On 31 January 2020, the European Insurance and Occupational Pensions Authority (EIOPA) released guidelines on outsourcing to cloud service providers (the ‘EIOPA Guidelines’). The EIOPA Guidelines aim to provide guidance to insurers and reinsurers on how to carry out outsourcing under the Solvency II regime should apply in the case of outsourcing to cloud service providers.

The EIOPA Guidelines have two overarching goals: (a) to provide clarification and transparency to market participants in order to avoid potential regulatory arbitrage and (b) to foster supervisory convergence regarding the expectations and processes applicable to cloud outsourcing.

Scope of the EIOPA Guidelines: all types of outsourcing with a cloud component

The EIOPA Guidelines apply not only when an undertaking outsourcing directly to a cloud service provider but also when the undertaking outsources operational functions or activities to service providers that further subcontract to cloud service providers but rely significantly on cloud infrastructures. The EIOPA Guidelines could be the case, for instance, when an insurance undertaking outsourcing certain HR functions to a payroll service provider forms part of the outsourcing chain, even if the undertaking has not performed the function or activity in the past. Moreover, if cloud-based outsourcing takes place via more than one undertaking or if the EIOPA Guidelines do not apply.

Furthermore and in line with the EIOPA Guidelines, the EIOPA Guidelines provide for more concrete criteria to assess whether an arrangement with a cloud service provider falls under the definition of outsourcing, providing a link to Solvency II Directive. In this regard, consideration should be given to (i) whether the outsourced function or activity is performed on a recurring basis or an ongoing basis and (ii) whether the function or activity could be performed by the undertaking in the ordinary course of business, even if the undertaking has not performed the function or activity in the past. Moreover, cloud-based outsourcing takes place via more than one undertaking or if the EIOPA Guidelines do not apply.

The EIOPA Guidelines set out concrete requirements for the outsourcing of operational or functional activities. Those provisions are grouped in three categories, which correspond to the five chronological phases of an outsourcing process, namely (1) governance and strategic planning; (2) functional analysis; (3) contractual requirements; and (4) audit and monitoring requirements.

For the cloud-based outsourcing of critical or important functions, the requirements are quite prescriptive, whilst greater flexibility is allowed for the outsourcing of non-critical activities. The EIOPA Guidelines provide guidance on whether the outsourcing concerns a critical or important operational function; a risk assessment, if appropriate; a due diligence procedure on the prospective cloud service provider; and assessment of the suitability of an existing cloud service provider. The EIOPA Guidelines provide concrete guidance for a number of these assessments, with the exception of the latter.

The contractual requirements contain a list of compulsory clauses to be included in any critical or important outsourcing arrangement with a cloud service provider. The analysis should include: (i) an assessment of whether the outsourcing concerns a critical or important operational function, and (ii) a risk assessment, if appropriate. The EIOPA Guidelines also provide for monitoring of key performance indicators and a written notification of critical or important outsourcing. As for the notice period, the EIOPA Guidelines specify certain information to be included in the written notification to a supervisory authority when a critical or important outsourcing arrangement is established or amended.

Underwriting decisions should be performed in an appropriate and transparent manner, in light of the key features of the PEPP. The analysis should include: (a) an assessment of the investment strategy of the intended insurance undertaking, (b) an assessment of the suitability of the intended insurance undertaking, and (c) an assessment of the suitability of the intended insurance undertaking.

Specific requirements for the various phases of cloud-based outsourcing

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