

Insurance Europe views on EC proposals on establishment of an Insurance Recovery and Resolution Directive

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General comments

The EC's proposals to implement a framework for recovery and resolution go beyond what is necessary given the extensive safeguards that are already in place to protect policyholders. The EC should strive to achieve a framework which is aligned with internationally agreed standards and should take care not to overburden insurers with unnecessary and costly requirements.

In view of the specific characteristics of insurance business and the existing instruments under Solvency II, there is no need for such an extensive Insurance Recovery and Resolution Directive (IRRDR).

Applying a banking recovery and resolution style regime to the insurance industry without considering insurance specifics is not appropriate and could undermine the different resolution process of a failing insurer. For example, unlike banks, insurers do not regularly have to be resolved literally "overnight" as they can continue to rely on a steady premium income, assets remain available and their obligations towards policyholders become due over a longer period. This is because just a few, if any, insurers provide critical functions for which there is a need to ensure a rapid transfer and continuation. In addition, in contrast to banks there are very limited financial stability risks of failing insurers.

The future IRRDR to be implemented in the EU should fully align with international standards originating from the International Association of Insurance Supervisors (IAIS). In the interest of international competitiveness, it should not goldplate these standards to the detriment of the European insurance industry.

Insurance Europe has identified the following key areas of concern with the EC's proposals for an IRRDR and continues to assess the impact of the proposals on European insurers with its members.

Scope

The EC's proposal has a very broad scope which is generally conflicting with the targeted approach taken at international level. The proposals would create a disproportionate operational and cost burden on the EU insurance sector.

The requirement for any undertaking (group or solo), to prepare pre-emptive recovery plans or be subject to resolution planning should be linked to the resolution objectives set out in Article 18, notably whether they are essential to the continuity of critical functions. The scope should be determined via a set of risk-based criteria related to their size, business model, risk profile, interconnectedness, substitutability and extent of their cross-border activity.

In principle, the industry agrees to primarily take a group approach. However, automatically including all insurance groups into the scope of the framework is neither sensible nor proportionate and the requirements for groups should be determined in the manner discussed above. Undertakings that are part of a group subject to recovery planning should not be required to develop subsidiary level recovery plans. A group recovery and resolution planning approach should also be considered for non-EU groups, including those that operate subsidiaries in the EU.

The EC's proposal to impose minimum national market coverage for recovery and resolution planning of 80% and 70% respectively is not related to the resolution objectives or the provision of critical functions and is not supported by the industry. If maintained, the minimum coverage should be substantially reduced in most markets or left to the discretion of Members States.

Safeguard integrity of supervisory framework

The EC proposals foresee a large number of new powers for supervisory and resolution authorities. While the industry recognises the need to create sufficient powers for authorities to carry out their duties, many of the proposals would give the European Insurance and Occupational Pensions Authority (EIOPA), the national supervisory authorities (NSAs) and newly established resolution authorities very intrusive and arbitrary powers.

The EC proposes powers for resolution authorities to address or remove impediments to resolvability and to put a company into resolution before a breach of the Minimum Capital Requirement (MCR). This provision contradicts the supervisory intervention ladder under Solvency II and undermines the integrity of the NSA and potential recovery strategies. The resolution authority should only be able to intervene where the MCR is breached and the NSA starts procedures to withdraw authorisation of an insurer.

The new early intervention powers for supervisors which would be implemented as part of changes to Article 141 of Solvency II (along with their equivalent measures foreseen in the proposals to changes the Solvency II Directive) would give NSAs power to intervene at still sound undertakings which fulfil all financial requirements. This would also effectively change the current supervisory ladder of intervention.

It is also necessary to fully clarify the mandate and distinction of mandate between the NSA and the independent resolution authority.

Shift of competence to EIOPA

The proposals would also result in a significantly increased role for EIOPA in the development and oversight of the recovery and resolution regime. The increased role of EIOPA is likely to result in a shift in the balance of power between it and the NSAs/resolution authorities. The industry is concerned that this shift will result in an imbalance between the group supervisory approach and the IRRD approach. Instead of overseeing the regime, EIOPA should continue to oversee NSA/resolution authorities carrying-out their duties and facilitate consistency and convergence. This will be particularly important as the implementation of the IRRD will be new to the majority of Member States.

Central elements of the IRRD which are foreseen to be developed by EIOPA in the regulatory technical standards (RTS), implementing technical standards (ITS) and guidelines should instead be included in the Level 1 text, particularly where the empowerment includes strategic or political decision where co-legislators need to be involved.

Recognition of mutual undertakings

The IRRD should better reflect the mutual business model. The requirements and especially the resolution tools in the IRRD are not all suitable for mutual insurance undertakings and should be modified to take this aspect into consideration. For mutuals there are no shareholders that can bear first losses, only policyholders (this is also true for other legal forms of undertakings without shareholders).

1. Scope, definitions and authorities (Art. 1- 3)

The definition of 'ultimate parent undertaking' is not clear. Insurance Europe supports a strict alignment on Solvency II definition as proposed by the EC in the new article 13.15. The proposed text refers to "a parent undertaking in a Member State of a group which is subject to group supervision in accordance with Article 213(2), points (a) or (b), of Directive 2009/138/EC, which is not a subsidiary undertaking of another insurance or reinsurance undertaking, an insurance holding company or a mixed financial holding company that is authorised and set up in any Member State". The first part of the definition refers to "in scope of SII" (i.e. Article 213(2) of Directive 2009/138/EC) while the second part states "which is not a subsidiary undertaking of a mixed financial holding company". It is therefore not clear how to handle insurance undertakings that are part of a mixed financial holding company (bank-led or insurance-led).

The definition of 'ultimate parent undertaking' also doesn't include parent undertakings that are headquartered in a third country even if from a jurisdiction which is fully equivalent to Solvency II and/or provides similar safeguards for policyholders in terms of the recovery and resolution of undertakings, based on local implementation of relevant international standards (such as the Financial Stability Board Key Attributes of Effective Resolution Regimes and International Association of Insurance Supervisors Common Framework for the Supervision of Internationally Active Insurance Groups).

The proposed definition of a low risk profile undertaking group, set out in the EC's proposed Article 213a of its Solvency II proposals should be included in the text as follows:

1. For the purposes of this Directive, the definitions laid down in Article 212 **(1)**, points (a) to (d) and (f) to (h) **and Article 213a** of Directive 2009/138/EC shall apply.

Finally, the European Commission has decided not to propose a harmonised Insurance Guarantee Scheme (IGS). Therefore, it is not clear why in the context of the IRRD a definition of IGS needs to be introduced. This task is up to the national legislators. It is recognised that Member States may need to clarify different roles of resolution and IGS within their jurisdictions but the IRRD should not go beyond that possibility/necessity.

2. Simplified obligations (Art. 4)

Insurance Europe highlights the high importance of a proportionate application of the requirements of the IRRD. The simplified obligations set out in Article 4 for the pre-emptive recovery plans, resolution plans and the assessment of resolvability must be designed to mitigate the unnecessary operational burdens which will arise from the application of the IRRD.

The EC's proposed minimum market coverage requirements (ie the proposed 80% for recovery plans and 70% for resolution planning) are not risk-based and will result in the application of the recovery and resolution planning requirements to many small insurance undertakings not providing critical or essential services. The

thresholds are inherently arbitrary with no clear link to the riskiness of undertakings and go beyond the expectations outlined in the international standards.

Consistent with approach to determining the scope, the application of simplified obligations should provide flexibility to apply the requirements of the IRRD through criteria which are based on each individual undertaking and not on the composition of national markets and not relative to other insurance companies in that member state.

Reference in Article 4, para 1(c) appear to be incorrect – it should be "*pursuant to **Article (7)**, Article 10 (2)...*" In addition, Article 4 para 1(a) should also include reference to Articles 9 to 12 and not only to Articles 5 to 7 as it refers to resolution plans as well as pre-emptive recovery plans.

3. Pre-emptive recovery plans (Art.5 and Art.7)

Purpose

Insurance Europe opposes the stated purpose of the pre-emptive recovery plan, set out in paragraph 1 that pre-emptive recovery plans should set out actions to be taken by companies "*to restore its financial position where that position has significantly deteriorated*". This text could be replaced with text such as "*to enable it to manage a situation where the 100% SCR requirement is breached by restoring its prudential balance to 100% SCR or by organising the orderly winding up of its activity.*"

It is important that the requirements of pre-emptive recovery planning are based on:

- Dealing with a situation of breaching the SCR
- Restoration to above 100% of the SCR (so not necessarily to the levels held currently).
- Allowing the option to plan for winding up some or all business.

Moreover, the current text sets far too onerous requirements for the outcome of the recovery plan while the above approach focuses on customer protection and is more in line with existing recovery and resolution requirements (eg in France).

Scope

Insurance Europe supports a scope for the pre-emptive recovery plans (and resolution plans) which is related to the resolution objectives, outlined in Article 18. In particular, the companies which are identified to be in scope are those which are essential to the continuity of critical functions. All undertakings which are identified to be in scope should be determined on the basis of their size, business model, risk profile, interconnectedness, substitutability and cross-border activity, as proposed in Article 5(2).

Article 7 proposes that all groups are subject to pre-emptive recovery planning. Insurance Europe generally supports a group approach to pre-emptive recovery planning. Groups are closely interlinked operationally and economically, so a recovery plan at group level makes much more sense than at subsidiary level. However, contrary to recital 22, the scope of group pre-emptive recovery plans should be limited to group entities that provide critical functions, as defined in Art 2(19).

In addition, for groups subject to pre-emptive recovery plans there should be no obligation at the subsidiary level to prepare an additional pre-emptive recovery plan. In this regard, Article 7.4 (b) should be deleted. If the group recovery plan does not take sufficient account of individual entities, the supervisory authority may demand improvements and insurers should be given appropriate time to make such improvements. The only exception would then be pursuant to Article 17 (3) in the absence of a joint decision of group supervisors and NSAs on the group recovery plan.

Article 5 proposes that at least 80% of the national market is subject to pre-emptive recovery planning. Requiring a minimum market coverage level is also neither sensible nor proportionate. Solo entities should be identified in a consistent manner to group entities in scope, ie those that provide critical functions and meet the

pre-determined criteria relating to size, business model, risk profile, interconnectedness, substitutability and cross-border activity.

Such a high minimum threshold would result in some relatively small entities being in scope of the recovery plans. Analysis from some of our members shows that in some markets, companies with gross written premiums during 2020 as low as €100 million would be included in the scope if the 80% threshold was applied. The preparation of pre-emptive recovery plans, updated on an annual basis and subject to extensive supervisory scrutiny, would create significant additional regulatory cost and burdens for these companies. Article 4 should provide some flexibility to apply simplified obligations for recovery plans for such companies but without further detail on eligibility criteria, it is not possible to assess to what extent this would alleviate the burden.

If a minimum market coverage is to be pursued by the EC, further clarification on how the proposed minimum market coverage is calculated and applied should be detailed in the level 1 text. In this case, Insurance Europe would suggest the following clarifications:

- Subsidiaries which are part of a group, subject to recovery planning, should be included in the calculation of the market share for each market in which they are active. The last paragraph in Article 5 (2) should therefore be changed to "*the subsidiary insurance or reinsurance undertakings of a group shall be taken into account...*"
- The criteria should be such that reinsurers and captive undertakings should not be automatically included in the scope. In this regard:
the reference to local market shares (Article 5 (2)) should be aligned with that of Solvency II which, in Article 35(6), sets out that "*The limitation to regular supervisory reporting shall be granted only to undertakings that do not represent more than 20 % of a Member State's **life and non-life insurance and reinsurance market respectively**...*". This would clarify that, at country level, there is economically two markets: the insurance and reinsurance market for life risks and the insurance and reinsurance market for non-life risks. The current text suggests that four markets (two for direct insurers and two separate markets for reinsurers) would be assessed for the 80% threshold.
- The nature of captives differs significantly from "standard" insurers writing a balanced portfolio of diversified risks in different Lines of Business covering a multitude of policyholders in the market. Captives usually write a limited number of Lines of Business, for risks which are linked to the industrial/financial group to which they belong, with stability with regard to the type of risks underwritten over time.

Article 5 (5) requires entities to update the pre-emptive recovery plans at least annually. Considering the extensive amount of time and resources needed to design those plans, Insurance Europe considers that a biennial frequency of updating those pre-emptive recovery plans would be more appropriate.

Additionally, the reference in Article 5, para 8 appears to be incorrect – it should be "*referred to in **paragraph 9.***"

4. Review and assessment by NSAs of pre-emptive recovery plans (Art.6)

Insurance Europe raises strong concerns about the proposed powers for supervisory authorities to address or remove impediments to recovery, outlined in Art. 6 (5). A company's strategy and governance structure should be aligned with the market and policyholder needs and comply with relevant laws, regulations and administrative provisions. It makes no sense to align the corporate structure or business of an entity or a group with potential smooth recovery processing. There is a clear risk that reasonable and efficient measures, like centralisation of processes and systems or intra-group transactions could not be implemented or even reversed. Such interventions could potentially impact areas such as corporate and tax law as well as investor relations and ratings. It's not unlikely that the insurers subject to such measures will suffer competitive disadvantages in the long-term. Likewise, policyholders could incur in additional costs or loss of returns.

A crisis in traditional insurance business normally offers enough time to implement necessary crisis measures and remove significant impediments. Compared to banks, a "run" or a liquidity crunch is highly unlikely to occur in insurance, since policyholders cannot simply withdraw their money from the insurance policy on demand. So, there's usually enough time to remove the impediments.

Improving the coordination between home and host supervisors where an undertaking carries out significant cross-border activities is a key topic of the Solvency II review. Insurance Europe supports improvements to the Solvency II framework and has provided feedback on this issue in response to the Better Regulation consultation on the EC's proposals on Solvency II.

Recovery and resolution framework should make it clear that it operates on the home state principle to avoid duplication of supervisory efforts and increased burden on firms. As such, provisions similar to Article 30 of the Solvency II Directive should be incorporated in the IRRD text.

Insurance Europe supports a strict alignment of the definition of "cross border" with Solvency II regulation (Article 159) and only business provided under the freedom of establishment and the freedom to provide services shall be considered as cross-border business for the purpose of this Directive. This means that business written by subsidiaries of an insurance group does not classify as cross-border business.

5. Group pre-emptive recovery plans and assessment by group supervisor (Art. 7 and Art.8)

Insurance Europe proposes to delete Article 7(5) (a) the provision of the group recovery plans to EIOPA. There is a risk that EIOPA will increasingly assume the role of an operational supervisor. This would undermine the role of the NSAs corresponding group colleges.

In addition, the definition of 'ultimate parent undertaking' provided by point 63 of Article 2 (2) (see point above under Article 2) excludes from its scope groups whose ultimate parent undertakings are headquartered in a third country even if from a jurisdiction which is fully equivalent to Solvency II. Thus, EEA subsidiary insurance or reinsurance undertakings of groups whose ultimate parent undertaking is headquartered in a fully equivalent third country would be excluded from this provision, denied the possibility to rely on the default group approach provided by Article 7 (1) even if the parent undertaking follows similar requirements at group level in its jurisdiction, and would fall under the scope of Article 5. A group recovery planning approach should also be considered for non-EU groups that are headquartered in Solvency II equivalent jurisdictions or jurisdictions that provide similar safeguards for policyholders in terms of the recovery and resolution of undertakings. This would be in line with insurance core principle (ICP) 25, which states that: *'The supervisor cooperates and coordinates with involved supervisors and relevant authorities to ensure effective supervision of insurers operating on a cross-border basis'*. This would also be consistent with the fact that, for resolution planning that has been taken into account, given the provisions under Articles 72-77 on the recognition of third-country resolution proceedings and the possibility for the EU and/or member states to establish bilateral agreements.

Any provisions about the interaction with the Bank Recovery and Resolution Directive/Single Resolution Mechanism (BRRD/SRM) and resolution authorities in banking and other financial sectors is missing. This is particularly relevant for conglomerates, where the bank resolution framework can be triggered by the failure of a mixed financial holding company and credit institution, even when the conglomerate is insurance-led. The text should also clarify the situation where the ultimate parent of the group is a bank and where subsidiary of the group is an insurance undertaking.

In the context of mixed financial holding companies, the scope of the "group supervisor" should be clarified. If the "group supervisor" is only at the level of the insurance group, it is not clear how the cooperation with ECB/SRB is foreseen. A separate "joint decision" between ECB/SRB and NSA/EIOPA is considered not possible given the interconnectedness between banking and insurance activities in a financial conglomerate.

6. Resolution plans (Art.9)

Insurance Europe supports a scope for the resolution planning which is related to the resolution objectives, outlined in Article 18. The identification of companies in scope of the resolution planning should be determined on the basis of their size, business model, risk profile, interconnectedness, substitutability and cross-border activity and the existence of critical functions, as proposed in Article 9(2) and consistent with the Financial Stability Board's (FSB) Key Attributes of Effective Resolution Regimes for Financial Institutions.

The proposed scope of the resolution planning and in particular, the minimum market coverage of 70% would not result in a proportionate scope. The Solvency II framework is calibrated in such a way that insolvencies only occur at 0.5% probability. Implementing a minimum market coverage would result in many more insurance companies being in scope than were expected to go into resolution. The target is also excessive in terms of global comparison. The IAIS states in its "[Application Paper on Resolution Powers and Planning](#)" that in most jurisdictions the development of a resolution plan is only required for a subset of insurers (eg size of the insurer with total assets above 50 billion euros) and not for the majority.

Analysis from some of Insurance Europe's members shows that, in some markets, companies with gross written premiums during 2020 as low as €100 million would be included in the scope if a 70% minimum threshold was pursued. The provision of data and ongoing dialogue required from the company in the preparation of these resolution plans would create additional regulatory cost and burdens for these companies.

The terms 'impediment', 'material impediment' and 'substantive impediment', are being used inconsistently. For example, in Article 9(6) g, reference is made to the removal of impediments, which should be the removal of substantive or material impediments only. Similarly, in Article 10(2) b reference is made to 'any potential impediments', which should be limited to/changed to substantive impediments. In recital 25, reference is made to 'material' impediments. Elsewhere 'substantive' impediments is used. Clarification of "substantive impediments" is needed. A link between critical functions and substantive impediments should be made in the definition.

In accordance with Art. 9.9, EIOPA would be required to issue guidelines to specify further criteria for the identification of critical functions. Insurance Europe opposes this proposal and considers that the criteria for the identification of critical functions should remain in the level 1 texts; identification of critical function is a fundamental issue which cannot be addressed through guidelines.

Insurance Europe does not support the extension of the scope of resolution planning to 'core business lines' which would be unnecessarily broad and confusing (ref. Article 9, para 6 (c)). Core business lines do not equal critical functions. It is only appropriate to include core business lines in the resolution framework in cases where they provide critical functions.

7. Group resolution plans (Art. 10 and Art.11)

Insurance Europe would welcome clarification in the level 1 text that no separate subsidiary level resolution plans are required for companies that are part of a group which is in the scope of resolution planning.

The EC states that IGS could contribute to funding the resolution process. This statement is translated to the requirement for resolution authorities to consider IGS as a funding source and set out principles for sharing responsibilities with other sources (Art. 10 Para. 2 lit e.). It is not clear whether these principles may allow resolution authorities to deny a financial contribution or must set the stage for utilising IGS for funding resolution. If the latter, Insurance Europe highlights that IGS do not have the same functions and are not based on an equivalent European framework as guarantee schemes in the banking sector. Moreover, it needs to be borne in mind that assets might not be available for funding due to legal restrictions. In Germany, insurance assets and insurance liabilities are inextricably intertwined to a large extent (Guarantee Assets). Due to these differences IGS should be kept separate from the IRRD. At a minimum, it needs to be clarified that Member

States have unrestricted discretion to determine whether, and if so, to what extent IGS are involved in financing resolution measures.

Insurance Europe also proposes to delete Article 11 (1) of the provision of the group resolution plans to EIOPA. There is a risk that EIOPA will increasingly assume the role of an operational supervisory authority. This would undermine the role of the NCAs (new installed national resolution authorities and the corresponding group colleges).

8. Resolvability (Art. 13-Art.16)

Insurance Europe has significant concerns about the proposed powers and alternative measures for resolution authorities to address or remove impediments to resolvability, outlined in Article 15 (4).

The proposed powers and measures could result in a company's business strategy being interfered with in the ordinary course of business, long before a potential crisis may or may not appear.

A company's strategy and governance structure should be aligned with the market and policyholder needs and comply with relevant laws, regulations and administrative provisions. It makes no sense to align the corporate structure or business of an entity or a group with potential smooth resolution processing. There is a clear risk that reasonable and efficient measures, like centralisation of processes and systems or intra-group transactions could not be implemented or even reversed. Such interventions could potentially impact areas such as corporate and tax law as well as investor relations and ratings. It's not unlikely that the insurers subject to such measures will suffer competitive disadvantages in the long-term. Likewise, policyholders could incur in additional costs or loss of returns.

A crisis in traditional insurance business normally offers enough time to implement necessary crisis measures and remove significant impediments. Compared to banks, a "run" or a liquidity crunch is highly unlikely to occur in insurance, since policyholders cannot simply withdraw their money from the insurance policy on demand. So, there's usually enough time to remove the impediments if and when an insurer becomes insolvent.

If the power to remove impediments is not removed, then the timeframes foreseen for insurers to propose possible measures to address or remove substantive impediments in Article 15 (3) are likely to be insufficient. Insurance Europe takes the view that the EC should allow sufficient time for insurers to identify appropriate actions.

Similarly, requirement to propose a plan to comply with 'alternative measures' in Art.15(4) within one month is unreasonable. The tight timeline whilst firms remain a going concern is not justified. In any case, decisions made under Art. 15(1)-(4) should apply only once the appeal process envisaged in Art. 15(7)(c) has been exhausted.

While Art. 15 contains certain proportionality safeguards, they are not sufficient to ensure that 'alternative measures' strike the right balance between resolvability objectives and the undertakings' freedom to determine their business model and strategy. As such, second sub-paragraph of Art. 15(4) should be replaced as follows (new text highlighted in bold):

*'When identifying alternative measures, resolution authorities shall demonstrate how the measures proposed by the insurance or reinsurance undertaking would not be able to remove the impediments to resolvability and how the **alternative measures proposed are proportionate to the perceived risk of impediments**. Resolution authorities shall **also demonstrate that proposed measures do not negatively impact the insurance or reinsurance undertaking's** business, its stability and its ability to contribute to the economy'.*

Similarly, the following sentence should be added at the end of the Art. 15(6): '*Resolution authorities shall avoid imposing alternative measures that are disproportionate to the perceived risk of resolvability impediments*'.

Insurance Europe opposes the idea that IGS, where available, could contribute resolution funding and propose reference to this, eg in Article 14 (1).

Finally, Insurance Europe proposes to replace '*by applying to it the different resolution tools referred to in article 26(3) and resolution powers referred to in Article 40 to 52*' **with** '*by applying to it the resolution tool referred to in article 26(3), that has been selected as preferred resolution strategy in the resolution plan and the corresponding resolution powers referred to in Article 40 to 52, necessary to execute to the preferred resolution strategy*'.

9. Joint decisions (Art. 17)

Insurance Europe is of the view that the possibility for a local NCA to request a subsidiary recovery plan (see Art. 17.3) should be exceptional and that the group would need to be given enough time to adapt the recovery plan when requested by a local NCA

10. Resolution objectives, conditions and general principles (Art. 18- Art 22)

Regarding the resolution objectives proposed by the EC, it should be made clear in the Directive that policyholder protection should apply equally to all policyholders: eg those of the entity in resolution as well as those of all other insurance undertakings. Therefore, the resolution authority should have to prevent any detriment to the other insurance undertakings operating in its member state.

If the basic principle remains that insurance undertakings are still able to go bankrupt, it would be appropriate for the choice of resolution objectives to be a combination of policyholder protection plus another objective. If not, it is unclear what the remaining role of ordinary bankruptcy proceedings is in an insurance context.

It is also noted that objectives a and c appear to overlap, because the definition of 'critical functions' includes protecting the social welfare of a large number of policyholders.

Regarding the conditions for resolution, outlined in Article 20, Insurance Europe proposes to change the reference to the failure of the subsidiary insurance or reinsurance undertaking rather than the failure of the assets and liabilities of the insurance or reinsurance undertakings.

Insurance Europe also does not support the introduction of a new threshold above the MCR for mandatory winding up, as outlined in Article 21. The supervisory ladder in the Solvency II Directive and the requirements in that directive for insurance undertakings in difficulty are sufficient. (See also comments on Article 83, on amendments to Solvency II Directive.)

Finally, although Insurance Europe does not disagree with the principle that, where appropriate, natural or legal persons that could be held liable under civil or criminal law for their responsibility for the failure of the undertaking should be held liable, it is not appropriate to link this to resolution.

Further clarification would also be helpful concerning demarcation of resolution regulation to national insolvency law regimes.

11. Valuation (Art. 23- Art. 25)

It is unclear why two separate valuations are foreseen, one immediately prior to the resolution decision and one subsequent to the resolution decision. Clarification on why these are needed should be further provided. For example, are there different valuation methods foreseen and if so, why? In addition, according to Article 24 (5) the definitive valuation should contain an estimation of the treatment of each class of shareholders and creditors, However, the treatment of policyholders in the event of resolution and a wound up under normal insolvency proceedings is also important, especially for mutuals. The treatment of policyholders should therefore be clarified in this article.

It should also be clarified how subordinated liabilities that must not cause or accelerate insolvency are to be reflected in the valuation required under Article 23.

Insurance Europe notes that the definitive valuation is still subject to the final valuation of Article 54. Therefore, it would be prudent to include a buffer for additional losses, in particular to prevent that advance payments during resolution that preempt the final valuation of Article 54 result in unequal distributions to creditors and policyholders.

12. Resolution tools and powers (Art. 26-52)

Insurance Europe provides the following initial observations on the proposed resolution tools and powers outlined in Articles 26-52.

- Article 26 (2): It is not clear if this article intends to introduce a priority between resolutions tools or not.
- Article 27: **The solvent run-off tool**
 - It is unclear what is meant with 'solvent'. Insurance Europe assumes this is not intended to refer to regulatory solvent (above SCR) or above MCR.
 - It is not clear how the power to withdraw the authorisation to write new contracts and the concept of solvent run-off relates to the Solvency II intervention ladder and the 'fail or likely to fail' criterion. An insurance undertaking should only enter into resolution when it has breached the MCR without a reasonable expectation of recovery through a short-term financing plan. When the MCR is irreparably breached, the insurance supervisor is required to withdraw the insurance license and consequently the insurer is not allowed to write new policies. Therefore, the insurer has already reached the point where it cannot write new policies anymore and it is not clear why the resolution authority should still have this authority.
 - It should be clarified what is meant by *net asset value* (Article 27 (6) lit. d) and Article 26 (4): does this refer to the valuation as per Article 23?
 - "...equity and instruments treated as equity" outlined in Article 27 (5) also needs to be clarified. For example, does this exclude restricted Tier 1 own fund instruments? Should it read "equity and other instruments of ownership" (a term also used in Article 31(1)(a) of the IRRD) instead?
 - Article 27.7 second subparagraph should reflect the possibility that mutuals are also subject to resolution and are owned by policyholders.
- Article 28.1: For resolution tools to work as intended in a mutual insurance undertaking, resolution authorities should not have to obtain the consent of the owners (which is missing in the article).
- Article 28.2.a: Also owners of mutual insurance undertakings, policyholders, should be amongst those that should benefit from consideration paid.
- Article 30.9 and 32.7: Owners of mutual insurance companies, policyholders, should be without duty or responsibility.
- Article 33.2: The management of the bridge undertaking shall operate the bridge undertaking to sell the undertaking and its assets, rights and liabilities to a purchaser. In order to cater for a situation

where the undertaking under resolution is a mutual insurance undertaking, the wording has to change to “to sell the undertaking or its assets, rights and liabilities to”, ie amend from “and” to “or”.

- Article 30: How is the transfer to an asset and liability management vehicle different from the transfer to a bridge institution?
- Article 31: Can the business be sold to an asset and liability management vehicle and, if so, what is the difference to the asset and liability separation tool?
- Article 32 (2): While the motivation for providing national supervisors with a variety of effective resolution tools in the event of a crisis is understood, the resolution tools established by the IRRD should not interfere with Insurance Guarantee Schemes (IGS) already established in Members States.
- For example, in Germany there is already a provision for the continuation of life insurance contracts by portfolio transfers to a statutory guarantee funds financed by German life insurance companies. The management of the guarantee funds is entrusted to a licensed and regulated insurance undertaking owned by German life insurers. This company operates on a status subject to approval by the German government with the sole purpose of rehabilitating the insurance portfolios of life insurance companies in trouble. This mechanism bears strong similarities to a bridge undertaking as proposed in Article 32 Para. 2 IRRD. **Therefore, a distinctive line between bridge undertakings and IGS must be drawn.** Most notably, the different appropriation of bridge undertakings (undertaking-specific perspective) compared to IGS (portfolio-specific perspective) can hardly be aligned. It is essential that the implementation of bridge undertakings as a resolution tool must not undermine well-established IGS-structures which reflect the particular demands of the local markets.
- Article 33 (4): Where the operations of a bridge undertaking are terminated, the bridge undertaking shall be wound up under normal insolvency proceedings. This might conflict with existing IGS, see comment above.
- Article 34(1) a: It seems theoretical that it will be possible that resolution authorities can use the write-down or conversion tool to recapitalize an insurance undertaking to apply the run-off tool and retain its insurance license. This means that there would be sufficient room when applying the ‘no creditor worse off principle’ (NCWO-principle- to apply bail-in and recapitalize the insurer from a level where it has failed (ie breached the MCR), to a level where it will again meet the SCR.
- Article 34: Can the write-down or conversion tool only be applied prior to application of solvent run-off or transfer tools?
- Article 36: The relationship between cancellation of shares, write down and conversion of liabilities is not clear. For purposes of the write-down tool, a similar concept should be foreseen, that ensures that more junior classes are written-down in full before write-down is applied to more senior classes.
- Article 37: The write-down and conversion tool requires clarification with respect to own fund instruments:
 - Is Article 37 (1) supposed to create a waterfall/priority for the write-down tool? This is only clear with respect to lit. a) but not with respect to lit. b) through d).
 - Article 37 (1) lit. a) should differentiate between unrestricted Tier 1 items (UT1), which should be reduced first, and restricted Tier 1 items, which should be reduced or converted only after UT1 has been cancelled or transferred. Note that reducing UT1 (a very likely scenario in a (near-) insolvency situation) may lead to the ineligibility of RT1 (and potential qualification as Tier 2). It should be clarified that maximum Tiering limits for RT1, T2 and T3 are ignored for the purpose of Article 37 IRRD. Note that bank regulation and insurance regulation differ: there are no maximum Tiering limits for AT1 or T2 for purposes of a bank’s total capital ratio, hence the issue of “excess RT1
 - Would a dilution pursuant to Article 35 (1) lit. b) also be considered as “reduction” within the meaning of Article 37 (1) lit. a)?
 - The tool does not consider ancillary own funds. Should there be an obligation to ask for those to be paid-in prior to using the write-down or conversion tools?
 - Are Tier 2 own fund items and Tier 3 own funds items liabilities of the same “class” as per Article 37 (1) 3rd sub-para.? While Tier 2 and Tier 3 own fund items can have the same rank in insolvency according to Article 73(1)(a) DR and Article 77(1)(a) DR, Article 37 (1) lit. b) and c) seems to introduce a priority in resolution which would be in contradiction with Article 22 (1) lit. b).
 - If any priority is to be determined, it should refer to available, not to eligible own funds.

- How should subordinated liabilities that no longer qualify as own funds (eg because grandfathering has ended) be treated, given that their rank in a normal insolvency would remain unchanged?
- Article 37 (1) last sentence is not necessary, as there is no partial recognition of insurance own funds. This is contrary to bank regulation, which foresaw grandfathering of Basel 2 style sub debt instruments on an amortising basis, thus resulting in the partial recognition of (a class of) grandfathered sub debt.
- Article 37: The write-down and conversion tool requires clarification with respect to policyholder claims:
 - In member states that have opted for Article 275 (1) lit. a) SII-D, how can the preference of policyholders over the assets underlying technical provisions be maintained? Would those liabilities be considered as secured liabilities and, thus, be non-eligible? If not, are policyholders in the same class as other senior debt?
- Article 37: It is not clear how, in practice, issuers can ensure the availability of an authorization as required by Article 37(4) IRRD to allow for a sufficiently "severe" dilution as per Article 35(1) IRRD.
- Article 49: Does the power to suspend the termination of contracts also apply to insurance contracts? What is the relationship with the power conferred to in Article 51? Does the power to suspend the termination of contracts with subsidiaries that are not in resolution apply outside of a group resolution scheme?
- Article 50 (2): What is the consequence, if applicable third-party law does not allow/recognize the exclusion of rights as provided for in Article 50 (2)? It should be clarified that the requirement does not apply to financial contracts existing on the date when the IRRD implementation becomes applicable.

13. Information exchange (Art. 70)

In Article 70, it should be clearly stated that a group resolution scheme should not grant resolution powers against any group entity where the conditions set out in Article 19 or Article 20 are not met. In this respect, it would be more appropriate for Article 70 (1) to refer to Article 20 (1) (instead of Article 19 (1)).

14. Relations with third countries (Art. 72-77)

The main objective of a recovery and resolution framework is to adequately protect policyholders by ensuring financial stability and the continuation of providing services of critical functions (and, thereafter, other creditors)

It is therefore of utmost importance that all involved supervisors and resolution authorities fully cooperate and coordinate their actions, nationally, and internationally, in cases of insurance groups operating cross-border. Supervisory coordination and cooperation during a crisis will ensure the best possible outcome for policyholders. Accordingly, international supervisory cooperation should be clearly promoted by the IRRD.

It should be made clear in the text that these bilateral/European agreements should also include references to recovery planning in third countries, instead of only focusing on resolution.

For those jurisdictions which are fully equivalent to Solvency II, and/or provide similar safeguards for policyholders in terms of the recovery and resolution of undertakings, based on local implementation of relevant international standards (such as the FSB's Key Attributes of Effective Resolution Regimes and the IAIS' Common Framework for the Supervision of Internationally Active Insurance Groups) reference should be made to reliance on group recovery planning requirements.

The presence of a group recovery or resolution plan supervised by an equivalent third country supervisor, should lift the obligation to prepare entity-level plans, on the same conditions as for EU groups for which group-level plans exist.

15. Penalties (Art. 78-82)

Insurance Europe opposes that administrative penalties and other administrative measures could include a public statement indicating the natural person responsible for the infringement as stated in Art. 79 (2) a). Such shaming interferes too much with the personal rights of the persons responsible.

16. Changes to SII Directive, Company Law Directives and EIOPA Regulation (Art. 83-88)

Insurance Europe strongly opposes the new intervention powers proposed to be included in the Solvency II Directive through Article 83 of the IRRD. The current Solvency II framework has proved to be fit for purpose. The defined thresholds, SCR and MCR, are cautiously calculated and allow for either an orderly return to financial solidity or – as measure of last resort – an orderly resolution. Supervisory intervention powers follow a pre-defined ladder according to the severity of non-compliance with regulatory requirements. Following the proposed amendments of Article 83 IRRD and of macroprudential tools in Article 144b and 144c Solvency II Directive, NCAs shall have the power to intervene at still sound undertakings fulfilling all financial requirements and resolution tools should also be applicable in case of non-compliance with governance requirements, such as proposed in Article 19 (3) lit b IRRD. This could undermine the current ladder of supervision and could even have counterproductive effects from a macroprudential perspective (eg increased uncertainty for investors regarding the availability of dividends, distortions in capital allocation).

In principle, early intervention before a breach of the SCR by NSAs should not be possible. A seamless integration of insurance-specific recovery and resolution framework and macroprudential tools into the existing supervisory ladder is essential. Thus, the proposed Article 141.1 in the Solvency II Directive should be changed to "..., where the insurance or reinsurance undertaking's decisions, including financial ones, ~~would result in the following three months or~~ already result in non-compliance ...". Additionally, it remains unclear who will determine the existence of sector-wide shocks. Compared with, for example, Article 18 EIOPA-Regulation a clear decision mechanism involving the Council of the EU and the EC is missing.

While the intervention powers set forth in Article 141 (2) lit. a) to c) are not necessary, as they are comprised in the crisis prevention powers set forth in the IRRD, Article 141 (2) lit. d) is out of place at a stage where the SCR may still be met by the undertaking. At this stage, the recovery from a deteriorated financial situation should be entirely in the power of the undertaking, which the supervisory authority closely monitoring the undertaking's recovery measures.

Furthermore, the conditions of intervention (which must be part of a legal rule) in Article 141 are not clear as the reference to Article 36 (2) lit. a) to e) is too broad, namely with respect to non-financial measures like the system of governance.

Insurance Europe is the European insurance and reinsurance federation. Through its 37 member bodies — the national insurance associations — it represents all types and sizes of insurance and reinsurance undertakings. Insurance Europe, which is based in Brussels, represents undertakings that account for around 95% of total European premium income. Insurance makes a major contribution to Europe's economic growth and development. European insurers pay out almost €1 000bn annually — or €2.7bn a day — in claims, directly employ nearly 950 000 people and invest over €10.4trn in the economy.