

CAA Circular 22/15: What is new for the governance of insurance and reinsurance companies

Executive Summary

- On 26 July 2022, the CAA published the new Circular 22/15 setting out regulatory requirements for the composition and functioning of the Board of Directors of insurance and reinsurance undertakings in the Solvency II framework.
- The Circular 22/15 replaces previous circulars of the CAA, adds important clarifications to the EIOPA guidelines and confirms a few existing requirements.
- The Circular 22/15 applies to insurance and reinsurance undertakings supervised by the CAA, including holding companies at the head of a group under the supervision of the CAA, with the exception of (i) captive insurance undertakings; (ii) captive reinsurance undertakings and (iii) non-captive reinsurance undertakings with gross annual premiums of less than EUR 100 million.

I. Background

On 26 July 2022, the *Commissariat aux Assurances* ("CAA") published a new circular letter (the "Circular 22/15") setting out regulatory requirements on the functioning and structuring of the Board of Directors of insurance and reinsurance undertakings.

The Circular 22/15 reflects and specifies some provisions of the second pillar of the Solvency II framework, included in the Directive 2009/138/EC, in the Delegated Regulation (UE) 2015/35, as amended and implemented (the "Reg. (UE) 2015/35")¹ and in the guidelines published by

¹ The Solvency II framework was transposed in Luxembourg by the law of 7 December 2015 on the insurance sector.

the European Insurance and Occupation Pensions Authority ("EIOPA"), especially the one published in 2014 on the system of governance ("EIOPA-BoS-14/253").

The Circular 22/15 provisions are tailored on undertakings having monistic governance (being such system the most commonly used in Luxembourg) although the Circular 22/15 applies, *mutatis mutandis*, to companies having a dualistic system of governance.

The Circular 22/15 is addressed to insurance and reinsurance undertakings, including holding companies at the head of a group under the supervision of the CAA, with the exception of captive insurance and reinsurance undertakings and non-captive reinsurance undertakings with gross annual premiums of less than EUR 100 million.

This GSK Update summarises the key provisions included in the Circular 22/15.

II. The distinction between executive director (*administrateur exécutif*) and independent director (*administrateur indépendant*)

The Circular 22/15 distinguishes between executive, non-executive and independent directors, thus furtherly specifying the definition of "persons who effectively run the undertaking" (Art. 42 Directive 2009/138/EC) provided by EIOPA².

² See Par. 1.21 EIOPA-BoS-14/25: "persons who effectively run the undertaking' cover members of the administrative, management or supervisory body taking into account national law, as well as members of the senior management. The latter includes persons employed by the undertaking who are responsible for high level decision making and for implementing the strategies devised and the policies approved by the administrative, management or supervisory body."



The executive director (*administrateur exécutif*) participates in the effective management of the company or its subsidiaries by being in charge of the day-to-day management, by participating in a management committee (*comité de direction*), by carrying out the execution of important or critical activities as well as the day-to-day management of the company without delegating signatures to third persons. Similarly, the notion of non-executive director (*administrateur non-exécutif*) is negatively defined as a director who is not an executive director.

The independent director (*administrateur indépendant*) is a director who is not an executive director of the company and who, in addition, is not connected, and has not been connected in the recent past (as defined in the Circular 22/15) by a significant financial relationship with the company, with the shareholders who control the company, with related companies, or with the management of the company, its shareholders or of other related companies (shareholding or controlling interest more than 10%). In addition, the independent director does not receive any deferred compensation or variable compensation linked to the performance of these companies. However, an independent director may be paid a fixed amount or in proportion to his/her participation in the company.

III. Qualities and composition of the Board of Directors

The Board of Directors should consist of a minimum of three members, providing that (i) the executive directors remain a minority within the Board of Directors³; and (ii) a Chairman should be appointed among the non-executive directors. The CAA must be notified of such appointment⁴.

Any change in the composition of the Board of Directors must be notified to the CAA within a maximum of four weeks. The departure of a director for any reason (including disappearance) must be notified to the CAA with-

in a maximum of two weeks from the date on which the company is informed of the departure⁵.

In order to effectively manage and oversee the undertaking in a professional manner⁶, the Board of Directors should possess on ongoing basis appropriate experience and knowledge in insurance and financial markets; system of governance; financial and actuarial analysis; risk management and regulatory framework and requirements. In addition, the Board of Directors shall have an excellent understanding of the company or group's overall business activities, risks, strategy and business model⁷.

Each director should demonstrate independence of judgement, integrity, strength of character and objectivity.

Legal persons may be appointed as directors of an insurance or reinsurance undertakings, upon the conditions that (i) such legal person may only hold one mandate on the Board of Directors at the same time; (ii) the legal entity must be represented by a natural person who is not a member of the Board of Directors⁸. In addition, the Circular 22/15 expects the undertaking to present a detailed justification to the CAA if the legal person appointed as a director is not a direct or indirect shareholder of the undertaking; a strategic partner of the undertaking; the management company of a captive insurance undertaking, of an insurance undertaking in run-off or of a reinsurance undertaking⁹.

The Board of Directors shall regularly evaluate its functioning and work, verify its effectiveness and ensure that each director has a good understanding of the work and functioning of the board. The Board of Directors should regularly assess or causes to be assessed the system of governance of the company or group, including the day-

³ See Par. 12 Circular 22/15.

⁴ See Par. 6 and 7 Circular 22/15.

⁵ See Par. 16 Circular 22/15.

⁶ See Art. 259, co. 1, let. c) Reg. (UE) 2015/35.

⁷ See Par. 8 and 9 Circular 22/15 and orientations n. 1 and 2 EIOPA-BoS-14/253.

⁸ See Par. 13 to 15 Circular 22/15.

⁹ See Par. 13 Circular 22/15.



to-day management and the key functions as defined by Solvency II¹⁰.

Moreover, the Board of Directors is also allowed to establish specialised committees, as well as audit committees subject to the scope of the law of 23 July 2016, transposing, among others, the Regulation (EU) 537/2014 of specific requirements regarding statutory audit of public-interest entities (the “Audit Law”).

The Board of Directors shall decide the composition, role and tasks of its specialised committees. Where the tasks of a specialised committee cover several key functions as defined by Solvency II, the Board of Directors shall organize the committee in a manner that respects the independence required for each of these functions¹¹.

Regarding the composition of the audit committees, the references to non-executive members (*membres non-exécutifs*) and to independent members of the audited entity (*membres indépendants de l'entité contrôlée*) in the Audit Law shall have the same meaning as non-executive director(s) and independent director(s) provided in the Circular 22/15¹². Moreover, the Circular 22/15 also provides for some specific structuring and functioning principles for the audit committees, inviting the undertaking to provide a justification to the CAA in case such principles are not followed¹³.

IV. Controlling powers by the CAA

The CAA shall continuously monitor the composition of the Board of Directors, the identity of its members, as well as its expertise. In particular, the collective and individual competencies of the Board of Directors shall be assessed by the CAA whenever a director leaves the Board and at least once every three years, as well as when there is a major change in the programme of activities.

¹⁰ See Par. 21 Circular 22/15 and Artt. 269 to 272 Reg. (UE) 2015/35.

¹¹ See Par. 29 Circular 22/15.

¹² See Par. 30 Circular 22/15 and Art. 52 Audit Law.

¹³ See Par. 31 Circular 22/15.

In this regard, the Board of Directors is required to document the executive, non-executive or independent nature of each director; the assessment of the individual suitability of each director, including of the legal person; situations that may lead to conflicts of interest, the collective competence of the Board of Directors, as well as the frequency and results of the assessments of the Board¹⁴.

V. Mandatory statutory provisions to be included in the undertakings' articles of association

Where an insurance or reinsurance undertaking is set up as a public limited company with a Board of Directors or in the form of a mutual society, its memorandum and articles of association must authorise the Board of Directors to delegate the day-to-day management to one or more managers, who must be approved by the CAA. Moreover, the articles of association of insurance holding companies and mixed financial holding companies incorporated as a public limited company or a European company must allow the extension in the application of the provisions applicable to insurance and reinsurance companies¹⁵.

Furthermore, the Board of Directors must be provided with regulations and corporate policies to approve the documents set out in Par. 41 to 43 of the Circular 22/15, either internally or by virtue of specific provisions in the articles of association of the undertaking¹⁶.

IV. Other responsibility of the Board of Directors

In addition to the legal prerogatives of any Board of Directors, the Circular 22/15 provides that the Board of Directors of an insurance or reinsurance undertaking shall have a key responsibility in other additional areas, including:

- The corporate compliance with the programme of operations defined in Art. 3 CAA Regulation n. 15/03 of 7 December 2015 on insurance and rein-

¹⁴ See Par. 10 and 21 Circular 22/15.

¹⁵ See Par. 32 Circular 22/15.

¹⁶ See Par. 40 Circular 22/15.



surance undertakings, as amended (the “RCAA 15/3”);

- The risk management and the steering of the internal risk and solvency assessment (“ORSA”), as well as the testing of its results and the incorporation of its conclusions into the strategy and capital management;
- Internal control and good corporate governance, including the proper application of policies, in particular the remuneration policy;
- Anti-money laundering and combating the financing of terrorism (AML/CFT);
- The proper application of accounting principles and valuation methods used in the annual accounts¹⁷.

Where appropriate, these tasks may be partially delegated to specialised committees, provided that the ultimate responsibility shall be preserved by the Board of Directors in any case.

In addition, the Circular 22/15 sets a list of documents or information which the Board of Directors must formally approve or be aware of¹⁸, although specialised committees may be established to contribute to the documents to be approved, analyse and to communicate their assessment to the Board of Directors.

VII. Date of application

The Circular 22/15 will apply from 30 September 2022 replacing the following existing CAA circulars:

- Circular letter 96/1 on the supervision of directors of direct insurance undertakings;
- Circular letter 99/1 on the composition and functioning of the Board of Directors of direct insurance undertakings;
- Circular letter 02/8 on the supervision of directors of reinsurance undertakings.

However, some provisions of the Circular 22/15 will apply from 31 March 2023, notably:

- the rules governing the composition of the Board (Par. 6 to 12 of the Circular 22/15);
- The mandatory provisions to be included in undertakings’ articles of association (Par. 32 and 40 of the Circular 22/15).

Similarly, the rules on the documentation of the evaluation of the governance system (Par. 10 and 21 of the Circular 22/15) shall be implemented by 31 March 2023 at the latest.

Andreas Heinzmann

Partner
GSK Stockmann SA
andreas.heinzmann@gsk-lux.com

Valerio Scollo

Partner
GSK Stockmann SA
valerio.scollo@gsk-lux.com

¹⁷ See Par. 39 to 46 Circular 22/15.

¹⁸ See Par. 41 to 43 Circular 22/15.



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www.gsk-lux.com

GSK STOCKMANN

BERLIN

Mohrenstrasse 42
10117 Berlin
T +49 30 203907-0
F +49 30 203907-44
berlin@gsk.de

HEIDELBERG

Mittermaierstrasse 31
69115 Heidelberg
T +49 6221 4566-0
F +49 6221 4566-44
heidelberg@gsk.de

FRANKFURT/M.

Bockenheimer Landstrasse 24
60323 Frankfurt am Main
T +49 69 710003-0
F +49 69 710003-144
frankfurt@gsk.de

MUNICH

Karl-Scharnagl-Ring 8
80539 Munich
T +49 89 288174-0
F +49 89 288174-44
muenchen@gsk.de

HAMBURG

Neuer Wall 69
20354 Hamburg
T +49 40 369703-0
F +49 40 369703-44
hamburg@gsk.de

LUXEMBOURG

GSK Stockmann SA
44, Avenue John F. Kennedy
L-1855 Luxembourg
T +352 2718 02-00
F +352 2718 02-11
luxembourg@gsk-lux.com

