

INSURANCE

FLASH

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Executive Summary

In this first **Insurance Flash**, we cover the following issues:

1. The **warning of the European Insurance and Occupational Pensions Authority (EIOPA) to insurers and banks to address consumer protection issues related to sale of credit protection insurance (CPI) products**, published on 4 October 2022.

We refer to the thematic review conducted by EIOPA and its main findings, the content of the warning, its publicity by the Directorate General of Insurance and Pension Funds (commonly known by its acronym in Spanish, "DGSFP") and **our preliminary assessment of the issue**.

For the reasons explained below, we consider that the EIOPA's warning, to which the DGSFP has adhered, together with the pressure from certain associations that are making assessments contrary to the bank distribution of insurance (bancassurance), even raising questions about the adequacy of existing practices to the regulations on restrictive antitrust practices, **will require insurance undertakings which are distributing their products through banking networks, through bancassurance intermediaries, and banks, in the coming months, to review their procedures**, in particular with regard to; (i) product oversight and governance rules, (ii) prior information provided to the customer by the distributor -in particular with regard to the distributor's remuneration policies and close links between insurance and banks-, and (iii) conduct of business rules, in order to ensure that these procedures meet the requirements and standards established by the national supervisory authority.

 For further information on this topic, [click here](#).

2. The **peer review report on outsourcing**, published by EIOPA on 19 July 2022.

The report identifies areas for improvement where greater convergence and clarity could be achieved with regard to the supervisory activity, including in particular the following areas: (i) the outsourcing of delegated authority, (ii) the definition of "material developments" and the meaning of "notification in a timely manner", both terms used in article 49.3 of the Solvency II Directive, and (iii) the supervision of so-called "empty shells".

Future changes to the regulation of the supervision of outsourced functions and activities as a result of the recommendations set out in the EIOPA document could affect, among other issues, the **additional documentation and/or information that the DGSFP requires from insurance companies within the outsourcing prior notification process, to the criteria used by insurance company to classify a function or activity as critical or important, as well as the functions and/or activities that insurers currently consider to be critical or important**.

In addition, national supervisory authorities can be expected to pay particular attention to the **intra-group outsourcing** model of **EU insurance companies in third countries**.

In short, **we consider that Spanish insurance companies should pay special attention to possible future legislative developments regarding prior notification of the outsourcing of critical or important functions and activities, as well as to the criteria that may also be published in the future by the DGSFP on the determination of when a certain function or activity should be considered critical or important.**

 For further information on this topic, [click here](#).

3. **Judgment of the Court of Justice of the European Union (CJEU) of 29 September 2022 (Case C-633/20) on "improper" policyholders in group insurance.**

The Court of Justice of the European Union has ruled on a reference for a preliminary ruling from the German Federal High Court (*Bundesgerichtshof*).

The question posed, very briefly, was whether an "improper" policyholder in group insurance contract, who receives remuneration from the persons who join as insured parties, is considered to be an insurance intermediary, both from the perspective of the repealed 2002 Insurance Mediation Directive and from the perspective of the current 2016 Insurance Distribution Directive.

The Court concludes that the activity carried out by the policyholder, in the specific case analysed, is covered by the concepts of insurance intermediary and insurance distributor as defined in the EU legislation.

For the reasons set out in the notice, **we do not believe that this ruling of the Court of Justice of the European Union represents, in the context of the Spanish legal system, a real novelty with respect to the traditional position of the DGSFP and our Courts, without prejudice to the fact that the ruling acknowledges, at the Community level, the "compatibility" between the "formal" figure of the policyholder in an improper group insurance policy and the concept of insurance intermediary or distributor.**

 For further information on this topic, [click here](#).

4. The **Resolutions of the DGSFP of 6 September 2022, publicising the revised Guidelines of the European Insurance and Occupational Pensions Authority on the valuation of technical provisions and contractual boundaries** (endorsed by the DGSFP).

 For further information on this topic, [click here](#).

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1. European Insurance and Occupational Pensions Authority (EIOPA) warning to insurers and banks on credit protection insurance (CPI)

As already highlighted in several publications, last 4 October, the European Insurance and Occupational Pensions Authority (EIOPA) issued a Warning¹, addressed to both insurers and credit institutions engaged in insurance distribution activities, regarding the marketing of what EIOPA calls credit protection insurance (CPI).

The warning is based on EIOPA's findings in the EIOPA thematic review of credit protection insurance distributed by banks, which is included in a paper prepared by EIOPA itself, also published on 4 October 2022².

1.1 Thematic review: scope of the review and main findings

A. Scope of the review:

El The thematic review carried out includes the analysis of the distribution of credit protection insurance linked to (1) mortgage loans, (2) consumer credit and (3) credit cards.

The study only examines insurance products distributed through the bancassurance channel (i.e. banks acting as distributors), and does not cover credit or loan granted by institutions other than banks, nor does it cover non-bank distribution channels.

The individual market samples used in the thematic review of EIOPA have been selected by the national supervisory authorities, covering a total of 174 insurance undertakings and 145 banks. In addition, EIOPA commissioned an external contractor (Prospex) to conduct ten consumer interviews in 10 Member States.

By way of introduction, in addition to distinguishing different bancassurance models within the European Union for the distribution of insurance products, EIOPA also refers to a number of benefits that bancassurance business models can bring to banks, insurers and consumers. Some of these benefits, according to EIOPA, are:

- 1) Economies of scope (i.e. cost efficiencies generated by offering multiple similar products);
- 2) reduced distribution costs (the bank leverages existing customer relationships, rather than the insurer investing in generating new customers);
- 3) reduced information and transaction costs, improving consumer welfare;
- 4) reduced searching costs for consumers, as they can benefit from insurance and financial products offered by a single provider;
- 5) finally, insurers have greater access to the data of potential customers, enabling them to offer their credit protection products to those customers who need them most.

¹ The Warning, dated 30 September 2022, is given in accordance with Article 9.3 of Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing EIOPA. According to this provision, as part of EIOPA's functions in the field of consumer protection and financial activities, EIOPA "may issue [...] a warning in the event that a financial activity poses a serious threat to the objectives laid down in Article 1(6)" (of the same Regulation, all of which, according to Article 1(6) itself, the main objectives shall be "to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses").

² Both the EIOPA's Warning and the thematic review can be found on EIOPA's website at https://www.eiopa.europa.eu/media/news/eiopa-calls-better-value-money-bancassurance-warning-banks-and-insurers_en.

Along with the text of the Warning and the thematic review document, other materials can be found at the same link, including a factsheet summarising the findings of the thematic review, a video with animation on the findings and an interview with EIOPA's experts on the thematic review methodology, findings and next steps.

An online event was held past 27 October to present the thematic review and its findings.

B. Main findings of the EIOPA thematic review:

Briefly, the main findings of EIOPA's thematic review are the following:

- 1) Consumers may have a poor understanding of the coverage of credit protection products, due to their complexity and diversity, which makes it very difficult for them to compare and make informed decisions.
- 2) The pricing of these products is diverse and tends to be high, which may be driven by the high remuneration levels of banks and the Net Underwriting Result (NUR) of insurers.
- 3) There are risks of conflicts of interest, due to the unusual high profitability, given the high commissions paid to banks for the distribution of these credit protection insurance products.
- 4) Credit protection products might raise questions with regards to bringing little value for consumers.

The quality of these products may be inadequate and may not meet the needs of consumers, as most products are sold as group policies where the coverage offered is standardised and determined by the bank (which often acts as the policyholder of a group insurance contract).

In most cases, there is little or no adaptation to consumer needs.

- 5) Choice is very limited due to product design features (group policies) and sales practices (tying), as most banks do not market credit protection insurance without the credit product, which could lead to increased prices for consumers.
- 6) Potential for mis-selling, since, in most cases, holding a credit protection insurance product is not mandatory and not all consumers may want, need, or be eligible for the coverage provided. However, high penetration rates indicate that a high percentage of consumers who want to obtain a bank credit product, leave the bank with a credit protection insurance policy, usually provided by the bank itself.

1.2 Conclusions contained in the EIOPA warning

The main conclusions of EIOPA's warning, in view of the thematic review described above, include the following:

- 1) A significant portion of the gross written premium (GWP) paid by consumers finances the remuneration of banks, while claims' payouts to consumers are, on average, below 30% of GWP.
- 2) For the period between 2018 to 2020, commissions paid to banks ranged: (i) between 30 % and 70 % of GWP for more than half of the policies related to mortgage loans; (ii) between 40 % and 80 % of GWP for more than two thirds of the policies related to consumer credit; and (iii) between 40 % and 90 % of GWP for most of the policies related to credit cards.
- 3) Most banks (74 %) did not have a cost allocation model for the sale of credit protection products. In the absence of such cost data, the high commissions cannot be justified by the level of costs borne by the banks.

- 4) Such high commissions can lead to significant and detrimental conflicts of interest and the implementation of poor business practices to maximise profits (e.g. aggressive sales techniques, mis-selling, etc.). The thematic study also showed, according to EIOPA, that insurers that are part of a strategic alliance or the same financial holding company as banks, accounting for 63 % of insurers, pay higher **commissions to these banks than when non-exclusive distribution arrangements are in place. EIOPA states that high commissions are the result of the bancassurance business models in place, requiring strong governance measures (including control systems) to properly mitigate conflicts of interest amongst manufacturers, distributors and consumers and to avoid that they result into poor conduct of business and consumer detriment.**
- 5) In addition, 34% of banks have implemented incentive schemes for their employees for the sale of these insurance products which, given the high commissions, raise significant concerns regarding compliance with Article 17(3) of the Insurance Distribution Directive³.
- 6) Most banks (83 %) sell the credit protection insurance product linked to the credit product, which means that consumers can only buy the insurance product if they purchase the main banking product from the same bank. This practice, according to EIOPA, limits consumers' ability to shop around and can reinforce the risks of mis-selling and aggressive sales techniques.
- 7) In addition, credit protection products are sold with a single premium (32 % of credit protection products related to mortgage loans, 51 % of those related to consumer credit and 18% of those related to credit cards), which raises additional problems of early termination, switching or cancellation of this type of insurance products. Some banks offer the possibility to finance the premium with a loan which generates additional interest costs for consumers and conflicts of interest (single premium financed products), as banks may have the incentive to offer this option to generate fee and interest income.

EIOPA considers that such practices raise serious concerns about the proper application of the fundamental regulatory principles set out in the Insurance Distribution Directive, and may be highly detrimental to consumers.

1.3 Content of the Warning

EIOPA warns insurers and banks (acting as distributors of insurance) to ensure that these products offer fair value to consumers by:

- a) the adoption of measures to address problems related to high remuneration paid by insurance producers to insurance distributors for the sale of credit protection insurance products, and
- b) the prevention of harmful conflicts of interest in the context of bancassurance business models.

³According to this provision: "Member States shall ensure that insurance distributors are not remunerated or do not remunerate or assess the performance of their employees in a way that conflicts with their duty to act in accordance with the best interests of their customers. In particular, an insurance distributor shall not make any arrangement by way of remuneration, sales targets or otherwise that could provide an incentive to itself or its employees to recommend a particular insurance product to a customer when the insurance distributor could offer a different insurance product which would better meet the customer's needs".

1.4 Adherence of the DGSFP to the EIOPA Warning

The DGSFP has adhered to EIOPA's warning, calling "all insurers and bancassurance operators in the Spanish market to review their activity in the field of credit-linked credit protection insurance with the aim of bringing their activity in line with the Distribution Law (RDL 3/2020) and the Product Oversight and Governance (POG) regulations"⁴.

In the same document, the DGSFP states that "the supervision of credit-linked credit protection products is one of the supervisory priorities and the Directorate General of Insurance and Pension Funds will exercise the appropriate supervisory powers to ensure the transparency and orderly development of the credit protection insurance market".

1.5 Preliminary considerations regarding EIOPA's Warning

Without prejudice to the potential supervisory measures that the various competent national authorities, including the DGSFP, may adopt in the light of the European Authority's warning, we believe that the following considerations can be made on a preliminary basis, particularly with regard to Spain:

- 1) The thematic review conducted by EIOPA on which the warning of the European Authority is based analyses a specific time period (2018-2020), without taking into account that (i) both the Insurance Distribution Directive (Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016) and (ii) the Mortgage Credit Directive (Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014) are rules that have been recently transposed into the laws of the EU Member States.

This is particularly so in the case of Spain, with a considerable delay in the transposition of the two Directives (the Insurance Distribution Directive through Royal Decree Law 3/2020, more than one year and a half behind the transposition deadline; and the Mortgage credit Directive with the Law of 2019 -which should have been transposed in March 2016).

In short, the data analysed by EIOPA, particularly in the case of Spain, given the delay in the transposition of both Directives, do not take into account the situation after the full transposition of both regulations.

- 2) On the other hand, if one looks at EIOPA's general indications for the different Member States covered by its thematic review, there are a number of issues that are not applicable to Spain.

Thus, for example, both the thematic review and the warning issued by EIOPA highlight (in the European Authority's view) that, in many cases, the use of group insurance makes it difficult for policyholders-borrowers to cancel and prevents an individual analysis of each customer and the adaptation of the premium to their personal circumstances.

This situation is not currently occurring in Spain on a regular basis, since in our market, with the exception of a few cases (concentrated in the field of credit protection insurance distributed in connection with credit cards), individual policies predominate, and not "formal or improper" group insurance policies, which, if they exist, are usually old policies, without this formula being normally used in new production products.

⁴ See the "Warning to insurers and bancassurance operators distributing credit protection insurance contracts" published by the DGSFP at <http://www.dgsfp.mineco.es/es/Consumidor/Alertas%20sobre%20conductas%20de%20mercado/Documents/Advertencia%20sobre%20contratos%20de%20seguros%20de%20protecci%C3%B3n%20crediticia.pdf>

This is clear, for example, from the graphs on page 33 of the thematic review document, from which it can be deduced that in Spain there is a differentiation of premiums according to customer profile and that there is no use (neither generalised nor majority) of "formal" or "improper" group policies.

- 3) With regard to the key issues raised by EIOPA in its warning (on the one hand, the low claims ratio compared to the high commissions for banks and the wide margin for insurers and, on the other hand, the potential conflicts of interest), these are issues directly and specifically addressed by the new regulations (with regard to the former, in particular, by the regulation on product oversight and governance (POG), included in the Insurance Distribution Directive, transposed by Royal Decree Law 3/2020⁵, as well as in Commission Delegated Regulation (EU) 2017/2358 of 21 September 2017 supplementing Directive (EU) 2016/97 of the European Parliament and of the Council as regards product control and governance requirements for insurance undertakings and insurance distributors, a directly applicable EU regulation; and with regard to the second, by the general principles that should inform the activity of private insurance distribution⁶, and, in general, the information obligations and rules of conduct included in the new distribution regulations, which, as mentioned above, have just been implemented in Spain and whose full effects cannot yet be included in EIOPA's analysis, taking into account the exercises analysed by EIOPA in its thematic review).
- 4) Other issues, also addressed in EIOPA's warning, such as a possible mis-selling of insurance products, are also specifically addressed in the recent insurance distribution regulation (with the regulation of tied and combination sales⁷), as well as in the residential credit regulation⁸.

Furthermore, Spanish banking customer protection legislation also deals with customer protection, in multiple regulations, approved prior to the aforementioned Insurance Distribution Directive and the Directive on credit agreements for consumers relating to residential immovable property⁹, regarding combined sales of banking and insurance products.

Not with mentioning that non-compliance with all these rules -insurance distribution, credit agreements on residential property, banking customer protection rules- due to deficiencies in the information and documentation provided or failure to provide it, must have its consequences (by way of possible penalties for administrative infringements, or impacting the validity of the insurance contract taken out and may even be the basis for claims for compensation by the customer).

The truth is that these are issues for which there is already a whole legal and regulatory regime of solid consumer protection, which specifically deals with these questions (and which, as we have said, in the case of bancassurance, is not limited to insurance and insurance distribution regulations, but is reinforced by specifically banking regulations, aimed at protecting the customer of the credit institution).

⁵ Arts. 25 of the Distribution Directive and 185 of Royal Decree-Law 3/2020.

⁶ General principle of Art. 17 of the Distribution Directive and Art. 172 Royal Decree-Law 3/2020 and, in general, the precepts on information obligations and rules of conduct contained therein.

⁷ Art. 24 Distribution Directive and Art. 184 Royal Decree-Law 3/2020.

⁸ Arts. 11 and 12 of the Mortgage Credit Directive and Arts. 6 and 17 of Law 5/2019.

⁹ Thus, for example, without being exhaustive, the following may be mentioned -as we have said, in addition to the regulations on the distribution of insurance and real estate loans, which are fully applicable to the insurance distribution- (a) the obligation to provide information on services ancillary to the credit agreement - in particular, insurance- when obtaining the credit or obtaining it on the terms offered is conditional on taking out the credit (the conditions that would alternatively apply to the credit if such ancillary services were not taken out must be provided) (section 2.5 (i) of Rule Six of Bank of Spain Circular 5/2012 of 27 June 2012 to credit institutions and payment service providers on the transparency of banking services and responsibility in the granting of loans); (b) the obligation to clearly and explicitly state the expenses that the customer must bear or compensation to be received as a result of the termination of the contractual relationship or its early cancellation, providing, in the case of linked insurance, the customer's right to receive the unearned premium rebates (section 1(b) of Rule Ten of Circular 5/2012); (c) the obligation to include, in the calculation of the APR, the expenses borne by the customer, including insurance premiums (section 7 (d), Rule Thirteen of Circular 5/2012). And, likewise, Bank of Spain Circular 4/2020 of 26 June on the advertising of banking products and services or Law 16/2011 of 24 June on consumer credit contracts.

- 5) On the other hand, the indication in EIOPA's warning about the lack of cost allocation for the sale of credit protection products does not mean that these costs do not exist or that they are at the same or lower level than those incurred in the case of insurance marketed through other distribution channels. Issues such as the design of insurance products distributed by banks (often designed specifically for the banking channel, with special coverage and service quality requirements imposed by the credit institution on its insurance partner for the benefit of the credit institution's customers), the quality of the sales force (with significant training expenses), or even the type of insurance undertakings (chosen by the banks according to their characteristics of innovation, management and, in short, the quality of the cover and service provided to the insured), have a relevant weight in the cost of the insurance products distributed by the banking channel.
- 6) Finally, the data in the annual reports published by the Complaints Service (Servicio de Reclamaciones) of the Directorate General of Insurance and Pension Funds cannot allow us to affirm that there are features in the bank distribution of insurance products in Spain that are less favourable to the consumer than those offered by distribution through other channels.
- 7) Without prejudice to the foregoing, the EIOPA warning, to which, as we have said, the DGSFP has adhered, together with the special pressure from certain associations that have made assessments against bancassurance, even raising questions about the adequacy of existing practices to the regulations on antitrust practices¹⁰, will require insurance companies that distribute their products through banking networks, by means of bancassurance intermediaries, and banks, in the coming months, to carry out a special review of their procedures, particularly in terms of product oversight and governance, prior information provided to the customer by the distributor, especially in relation to the distribution of insurance products, and credit institutions, in the coming months, a special review of their procedures, in particular as regards product control and governance, prior information provided to the customer by the distributor -especially in relation to the distributor's remuneration and close links between the distributor and the insurer- and conduct of business rules, in order to ensure that these procedures will pass the possible (and demanding) standards of the national supervisory authority.

¹⁰ See in the following link the reference to the report submitted by Adeco to the National Commission of Markets and Competition (Comisión Nacional de los Mercados y de la Competencia): <https://www.adecose.com/adecose-presenta-a-la-cnmc-su-informe-de-proteccion-de-los-clientes-en-la-distribucion-de-seguros/>

2. EIOPA peer review report on outsourcing of activities and functions

On 19 July 2022 EIOPA published its report on the peer review carried out in relation to the outsourcing of functions and activities by insurers¹¹.

The review showed that insurers in the European Economic Area (EEA) are increasingly outsourcing, mainly in the field of technology, although the level of outsourcing varies widely within the EEA.

Most national authorities focus their supervision of risks related to the outsourcing of critical or important functions and activities on the prior notification to the supervisory authority by the insurers themselves.

Other authorities opt for a prior notification process with less stringent requirements, combined with more intensive ex post on-going supervision. A few authorities combine a particularly rigorous prior notification procedure for outsourcing critical or important functions and activities with intensive on-going monitoring.

The review also found that on-site inspections are the most effective instrument to verify the overall governance structure around outsourcing and to confirm whether companies comply with Solvency II requirements in relation to outsourced activities.

As areas for improvement, where greater supervisory convergence and clarity on supervisory expectations could be achieved, the following have been identified, where EIOPA will consider further analysis:

- a) outsourcing of delegated authority (i.e. where an insurance intermediary who is not an employee of the insurer can underwrite risk or settle claims on behalf of the insurer);
- b) the definition of "material development" and the meaning of "notification in timely manner" under Article 49(3) of the Solvency II Directive¹²; and
- c) supervision of those companies that make such extensive use of outsourcing that it affects their corporate substance (so-called "empty shells"¹³).

2.1 Next steps

EIOPA will supervise and assess compliance with the recommendations contained in the peer review document. A detailed breakdown of each recommended action and the national supervisory authorities to which each recommendation is addressed can be found in the report issued by EIOPA.

In the case of Spain and other Member States, the review focuses on intensifying the supervisory work at the time of prior notification of outsourcing carried out by the insurance undertaking itself¹⁴.

The review also emphasises the need for competent national authorities to clarify the criteria for determining the classification of critical or important functions and activities (also known as "CIF")¹⁵.

Furthermore, the review recommends¹⁶ the development and use of internal procedures (not on-site supervision) to support the supervision of outsourced activities and functions.

¹¹ The link to the EIOPA document, dated 22 June 2022, is as follows: https://www.eiopa.europa.eu/document-library/peer-review/peer-review-outsourcing_en

¹² This provision of the Directive refers to the prior notification by insurance entities of the outsourcing of critical or important functions or activities (transposed by art. 67.3 of Law 20/2015 of 14 July 2015 on the regulation, supervision and solvency of insurance and reinsurance entities, "LOSSEAR").

¹³ On this issue, see also, in an area related to intra-group outsourcing of functions and activities, EIOPA's Consultation Paper on Supervisory Statement on the use of governance arrangements in third countries to perform functions or activities of 1 August of this year: https://www.eiopa.europa.eu/document-library/consultation/consultation-use-of-governance-arrangements-third-countries_en

¹⁴ See page 11 of the EIOPA document.

¹⁵ See page 10 of the EIOPA document.

¹⁶ See page 12 of the EIOPA document.

This off-site supervision, which consists mainly of examining documentation and reports prepared by the insurers themselves (i.e. RSRs, ORSAs, other specific reports), their auditors and/or service providers, can be used by supervisors to: (i) identify risks; (ii) review documentation associated with outsourcing arrangements; and (iii) obtain evidence that may warrant the initiation of on-site inspections at the insurance undertaking or service provider's premises or conducting a market analysis.

The review also highlights areas of best practices in several national supervisory authorities, pointing out the DGSFP, together with other authorities, as a good example in the structuring and digitalisation of the information to be provided to the supervisory authority in the procedure for prior notification of the critical or important outsourced function or activity.

EIOPA will consider how to best reflect the general conclusions of the peer review in its work on supervisory convergence and will take the results into account in the implementation of the future EU Regulation on digital operational resilience for the financial sector (DORA), where applicable, which will aim at ensuring the functioning of the European financial sector in the event of severe operational disruptions.

2.2 Preliminary considerations in relation to EIOPA's Peer Review Report on outsourcing of functions

In the light of the peer review, possible areas for regulatory change in Spain in the field of outsourcing could be the following:

- a) Given EIOPA's recommendation to some national authorities to develop and make use of internal procedures that allow better supervision of outsourcing at the time of prior notification, it is possible that in the future the DGSFP may require additional documentation and/or information from insurance companies at the time of prior notification, increasing the level of supervision at this initial stage.
- b) In view of the recommendation¹⁷ to define the criteria to be used by insurance institutions to classify critical or important functions and activities (CIF), it is possible that some national supervisory authorities, including the DGSFP, will establish (as others have already done before) criteria to be used to classify a function or activity as critical or important, which could alter the criteria hitherto used by insurers, as well as the functions and/or activities that institutions currently consider as critical or important¹⁸.
- c) Furthermore, both EIOPA's peer review report on outsourcing of functions and EIOPA's consultation paper of 1 August this year on a supervisory statement on the use of governance arrangements in third states for the purpose of performing functions or activities, express the authorities' growing concern about the use by certain insurance companies (also by certain intermediaries) of so-called "empty shells", so that national supervisory authorities can be expected to pay particular attention to the pattern of intra-group outsourcing by European insurance companies in third countries.

In sum, we consider that Spanish insurance companies should pay special attention to possible future developments regarding the content of the prior notification of the outsourcing of critical or important functions and activities (with the DGSFP expected to require additional documentation and information in the future), as well as to the criteria that may also be published in the future by the DGSFP on the determination of when a certain function or activity should be considered critical or important.

¹⁷ See page 104 of the EIOPA document. It is set out that, in order to classify a function or activity as critical or important, it is necessary to take into account criteria such as the entity's ability to continue to comply with regulatory requirements to maintain the administrative authorisation, the financial impact on policyholders, or beneficiaries of the contract, or its reinsurer, the stability of the entity and the quality and continuity of services provided to its policyholders, the impact on the entity of accumulating several outsourced activities.

¹⁸ The EIOPA document (see page 14) considers the French national authority (L'Autorité de contrôle prudentiel et de résolution - ACPR-) as an example of best practices adopted when identifying these key functions and/or activities. Therefore, the DGSFP could take into consideration the criteria/practices adopted by the ACPR in the elaboration of these criteria. 10

3. Judgment of the Court of Justice of the European Union (CJEU) of 29 September 2022 (Case C-633/20) on "improper" policyholder in group insurance policies

The Court of Justice of the European Union has given a preliminary ruling on a question raised by the German High Court (Bundesgerichtshof).

The question referred by the German High Court was whether; an entity which as the policyholder of an insurance contract, concluded with an insurance undertaking an insurance contract for health care abroad and an insurance policy to cover the costs of returning home, as a Group insurance for its customers and which received remuneration from the persons adhering to the insurance, could be considered as an insurance intermediary within the meaning of the now repealed Insurance Mediation Directive (Directive 2002/92), and Article 2.1 paragraphs 1, 3 and 8 of the current Insurance Distribution Directive (Directive 2016/97).

The Court concludes that those provisions of the Insurance Distribution Directive must be interpreted in the sense that, the activity of that policyholder is covered by the concepts of insurance intermediary and insurance distributor as defined in the EU legislation.

As is well known, the criteria (for decades) of the DGSFP, as well as of various rulings by Spanish courts, has been to consider that in "formal" or "improper" Group insurance (not expressly prohibited, but perceived with a critical view by the supervisory authority and the courts), in which the insured parties are obliged to pay the premium, there are as many contractual insurance relationships as there are insured parties and that each of these is the real "dominus negotii" of the contractual insurance relationship, and their consent is required for the modification of the content of the rights and obligations of the "improperly" Group insurance contract.

Various consultations of the Insurance Mediators Service (Servicio de Mediadores de Seguros) of the DGSFP can also be mentioned here, in relation to the interpretation of the repealed Law 26/2006, of 17 July, on Private Insurance and Reinsurance Mediation (for example, that of 17 February 2009, on the distribution by the Royal Spanish Hunting Federation of hunter's civil liability insurance), in which the DGSFP concluded that, in those cases in which the policyholder receives remuneration for the distribution activity, it should be understood that the policyholder is, in reality, an insurance intermediary. Under this scenario, as above mentioned, it must be understood that there is an individual and direct contractual insurance legal relationship between each of the insured parties

In short, in view of the above, in the context of **the Spanish legal system, we do not believe that the ruling of the Court of Justice of the European Union represents a real novelty with respect to the traditional position of the DGSFP and our Courts, without prejudice to the fact that the ruling entails the recognition, at Community level, of the "compatibility" between the "formal" figure of the policyholder in an improper group insurance policy and the concept of insurance intermediary or distributor.**

4. Revised guidelines of the European Insurance and Occupational Pensions Authority on the valuation of technical provisions and on contractual limits

The DGSFP, by resolutions of 6 September 2022, has published the revised EIOPA Guidelines on the valuation of technical provisions¹⁹ and contract boundaries²⁰, endorsing these revised guidelines.

The revision of both sets of guidelines **will apply from 1 January 2023**.

¹⁹See resolution of the DGSFP publicising the revised Guidelines of EIOPA on the valuation of technical provisions at <http://www.dgsfp.mineco.es/es/Paginas/Resoluci%C3%B3n-Directrices-sobre-valoraci%C3%B3n-provisiones-t%C3%A9cnicas.aspx>. The revised Guidelines can be found at <https://www.eiopa.europa.eu/document-library/guidelines/revised-guidelines-valuation-of-technical-provisions>

²⁰See DGSFP resolution publicising the revised EIOPA Guidelines on contractual limits at <http://www.dgsfp.mineco.es/es/Paginas/Resoluci%C3%B3n-Directrices-l%C3%ADmites-contractuales.aspx>. The revised Guidelines can be found at <https://www.eiopa.europa.eu/document-library/guidelines/revised-guidelines-contract-boundaries>