ECO-SLV-09-233

Comments on Consultation 29-09 Draft L2 Advice on Own Funds - Criteria for supervisory approval of ancillary own funds	
Name company: CEA	
Reference	**Comment**
Introductory remarks	The CEA welcomes the opportunity to comment on the Consultation Paper (CP) No. 29 on Own Funds - Criteria for supervisory approval of ancillary own funds. It should be noted that the comments in this document should be considered in the context of other publications by the CEA. Also, the comments in this document should be considered as a whole, i.e. they constitute a coherent package and as such, the rejection of elements of our positions may affect the remainder of our comments. These are CEA's views at the current stage of the project. As our work develops, these views may evolve depending in particular, on other elements of the framework which are not yet fixed.
Key comments	**We strongly believe that an arbitrarily limited approval period is not appropriate**. Continuous re-approval will introduce volatility. We believe that in cases where there have been no material changes in circumstances since the previous supervisory approval of Ancillary Own Funds, then should remain approved. Only when the supervisory authority is informed (or observes) that the ability of the counterparty to pay has been altered, should the approval of ancillary own funds be subject to review. **We are strongly opposed to capital requirements for off-balance sheet assets** recognised as ancillary own funds for the reasons described in our comments to 3.6. While **we agree that a principles-based approach at Level 2** is necessary to reflect the heterogeneity of ancillary own funds, we believe that the approval of certain standardised types of AOF with well known characteristics should be facilitated and harmonised through the use of clearly pre-defined criteria in level 2 as set out in our comments to 3.35. **We are concerned that the time required for the supervisory approval of ancillary own funds may vary from one jurisdiction** to another depending on the ability and the resources of supervisors to assess innovative instruments. We believe that supervisory convergence will be strengthened by setting common time frames for the supervisory approval process and by enhancing transparency of supervisory process (as discussed as part of CP34).
General Comments	The Solvency II Directive proposal adopted by the European Council and Parliament should be the basis for CEIOPS' final advice. For example: "*In line with the eligibility criteria set forth in Article 98, ancillary own funds can cover <u>at maximum</u> two-thirds of the Solvency Capital Requirement, provided that Tier 3 ~~ancillary~~ own funds do not exceed one-third of the Solvency Capital Requirement."*

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Para 3.5	**Both legal and economic considerations are key -** CEIOPS in this introductory paragraph is considering the legal aspect as the key consideration. However later in the paper importance is also given to economic considerations such as the counterparties default risk, delay to pay and its willingness to pay. Thus both legal and economic considerations are assessed, and this should also be emphasised in the explanatory text of the paper: "~~*A*~~ *key consideration**s*** *in assessing this risk ~~is~~ are the legal enforceability of the commitment and the economic considerations with regard to the counterparty*." In addition, we feel that the existing and proven legal certainty of ancillary own fund instruments is minimised when referring to "promises" instead of "commitments". We strongly recommend sticking to the language of the Framework Directive in that respect: "*Ancillary own funds carry the inherent risk that the (re)insurance undertaking does not receive the amount of basic own funds that the counterparty has ~~promised~~ committed to provide*."
Para 3.6	**We are strongly opposed to capital requirements for off-balance sheet assets recognised as ancillary own funds -** We agree with the interpretation that the Level 1 text keeps ancillary own funds off the solvency balance sheet until they are paid in or called up. Normally the AOF received when called would be in cash so no adjustment to risk would be incurred. Therefore once paid in or called up, the assets recognised on the balance sheet are not subject to a capital requirement in most cases in practice. As own funds are subject to tier limits introduced by the Level 1 text there is already an allowance being made for the fact that AOF are of lower quality than tier 1 capital. If in addition to this, capital requirements were to be imposed on AOF, there would implicitly be a double counting of the uncertainty inherent in these instruments. These instruments should be valued on economic basis which recognises risks such as counterparty default risk on an expected value basis. Further allowance for counterparty default risk or any other risks bared by these instruments, above the one already made on an expected value basis, is made by limiting the amount of AOF that can be used as eligible elements of capital to cover the SCR through the tiering system as defined in Level 1.
Para 3.8	A comparison between Solvency I and II with respect to the treatment of ancillary own funds should take into account of the differences in the balance sheet valuation and capital requirements. The blunt comparison of the treatment of ancillary own funds made between in Solvency I and II is a shortcut. In Germany for example, QIS4 showed that the SCR for non-life insurers was three times higher than the solvency margin under Solvency I. If 1/3 of the SCR has to be covered by tier 1, Solvency II is quite stricter as ancillary own funds will be only allowed to qualify for tier 2 and tier 3. Furthermore, it should be noted that Solvency I gives only a very limited recognition of AOF.

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Para 3.9	The need for additional own funds does not only arises when faced with a loss but more generally when the risk exposure of the undertaking increases: "*Ancillary own funds are generally called up when a (re)insurance undertaking is in need of additional funds, frequently as a result of losses or of an increase of the risk exposure of the undertaking".*
Para 3.13	See comments to 3.39 and 3.40
Para 3.14	It is not clear what is meant by "source evidence" In addition, we feel the wording does not reflect the Level I text (Art. 89 (3)): "*The (re)insurance undertaking's request for approval of either an amount of ancillary own funds or a method to determine this amount requires adequate detailed information ~~that can be supported by reliable source evidence~~.*"
Para 3.15 – 3.19	**We fully support a principles-based approach -** However, the approval of certain standardised types of AOF with well known caracteristics should be facilitated and harmonised through the use of clearly pre-defined criteria. (see comments to 3.35)
Para 3.21	**We are concerned that in some cases the supervisory approval of ancillary own funds will take too long -** We do not see the reason why "at this stage" it is not possible to set a time frame for granting approval. It seems that CEIOPS is not sure that all supervisory authorities will be able to comply with such a requirement. This issue is addressed in Recital 13 a + Art. 27: "*Member States are required to equip their supervisory authorities with the necessary resources. The development of Level II implementing measures is the right place to think about procedural aspects of the approval process*." We do not agree with CEIOPS' intention to revisit the issue of an appropriate time frame "*once supervisory authorities have gained more experience*". Instead we suggest the following: • Supervisory authorities should do everything to reach a decision on the application as quickly as possible and within one month from the date of receipt of the complete application. This time line appears appropriate to prescribe a maximum time frame in which all supervisory authorities across Europe must grant their approval. It would be not fair if the approval process is excessively more time consuming in one Member State than in another Member State. • If other supervisors concerned will be involved we agree in a longer period of two months for granting approval. • If CEIOPS is referred to in a consultation and mediation process an additional month is appropriate. The suggested prompt timelines is in line with the Framework Directive requirement that supervisory power have to applied in

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	a timely manner (Art. 34 (6): *"Supervisory powers shall be applied in a timely and proportionate manner."*) Non-approval has to be accompanied by full reasoning and any other views expressed by other supervisors concerned or by CEIOPS, if referred to in a consultation or mediation process. We urge CEIOPS to work on a standard form for the application of approval of ancillary own funds. Supervisors should provide undertakings with a check list which documents will have to accompany the standard form to make the application complete. This would contribute to a prompt approval or non-approval within the proposed time line. Supervisors should announce in advance the information from the requesting undertaking they think is needed in granting approval. This would also limit duplication of information gathering in the case that supervisors will obtain information from sources other than the undertaking concerned (e. g. When the counterparty is supervised). Appropriate rules for existing own funds items are necessary to smoothen the transition to Solvency II and avoid overstressing capital markets for investors in reinsurance and insurance undertakings (grandfathering). In the CRD review the Commission proposed transition provisions (Art. 154 (8) and (9)). Although the situations in banking and insurance are different, the rationale is valid here as well.
Para 3.25	**We agree** that ancillary own funds have a different function in the capital component of an insurer's balance sheet compared with that of a bank.
Para 3.27 – 3.32	For QIS4 it was still unclear whether these assets were going to be granted approval under Solvency II. In particular, when the capital requirements were covered already by other own funds, undertakings did not report those items. With regard to the recoverability of supplementary member calls, there is no evidence of these constituting a significant risk in the past. CEIOPS findings (August 2007) as regard supplementary member contributions revealed no explicit concerns ("No noteworthy recovery problems have been reported." respectively "110. There have been some significant unbudgeted calls, but no noteworthy recovery problems."). Reporting on recoverability assumes that ancillary own funds have been called up in the past which has rarely been the case in practice. Therefore, it is understandable that information was not available to QIS4 participants. We disagree with the statement that "undertakings were either not able or willing" to provide feedback on AOF as part of QIS4. The industry has so far demonstrated its willingness to engage in a constructive dialogue with supervisors in general on Solvency II. **delete paragraph**

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Para 3.33	**The room for supervisory and national interpretation should be as limited as possible under level 2 -** Supervisory approval should be based on clear objective criteria. We believe that fixed criteria will lead in legal certainty and convergence of supervisory practice across Europe as regards ancillary own funds. National or case-by-case discretions should be avoided. The wording does not reflect the Level I text (Art. 89 (3)): *"The ~~assessment~~ **approval** of the **monetary** amount of an ancillary own fund item **or the method to determine the amount of an ancillary own funds** that can be included in own funds requires supervisory ~~judgement~~ **criteria**."*
Para 3.34	**We suggest differentiating between the assessment process conducted by the undertaking on a continuous basis prior to seeking for approval on the one hand and the approval process on the other hand -** *"The ~~assessment~~ approval process needs to be flexible enough to allow the supervisory authority to consider market innovations and market conditions."*
Para 3.35	**The advice is not in line with the level 1 text that requires implementing measures "specifying criteria" at Level 2. These Level 2 criteria should enhance convergence in supervisory practices. Criteria should not be "elaborated" as part of Level 3 -** We agree that a principles-based approach at Level 2 is necessary to reflect the heterogeneity of ancillary own funds. However, we believe that the approval of certain standardised types of AOF with well known characteristics should be facilitated and harmonised through the use of clearly pre-defined criteria in level 2: *"The approach to the supervisory approval of ancillary own funds should take a principles-based approach at Level 2~~, allowing room for the criteria below to be elaborated on as part of Level 3 supervisory guidance, should divergent supervisory practices become an issue in practice."~~* We support setting criteria for all ancillary own funds consistently and suggest endorsing the three categories of AOF foreseen in level 1: • **Unpaid share capital or initial fund that has not been called up** - "Unpaid share capital" and "initial fund that has not been called up" are defined via company law and well-known in accounting. The counterparty is considered as owner of the (re)insurance undertaking and is liable up to amount of already paid-in share capital and the not-paid-in share capital. It is involved in the control of that undertaking. A high paid in-quota provides evidence that the commitment to pay in the rest is likely. Such capital items have a fixed nominal value which reflects the loss-absorbency of these items. The amount approved as ancillary funds item should hence be equal to its nominal value (Art. 89 (2)). • **Supplementary members' calls** - Supplementary members' calls are claims of mutual or mutual-type associations against policyholders based on statuary or a contractual basis. The framework directive restricts the recognition of

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	supplementary members' calls as ancillary own funds to supplementary contributions within the forthcoming twelve months. Because of the high number of individual counterparties (policyholders) we expect that approval is not granted for a fixed amount but for a method to determine the amount. Solvency I required supervisory authorities to develop guidelines for granting approval for supplementary members' calls (Art. 17 of 2002/13/EC: "The competent national authorities shall establish guidelines laying down the conditions under which supplementary contributions may be accepted;..."). These could constitute a starting point for the criteria used under Solvency II. • **Other legally binding commitments (including letters of credit and guarantees)** - This category includes different instruments which do not have to be standardized as the items mentioned before. In general an individual assessment of the instrument and the counterparty would be necessary. The assessment of the counterparty might be relatively easily done if the counterparty is supervised. The assessment should be even easier if the counterparty is part of the same group with a single supervisor or a college of supervisors or in groups with centralised risk management according subsection 6 of Title III of the Solvency II directive. We believe this categorisation will enhance the harmonisation of the approval of AOF and reflects CEIOPS advice in 3.21 ("*Approval is highly dependent on the complexity of the commitment and of the assessment of the status of the counterparties involved*.")
Para 3.37	The wording does not reflect the Level 1 text (Art. 89 (3)). The supervisor authority is asked to approve either the amount or the method to determine the amount of ancillary own funds but not both**.** Furthermore, the basis for approval is the application and not the internal documentation of the undertaking. Supervisors should use only other information which is relevant for the approval process. *"The supervisory authority ~~assesses~~ approves either the amounts~~, and, where relevant,~~ or the methods to determine those amounts, on the basis of ~~documentation~~ application and any other information it has which ~~it deems appropriate~~ relevant for the ~~assessment~~ approval process."*
Para 3.38	***delete*** – repeats just the Level I text(Art. 34 (3) or it should be at least restricted to *"further information necessary for granting approval": ~~"The supervisory authority can always request further information from the (re)insurance undertaking."~~*
Para 3.39	**The approval should be granted for the duration of the AOF -** An arbitrarily limited approval period is not appropriate. Continuous re-approval will introduce volatility. We believe that in cases where there have been no material changes in

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	circumstances since the previous supervisory approval, these ancillary own funds should remain approved. Only when the supervisory authority is informed or observes that the ability of the counterparty to pay has been altered, the AOF should be subject to review.
Para 3.40	**Supervisory approval is not an ongoing process but starts with the application and ends with approval or the fully reasoned rejection -** We believe that the company's monitoring of the ancillary own funds and not the supervisor's monitoring should be continuous. If it is continuous for the supervisor, the supervisor will be interfering in the management of the business and will no longer be independent of it. We propose that the approval process is done by supervisors within set time lines. (see comments to 3.21): "~~Supervisory approval is not restricted to one point in time.~~" Furthermore, we believe that the wording of the current advice does not reflect the Level I text (Art. 89 (3)): *"to revise either**...**"*
Para 3.41	The criteria at Level II should take into account of the proportionality principle which does not only apply to smaller undertakings but is based on the nature, scale and complexity of the underlying risks
Para 3.43	Level 2 should not advice undertakings on how to best assess their ancillary own funds items. This recommendation might be included in the explanatory part of the consultation paper. But it seems not appropriate to include it in the advice. ***Delete***
Para 3.44 – 3.46	**The three step process is based on a misunderstanding of the Level 1 text which speaks not of realistic and prudent amounts, but of realistic and prudent assumptions -** The three steps are interrelated and should be seen in conjunction. An integrated approach is deemed more appropriate and could be linked to the criteria set out in the level 2 text. In particular steps 2 and 3 seem redundant. We also notice that the three step approach does not include guidance how to take into account the criteria set forth. The assessment of the amount of own funds should reflect the loss-absorbency and should be based upon prudent and realistic assumptions as required in Art. 89 (2) of the Framework Directive. This means that undertakings and supervisory authorities should not assume in their assessment unlikely scenarios and/or exceptional circumstances. The reduction of the nominal value permitted to be used as available capital can therefore not overcome the contribution of that nominal value to the SCR – standard formula – via the counterparty risk. (see comments to

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	3.6). We note that the proposed three steps approach fails to include the Level 1 text requirement to ascribe to each ancillary own fund an amount which reflects the loss-absorbency of the item*: "~~Step 1.~~ The supervisory authority ascribes to each ancillary own fund an amount which reflects its loss-absorbency and reviews the amount of funds that the (re)insurance undertaking is legally able to call, ..."*
Para 3.44	**Legal enforceability is governed not only by articles of association or contracts but also by the broader legal environment -** ~~Step 1:~~ "... and that is legally enforceable~~, under either its articles of association or in the contracts that govern the commitment to provide funds.~~"
Para 3.47a new	**Supervisory authorities should do everything in their powers to reach a decision on the application as quickly as possible and within one month from the date of receipt of the complete application (see comments to 3.21) -** If other supervisors concerned are involved, a longer period of two months for granting approval is appropriate. If CEIOPS is referred to in a consultation and mediation process an additional month is appropriate (see comments to 3.21): "*The supervisory authority should decide on the application within one month from the receipt of the complete application. If other supervisory authorities concerned are consulted a longer period of two months for the decision is accepted. In the case of a consultation or mediation role of CEIOPS in the decision making process an additional month is appropriate."*
Para 3.47b new	**Transparency of supervisory actions is desirable to help ensure harmonisation across EU member states (see CEA comments to CP34):** *Any decision by the supervisory authorities to reject the application for the inclusion of an ancillary own funds in own funds should be accompanied by the reasons therefore. Any other views expressed by other supervisors concerned or by CEIOPS, if referred to in a consultation or mediation process, should be included.*
Para 3.49	**The definition of liquidity risk is different from that given in Art. 13 (28) of the Framework Directive: "***Liquidity risk means the risk that insurance and reinsurance undertakings are unable to realise investments and other assets in order to settle their financial obligations* when *they fall due"*. The use of a wider liquidity risk definition is inappropriate in this context, and the paper should be rather explicitly dealing with: "the risk of delays in payment of counterparties".
Para 3.50	**We do not think that using the SCR counterparty risk module in assessing the default risk of ancillary own funds is appropriate in this case -** The counterparty risk module was not designed and calibrated to be used here. Indeed the SCR module is not meant to be used for valuation purposes but rather for capital requirements covering 1/200 year events over 1 year. (see comments to 3.6).

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	In addition, the counterparty risk module is not adapted to policyholders in the case of supplementary member's calls: *"The supervisory authority ~~assesses~~ evaluates the probability of default of the counterparty and the loss given default. ~~One possible way of performing this assessment could be to use the SCR counterparty risk module in those cases where the counterparty is subject to a credit rating, assuming there is no other factor that could affect the default risk.~~ The supervisory authority could use ~~other~~ appropriate approaches as they are used by the requesting undertaking."*
Para 3.51	(External) credit ratings have to be considered, if available, but overreliance on them is undesirable. Furthermore, we understand "*prompt transfer*" here in the sense that the transfer is done if needed under the conditions agreed between the undertaking and the counterparty.
Para 3.51a new	For the purpose of ensuring transparency of supervisory practices, criteria other than the ones listed should be communicated to the requesting undertaking: The supervisory authority should communicate criteria other than the ones listed to the requesting undertaking.
Para 3.52	**See comments to 3.49** *"The supervisory authority bases its approval on assessment of delays of the payment of counterparties ~~assesses the liquidity position of the counterparty~~ applying the following criteria:"* Even though in the directive the calling in and the transfer of assets is not required to be immediate, it seems reasonable to assess the time horizon and conditions of the expected flows of funds. We understand "prompt transfer" here in the sense that the transfer is done if needed under the conditions agreed between the undertaking and the counterparty.
Para 3.54	**The Level 2 text should not contain examples -** We suggest keeping the advice short and putting examples in the explanatory text, if necessary. We are concerned that CEIOPS makes reference to certain national specificities without providing an analysis of situations in other Member States. *"The supervisory authority assesses the existence of incentives and motivations for the counterparty to pay. In some jurisdictions, the non-payment of a call triggers losses to the counterparty. ~~For example, in Spain, a shareholder loses economic rights (dividend, rights issue) and voting rights in the case of non-payment of a capital call.~~ Incentives and motivations also include reputational and other adverse consequences of non-payment. ~~Another example is the case of Professional and Indemnity Associations, where insurance is mandatory and will be withdrawn if a supplementary call is not honoured, and where the associations have "power of arrest" over members' assets. In contrast, the relationship between~~*

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	~~*other (re)insurance undertakings and their counterparties may be less certain."*~~
Para 3.56	The reason for the distinction between corporate and non-corporate counterparties is unclear to us.
Para 3.57	This paragraph does not deal with the "*willingness to pay*" but with "*delays in payment*" as defined in 3.49. It should therefore be moved to 3.52.
Para 3.58	**We do not agree with "assessing the legal resources" of an undertaking -** This could imply that small and medium undertakings with a limited legal function are penalised. It should be taken into account that external lawyers may be commissioned to support undertakings for the enforcement of legally binding commitments, if necessary. We object a "fit & proper" assessment of persons responsible for the enforcement of a call.
Para 3.59	**Sufficient data in practice will often be unavailable or difficult to obtain** - Calling in capital is rarely done. Data is limited or not publically available. We think that statistical assessments should therefore not be a requirement. The level I text foresees the use of information to the extent that this information can be reliably used to assess the expected outcome of future calls. In general, we are concerned that supervisors will demand historical data which might not be available. In some countries, supplementary member calls are so rare that data may be outdated: *"The supervisory authority assesses whether the (re)insurance undertaking has used information on the outcome of past calls which can be reliably used to assess the expected outcome of future calls of that undertaking* ~~*sufficient data to allow a statistical assessment*~~*."* Instead, undertakings may consider using data used in local GAAP accounting for the adjustment of yearly premium amounts, (so called "general provision for doubtful debts"), as a reliable source of information for assessing the default risk in payments by policyholders in the case of supplementary members called in cases where these are to be collected with processes broadly similar to those used for premiums. In accounting such adjustments are based on average past experience and are audited. Furthermore, a starting point for more guidance on the approval of supplementary member calls may be to assess what is currently done at national levels. We agree with not approving unlimited amounts if this does mean that a certain amount is approved.
Para 3.62 - 3.63	**Re-approval should be less demanding than the initial approval and should avoid creating undue volatility -** We disagree with the idea of re-approval of ancillary on funds as it introduces uncertainty and volatility into these funds as explained in our comment to 3.39. The approval should be granted for the duration of the AOF. Only when the supervisory is informed or observes that the ability of the counterparty to pay has been altered, the AOF should be subject to review.

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	Potential pro-cyclical effects of the review process have to be taken into account as part of the Pillar II review and the supervisory ladder of intervention created for that purpose. *"Supervisory approval of either of the amount of each ancillary own fund item for inclusion in own funds, or of the method to determine the amount, ~~and of the amount determined in accordance with that method for a specified period of time~~ should be subject to supervisory re-review where the supervisory authority is informed, or observes, that the ability and willingness of the counterparty to pay has, ~~or may have,~~ altered significantly since approval was granted. In other words, the supervisory authority has the power either to revise the amount, or the method, for which it has previously granted approval taking into account of macro-prudential implications of this review, e. g. pro-cyclic effects."*
Para 3.64	**Disclosure requirements should be dealt with as part of the advice on the implementing measure on public and supervisory disclosure -** The proposed reporting are far reaching and interfering with the implementing measures in Art. 35 (6) (supervisory reporting) and Art. 55 (public disclosure). CEIOPS should not make isolated recommendations concerning public disclosure in the area of ancillary own funds. Similarly, we do not think that is appropriate to define possible supervisory reporting requirements on ancillary own funds without aligning them with possible supervisory reporting requirements on other own funds. We do not agree that public disclosure should be an ex-ante criteria for approval of ancillary own funds, but we agree that high level information on own funds as set out in Art. 50 (1) e) i has to be provided in the annual solvency and financial condition report, i. e. a description of the company's capital management which includes the tier structure and the quality of own funds. The examples mentioned for information to be disclosed are far from being legally deliverable, far from being feasible in practice and far from being relevant in such detail for external stakeholders. We invite CEIOPS not to override the principle of confidentiality as set out in Art. 52 (1). Requiring disclosing the names of each policyholder which has to provide eventually supplementary member calls (and the amount) conflicts with data protection rules. For example the requirement to publically disclose detailed information on ancillary own funds and, in particular, "*the methodology applied in arriving at each amount*" is inappropriate. We believe that, the methodology agreed between the undertaking and the supervisor can be quite difficult to understand outside the areas/departments involved. The disclosure to the public should be purely qualitative, without formulas or reference to mathematical and/or statistical analysis.