider, for example, the fixed criteria set out for the appointment of the group supervisor and the possibility to derogate from them in light of the structure of the insurance group and the relative importance of the (re)insurance undertaking's activities in different countries. Relevant

tasks are assigned to the group supervisor and to the college of supervisors.

The Solvency II's group supervisory system in line with to that established by the Financial Conglomerates Directive. In accordance with IAIS's international standards, the group supervisor and the coordinator have appropriate coordination and decision-making powers and are responsible for the exercise of supervision respectively at the level of the insurance group and of the financial conglomerate.¹⁴² They ensure that relevant supervisory activities and information are coordinated at the group-wide level, reducing duplicative efforts among both the supervisors and the entities subject to supervision.¹⁴³ The functioning of the college of supervisors, then, facilitates a coordinated approach to supervision and fosters cooperation between supervisors. Both the Solvency II Directive and the Financial Conglomerates Directive recognize that cooperation is central to ensure effective supervision of cross-border insurance groups and of insurance undertakings within financial conglomerates and thus they require supervisory authorities to proactively consult each other and exchange relevant information.¹⁴⁴

Overall, it seems that the regulatory systems of supervision considered enable the competent authorities to adjust the exercise of the supervisory powers to the complexity of the entities subject to supervision, providing for a proper application of the proportionality principle.

SUMMARY

The Insurance Groups Directive, currently in force, was introduced in 1998 and establishes the supplementary supervision of insurance entities within an insurance group in order to enable supervisory authorities to have a more accurate assessment of their financial situation ("solo-plus" supervision). Supplementary supervision does not substitute the supervision of individual insurance undertakings by the competent au-

¹³⁹ Financial Conglomerates Directive, Article 12(1).

¹⁴⁰ CEIOPS. (2009) "Report on the Functioning of the Coordination Committees", available at: https://eiopa.europa.eu/fileadmin/tx_dam/files/Colleges/8.pdf, accessed on 20. 6. 2012.

¹⁴¹ See IAIS "Working Draft of the Common Framework for the Supervision of Internationally Active Insurance Groups", 2 July 2012, pp. 5 ss., available at: <http://www.iaisweb.org/ComFrame-938> (emphasizing the importance of customized supervisory approach, in particular for the largest insurance groups) [hereinafter IAIS ComFrame].

¹⁴² IAIS ComFrame, p. 6.

¹⁴³ IAIS ComFrame, p. 6.

¹⁴⁴ On the need for mutual cooperation and information exchange between insurance supervisors, see IAIS. (2007) "Multilateral Memorandum of Understanding on Cooperation and Information Exchange (IAIS MMoU)", p. 4, available at: <http://www.iaisweb.org/MMoU-381>, accessed on 20. 6. 2012; IAIS. (1999) "Principles Applicable to the Supervision of International Insurers and Insurance Groups and Their Cross-Border Business Operations", p. 8, available at: http://www.iaisweb.org/_temp/Principles_applicable_to_the_supervision_of_International_insurers_and_insurance_group_and_their_cross_borders_business_operations.pdf, accessed on 20. 6. 2012.

horities. Solo supervision, indeed, remains the essential principle of insurance supervision. The Directive, however, provides for minimum measures of harmonization. Although it recognizes that a high level of cooperation between the supervisory authorities is needed in order to ensure optimal supplementary supervision, it does not give any reference to the methods for achieving such cooperation and to the type of information to be exchanged among the supervisory authorities. The flexibility of the Directive in this respect may lead to a less strict system of cooperation and to variations in the cooperative approach adopted by the different supervisory authorities. Further, the Directive does not provide for the mandatory appointment of a lead supervisory authority which should be responsible for the exercise of the supplementary supervision.

The Helsinki Protocol and the CEIOPS Guidelines for Coordination Committees that followed respectively in 2000 and 2005 represent important step towards the enhancement of convergence in the way supervisory coordination is realized. The two documents aim at an optimal rather than minimalist implementation of the Insurance Groups Directive and lay down provisions that specify how the relevant authorities should cooperate for exercising supplementary supervision. In this regard, they require that supervisory authorities create a Coordination Committee (Co-Co) for each insurance group operating in more than one EEA-country. The appointment of a lead supervisor, which has the responsibility to carry out most or all of the supplementary supervision, is then recommended. The legal framework analyzed is distinguished by a certain degree of flexibility since the cooperation achievable through the Co-Cos may permit to carry out a tailor-made form of supervision in connection with the peculiarity of each insurance group. As to the lead supervisor, it should be emphasized, however, that his appointment is not mandatory under the rules currently in force.

The Solvency II Directive, which will entirely repeal the Insurance Groups Directive, provides for an innovative model of group supervision where a central role is assigned to a group supervisor that is appointed according to fixed criteria. The overall organizational form of group supervision provided by the Solvency II Directive seems adequate. The supervisory tasks are detailed and well balanced between the group supervisor – which should play a role of impulse and coordination – and the other supervisory authorities that operate through

a supervisory college. The college of supervisors should ensure effective cooperation and consultation among the supervisory authorities. Although the model of group supervision based on a group supervisor operating along with a supervisory college already exists in the form of Coordination Committees and of lead supervisors pursuant to the Insurance Groups Directive as implemented by the Helsinki Protocol and the CEIOPS Guidelines, it should be considered, however, that the introduction according to Solvency II of uniform specific rules concerning the powers of the group supervisor and of the college of supervisors should contribute to a more adequate and efficient organization of insurance group supervision.

The supervisory system of insurance group under Solvency II resembles that established by the Financial Conglomerates Directive for financial conglomerates. The organizational form of supervision at the level of financial conglomerates, indeed, is based as well on a supervisory authority responsible for the exercise of the supervision (i.e. the coordinator) and on a college of supervisors. The coordinator has appropriate decision-making powers and ensures that relevant supervisory activities and information are coordinated at the group-wide level, reducing duplicative efforts among both the supervisors and the entities subject to supervision. The role of the college of supervisors, then, should result in coordinated supervision and cooperation between supervisors. Both the Solvency II Directive and the Financial Conglomerates Directive recognize that cooperation is central to ensure effective supervision of cross-border insurance groups and of insurance undertakings within financial conglomerates and thus they require supervisory authorities to proactively consult each other and exchange relevant information. In the perspective of avoiding overlapping requirements between the two Directives to the advantage of the supervisory authorities and of the undertakings subject to supervision, it is worth noting that, under some circumstances, the Solvency II Directive advisably permits the application of waivers from some rules on insurance group supervision.

Overall, the regulatory systems of supervision discussed here will enable the competent authorities to adjust the exercise of the supervisory powers to the complexity of the entities subject to supervision, in keeping with the proportionality principle.