

REPORT ON THE INDEPENDENCE OF NATIONAL COMPETENT AUTHORITIES

EIOPA-BoS-21/278
18 October 2021

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LIST OF ACRONYMS AND ABBREVIATIONS

BoS	Board of Supervisors
EBA	European Banking Authority
EEA	European Economic Area
EIOPA	European Insurance and Occupational Pensions Authority
ESAs	European Supervisory Authorities
ESAs' Review	Means the review of the Regulations setting up each of the European Supervisory Authorities that resulted in the entry into force of the revised Regulation on 1/1/2020
ESMA	European Securities and Markets Authority
MoU	Memorandum of Understanding
NCA	National Competent Authority
OECD	Organisation for Economic Cooperation and Development
UNODC	United Nations Office on Drugs and Crime

BACKGROUND

REASONS FOR PUBLICATION

The revised EIOPA Regulation introduced new tasks to EIOPA, one of them is to foster and monitor supervisory independence. Article 8(1) of the EIOPA Regulation states that EIOPA “shall contribute to the consistent application of legally binding Union acts, in particular by a common supervisory culture [...] fostering and monitoring supervisory independence”. Furthermore, Article 30(3) of the EIOPA Regulation sets out that Peer Reviews shall be used as a tool for “the assessment of the degree of independence, and governance arrangements of the competent authority [...]”.

Based on self-assessments provided by National Competent Authorities (NCAs), this report takes stock of the situation on NCAs independence along key aspects i.e. operational independence, financial independence, personal independence as well as accountability and transparency. It should be noted that this report does not represent an assessment of NCAs independence. Rather it seeks to factually represent the legal and operational position of NCAs under the key elements of independence.

This report can support NCAs in assessing whether it might be desirable to seek any legislative or regulatory amendment to further improve the framework underpinning their independence. Moreover, it can provide valuable information to EIOPA for future work in the field of supervisory convergence, including Peer Reviews.

In addition, it can be used by the European Commission for its report to be issued under the EIOPA Regulation review clause by January 2022 evaluating, inter alia, “*the independence of the competent authorities and convergence in standards equivalent to corporate governance*”¹.

The revised founding Regulations grant all ESAs the same task to foster and monitor supervisory independence. EIOPA has therefore coordinated with both EBA and ESMA in the preparatory work for this report.

¹ Article 81(1)(a)(i) of Regulation (EU) N.1094/2010

CONTENT

This report contains an executive summary and is divided into two chapters. The first chapter explains the context in which information was gathered from NCAs. The second chapter presents the outcome, structured around four sections, namely operational, financial and personal independence as well as accountability and transparency.

The report represents the information provided by NCAs. As in some cases a different level of detail was provided, the number of NCAs may not always add up to the total number under each item and not all NCAs are always listed under all items.

EXECUTIVE SUMMARY

Independence of NCAs is of paramount importance to support fair, efficient and transparent markets and hence to foster confidence in financial markets and the protection of investors. As such independent NCAs support the objectives of enhancing consumer protection and strengthening orderly and stable markets across the EU. NCA independence is key to achieving effective and efficient supervision as well as the consistent application of EU rules across Member States. NCAs independence thereby supports ensuring a level playing field of high-quality regulation, supervision, enforcement and hence supervisory convergence.

The achievement of NCA independence is multi-faceted and is dependent on a number of legal, institutional, operational and cultural factors. Independence is first enshrined in legislation and institutional design, but it is also how NCAs operate on a day-to-day basis through their activities, decision-making and stakeholder engagement, which embeds the culture of independence and the achievement of good regulatory outcomes. Achieving good regulatory outcomes requires that NCAs decisions are made in an objective, impartial and consistent manner, without conflict of interest or improper influence.

Stakeholder engagement and public consultation on key policy proposals are an important part of the regulatory process. NCAs need to understand developments in the market and undertakings' behaviour in order to assess the impact of their decisions. However, conflict of interest is a risk that must be closely monitored, and a balance needs to be struck to avoid any undue influence from interested parties or political interference in the regulatory process and supervisory activities. Similarly, NCAs benefit from a healthy turnover of staff from and to the industry but it is important to have a legal framework and internal ethics codes, which promote the standards and behaviours of objectivity and independence. Rules on cooling off periods are also necessary to manage any actual or potential conflict of interests between the NCA and industry. The capacity of the NCA to act independently will be enhanced by adequate legal protection for the NCA and its staff when acting in the bona fide discharge of their functions and powers.

NCAs' independence cannot be ensured without financial independence and this requires an appropriate stable source of funding and proper resources including the ability to recruit and retain suitable expert and qualified staff.

Finally, independence can only be conferred on NCAs when it is accompanied by a strong framework of public transparency and accountability. NCAs must be able to communicate and explain their policies and decisions in order to promote public understanding and trust in the regulatory process and there should be a system permitting judicial review of final decisions of the NCA.

In this report, NCAs independence is analysed in consideration of the operational, financial and personal independence as well as accountability and transparency, in line with the principles and criteria as approved by the EIOPA Board of Supervisors.

OPERATIONAL INDEPENDENCE

Independence depends on how NCAs operate on a daily basis in their activities, decision-making and stakeholder engagement. The way NCAs operate embeds the culture of independence and the achievement of good regulatory outcomes.

When analysing NCAs independence from the operational angle, consideration was given to the absence of interference from governments, authorities and sectoral interest, the adequacy of the legal powers and resources granted to the NCAs to fulfil its missions. Operational independence allows NCAs to operate free of influence from the government and industry on a day-to-day basis. This is important to allow NCAs to carry out their regulatory mandate in a consistent and objective manner and make decisions which are not influenced by short term political interests.

Generally, all NCAs confirm that they are independent authorities, who operate independently on a day-to-day basis, and are not bound by any instructions from Government or any other body or institution. There are different approaches across NCAs in relation to, on one hand, when consultation is mandatory and, on the other hand, circumstances where NCA's are required to consider requests made by Governments. Approximately half of the NCAs are required to consult when exercising their powers to implement secondary legislation. This includes consultation with Government, Ministry of Finance, public authorities, industry, other bodies or the public in general. Interactions could be desirable² but the process for consultation should be transparent and consultation with, or approval by, a government ministry or other authority should not include operational decisions. As part of their daily operations, NCAs cooperate and exchange information with Government and other relevant bodies. In addition, while the vast majority of NCAs are established as independent bodies, a few are established under the aegis of a ministry and a limited number are subject to instructions from the minister in relation to supervisory matters.

² OECD notes that: "independence does not imply that regulators are anonymous, silent, or above and beyond the policy arena. Regulators interact with ministries, who are ultimately responsible for developing the policies for the regulated sector; with parliaments, who approve those policies and often evaluate their implementation; with the regulated industry, which needs to comply with the decisions of the regulator; and with citizens, who are the ultimate beneficiaries of the actions of governments and regulators. These interactions are inevitable and desirable. The balance between the appropriate and undue influence that can be exercised through these interactions is at the core of the discussion on the independence of regulators": OECD, *Being an Independent Regulator, The Governance of Regulators*, OECD Publishing - 2016, Paris, <https://doi.org/10.1787/9789264255401-en>

The vast majority of NCAs report the existence of legal provisions governing the avoidance of conflict of interests. For many NCAs, these legal provisions are supplemented by internal rules, codes of ethics and policies.

Almost all NCAs consider that they have adequate legal powers to meet their regulatory mandate notably supervision, inspections, requests for information and documents and ability to impose sanctions, including fines. Most NCAs have regulatory responsibility over supervised entities throughout their entire life cycle, from authorisation to the withdrawal of the authorisation. However, it is fair to note, that some NCAs raised the challenge for legal mandates and powers to adapt and keep pace with the changing financial landscape and the resource demands this creates.

Delegation to an external party may have an impact on the independence of NCAs depending on their scope and framework. The majority of NCAs cannot delegate their powers to third parties or can only delegate internally within the NCA organisational structure. Some NCAs are permitted to delegate powers to third parties and this is usually reserved for enforcement activities.

Not all NCAs report being in a position to hire staff for the fulfilment of their supervisory tasks. A number of NCAs noted the challenge with recruiting experienced staff, particularly while competing for talent with private industry who offer more attractive remuneration packages. Some NCAs are in a position to pay higher salaries compared to other public sector entities or have their level of salaries linked to relevant industries. NCAs report offering adequate training opportunities, including those provided by EIOPA, to their staff.

FINANCIAL INDEPENDENCE

In order to be independent, NCAs need to have adequate funding and the ability to use it to fulfil their mission. Supervisory effectiveness is dependent on financial independence to ensure that NCAs have the freedom to determine their staffing, training, and remuneration needs. NCAs should have autonomy over budget approval and ongoing management in order to make necessary investment in IT and other infrastructure to ensure that they can maintain operational effectiveness in a changing environment.

As noted by the OECD³, regardless of the source of funding for regulators, particular attention should be paid to the way in which funding needs are determined, appropriated and spent.

³ OECD notes that "Source of funding – fees, general revenues or a mix of the two – vary but the source appear less important than the way in which funding needs are determined, appropriated and ultimately spent to determine the extent to which regulators can act independently": OECD, *Being an Independent Regulator, The Governance of Regulators*, OECD Publishing - 2016, Paris, <https://doi.org/10.1787/9789264255401-en>

While almost all NCAs reported adequate funding to discharge their regulatory mandates, a variety of funding models are in operation.

The majority of NCAs are fully financed from revenues received from supervised entities, with no contributions from the state budget. In some cases, industry fees are collected by the Ministry of Finance who allocates an appropriate budget to the NCA. A number of NCAs are financed from a combination of their own revenues and a contribution from the state budget. For the majority of NCAs budgetary approval is required from the Government or other external bodies while for other NCAs, Board approval is sufficient. Some NCAs cited the need for additional funding and resources.

PERSONAL INDEPENDENCE

The independence of NCAs implies personal independence which can be analysed at the level of the management bodies (e.g. their composition, the appointment of members) and of the staff. Moreover, in order to act independently and avoid undue influence from industry, it is important that supervisors have legal protection in the bona fide execution of their roles.

All NCAs stated that they have established legal procedures for the appointment of the members of their governing body. In general, the members of the governing body are appointed by decision of either the executive branch, the legislative branch or the head of state, with more than one power being involved in the nomination process in certain jurisdictions. In most cases, members of the governing body are assessed based on requirements including expertise, lack of criminal convictions and no conflicts of interest. Terms of appointment for members of the governing body varied but the most common terms by far are 5 and 6 years. The majority of NCAs provide for the renewal of the term. The majority of NCAs have specific procedures for the removal of members of the governing body or, at the very least, admit it is possible to dismiss a member of the governing body in some circumstances.

Although almost all authorities reported adequate legal protection for staff in the bona fide discharge of the NCAs functions and powers, a few authorities indicated that the legislation in force does not offer legal protection or that it affords only limited legal protection. In addition, there are differences with regard to the type of legal protection afforded to staff. In a number of jurisdictions, liability rests solely with the NCA and there is no personal liability for staff in the exercise of their duties. Other NCAs reported protection for staff in the bona fide discharge of their duties but they remain liable in other circumstances e.g. misconduct, negligence or fraud. Some NCAs provide financial support to staff, for example insurance contracts, loans/allowances and/or financial guarantees in the context of legal proceedings initiated by third parties against an individual.

Cooling-off restrictions are key to avoid conflict of interest when members of the governing bodies and/or staff are leaving their position in the NCA. They signal a clear and useful distinction between

the regulator and the regulated industry. While most NCAs have cooling off rules in place for former members of the governing bodies and/or staff either in application of national law or internal rules, their scope of application and duration varies significantly. In addition, some NCAs do not impose restrictions on former members of the governing bodies or staff after they have left their position.

ACCOUNTABILITY AND TRANSPARENCY

NCAs independence implies adequate accountability and transparency. NCAs have significant powers in regulating and supervising the financial sector. Therefore accountability, transparency, and integrity are a crucial component of effective regulation and supervision. NCAs should be accountable not only to governmental agencies and/or the Parliament but also to the public at large in relation to their activities and decisions.

All NCAs responded that they ensure public transparency through the publication of certain documents, usually on their website. The majority of NCAs publish financial statements, while some also make public their strategic plan/objectives. A number of NCAs disclose the sanctions/measures against supervised entities. Some NCAs publish documents in English as well as a way to enhance their accountability towards the public including outside their jurisdiction.

In general, NCAs have a duty to report on their activities to a government entity or democratic assembly. This usually takes the form of an annual report, which is also available on the NCA's website.

Several NCAs mention their accountability to the national parliament in the form of hearings, special committees, parliamentary questions etc. Some NCAs are accountable to the Minister of Finance, not on daily operations, but in relation to the provision of information.

All NCAs report being subject to judicial review in relation to their regulatory or supervisory decisions. The majority of NCAs refer to administrative proceedings for judicial review, while some jurisdictions have civil or criminal proceedings in certain circumstances. In all cases, individuals or firms seeking judicial review of NCA decisions are permitted to make representations to the review body.

1. INFORMATION USED

1. In order to prepare an overview to compare NCAs across different principles of independence, EIOPA used several sources of information.
2. EBA and ESMA have collected information regarding the independence of supervisory authorities via comprehensive surveys, information received via other work streams or targeted additional questions. EIOPA was given access to this information to avoid sending out similar surveys or information requests to its Members. Furthermore, it responded to the request of the EIOPA Board of Supervisors to cooperate and align the work among the ESAs as closely as possible.
3. EIOPA has reached out bilaterally to those Members not covered by the information gathered via EBA and ESMA work⁴.
4. Finally, a first draft of the report was shared with the Members and their feedback and additional information has been included in the report.
5. The report highlights the main observations resulting from the overview and uses a factual approach based on information gathered. The report does not provide an assessment of NCAs' independence.

⁴ CY (ICCS), CY (RIORP), ES (DGSFP), EL (Ministry of Labour and Social Affairs), IE (Pensions Authority), IT (COVIP), IT (IVASS)

2. NCA'S INDEPENDENCE

2.1. OPERATIONAL INDEPENDENCE

6. The operational independence of NCAs is considered taking into account (1) the absence of interference from the government, the commercial and sectoral interest, (2) the adequacy of the legal powers of NCAs to perform their tasks and fulfil their responsibilities, (3) the adequacy of their operational resources covering their staffing but also their investments on IT software and hardware, for the purpose of this report.

2.1.1 ABSENCE OF INTERFERENCE

7. The ability to operate independently without interference from government, commercial or sectoral interests should take into account any requirements for (1) consultation with Government or other authorities in relation to decisions, and consider the requests made from Government and freedom of NCAs to not accept those requests, (2) the management of conflict of interest (including with regard to commercial or sectoral interests).

8. Furthermore, the European Parliament and the Council have already taken into account the importance of the absence of interference and since the beginning the regulations establishing the three ESAs (article 42) foresee that neither public institutions or bodies, nor any other public or private body shall seek to influence the members of the Board of supervisors in their performance. The section of personal independence of this report also approaches this matter from an independence of board members standpoint.

2.1.1.1 Consultation with Government or other authorities

9. All NCAs noted that they have the ability to operate on a day-to-day basis without external political interference or from commercial or other sectoral interests.

10. Considerable varieties among NCAs exist as regards mandatory consultation and the necessity to consider the requests made from Governments as well as the extent to which NCAs are obliged to consult. Most NCAs (17)⁵ are required to consult in implementation of their empowerment to issue secondary legislation or require approval by Royal Decree⁶. This could range from consulting the public⁷, representative organisations of the relevant financial institution/industry⁸, the Government (mostly the Ministry of Finance) and/or other public authorities⁹, or any other stakeholder concerned¹⁰. Other NCAs have not reported obligatory

⁵ AT, BE (FSMA), BE (NBB), BG, CZ, DE, DK, ES, FI, HR, IE (CBI), IT (COVIP), IT (IVASS), HU, LU, LV, NL, PT, SK

⁶ BE (FSMA), BE (NBB)

⁷ E.g.: AT, PT

⁸ IT (COVIP), IT (IVASS), NL

⁹ AT, EL (Ministry of Labour and Social Affairs), CZ, ES, HR, IE (Pensions Authority), NL, SK

¹⁰ CY (Pensions Authority), HU (e.g. the ECB), IT (COVIP), IT (IVASS)

consultations before adopting secondary legislation. One NCA¹¹, even if not required, conducts public consultations as a good practice. For some NCAs¹², the Minister's approval is required by laws or general regulations in order for the secondary legislation to become effective. One NCA mentioned a consultation requirement to specific high-level issues, such as consultation with the Minister for Social Protection on the annual compliance statement¹³. Two NCAs have a Consultative Council established, which they have to consult on any proposed regulation¹⁴. Another NCA¹⁵ mentioned that approval is required (by law) by the council of Ministers, for the introduction or revision of primary and/or the change of secondary legislations. In addition, consultation is required with the Council of Occupational Retirement Provisions in certain defined areas. One NCA has a prudential regulatory advisory committee established, which they have to consult on any proposed regulation. It is however to be noted that the advice given by the committee does not need to be followed by the NCA¹⁶. Also, one NCA noted that when regulations contain rules relevant to personal data protection legislation, it is necessary to consult the National Data Protection Commission¹⁷.

11. Four NCAs¹⁸ are established as an independent supervisory authority under the Ministry and four¹⁹ NCAs are part of the Ministry. Each of them has its own specific arrangement for its operation (e.g. functionally and operationally separate from the Ministry²⁰) as well as for the relationship with the Ministry, however they share some specific characteristics. Some NCAs are subject to instructions from the minister²¹, in relation to the general supervision and/or in specific cases. One of these NCAs indicated it is subject to instructions from the minister in matters that do not fall within the independent supervisory activity²². Three other NCAs indicated they are subject to legal and technical oversight of the Ministry that bears the political responsibility for the NCA's activities²³. One NCA²⁴ reported that the supervisory body ('Service') is a directorate of the Ministry

¹¹ LT

¹² AT (approval of a secondary legislative act by a Minister only if specified in the primary legislative act), IE (CBI)

¹³ IE (Pensions Authority)

¹⁴ CY (RIORP), LV

¹⁵ CY (RIORP)

¹⁶ LU

¹⁷ PT

¹⁸ DE (Ministry of Finance), DK (Ministry of Industry, Business and Technology), IE (CBI) (Ministry of Finance) and NO (Ministry of Finance)

¹⁹ CY (ICCS) (Ministry of Finance), CY (RIORP) (Ministry of Labour, Welfare and Social insurance), EL (Ministry of Labour and Social Affairs), ES (Ministry of Economic Affairs and Digital Transformation)

²⁰ DE

²¹ DK, NO

²² DK: those matters are on good business practice in consumer affairs, preparation of legislation and EU negotiations, where the minister can instruct regulator both in relation to general supervision and in specific cases. Consultation is not established by law and it is considered on a case by case basis.

²³ AT, DE, NO

²⁴ CY (ICCS)

of Finance (a part of the Ministry), while the Superintendent of Insurance (the Head of supervision) is appointed separately and can be a civil servant or not. The Service acts on behalf and at the instructions of the Superintendent. As per the Law the Superintendent of Insurance does not report to the Minister, in his capacity as the Head of supervision. One NCA²⁵ mentioned that the full dependency on the Ministry, in terms of budget, premises and Ministry staff to provide admin and support services, and also the full dependency on staff from temporary detachments (from other Ministries and Public Authorities), can create operational constraints, processing delays, and problems in the smooth functioning of the authority and difficulties in the implementation of its policies and procedures.

12. One NCA is an independent institution owned by the State and operating under the auspices of the (Prime) Minister according to the law²⁶. Another one is an authority under the Government and Ministry of Finance²⁷ that gets assignment through instructions and annual regulation letter by the Government, but it is independent to operate daily without external influence.

13. All NCAs report that they are able to operate independently on a day-to-day basis without interference of the Ministry, while few NCAs reported that they are under specific obligation either to inform the Ministry of matters of special importance²⁸ or to obtain specific approval from the Ministry (so called authorisation reservation by the Ministry before issuing regulations and other general decrees²⁹). One NCA stated that the Ministry of Economic Development is adopting extraordinary administrative measures, such as winding-up or withdrawal of authorisation, whereby the NCA acts as a proposer³⁰. Other examples of relationship between the NCA and the Government are reflected through demands that the Minister can make on the NCA's personnel and through consultation, approval of, or consent required from the Minister prior to certain action³¹. In another case³², confidential information is shared at the request of the Minister of Economic Development when the information is necessary for the adoption of specific measures, for example withdrawal of the authorisation of the (re)insurance undertakings. One NCA³³ mentioned that it has a duty to inform the relevant ministries in connection with preparation of legal acts and regulations under preparation by a European Supervisory Authority, if such technical standard or guideline may have an effect on national legislation and/or the functioning or stability of the financial markets.

²⁵ CY (RIORP)

²⁶ IS

²⁷ SE

²⁸ AT, DE, NO

²⁹ DE

³⁰ IT (IVASS)

³¹ IE (CBI)

³² IT (IVASS)

³³ FI

14. Consultative groups exist in a number of NCAs. One NCA³⁴ has a specific internal body, the Consultative Council, set up as a collegial advisory body consisting of the supervisor's representatives and the heads of public organisations, such as professional associations and participants of the financial and capital market. Another NCA³⁵ has a prudential regulatory advisory committee established within the authority, which may be consulted for advice to the Government on any proposed legislation in the field of insurance sector supervision. The NCA must seek advice from this advisory committee on any regulation it proposes, however, it does not need to follow the advice. Another NCA³⁶ noted it has a consultative body i.e. the Council, to give opinions and professional and scientific advice for the sake of the development of the supervisory practice. One NCA³⁷ reported the existence of an advisory council as part of its governing bodies.

15. Supervisory authorities cooperate and exchange various information and data, important for their operations; cooperation with other authorities or relevant ministries could either be defined by the law³⁸ and/or in the MoU among relevant authorities³⁹. Another example of cooperation is the case where the NCA follows policy guidelines as may be set out by the Government, while one of the functions of this particular NCA is to advise the Government on the formulation of policies in the field of financial services and to recommend actions in relation to matters falling within the regulatory and supervisory functions of that NCA⁴⁰. Four NCAs⁴¹ noted that they support the competent Minister for the preparation of sectoral legislation.

2.1.1.2 Conflict of interest

16. The other aspect of absence of interference relates to conflict of interest, where all NCAs reported independence in performing their regular operations. Broadly speaking we may identify two groups in relation to how their conflict of interest requirements are defined:

- ▶ Defined by the law for 32 NCAs⁴², in 3 of those defined by the Constitution⁴³;
- ▶ Defined by internal rules, conflict of interest policies, internal regulations and the statute for 5 NCAs⁴⁴.

³⁴ LV

³⁵ LU

³⁶ HR

³⁷ PT

³⁸ EE, EL (Bank of Greece), FI, FR, HR, IS, IT, PT, SI

³⁹ IT (MoUs between the NCA, Bank of Italy and/or competent authorities), PT

⁴⁰ MT

⁴¹ CY (ICCS), DE, IT (COVIP), IT (IVASS)

⁴² AT, BE (FSMA), BE (NBB), BG, CY (ICCS), CY (RIORP), CZ, DE, DK, EE, EL (Bank of Greece), EL (Ministry of Labour and Social Affairs), ES, FI, FR, HR, HU, IE (Pensions Authority), IS, IT (COVIP), IT (IVASS), LI, LT, LU, LV, MT, NL, NO, PL, PT, SE, SI

⁴³ AT, CZ, SE

⁴⁴ FR, IE (CBI), PL, RO, SK

17. It is important to stress that, in addition to the legal provisions defining avoidance of conflict of interest, many of the NCAs from the first group explained that also internal rules, Code of ethics for staff and various internal policies define and require avoidance of conflict of interest.

18. A group of NCAs that reported legal requirements for avoidance of conflict of interest provided additional explanations for their consultations with the financial industry, such as that commercial or sectoral interests are free to lobby and make representations to the NCA while the NCA is under no obligation to act on those⁴⁵, or that NCAs consult⁴⁶ in order to collect views in the context of the elaboration and adoption of resolutions or circulars, but without interference into daily operations.

2.1.2 LEGAL POWERS

2.1.2.1 Adequacy of legal powers

19. Almost all NCAs⁴⁷ consider having adequate legal powers to meet their mandate throughout their different remits. Overall, those powers encompass in the area of supervision and enforcement the ability, among other, to conduct inspections, require documents, conduct hearings and, if necessary, impose preventive or coercive measures or impose sanctions and fines and other administrative measures.

20. Depending on the organisational structure of financial supervision in the relevant Member State, NCAs may be able to deal with their supervised entity throughout their entire life cycle, from licensing to eventually the removal of the license if needed, and in one NCA⁴⁸ even after the withdrawal of the authorisation to ensure adequate policyholders' protection and adequate settlement of claims regardless the undertaking is solvent or not. Competences may be shared in some areas with another authority (e.g. the prudential regulator under a functional approach). In the end, those powers sometime involve the ability to issue binding standards.

21. One NCA⁴⁹ considers limitations with the notion of adequate powers. Although it has adequate powers to meet its responsibilities taking into account the nature of the market, it considers it "challenging to adapt" considering how "the field of EU financial regulation expands and grows" and notes that it is currently not empowered to directly apply monetary sanctions for infringements of laws in its field of competences.

22. This notion of a needed constant evolution of powers to adapt is also stated by other NCAs⁵⁰. That evolution can be the result of an adjustment to an evolving financial world, to a crisis, or in response to particular events occurring within the jurisdiction.

⁴⁵ IE (CBI)

⁴⁶ IT (IVASS), NL

⁴⁷ Except HR

⁴⁸ IT (IVASS)

⁴⁹ HR

⁵⁰ DE, IE (CBI), SI

23. Regarding the evolutions of their powers, some NCAs indicate that it fell within their mandate to:

- ▶ propose changes to laws within its scope of competences to the relevant ministries⁵¹,
- ▶ annually send a letter to the Minister of Finance (or Social Affairs and Employment for pension funds), that contains advices and requests to amend or improve regulation⁵².

2.1.2.2 Delegation of powers

24. Fifteen NCAs⁵³ stated that they are not able to delegate their powers and nine NCAs⁵⁴ referred to their ability to delegate internally. However, nine NCAs⁵⁵ have the ability to delegate to external entities. Some of them have the ability to fully externalise powers⁵⁶, others can do it partly⁵⁷.

25. Usually, the NCAs' ability to delegate results from the laws, the jurisdiction's Constitution⁵⁸ (the NCA can only delegate to a public authority), or the jurisprudence (no delegation of the core function of the NCA like imposing fines and sanctions⁵⁹).

26. Internal delegations are mostly aimed at entrusting to Board members, or head of directorate, or to staff members responsibilities that are normally assumed by higher up in the hierarchy, usually from the Chair or from Board members.

27. When NCAs are able to delegate to external legal or physical persons, the most common use lies in the realm of enforcement. In those cases, the NCAs⁶⁰ referred to their wish to benefit from precise skills, hence looking for external experts, auditors, etc., and to resolve internal resources constraints. These NCAs stressed that the decision regarding the outcome of the cases remain usually in the hands of the NCAs⁶¹.

⁵¹ CZ, DE, EE, EL (Bank of Greece), HR, HU, IT (COVIP), IT (IVASS), LV, PT, SI

⁵² NL

⁵³ AT, BE (NBB), BG, CZ, EE, EL (Ministry of Labour and Social Affairs), ES, FI, FR, IT(IVASS), LV, NL, NO, PL, SK

⁵⁴ CY (RIORP), DK, EE, IE (CBI), IE (Pensions Authority), IS, LT, MT, PT

⁵⁵ BE (FSMA) (though the FSMA is not authorised to delegate its supervision function or decisions to external parties, it might seek the help of external entities to carry out some specific tasks (such as mystery shopping)), CY (RIORP), DE, HR, IT (COVIP), LI, LT, RO, SI

⁵⁶ DE, RO

⁵⁷ IT (COVIP), LI, LT, LU, SI

⁵⁸ FI

⁵⁹ DE

⁶⁰ DE, EE, HR, LU, MT, SI

⁶¹ DE, EE, MT

28. A precise framework to manage such external delegation was reported by one NCA⁶². Whereas the law regulating the functioning of the supervisory authority does not specifically provide for powers of delegations, delegation may be possible in the remit of the sectorial legislation (for example based on the law transposing MiFid). In these cases “all necessary steps to ensure that the delegated entities have the necessary capabilities to carry out the tasks” must be taken, and the delegation must be organised through a clear, “defined and documented framework”.

2.1.3 ADEQUACY OF OPERATIONAL RESOURCES

29. The adequacy of operational resources includes the autonomy for hiring staff with appropriate skills and expertise and for investing in IT hardware and software.

30. NCAs’ ability to discharge their tasks depends on more than just the absence of interference and adequate legal powers, which this report discussed in previous chapters. An NCA with inadequate resources is set-up to fail. Therefore, one key element for putting an NCA in a position to fulfil its tasks successfully is ensuring that proper resources are available. At the same time, NCAs are expected to use their limited resources appropriately, for example by following a risk-based supervisory approach and ensuring an efficient and effective discharge of their tasks.

31. In relation to adequate resources, it is important that the level of resources should recognise the difficulty of attracting and retaining experienced and skilled staff, and that the regulator should ensure that its staff receives adequate, ongoing training.

32. In addition to the ability to hire and retain staff as well as provide ongoing training for their staff, NCAs may face restrictions when procuring equipment and IT tools. Adequate equipment and tools to categorise and analyse large amounts of data is paramount when fulfilling its tasks. Digitalisation transforms traditional supervisory approaches, when properly designed and implemented. Any unnecessary impediments to spending available funds on operational resources can be seen as restricting the independence of an NCA. At the same time, it is acknowledged that checks and balances with regard to spending funds need to be in place.

2.1.3.1 Attracting and retaining experienced and skilled staff

33. Some NCAs⁶³ report limitations when hiring staff for the fulfilment of their supervisory tasks and functions. One NCA⁶⁴ explained staff can only be hired according to the procedures, authorisations and human resources policies of the General Administration. This sometimes means that it is difficult to adapt and not always adjusted to the specific needs of the NCA. Another NCA⁶⁵ reports – that while operational changes within the approved NCA budget can be made by the NCA on its own discretion - expenses for human resources and the change in the amount of expenditures allocated to it are excluded from that power.

⁶² RO

⁶³ E.g.: BG, CY (ICCS), ES, FI

⁶⁴ ES

⁶⁵ BG

34. Nine NCAs⁶⁶ noted explicitly that recruiting and retaining skilled and experienced staff is a challenge. One of the cited reasons is having to compete for talent on an open market, where private companies can outmatch NCAs with regard to remuneration or non-monetary incentives. One NCA⁶⁷ does not see an interconnection between the difficulty of attracting and retaining skilled staff and the NCA's level of resources.

35. One NCA mentioned that if they wish to recruit additional staff it must seek the agreement of the Department of Social Protection and the Department of Public Expenditure⁶⁸.

36. One NCA⁶⁹ mentioned that comparably low salaries in the public sector create difficulties when attracting or retaining staff.

37. Some NCAs report to be in a position to either pay higher salaries compared to other public sector entities⁷⁰ or have their level of salaries to be competitive with relevant industries⁷¹.

38. Some NCAs report having the autonomy to increase the salary of their staff⁷². Two NCAs⁷³ report having the autonomy to increase the salary of its staff, within the agreed budget and as the result of negotiations with Unions and Staff Representation. One NCA⁷⁴ reports that it has the autonomy within the approved budget to hire staff, remuneration and expenses are based on the Central Bank's collective agreements or administrative instructions.

39. When looking at the differences, we see examples of individual practices to overcome the aforementioned challenge. Two NCAs⁷⁵ report having launched an employee referral recruitment program. Three NCAs⁷⁶ approach selected students in their final years at university as an additional recruitment opportunity. Another NCA⁷⁷ has introduced a graduate program. Likewise, one NCA⁷⁸ awards remunerated yearly internships to recent graduates, in order to recruit high-potential reinforcements. One NSA⁷⁹ reports having, together with Central Bank, a Young Professionals

⁶⁶ CZ, DK, ES, HR, LT, MT, PL, PT, SI

⁶⁷ BE (FSMA)

⁶⁸ IE (Pensions Authority)

⁶⁹ LI

⁷⁰ DE, IT (IVASS), LT

⁷¹ BE (FSMA), BE (NBB), BG, EL (Bank of Greece), HR, LV

⁷² BE (NBB), CZ, LT, RO

⁷³ IT (IVASS), NL

⁷⁴ FI

⁷⁵ BE (FSMA), MT

⁷⁶ CZ, HR, MT

⁷⁷ IE (CBI)

⁷⁸ IT (IVASS)

⁷⁹ FI

program for nearly graduated or recently graduated students who are offered for a period of one year and a half an opportunity to work within different departments.

40. One NCA⁸⁰ for example offers a position as an officer in the higher intermediate civil service by pursuing an integrated degree program in central banking. The theoretical studies take place at the university and the practical studies generally at the NCA.

41. It is worth to note that staff turnover reported by some NCAs⁸¹ is low i.e. below 10%.

42. In summary, while NCAs face a challenge in recruiting staff, different solutions are being pursued to overcome this challenge within the specific national frameworks. Remuneration is considered as an important factor when recruiting talent, but other factors, such as work-life-balance, were mentioned as well. Certain NCAs⁸² noted that governmental authorisation is required in terms of hiring and increasing salaries and that such authorisation is granted on very few occasions.

2.1.3.2 Adequate, ongoing training

43. We have not received any indication from NCAs that they are being restricted by external factors or report restrictions for their staff from pursuing professional training in general. Some NCAs indicated that training offered by EIOPA for staff of NCAs is widely used. One NCA⁸³ mentioned their initiative to align learning and development practices with European counterparts.

44. The information received from NCAs shows a wide range of training opportunities being provided to staff. We see a spectrum where – on the one end – NCAs offer training that focuses on specific job-related skills, while other NCAs report supporting relevant qualifications more broadly.

45. As an example, three NCAs⁸⁴ report providing various forms of support, including financial support, to staff members for university courses, such as postgraduate studies. Two NCAs⁸⁵ report supporting staff to pursue relevant third level, post graduate and approved professional qualifications and providing fee payment as well as study and examination leave where applicable. Four NCA⁸⁶ reports supporting staff in their study programs by offering study and examination leave.

46. Four NCAs⁸⁷ mention that they provide new employees with dedicated initial training to support their familiarisation with supervisory tasks. Some other NCAs⁸⁸ report that they organise several in-house seminars on technical issues (some with senior staff and national and international

⁸⁰ DE

⁸¹ AT, BE (FSMA), BE (NBB), CY (ICCS), CZ, DE, IE (CBI), RO

⁸² ES

⁸³ IE (CBI)

⁸⁴ AT, HU, PL

⁸⁵ IE (CBI), MT

⁸⁶ BE (FSMA), IT (IVASS), LV, PL

⁸⁷ BE (FSMA), HR, FR, IT (IVASS),

⁸⁸ ES, FI, HR, IT (COVIP), IT (IVASS), LU, PT

experts as lecturers) in order to allow participation of a significant number of employees, also on a remote basis, and one noted that an ad hoc portal has been created on the NCA's extranet to facilitate access to training materials (including recording of webinar and other online events). One NCA⁸⁹ launched a Financial Supervisors Academy, which is a nationally accredited training centre delivering training in relation to financial services supervision.

47. A number of NCAs⁹⁰ explicitly report having a formalised dialogue or a structured approach to reflect on individual trainings received and planned.

48. To sum up, NCAs do not report external influence that discourages their staff from training. NCAs report offering adequate training opportunities, including those provided by EIOPA, to their staff.

2.1.3.3. Other operational resources

49. This last section looks at NCAs power to fund and pursue any other operational resources, which are deemed necessary for the successful discharge of tasks. This section focuses in particular on costs of digitalisation, which have a profound impact on supervisory authorities.

50. Fourteen NCAs⁹¹ report no impediments to funding and procuring necessary operational resources. One NCA⁹² reported for example that the introduction of a fee-based financing system in 2019 led to more financial autonomy. In contrast, the budget of several other NCAs⁹³ remains part of the state budget.

51. Where market participants need to share information either with their supervisor or with the market, the stakeholders expect NCAs to use this information for their supervisory purposes. A mere collection of information without any analysis cannot be considered a successful discharge of duties. If budgetary constraints prohibit NCAs from developing necessary analytical tools, then concerns with regard to independence can be raised.

52. An NCA⁹⁴ reported that its ability to buy or create IT solutions depends on the Government budget, because the budget of this NCA is part of the general budget of the Government. This makes it sometimes difficult to adapt the budget to the real needs of that NCA. An NCA⁹⁵ reported it is implementing duly approved projects related to digitalisation and the enhancement of its IT tools and solutions. Due to lack of responses, it is unclear how many NCAs introduce IT tools only when they are readily available on the market and would not pursue bespoke solutions. Operational resources are however not limited to IT related aspects.

⁸⁹ MT

⁹⁰ CZ, BE (FSMA), BE (NBB), FI, FR, HR, IE (CBI), IT (IVASS), NL, PT, RO

⁹¹ BE (FSMA), BE (NBB), CZ, EL (Bank of Greece), FR, HR, IT (IVASS), IS, LU, NL, PL, RO, SE, SK

⁹² PL

⁹³ BG, CY (ICCS), CY (RIORP), ES

⁹⁴ ES

⁹⁵ PT

53. In summary, a number of NCAs have shared their experiences regarding overcoming constraints with regard to operational resources, while acknowledging that sufficient resources for day-to-day operations are available.

2.2. FINANCIAL INDEPENDENCE

54. When looking at the financial independence of the NCAs, considerations are given to where the competence for approving the budget lays, the sources of funding and the sufficiency of funding for fulfilling the NCA responsibilities.

55. Sixteen NCAs⁹⁶ responded that their Board is responsible for the approval of the NCAs budget, which does not mean for all of these NCAs that they are fully autonomous in the definition of this budget. For some the budget is approved by the Ministry of Finance⁹⁷ or the Parliament⁹⁸, or both of them⁹⁹. For one NCA the budget is approved by the Prime Minister¹⁰⁰. Others did not communicate specific information on this process.

56. The responses of the NCAs reflected a variety of financing models, such as own revenues from fees collected directly from the supervised entities, own revenues combined with funds from the state budget, grants from state budget that are covered fees from the supervised entities collected at state budget and funding from the state budget.

57. Fourteen¹⁰¹ NCAs are fully financed from their own revenues levied from supervised entities, without contributions from the state budget.

58. Three¹⁰² NCAs are financed from the fees from authorised entities, but the Treasury or Ministry of Finance collects the fees as revenues of the state budget. The Ministry of Finance/Parliament shall, on the basis of an appropriation in the state budget, determine the appropriation for the operation of the NCA.

59. Another NCA¹⁰³ is collecting fees from the supervised entities, but the budget is part of the State Budget and it is approved each year and defined in the State Budget Act. If there is a difference between the approved expenditures and the income, this difference is covered by a state subsidy.

⁹⁶ AT, BE (FSMA), BE (NBB), HR, CZ (fully autonomous in the definition of its budget), FI, FR, DE, IE (CBI), IE (Pensions Authority), IT (COVIP), IT (IVASS), LT (fully autonomous in the definition of its budget), LV, RO, SI

⁹⁷ MT, NL

⁹⁸ EL (Ministry of Labour and Social Affairs), FR, HU

⁹⁹ CY (ICCS), CY (RIORP), DK, ES, IS, NO, PT, SE

¹⁰⁰ PL

¹⁰¹ BE (FSMA), BE (NBB), DE, EE, FR, HU, IT (IVASS), LU, LV, NL (except the supervision and resolution on Bonaire, Eustatius and Saba), PL, RO, SI, SK

¹⁰² DK, IS, NO

¹⁰³ BG

60. One NCA¹⁰⁴ is funded from its own revenues, but these are not collected from the fees from supervised entities (they are revenues from monetary policy, currency circulation, and foreign exchange reserves management). Another NCA¹⁰⁵ is funded from own revenues either generated from the fees/levies on supervised entities or from other sources, i.e. from its own portfolio. The Central Bank Board approves the budget in both cases. Another NCA is financed by contributions of financial market participants and by funds of the NCA¹⁰⁶.

61. One NCA¹⁰⁷ stated that they cannot hire staff directly, as there is no internal organisational structure/pyramid within the NCA, and as a result of this the NCA fully depends on staff from temporary detachments, i.e. public servants from other Ministries and Public Authorities.

62. One NCA¹⁰⁸ is financed from its own revenues (95% of the budget) and a contribution from the Central Bank (5%). The annual budget is approved by the Financial Supervisory Authority Board and is submitted to the board of the Central Bank for confirmation.

63. One NCA is financed from its own revenues via contributions and fees from supervised entities, but also from the proceeds from the sale of goods and services, the income from own assets and those resulting from its activity, the income from financial investments, subsidies, donations, or contributions granted by any domestic or foreign entities, and the amounts of the fines applied for the administrative infractions it has jurisdiction to sanction¹⁰⁹.

64. Six NCAs¹¹⁰ are financed from their own revenues (revenues levied from supervised entities) with a contribution from the state budget in some cases, for example, when they wish to recruit additional staff¹¹¹.

65. One NCA¹¹² is financed from their own revenues (revenues levied from supervised entities), with the possibility of contribution from the state budget, but have never used the state budget financing option.

66. One¹¹³ NCA receives a grant from the government to cover costs for its supervision. It is the government and the parliament that decides the level of funding.

¹⁰⁴ CZ

¹⁰⁵ EL (Bank of Greece)

¹⁰⁶ LT

¹⁰⁷ CY (RIORP)

¹⁰⁸ FI

¹⁰⁹ PT

¹¹⁰ AT, IE (CBI), IE (Pensions Authority), IT (COVIP), LI, MT

¹¹¹ IE (Pensions Authority)

¹¹² HR

¹¹³ SE

67. For some NCAs¹¹⁴ the budget is part of the Ministry they belong to. As such, one NCA reported that all its needs are covered in accordance with the general rules that are applied uniformly for all Ministry's units¹¹⁵.

68. Two NCAs¹¹⁶ note that, in case of surplus, the money saved from the previous year enters in the budget of the following year as a revenue and concurs to cover the expenditures expected in relation to the performance of the various tasks and activities of the NCA.

69. One NCA¹¹⁷ is autonomous in the definition of its budget and benefits from a special fund to cover unexpected or greater expenditure.

70. Most NCAs, except two¹¹⁸, responded that the funding is sufficient and stable to permit them to fulfil their responsibilities. One NCA¹¹⁹ declared that being a Directorate within the Ministry of Finance, there are budgetary constraints and processing delays, which may create problems in the functioning of the authority. One NCA¹²⁰ stated that the increasing complexity and scope of duties and responsibilities that have been assigned to the supervision of the insurance sector and pension funds puts into question the sustainability of a funding mechanism that is suitable to support these developments.

2.3. PERSONAL INDEPENDENCE

2.3.1 APPOINTMENT AND REMOVAL OF MEMBERS OF THE GOVERNING BODY

71. This section focuses on matters relating to the appointment, renewal of term and removal of the members of the NCA's governing body responsible for day-to-day decisions.

72. Consequently, it does not include information pertaining to other bodies that work closely or jointly with the governing body, such as non-executive functions (e.g. supervisory boards or councils that determine the general guidelines to be followed by the governing body) or with specific dedicated functions (e.g. determination of the terms of employment of the members of the governing body or responsibility for the decision within the context of sanctioning procedures decisions).

73. The answers received from the NCAs clearly indicate that for all of them legal procedures have been established for the appointment of the members of their governing body.

74. Notwithstanding the different answers received, some general tendencies were identified. In general, the members of the governing body are formally appointed by either the executive

¹¹⁴ CY (ICCS), CY (RIORP), EL (Ministry of Labour and Social Affairs), ES

¹¹⁵ EL (Ministry of Labour and Social Affairs)

¹¹⁶ IT (IVASS), RO

¹¹⁷ IT (IVASS)

¹¹⁸ CY (ICCS), PT

¹¹⁹ CY (ICCS)

¹²⁰ PT

branch¹²¹, the legislative branch¹²² or the Head of state¹²³. In some cases, more than one entity is involved in the decision¹²⁴.

75. There is not a Board in three NCAs¹²⁵. For two of these, the person responsible for day-to-day decisions is the Superintendent of Insurance¹²⁶ or the Registrar¹²⁷. The appointment and removal of these persons is made by the Government. For the Superintendent of Insurance the appointment is for 5 years with the possibility of a one-time renewal for the same period. For the Registrar the duration of the mandate is at the discretion of the Minister of Labour Welfare and Social Insurance. In one of these NCAs¹²⁸, the person responsible for day-to-day decisions is the Director General. The appointment and removal of the Director General of Insurance and Pension Funds follows the ordinary procedure foreseen for all Directors General of the General State Administration: he/she is appointed and dismissed by the Government, at the proposal of the Minister of Economy. Therefore, there is not a mandate with a pre-determined duration.

76. Of note are the appointment regimes adopted in two NCAs, as they are substantially different from the ones adopted in other jurisdictions. In one NCA¹²⁹, two members of the supervisory board are appointed by virtue of office (ex officio): Minister responsible for the area and the President of Central Bank. Half of remaining ones (2 members) are appointed by Central Bank on the proposal of the President of the Central Bank. The other half (2 members) are appointed by Government of Estonia on the proposal of the minister responsible of the area. In another NCA¹³⁰, Members of the governing body of the NCA are appointed by the Cabinet of the Head of State¹³¹.

77. In addition, the procedure adopted in some countries includes either (i) the consultation of other entities or (ii) foresees that the proposals of members to be appointed are made by another entity. Consultations or proposal of members by another entity are foreseen:

¹²¹ CY (ICCS), DK, ES, IE (CBI) (for all members except for the Deputy Governors, Governor and the Secretary General of the Department of Finance), IE (Pensions Authority), IS, MT, PL, PT, SE

¹²² FI, HR, LT (Chairman), LV, RO, SI

¹²³ AT, BE (FSMA), BE (NBB), CZ, DE, EL (Bank of Greece), IT (COVIP), IT (IVASS), LT (Board Members), LU, NL

¹²⁴ HU, SK

¹²⁵ CY (ICCS), CY (RIORP), ES

¹²⁶ CY (ICCS)

¹²⁷ CY (RIORP)

¹²⁸ ES

¹²⁹ EE

¹³⁰ NO

¹³¹ The governing body in Finanstilsynet is appointed by the King in Council. King in Council is a formal body composed of the cabinet ministers chosen by the Prime Minister and functions as the collective decision-making organ constituting the executive branch of the Kingdom. Decisions made by the King in Council are the King's decisions, but are practically those of the government.

- ▶ By the executive branch in six NCAs¹³²; and
- ▶ By the legislative branch in one NCA¹³³;
- ▶ By a combination of the above in 3 NCAs¹³⁴.

78. The majority of NCAs indicated that their legislation foresees appointment requirements that must be complied with for anyone to be appointed as member of the governing body. However, the answers presented were (i) too varied (reflecting the particularities of each country) and (ii) some jurisdictions presented very little detail regarding the appointment criteria adopted at national level.

79. Regarding the appointment requirements or suitability criteria applicable to members of the governing body, the following general tendencies were identified:

- ▶ Financial expertise;
- ▶ Lack of prior criminal convictions, with many countries placing an emphasis on criminal offences related to money laundering and market abuse;
- ▶ No history of being subjected to insolvency proceedings; and
- ▶ No interest in a supervised entity.

80. In what regards the duration of the term of members of the governing body the answers were also varied:

- ▶ 2 years in one NCA¹³⁵;
- ▶ 3 years in two NCAs¹³⁶;
- ▶ 4 years in 2 NCAs¹³⁷;
- ▶ 5 years in 12 NCAs¹³⁸;
- ▶ 6 years in 13 NCAs¹³⁹; and

¹³² AT, DE, FI, HU, IS, SI

¹³³ PT

¹³⁴ IT (COVIP), LT, SK (both the executive and legislative branch)

¹³⁵ DK

¹³⁶ EE (Management Board members except the Chair), FI

¹³⁷ EE (Chairman of the Management Board), NO

¹³⁸ AT, BE (NBB, Governor), DE, FR, IE (CBI) (for members except Governor(s)), IE (Pensions Authority), IS, LT (Chairman), LV, MT, PL, RO, SK

¹³⁹ BE (FSMA), BE (NBB, Directors), BG, CZ, EL (Bank of Greece), FR (Governor), HR, HU, IT (IVASS), LT (Board Members), LU, PT, SI

- ▶ 7 years in 3 NCAs¹⁴⁰.

81. Some of the NCAs have different mandate durations, depending on the specific member of the governing body in question:

- ▶ Belgium – the mandate for the members is in general for 6 years, but the mandate of the Governor lasts for 5 years;
- ▶ Denmark – the mandate for the members is in general for 2 years, but the mandate of the Director General lasts for 5 years;
- ▶ Estonia – the mandate for the members is in general for 3 years, but the chairman’s mandate lasts for 4 years;
- ▶ France – the mandate for the members is in general for 5 years, but the Governor’s mandate lasts for 6 years;
- ▶ Ireland – the mandate for the members is in general 5 years, but the Governor’s mandate lasts for 7 years;
- ▶ Lithuania - the mandate for the members is in general for 6 years, but the chairperson’s mandate lasts for 5 years.

82. As to the renewal of the term, again, the answers were varied. Countries that have different mandate durations, also have different rules for the renewal of the mandate depending on the member of the governing body in question. The rules regarding mandate renewal provide for:

- ▶ Renewal allowed in 23 NCAs¹⁴¹; and
- ▶ Renewal not allowed in 2 NCAs¹⁴².

83. Among NCAs allowing for renewal of the mandate, it is limited to once in five NCAs¹⁴³.

84. Some NCAs have special regimes:

- ▶ In one NCA¹⁴⁴, renewal is admissible in respect of all members, but where the renewal is in general for equal terms of two years, in the case of the Director General, it is limited to a term of 3 years (following an initial term of 5 years);

¹⁴⁰ IE (CBI) (for the Governor), IT (COVIP), NL

¹⁴¹ AT, BE (FSMA), BE (NBB), BG, CZ, DE, EE, FI, HR, HU, IE (CBI), IS, IT (IVASS), LT, LU, LV, MT, NL, NO, PL, RO, SI, SK

¹⁴² IT (COVIP), PT

¹⁴³ CZ, FR, HU, IS, LV

¹⁴⁴ DK

- ▶ In another NCA¹⁴⁵, although renewal of mandate is possible for other members of the governing body, the chairman's mandate is not renewable; and
- ▶ In one NCA¹⁴⁶, although there are no limits to the renewal of the term of the Chair of the Board, the other members can only serve for two consecutive terms.

85. NCAs have specific procedures for the removal of members of the governing body or, at very least, admit it is possible to dismiss a member of the governing body.

86. The entity with the power to dismiss or remove a member of the governing body of the NCAs also varies depending on the country (in general, it is the same entity responsible for the appointment):

- ▶ The executive branch in 7 NCAs¹⁴⁷;
- ▶ The legislative branch in 5 NCAs¹⁴⁸;
- ▶ The Head of state in 7 NCAs¹⁴⁹; and
- ▶ More than one of the above in 2 NCAs¹⁵⁰.

87. Of note is the regime adopted in Estonia, according to which the members of the governing body of the EFSA are removed by members of the EFSA's supervisory board, meaning it is aligned with the appointment regime.

88. In general, all jurisdictions that allow for removal foresee in the applicable law the removal conditions. The answers regarding the grounds for removal are varied, but many NCAs did not indicate in detail the removal criteria adopted in their country.

89. As to those NCAs that indicated the circumstances under which removal may occur, the requirements will usually include situations where the member of the governing body no longer meets the conditions stipulated for the appointment or is proven guilty of serious misconduct.

2.3.2 LEGAL PROTECTION OF STAFF

90. Thirty-two authorities¹⁵¹ reported that there are adequate legal protections for the bona fide discharge of the authority's functions and powers. Three authorities indicated that the

¹⁴⁵ FR

¹⁴⁶ LT

¹⁴⁷ AT, DK, IE (CBI), IE (Pensions Authority), IS, MT, PT

¹⁴⁸ FI, LT (Chairman), LV, RO, SI

¹⁴⁹ BE (FSMA), BE (NBB), CZ, DE, LT (Board Members), LU, NL

¹⁵⁰ IT (COVIP), IT (IVASS)

¹⁵¹ AT, BE (FSMA), BE (NBB), BG, CY (ICCS), CY (RIORP), CZ, DE, DK, EE, EL (Bank of Greece), EL (Ministry of Labour and Social Affairs), ES, FI, FR, HR, HU, IE (CBI), IE (Pensions Authority), IT (COVIP), IT (IVASS), LI, LT, LU, LV, MT, NL, NO, PT, SE, SK, SI

legislation in force does not offer legal protections¹⁵² or that it affords only limited legal protections¹⁵³. In one country¹⁵⁴, in civil actions, the authority in the first place - and subsequently the State Treasury - may be held liable for damage inflicted by the authority (however the authority and persons carrying out banking supervision activities are not liable for damage resulting from legitimate actions or omission of action connected with supervision over banking activities). One authority¹⁵⁵ mentioned that a recently adopted law provides that costs incurred by legal proceedings initiated against the Board members or against its staff are supported by the authority if the judicial bodies find the fulfilment or omission of the fulfilment by these people, in good faith and without negligence of any act or fact in connection with exercising, in accordance with the law, the attributions of supervision and control.

91. Out of the 32 authorities that reported that adequate legal protections for the bona fide discharge of the authority's functions and powers are afforded, differences emerge with regard to the type of legal protections (e.g. immunity from personal civil liability toward the injured party and/or financial support by the authority), and to whom and in which cases such legal protections apply. One authority¹⁵⁶ did not elaborate on the legal protections afforded to the head and members of the governing body of the authority, as well as its staff. One¹⁵⁷ of them only mentioned that the above-mentioned persons are in general subject to labour laws.

92. In particular, on the issue of personal liability for damages caused to an injured party, seven authorities¹⁵⁸ reported that an even more general discharge than a 'bona fide' discharge applies pursuant to national legislation, as liability for damages caused in the exercise of supervision only lies with the authority whereas the authority's employees or members of the governing body do not bear personal liability (except for cases of criminal liability discussed below). In particular, one authority¹⁵⁹ indicated that the domestic legislation is based on the principle that the State or the public authority concerned may be held responsible for the unlawful or negligent conduct of its civil servant and therefore personal liability for particular civil servants is in practice non-existent.

93. Fifteen authorities¹⁶⁰ stated that, according to national legislation, the members of the governing body (including the chairman) and its staff are not accountable for the bona fide discharge of the authority's functions and powers, but they are liable for damages in other

¹⁵² IS, RO. In IS, the NCA is liable for loss or damages caused by the banks employees in the course of their employment. However, anyone who seeks financial compensation for an alleged infringement caused by the banks employees is not barred from bringing a legal action personally against the banks employees. Similarly, anyone can file a claim for the banks employees for alleged criminal infringements to the police. As evidence of this situation, such cases have been brought against the banks employees. In neither situation do the banks employees have any claim against the bank for financial support for legal defense in court or payment of compensation.

¹⁵³ PL

¹⁵⁴ PL

¹⁵⁵ RO

¹⁵⁶ SE

¹⁵⁷ EE

¹⁵⁸ BG, CZ, DK, EL (Bank of Greece), HU, NO, SK

¹⁵⁹ NO

¹⁶⁰ BE (FSMA), BE (NBB), EE, HR, IE (CBI), IE (Pensions Authority), IT (COVIP), IT (IVASS), LI, LT, LV, MT, NL, PT, SI

circumstances. For example, they are liable when it is proved that the damages are the consequences of (i) wilful misconduct¹⁶¹; (ii) gross negligence¹⁶², (iii) fraud¹⁶³, (iv) bad faith¹⁶⁴, (v) deceit¹⁶⁵ and/or (vi) when members of the management caused damages wrongfully by unlawful behaviour¹⁶⁶. One NCA mentioned that liability charges would require that significant official duties were violated and (cumulatively) that the damages are not attributable to breaches of duty or regulation by a supervised person or entity¹⁶⁷. Another authority¹⁶⁸ reported that an official is protected for the discharge of actions taken with due care, applying a standard of reasonable care expected of an official. Please note that some of the said authorities¹⁶⁹ also reported that the authority itself is not liable for damages caused by an act or omission in the discharge of the authority's functions and powers save in the event of gross negligence¹⁷⁰, wilful misconduct¹⁷¹, fraud¹⁷² and/or bad faith¹⁷³ and/or significant violations of official duties¹⁷⁴. One authority¹⁷⁵ noted that, although the judicial authority is ultimately responsible to sanction misbehaviour and provide for compensation of damages suffered by persons injured by the authority's staff, the authority itself can always adopt administrative measures in case of misbehaviour of its staff.

94. A few authorities reported that under national legislation responsibility (addressee for claims brought by the injured party) for the performance of the authority's official duties rests in the first place with the Federal Government¹⁷⁶ or with the State or the authority the civil servant is employed by¹⁷⁷, which however are entitled to demand reimbursement from the authority's bodies

¹⁶¹ HR, IT (COVIP), IT (IVASS), LT, MT, NL, PT, SI

¹⁶² BE (FSMA), BE (NBB), HR, IT (COVIP), IT (IVASS), LT, NL, PT, SI

¹⁶³ BE FSMA, BE (NBB), IT (COVIP), IT (IVASS)

¹⁶⁴ IE (CBI), IE (Pensions Authority), IT (COVIP), IT (IVASS), LV

¹⁶⁵ IT (COVIP), IT (IVASS)

¹⁶⁶ EE

¹⁶⁷ LI

¹⁶⁸ FI

¹⁶⁹ BE (FSMA), BE (NBB), IE (CBI), IE (Pensions Authority), LI, NL

¹⁷⁰ BE (FSMA), BE (NBB), NL

¹⁷¹ NL

¹⁷² BE (FSMA), BE (NBB)

¹⁷³ IE (CBI), IE (Pensions Authority)

¹⁷⁴ LI (a cumulative condition is that damages are not attributable to breaches of duty or regulation by a supervised person or entity)

¹⁷⁵ IT (IVASS)

¹⁷⁶ AT

¹⁷⁷ DE

or employees¹⁷⁸ or to have recourse against the civil servants¹⁷⁹ in cases official duties were breached with gross negligence or intentionally (the two authorities specified, respectively, that liability for the discharging of duties in slight negligence or in good faith is excluded). Two of these authorities¹⁸⁰ reported that their liability is limited as it performs its functions and exercises its powers exclusively in the public interest. For one NCA¹⁸¹ this means that it cannot be liable to third parties, except in cases of an abuse of authority.

95. Eight authorities¹⁸² reported mechanisms – such as for example insurance contracts, loans/allowances and/or financial guarantees - under which financial support is afforded by the authority to its employees and/or to members of its governing body in the context of proceedings initiated by third parties against them for facts or omissions relating to or arising from the discharge of their duties or functions. Some of those authorities specified that the authority is responsible for legal protection and the costs thereof only on certain conditions, e.g. if the act or decision was taken by the staff or board member within the course of their functions and in good faith¹⁸³ or unless the official or employee has acted through wilful misconduct¹⁸⁴. Interestingly, four authorities¹⁸⁵ expressly indicated that the authority can provide support to former employees/officials as well. A few authorities¹⁸⁶ stated that they reserve the right to take actions deemed necessary, including seeking restitutions of funds, depending on the outcomes of the official liability lawsuit.

96. Only a few authorities provided specific information on criminal liability. For one NCA¹⁸⁷ it was indicated that the authority's employees and members of the governing body don't bear pecuniary liability, however they bear criminal liability if there are evidences that they have committed a crime – in this case their liability depends on the crime committed and the envisaged sanction. Another NCA¹⁸⁸ mentioned that criminal sanctions apply against the authority's employees for actions beyond the usual and proper exercise of their profession. Another authority¹⁸⁹ reported intentional or negligence misconduct is punishable by the criminal code and that a duty to compensate damages applies only in case of intentional misconduct. One authority¹⁹⁰

¹⁷⁸ AT

¹⁷⁹ DE

¹⁸⁰ AT, DE

¹⁸¹ DE

¹⁸² AT, CZ, DE, FR, IT (COVIP), IT (IVASS), LT, MT

¹⁸³ ES

¹⁸⁴ MT

¹⁸⁵ ES, IT (IVASS), LT, MT

¹⁸⁶ DE, LT, MT

¹⁸⁷ BG

¹⁸⁸ DK

¹⁸⁹ FI

¹⁹⁰ PL

reported that the legal protection of the chair, deputy chairs and staff against criminal charges is very limited (for example they may be subject to private accusation for defamation or insult e.g. in relation to publication of warnings or sanctions).

97. Apart from the legal protection of staff in the exercise of their functions, an element for further investigation is the safe working environment for the staff of the authority. We have seen examples where external pressure, in different forms, has been exerted on the staff, which could also impact the independence.

2.3.3 COOLING OFF PROVISIONS

98. Cooling-off provisions, intended as restrictions for leaving staff or board members pursuing professional activities in the regulated sector¹⁹¹, could contribute to enhance personal independence by reducing the risk of conflict of interests and industry's interference.

99. In particular, OECD noted that "Cooling-off periods can contribute to signaling and promoting a culture of independence and mark a clear boundary between industry and the regulator." At the same time, however, OECD noted cooling-off periods "can also create perverse incentives in limiting the attractiveness of positions for experienced industry experts (or limiting the pool to end-of-career experts) and attract civil servants (who could potentially return to their positions but could also be more prone to pressures from the executive). Some of these perverse incentives can be minimised by having some compensation during the cooling-off period, which is the case for some regulators"¹⁹².

100. With regard to the duration of cooling-off restrictions, the Good Practices Guide prepared by the World Bank, OECD and UNODC¹⁹³ states that, "*When considering the length of cooling-off periods, core factors to consider include whether the time lengths are fair, proportionate and reasonable, considering the seriousness of the potential offence. Tailoring the duration of restrictions is also necessary depending on the type of problem area and level of seniority*".

101. A variety of approaches to cooling-off periods at national level in relation to both the notice period and the period after leaving the service is observed. Indeed, if most NCAs (but not all), have cooling off rules in place, either in application of national law or further to own initiatives, their scope of application and duration varies significantly.

102. Whereas the majority of NCAs seems to apply conflict of interest rules during the notice period for their staff and/or members of the governing bodies when these are not part of staff, seven NCAs¹⁹⁴ do not have specific cooling off rules for the notice period. Six NCAs¹⁹⁵ indicated that while they do not have a separate set of rules on notice period, they apply the generic rules on

¹⁹¹ NCAs that apply solely restrictions on the use of confidential information after leaving the authority are considered as not having specific cooling-off restrictions on activities for the purposes of the analysis.

¹⁹² OECD, Being an Independent Regulator, The Governance of Regulators, OECD Publishing - 2016, Paris, <https://doi.org/10.1787/9789264255401-en>

¹⁹³ Preventing and Managing Conflicts of Interest in the Public Sector GOOD PRACTICES GUIDE- Prepared at the request of the G20 Anticorruption Working Group by the World Bank, OECD and UNODC, July 2020.

¹⁹⁴ DK, IE (CBI), IS, LI, LV, SI, RO

¹⁹⁵ CZ, EL (Bank of Greece), HU, LT, LV, PL

conflicts of interest that cover the entire period of employment. Eight NCAs¹⁹⁶ imposed restrictions during a notice period for leaving staff and/or members of the governing bodies in the past five years.

103. Most NCAs foresee restrictions on their former staff and/or members of the governing bodies (when they are not part of staff) after they have left their position. Three NCAs¹⁹⁷ noted that the commissioners and managers are subject to a 2-year mandatory cooling-off period which is neither remunerated nor compensated. One NCA¹⁹⁸ mentioned that there is no monetary compensation, neither for board members, nor for staff members. Some NCAs¹⁹⁹ responded that they do not have such restrictions.

2.4. ACCOUNTABILITY AND TRANSPARENCY

104. For supervisory independence, transparency is critical to promote confidence and trust by other NCAs and the public.

2.4.1 PUBLIC TRANSPARENCY

105. All the NCAs responded that they ensure the public transparency through the publication of certain documents such as the annual report, the financial statements.

106. The common practice reflected in the responses received from the NCAs is the publication of the annual report on their website²⁰⁰.

107. Other good practice identified among 22²⁰¹ NCAs is to ensure the transparency of the financial statements, and, for four²⁰² of these NCAs, also the budget, while eighteen²⁰³ NCAs make public their strategic plan/objectives.

108. Twenty-seven²⁰⁴ NCAs disclose on their website the sanctions/measures against the supervised entities. For one NCA²⁰⁵ the disclosure of sanctions on its website is effected on an ad hoc basis, depending on the subject matter at hand and as provided for in the relevant provisions.

¹⁹⁶ BE (FSMA), EE, FI, LI, MT, NL, NO, SE

¹⁹⁷ CY (ICCS), CY (RIORP), IT (IVASS)

¹⁹⁸ FR

¹⁹⁹ FI, IS, LI, RO

²⁰⁰ AT, BE (FSMA), BE (NBB), CZ, DE, DK, EE, EL (Bank of Greece), FI, FR, HR, HU, IE (CBI), IE (Pensions Authority), IS, IT (COVIP), IT (IVASS), LI, LT, LU, LV, MT, NL, NO, PL, PT, RO, SI, SK

²⁰¹ AT, BE (FSMA), CZ, DE, DK, EE, EL (Bank of Greece), FR, HR, HU, IE (CBI), IE (Pensions Authority), IT (COVIP), IT (IVASS), LV, LT, MT, NL, NO, PT, SI, ES

²⁰² DE, IT (COVIP), IT (IVASS), PT

²⁰³ AT, CZ, DE, DK, EE, ES, FR, HR, HU, IE (CBI), IE (Pensions Authority), IT (IVASS), LT, LV, MT, NL, PT, SI, RO

²⁰⁴ AT, BE (FSMA), BE (NBB), BG, CY (ICCS), CZ, DE, DK, EE, EL (Ministry of Labour and Social Affairs), FI, FR, HR, HU, IE (CBI), IE (Pensions Authority), IS, IT (COVIP), IT (IVASS), LI, LT, LV, NO, PL, PT, RO, SI

²⁰⁵ EL (Bank of Greece)

109. One²⁰⁶ NCA publishes official documents, in line with the statutory framework, but no further details were provided.

110. Twenty-one²⁰⁷ NCA publish on their website information on the regulations they adopt.

2.4.2 ACCOUNTABILITY TO GOVERNMENT OR OTHER AUTHORITIES

111. Accountability to government or other authorities is a key in understanding the way of working of a supervision system. This section only covers the a posteriori accountability.

112. In general NCAs have a duty to report on their activities to a government entity and/or democratic assembly. This reporting takes frequently the form of the drafting of an annual report, report that is later submitted either to one or several members of the Government and/or presented to the Parliament.

113. All reporting authorities are requested to publish and make available to other public bodies an annual or bi-annual report. The publication of an annual report is the most common way of reporting to other authorities and also to inform the public about the activities carried out by the NCA during the previous year. The annual report shall be submitted to or approved by Ministries for nine NCAs²⁰⁸ and/or presented to the Parliament for twenty-six NCAs²⁰⁹.

114. Some NCAs mention that their annual accounts or their annual report are approved by an independent committee or an external audit. Others indicate that their activities are monitored by a supervisory or audit committee or that their annual accounts are subject to the control and the approval of the national court of auditors.

115. Regarding the accountability to democratic assemblies, twenty-five NCAs²¹⁰ - mention their accountability to the national Parliament - by hearings of the Chairperson or of members of the steering committee, by answering questions from the Parliament or special commissions or by submitting reports for information, discussion or approval.

2.4.3 INDEPENDENT REVIEW OF REGULATOR'S DECISIONS

116. An appropriate scrutiny and review, like those enabling the judicial review of licensing, authorisation or enforcement related to authorities' final decisions are examples of authority accountability. In that sense, the following detailed information should be used as a comparison exercise between the information provided by the different authorities participating, without

²⁰⁶ SE

²⁰⁷ AT, BE (FSMA), BE (NBB), BG, CY (ICCS), CZ, DE, EL (Bank of Greece), EL (Ministry of Labour and Social Affairs), ES, FI, FR, HR, HU, IT (COVIP), IT (IVASS), LT, LV, PT, RO, SI

²⁰⁸ DK, FI, IT (COVIP), IT (IVASS - transmits a report on its activity simultaneously to the Parliament and the Government), LI, LU, MT (the annual report is presented in Parliament through the Minister. No Minister approval is required either), PL (KNF presents the report to the Prime Minister), PT

²⁰⁹ AT, BE (FSMA), BE (NBB), BG, CY (ICCS), CZ, EE, EL (Bank of Greece), ES, FI, FR, HR, HU, IE (CBI), IE (Pensions Authority), IS, IT (COVIP), IT (IVASS), LI, LT, LV, MT, PT, RO, SI, SK

²¹⁰ AT, BE (FSMA), BE (NBB), BG, CY (ICCS), CY (RIORP), CZ, EL (Bank of Greece), EL (Ministry of Labour and Social Affairs), ES, FR, HR, HU, IE (CBI), IE (Pensions Authority), IS, IT (COVIP), IT (IVASS), LT, LV, MT, PT, RO, SI, SK

prejudice to the factual existing legal and constitutional reality in the different jurisdictions, which de jure foresees mechanisms and structures with greater development and complexity than those discussed here below.

117. In all jurisdictions, national regulations require regulatory authorities to be subject to judicial review. The NCAs indicate that decisions taken by their authorities are subject to judicial procedures with the relevant courts, as appropriate.

118. The vast majority of the NCAs reported that their decisions can be appealed in administrative proceedings. Specifically, 33²¹¹ NCAs state that NCAs decisions are subject to judicial review by administrative procedures in accordance with their relevant national law.

119. In addition, some authorities²¹² mentioned civil proceedings for the review of an authority decision. Moreover, four jurisdictions²¹³ indicated in their responses that certain circumstances are under the remit of criminal courts, e.g. when the investigation or proceeding involves a possible violation of criminal law.

120. It should be noted that three NCAs²¹⁴ mention an alternative dispute resolution mechanism provided in their jurisdictions. It is observed²¹⁵ that for two²¹⁵ of them, that the decisions issued by such non-mechanisms can be appealed to the judicial courts.

121. Specifically, regarding alternative dispute resolution mechanism, one NCA²¹⁶ states that “decisions can be appealed to the Business Appeals Board and/or the judicial courts”. Another NCA²¹⁷ specifies that certain of its decisions are subject to review by IFSAT²¹⁸ when appealed to that body. One NCA²¹⁹ noted the possibility to file an appeal with the Financial Services Tribunal within 30 days from the receipt of the decision, whereas another NCA²²⁰ mentioned the same timeframe, but an appeal procedure with the Permanent Secretary of the Ministry of Finance

122. On the other hand, the accountability structures should ensure that persons affected by NCAs decisions are entitled to have a hearing by the authority prior to the decision being taken.

123. NCAs indicated that they allow representations before they make a decision. Representations could be made by formal allegations formulated either orally, in written or both and, means of defence which may influence such decision can be used. The legal basis for

²¹¹ AT, BE (FSMA), BE (NBB), BG, HR, CY (ICCS), CY (RIORP), CZ, DE, DK, EE, EL (Bank of Greece), EL (Ministry of Labour and Social Affairs), ES, FI, FR, HU, IE (CBI), IE (Pensions Authority), IS, IT (COVIP), IT (IVASS), LT, LI, LU, LV, NL, NO, PL, PT, RO, SE, SI, SK

²¹² BE (FSMA), BE (NBB), DE, IE (Pensions Authority), IT (IVASS)

²¹³ AT, IT (IVASS), HR, IE (Pensions Authority)

²¹⁴ DK, IE (CBI), MT

²¹⁵ DK, IE (CBI)

²¹⁶ DK

²¹⁷ IE (CBI)

²¹⁸ Irish Financial Services Appeals Tribunal

²¹⁹ MT

²²⁰ CY (ICCS)

representations differs depending on jurisdictions. Most NCAs refer to the general proceeding foreseen in national administrative procedure acts, whereas some NCAs to provisions contained in the pertinent sectoral regulations or the authority's internal written procedure.

3. CONCLUSION

124. For each of the four key aspects of NCAs independence, i.e. operational, financial, personal independence as well as accountability and transparency, we observe that NCAs provided a large variety of responses. For each of these aspects we see a general trend but also some differences in the approach of NCAs. In order to foster supervisory independence, it will be important to assess more closely the approaches and practices considered as efficient in supporting supervisory independence in order to incentivise changes. The detailed criteria for assessment and tools such as Peer Reviews will be instrumental for fostering supervisory independence.

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