Position Paper

Insurance Europe response to EIOPA consultation on potential harmonisation of recovery and resolution frameworks for insurers

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General comment

Insurance Europe welcomes the European Insurance and Occupational Pensions Authority's (EIOPA) recognition that insurance differs fundamentally from banking and that this has a significant impact on both the need for, and design of, recovery and resolution tools.

Insurance Europe believes it is important to reiterate that Solvency II already provides several safeguards that need to be considered. The Solvency Capital Requirement (SCR) ensures a high level of capital buffer, calibrated to ensure a firm will remain able to meet all obligations to policyholders even after a 1-in-200 year loss event. The supervisory ladder of intervention in Solvency II allows supervisors to begin taking actions when the SCR is breached and to fully take over the company if the MCR is breached – a point at which an insurance company still has significant assets in excess of those needed to meet its obligations to policyholders. Even before Solvency II, there were very few failures and even fewer resulting in any losses for policyholders. Insurers have rarely needed to benefit from government support, and under Solvency II they will be far less likely to do so in the future. Finally, Solvency II also includes provisions for the winding-up of insurers and national insolvency laws to complement these. This is why new powers for supervisors to intervene even earlier, before the SCR is breached, are not needed.

This is not to say that a certain degree of harmonisation of recovery and resolution practices could not be beneficial. In particular:

- Stay and suspension powers can very often prevent the need to use more drastic measures within the resolution toolkit. Although mass lapses are extremely unlikely in practice, such powers would create an absolute limit to insurers' exposure to very significant forced "fire sales" of assets and contagion. As EIOPA's discussion paper shows, these powers are not at this stage available to all NCAs.
- Cross-border cooperation and coordination between supervisory and/or resolution authorities can be reinforced, as well as the mutual recognition of resolution actions.
- Clarification that, for all member states, no use should be made of early intervention powers before there has been a breach of the SCR.

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But Insurance Europe believes such measures can also be introduced in the absence of a harmonised framework for recovery and resolution at EU level.

More generally, Insurance Europe would point out that:

- The traditional insurance business has proven extremely resilient to business cycle fluctuations in the past, as evidenced by the fact that insurers weathered the recent financial crisis quite well. Very limited government support was necessary, as EIOPA notes.
- Insurance failures are rare and do not affect other insurers or the payments system. Should an insurer fail, there is also no convincing evidence of a lack of substitutability of products that would justify the introduction of additional measures.
- Unlike in banking, insurers do not fail suddenly as insurers' liabilities crystallise gradually over time, allowing for a structured wind-down, so that policyholders are unlikely to be left without cover. In addition, insurance liabilities are largely independent of each other, and are not 'callable' on demand since an insurance liability occurs at a specified point in time or following a pre-defined, insured event. Hence, systemic risk is significantly lower in insurance than in banking.
- The unique characteristics of the insurance business model stand in clear contrast to those of banks; resolution approaches should closely reflect that. The key difference between a bank's resolution and an insurer's resolution is that the latter can be managed over an extended period. There is no need to rush into resolution, particularly because doing so could generate avoidable losses for policyholders.

Summary of Insurance Europe's response

- At this stage, it is not demonstrated that normal insolvency procedures would be unsuitable to deal with insurance failures or that existing powers and tools have been inadequate.
- Given the absence of compelling evidence that would support changing existing frameworks, Insurance Europe believes that any potential harmonisation could only be principle-based. A harmonised framework on recovery and resolution for insurers should be developed to the extent European regulation like Solvency II is insufficient.
- Should a recovery and resolution framework be introduced, all insurers regulated under Solvency II should be in scope, subject to the proportionality principle. Exercising the proportionality principle is paramount to limit the scope to undertakings for which the application of the corresponding building block would provide a tangible benefit.
- Insurance Europe also finds it important that any legal framework is clear enough to provide sufficient legal certainty. Conditions, possible triggers and tools should therefore be clearly defined in the legal framework, but there should be room for flexibility in the *application* of the rules in order to achieve the optimal outcome.
- Portfolio transfers, run-offs and normal corporate restructuring and insolvency proceedings have all proven appropriate in the past to deal with the vast majority of insurer failures, as EIOPA recognises. Therefore, more effort must be invested to provide a rationale for why a complement to these tools is required and to whom the amended framework should apply.
- Pre-emptive recovery planning should only be considered for insurers where it would provide a tangible benefit, as determined by the relevant supervisory authority. When a pre-emptive recovery plan is required, it should be seen as an extension of the ORSA and could therefore find its base in the ORSA (and elements like the medium-term capital management plan and contingency plans).
- In terms of scope and purpose, there must be a clear distinction between recovery plans and resolution plans. Both planning requirements should be applied in a proportionate manner, with due consideration of the results from ORSA and stress tests.
- Insurance Europe believes that there is no justification for the use of early intervention powers unless there has been a breach of SCR or MCR. In all cases, the exercise of powers must be limited by proportionality considerations. Solvency II (through the ladder of supervisory intervention) already enables supervisors to step in when there is an imminent risk that capital requirements are breached. Further anticipating regulatory intervention is hardly justifiable in terms of proportionality and would undermine a cornerstone of Solvency II crisis management. EIOPA should clearly state which are the

situations that would justify early intervention and explain why the ladder of intervention provided by Solvency II would not suffice to deal with them.

- Resolution should be a measure of last resort, which should only be employed once all recovery options have been exhausted. Entry into resolution should not occur before the insurer has reached the point of non-viability. On the other hand, entry into resolution could be necessary before an insurer is balance sheet insolvent, if a formal "wind-up" would yield suboptimal outcomes for policyholder protection and continuity of cover. The focus of resolution should in any case be on those actions that are necessary where the firm is no longer viable and actions provided for in Solvency II are deemed insufficient.
- In Insurance Europe's view, resolution powers need to be well-defined and targeted, so as to avoid forcing resolution authorities into taking sub-optimal actions. Run-offs and portfolio transfers are sufficient to deal with the large majority of insurance failures. Therefore, these should be the most preferred tools and authorities should clearly explain when using more intrusive tools why run-off or portfolio transfers are not sufficient to meet the objectives of resolution.
- Applying the bail-in tool in an insurance context would not be appropriate. Any such tool should be based on existing local corporate restructuring legislation. If authorities are looking to adjust creditor liabilities, as with writing down policy benefits, corporate restructuring arrangements already exist and they require creditor and court agreement.
- Policyholders should be in scope of bail-in through ordinary corporate restructuring arrangements only as a measure of last resort, given the invasiveness of this resolution tool. In any case, the principle of No Creditor Worse Off than in Liquidation (NCWOL) should apply.
- Insurance Europe agrees with the concept of cooperation agreements and believes that cooperation and coordination between relevant supervisors and resolution authorities within the EEA and third countries is important.

Answers to consultation questions

Q1) Do you consider the arguments in favour or against a harmonised recovery and resolution framework, as identified and analysed in this chapter, exhaustive?

Q2) In your view, are there any other arguments in favour or against a harmonised recovery and resolution framework which should be considered? If yes, please provide an explanation for the arguments.

Insurance Europe agrees with EIOPA's analysis and conclusion that, at this stage, it is not demonstrated that normal insolvency procedures would be unsuitable to deal with insurance failures, and that it has not been demonstrated that existing powers and tools have been inadequate.

Given the absence of compelling evidence that would support changing existing frameworks, Insurance Europe believes that any potential harmonisation could only be principle-based. We also note that EIOPA's suggestion of a minimum harmonised framework would not address the challenge of inconsistent implementation across Member States. It would also be prudent to defer action at a European level in order to allow for the consideration of IAIS' work on recovery and resolution.

Insurance Europe wishes to highlight that Solvency II already includes certain requirements in terms of recovery: recovery plan in case of non-compliance with the SCR, finance scheme in case of non-compliance with the MCR and supervisory powers in deteriorating financial conditions. Therefore, requiring pre-emptive recovery plans from all insurers regulated under Solvency II without applying the proportionality principle would needlessly place a significant and disproportionate regulatory burden.

As a principle, a harmonised framework on recovery and resolution for insurers should be developed only to the extent existing European regulation like Solvency II is shown to be insufficient, ideally through a gap analysis which Insurance Europe sees as important to drawing well-informed conclusions. Consequently, if such an exercise reveals deficiencies, any new framework should focus on necessary supplements and be fully compatible with Solvency II. It would also need to be supported by good cooperation between supervisory and/or resolution authorities.

Furthermore, and as highlighted by EIOPA, very few insurers received public support during the financial crisis. In an insurance context, resolution mechanisms are most often based on run-off and portfolio transfer mechanisms and the need for public support is much lower than in the banking sector. This is primarily because insurers' resolution does not need to lead to saving the insurance company (unlike in banking), but rather to the protection of policyholders' rights (i.e. saving the insurance portfolio). Recapitalisations are therefore less common in insurance than in banking.

Insurance Europe welcomes EIOPA's recognition in section 3.2.2 (A) that risks in insurance are very different than in banking and would encourage EIOPA to carry this assessment into further detail so as to ensure that any resolution tools are appropriate for insurers and not simply transposed from banking resolution rules.

EIOPA states that the existing fragmented landscape of national recovery and resolution frameworks could cause significant impediments to the resolution of insurers, particularly cross-border groups. For the cross-border elements/activities of an insurer, rules at EU level could be appropriate, but without making a distinction between local versus cross-border insurers. Insurance Europe notes that the only appropriate measure EIOPA identifies in the Discussion Paper for cross-border groups is cooperation and coordination. This is something which the college of supervisors should be well-placed to do.

Concerning cross-border business, Insurance Europe would like to point out that, contrary to what is stated by the Discussion Paper, gross written premiums written by subsidiaries represents national business, whereas gross written premiums written via FoS/FoE in host markets is cross-border business. One of the reasons given in favour of a harmonised framework for insurance recovery & resolution is that 29% of gross written premium is regarded cross-border business. As mentioned above, gross premium written by subsidiaries does not account for cross-border business. The effective cross-border business, corrected by the share of the subsidiaries of 25%, only amounts to 5% (paragraph 115 in the Discussion Paper).

Further aspects of Solvency II, such as group supervision, are regularly evaluated by the European Commission (see Article 242 of Solvency II). In the interest of coherent supervision any need for change should be profoundly examined and discussed. By no means should there be further and isolated initiatives.

Any potential recovery and resolution plan requirements should take proper account of pre-existing recovery and resolution plans crafted at the group-wide / parent level. Consideration should also be given to what the College can do to prepare itself for such an eventuality. When looking at recovery and resolution plans, it can be difficult for an insurer to predict how a supervisor might behave.

Q3) What is your view on the proposed building blocks for recovery and resolution?

The building blocks considered by EIOPA reflect different phases in which crisis management measures are envisaged. Clear criteria to identify these phases are necessary for harmonisation and the measures taken should be adequate to the stage of the crisis. Significant interventions — like removal of members of the management body — in the early intervention phase would be inappropriate. It is also unclear how to separate resolution from winding up and liquidation, since both require the non-viability of the insurer.

While there is merit in intervening sufficiently early to prevent the escalation of financial difficulties for an insurer, Insurance Europe has strong concerns regarding building block 2 – early intervention. The Solvency II ladder of supervisory intervention already provides for intervention points while the insurer is still sufficiently capitalised. Additional early interventions could negatively impact the reputation/value of an insurer in a manner that could exacerbate the difficulties it faces. The use of additional early intervention tools could risk the unnecessary destruction of both shareholder and policyholder value.

The Discussion Paper states that in some situations early intervention may be needed before the breach of regulatory capital requirements to avoid the escalation of financial problems but does not present any further justification of this. Insurance Europe believes that EIOPA should clearly state which are the situations that would justify early intervention and explain why the ladder of intervention provided by Solvency II would not suffice to deal with them. Insurance Europe believes that it would be extremely difficult to justify giving supervisors the ability to take management decisions for an insurer which is still viable.

In addition, the responsibility for recovery measures should rest with the insurer rather than the supervisor. The introduction of early intervention would otherwise create a new intervention level and, therefore, an extra level of regulatory interference.

Regarding building block 4, Insurance Europe generally believes that a better working cooperation and coordination between relevant national and foreign authorities (achievable without introducing additional regulation) is important. Especially in a cross-border context (FoS) a strong cooperation between home and host supervisory authorities is essential to guarantee a level playing field on the markets concerned.

Q4) Should additional building blocks be considered? If yes, what should these building blocks be?

No further building blocks are needed.

Q5) What is your view on the scope of a recovery and resolution framework?

Should a recovery and resolution framework be introduced, all insurers regulated under Solvency II should be in scope subject to the proportionality principle. In adopting a proportionate approach, Insurance Europe would envisage that recovery and resolution plans would not be necessary for many insurers and that the framework should not be unnecessarily burdensome for those insurers to which it would apply.

Portfolio transfers, run-offs and normal corporate restructuring and insolvency proceedings have all proven appropriate in the past to deal with the vast majority of insurer failures, as EIOPA recognises. Therefore, more effort must be invested to provide a rationale for why a complement to these tools is required and to whom the amended framework should apply.

Regarding the inclusion of branches within scope, Insurance Europe believes it is important that the framework is consistent with the specific home/host rules in Solvency II. This means that that for branches any recovery and resolution requirements should be within the supervisory remit of the home supervisory authority and should not create new supervisory responsibilities for host supervisory authorities. Otherwise the requirements could undermine the way that branches are supervised currently and the effective cooperation between home and host supervisors.

Q6) What is your view on the approach to the proportionality principle, i.e. defining the specific applicability for each sub-building block separately?

Exercising the proportionality principle is paramount to limit the scope to undertakings for which the application of the corresponding building block would provide a tangible benefit. Furthermore, the proportionality principle should be applied to make simplified solutions possible. EIOPA needs to be more concrete about how the proportionality principle should be enforced in practice. Conditioned by the application of the proportionality principle, all insurers regulated under Solvency II should be in scope of the framework.

Insurance Europe also finds it important that any legal framework is clear enough to provide sufficient legal certainty. Conditions, possible triggers and tools should therefore be clearly defined in the legal framework, but there should be room for flexibility in the application of the rules in order to achieve the optimal outcome.

Q7) Do you agree on the need for pre-emptive recovery planning?

EIOPA proposes a requirement for insurers to develop and maintain pre-emptive recovery plans even when the SCR is above 100%. This would go further than what is already foreseen by Solvency II, which requires the development of a recovery plan once an insurer breaches or is likely to breach in the short-term the SCR.

Pre-emptive recovery planning should only be considered for insurers where it would provide a tangible benefit, as determined by the relevant supervisory authority. When a pre-emptive recovery plan is required, it should be seen as an extension of the ORSA and could therefore find its base in the ORSA (and elements like the medium-term capital management plan and contingency plans).

Q8) In your view, what should the conditions be in order to determine the range of insurers for which simplified obligations could apply?

The requirement for pre-emptive recovery plans, which could take a myriad of forms, could place a significant regulatory burden if applied in a disproportionate manner to all insurers. Given that every eventuality cannot be covered and that a plan can only address possible causes of failure and the options for recovery in that circumstance, the proportionality principle needs to be applied to all requirements, but especially to this one. The proportionality principle should be applied when considering whether the set-up of recovery plans is actually needed in all cases to ensure that certain firms, based on their size and complexity, do not devote unnecessary resources developing such plans when the relevance of doing so is rather limited and could be counter-productive where it acts as a distraction for more effective preventative measures. There should be a possibility for national supervisory authorities to exclude insurers that are less complex. The exercise of their discretion should be subject to guidelines to ensure uniform application.

Q9) And what should the conditions be in order to determine the range of insurers which may be exempted from the requirement to develop recovery plans?

The requirement for pre-emptive recovery plans, which could take a myriad of forms, could place a significant regulatory burden if applied in a disproportionate manner to all insurers. Given that every eventuality cannot be covered and that a plan can only address possible causes of failure and the options for recovery in that circumstance, the proportionality principle needs to be applied to all requirements, but especially to this one. The proportionality principle should be applied when considering whether the set-up of recovery plans is actually needed in all cases to ensure that certain firms, based on their size and complexity, do not devote unnecessary resources developing such plans when the relevance of doing so is rather limited and could be counter-productive where it acts as a distraction for more effective preventative measures. There should be a possibility for national supervisory authorities to exclude insurers that are less complex. The exercise of their discretion should be subject to guidelines to ensure uniform application.

Q10) In your view, what should the content of pre-emptive recovery plans include?

Insurance Europe would suggest the following principles that should be followed when drafting a recovery plan:

- In general, if the probability of a company to enter in regulatory recovery is low, an additional pre-emptive recovery plan is less or not necessary.
- A group recovery plan should be sufficient and should automatically satisfy requests for setting up national plans for subsidiaries, as recovery measures concern the whole group (e.g. intra-group capital injections). A myriad of local recovery plans would not only be confusing but would unduly increase the regulatory burden without bringing any added value. In addition, a group recovery plan would be deemed sufficient as increased cooperation and coordination between relevant authorities

- will have ensured that such plan is appropriate. This should apply to both groups based in the EU and groups based outside the EU but with subsidiaries in Europe.
- The plan should be set up to include all material legal entities which make up a substantial part of the group's total assets and operating profits. A broader scope would not yield any new recovery options.
- The recovery options should be commensurate to the stresses they are seeking to address. The modelled stresses should be restricted to a few meaningful ones and an idiosyncratic one. The number of large scale recovery options is limited, so using a larger number of tests would not help identify more recovery options.
- Data privacy must be secured when sharing the recovery plan among relevant supervisors and the confidentiality of the recovery plan must be ensured.
- The plan should include the identification of possible recovery options, such as actions to strengthen the capital situation.
- In line with the principle of proportionality, and considering the long-term properties of life insurance business, insurers should be allowed to provide updated recovery plans at longer intervals and also when there are material changes in risk or business structure.

Q11) Do you agree on the need for pre-emptive resolution planning? Should there be any difference in the scope for pre-emptive recovery planning and resolution planning? If yes, what are the reasons for this?

In terms of scope and purpose, there must be a clear distinction between recovery plans and resolution plans. Both planning requirements should be applied in a proportionate manner, with due consideration of the results from ORSA and stress tests. Given the long-term nature of the insurance business and the continuum of actions that can be taken to address a failing insurer, resolution plans should exclusively address the remote situation that the insurer eventually ends up at the point of non-viability.

Q12) What should the conditions be in order to determine the range of insurers for which the resolution authorities may waive the requirement to develop pre-emptive resolution plans?

In terms of scope and purpose, there must be a clear distinction between recovery plans and resolution plans. Both planning requirements should be applied in a proportionate manner, with due consideration of the results from ORSA and stress tests. Given the long-term nature of the insurance business and the continuum of actions that can be taken to address a failing insurer, resolution plans should exclusively address the remote situation that the insurer eventually ends up at the point of non-viability.

Q13) In your view, what should the conditions be in order to determine the range of insurers for which simplified obligations could apply?

Insurance Europe agrees that, in order to avoid excessive burdens for insurers, resolution authorities should try to limit the information required from insurers (in the context of drafting the resolution plan) to what is essentially needed and cannot be gathered from other sources, such as secondary data and existing information from the ORSA, medium-term capital management plan, contingency and emergency plan and from reporting of intragroup transactions. An annual adjustment of the pre-emptive resolution plan would only be needed in case of material changes to the insurers risk profile, business or group structure. Otherwise, just a confirmation of the main assumptions used for the preparation of the plan should be sufficient.

Q14) In your view, what should the content of pre-emptive resolution plans include?

There will necessarily be differences between the content of recovery plans and resolution plans. Recovery plans focus on business continuity and therefore are broad in scope, whereas resolution plans should be clearly focused on detailed contingency planning for material legal entities within a group to avoid the planning process becoming unduly burdensome for both the insurer and supervisors without providing material added benefit.

Insurance Europe believes that group recovery/resolution plans, only if so required by the group supervisor (where appropriate given how the group is managed in practice), should be considered sufficient, as long as the group plan takes sufficient account of the resolution of solo entities in the group, and replace the need for recovery/resolution plans on a solo basis. EIOPA should minimise impediments to the overall group supervisor that is responsible for resolution planning. If it is deemed necessary to establish additional recovery/resolution plans over the group plan, it should be ensured at the very least that a close collaboration with the group supervisor exists so as to avoid any duplication. This should apply to both groups based in the EU, and groups based outside the EU with subsidiaries in the EU.

Group plans should provide a more comprehensive view of all possibilities available during a resolution process. They should foresee the possibility of separating the entities of the group that cannot be saved from the entities of the group that are viable on a going concern basis, and also include the possibility of resolving a single entity without resolving the entire group. Multiple local plans could hardly provide this and could therefore potentially lead to sub-optimal outcomes.

Insurance Europe agrees that, in order to avoid excessive burdens for insurers, resolution authorities should try to limit the information required from insurers (in the context of drafting the resolution plan) to what is essentially needed and cannot be gathered from other sources, such as secondary data and existing information from the ORSA, medium-term capital management plan, contingency and emergency plan and from reporting of intragroup transactions. An annual adjustment of the pre-emptive resolution plan would only be needed in case of material changes to the insurers risk profile, business or group structure. Otherwise, just a confirmation of the main assumptions used for the preparation of the plan should be sufficient.

Insurance Europe believes that the operational resolution plans need to be tailored to the circumstances of the insurer and should also be flexible, allowing authorities to consider the circumstances of resolution. At the same time, overreliance on resolution plans may obstruct the clear view on the causes for a crisis and the adequate measures to cope with them.

Insurance resolution does not have the same urgency as bank resolution, and tools such as portfolio transfer and run-off facilitate this longer-term process. Authorities should therefore be able to adapt their approach and plans as the situation evolves. The results from the pre-emptive recovery planning should also be considered. In general, if the recovery planning is realistic the resolution planning will be less necessary.

Q15) Do you agree that resolution authorities should only have to assess the resolvability of insurers for which a resolution plan is drafted?

Insurance Europe agrees that resolution authorities should only have to assess the resolvability of insurers for which a resolution plan is drafted, while taking the principle of proportionality into consideration (as assessing the resolvability of insurers may not always be necessary depending on the size and complexity of the insurer). Apart from that, the separate purpose of resolvability assessments, particularly in relation to resolution plans is not obvious. Insurance Europe understands that such an assessment is a necessary element of developing or verifying resolution plans.

The resolvability assessment should consider how, in the unlikely situation in which an unpredictable event has led an insurer to a point of non-viability that it cannot recover from, policyholders' interests can be best protected. The resolvability assessment should be discussed with the supervisory authority.

In Insurance Europe's view, the resolvability assessment should focus on:

- Sources of support.
- Enforceability of intra group agreements.
- Transferability of service agreements where services are provided by other parts of the group, or contracted by other parts of the group.

Q16) Do you agree that resolution authorities should have the power to require the removal of significant impediments to the resolvability of an insurer? And what type of potential impediments could be considered?

Q17) How could the simplified obligations in assessing the resolvability of insurers be defined?

The power to require the removal of significant impediments to the resolvability of an insurer should be considered with restraint. Requiring the removal of impediments means that the competent authorities interfere with the legal structure of the insurer. This would be a massive intervention that is only justified under exceptional circumstances. It is also important that there are safeguards surrounding the use of such power to provide appropriate checks and balances, and a mechanism by which an insurer can challenge and seek impartial review of the proposed use of this power. It should also be noted that the power to remove impediments to resolvability is of lesser relevance in an insurance context, given the timeframe over which insurer resolutions can take place (e.g. systems do not have to be ready for resolution over the weekend, such as with banks). The decision to impose any such requirement should take due account of the effect on the soundness and stability of ongoing business.

Directors and senior managers in designated functions who can exercise significant influence are already notified to and approved by insurance supervisors. The power to remove senior management is already available to insurance supervisors.

Q18) Do you think that early intervention should be part of a recovery and resolution framework for insurers?

In Insurance Europe's view, it is not suitable to apply early intervention powers when the SCR is above 100%. These powers may be useful if a company is in freefall, but the supervisor should have to prove that this is indeed the case.

As EIOPA points out, Solvency II (through the ladder of supervisory intervention) already enables supervisors to step in when there is an imminent risk that capital requirements are breached. Further anticipating regulatory intervention is hardly justifiable in terms of proportionality and would undermine a cornerstone of Solvency II crisis management. It would also add another layer of solvency requirements and thus introduce legal uncertainty in relation to the prudential framework for insurers. It should also be noted that early intervention could negatively impact the reputation/value of an insurer in a manner that could exacerbate its difficulties.

Paragraph 189 states that early intervention could be regarded as further developing or supplementing existing powers in Solvency II and that "the aim is to supplement Solvency II and not interfere with the actual supervisory framework." Any measures or frameworks which provide for early intervention can be expected to be an integral element in the supervisory framework and should be viewed in the context of the objectives of that framework. Furthermore, it is not clear how supplementing Solvency II in this way would not interfere with the actual supervisory framework given the central role that Solvency II now plays in insurance supervision.

Paragraph 190 states that early intervention objectives are similar to the supervisory objectives in Solvency II. It is not clear why the proposals on early intervention fall within the remit of this Discussion Paper on recovery and resolution, particularly because the proposal is for a minimum harmonising recovery and resolution framework whereas Solvency II is a maximum harmonising directive. The link with Article 242 of the Solvency 2 Directive should be made here as appropriate.

The Discussion Paper states that in some situations early intervention may be needed before the breach of regulatory capital requirements to avoid the escalation of financial problems but does not present any further justification of this. The existing ladder of intervention in Solvency II has been designed specifically to address this issue from a solvency perspective. Furthermore, the SCR and risk margin underlying the technical provisions are designed to provide a high level of policyholder protection. If the proposal is to provide for early intervention based on solvency over and above what is already in existence in Solvency II, the reasons for doing this in terms of the perceived limitations of Solvency II should be made clear. Therefore, Insurance Europe believes that EIOPA should clearly state which are the situations that would justify early intervention and explain why the ladder of intervention provided by Solvency II would not suffice to deal with them.

Insurance Europe does not believe that the examples provided by EIOPA (e.g. fall in solvency ratio, downgrade of credit rating) are appropriate. As already shown, the solvency ratio can be extremely volatile due to market conditions. Besides, Solvency II requires compliance with the SCR (a minimum solvency ratio of 100%). It is up to each insurance group to decide on the management of its own funds.

Q19) What is your view on the approach towards early intervention conditions?

Insurance Europe believes that EIOPA should clearly state which are the situations that would justify early intervention and explain why the ladder of intervention provided by Solvency II would not suffice to deal with them.

With respect to triggers for early intervention, Solvency II coverage as provided by the directive is by far the most accurate determinant of an insurer's financial condition and of its ability to meet claims to policyholders. The only practical and effective option, without undermining the existing Solvency II framework, would be to align the conditions on the Solvency II supervisory ladder of intervention.

Q20) Do you have any comments on the early intervention powers listed in the table?

Insurance Europe believes that there is no justification for the use of early intervention powers unless there has been a breach of SCR or MCR. At the very least, the exercise of powers must be limited by proportionality considerations. In no situation should early intervention measures mean that the resolution authority can make decisions for the insurer or decide which measures the management board of the insurer must execute. Early intervention powers must be limited to measures like shorter reporting periods and a higher frequency of meetings between the management board and the authority. Insurance Europe believes that the powers listed in the paper are going far beyond that. In particular, there is no need for an intervention power to call partner or parent companies of a group for cash injections. Such an intervention power might collide with the principles of corporate and group law some Member States.

Q21) Should other early intervention powers be considered? If yes, what are these powers?

No other early intervention powers should be considered.

Q22) Do you agree that Member States should consider the designation of an administrative resolution authority for the resolution of insurers?

It should be left to Member States to decide whether the designation of a specific resolution authority is needed. What is essential in any situation is to have complete clarity as to who holds and has the ability to exercise resolution powers.

Q23) Do you agree with the objectives of resolution? Should other objectives be considered? If yes, what are these objectives?

Policyholder protection is the very purpose of prudential regulation; the current level of protection offered by Solvency II and national insolvency law already provides very adequate safeguards. In particular, the SCR ensures a high level of protection for policyholders, and Solvency II already provides for the development of recovery plans long before there is a real risk that policyholders will not be protected in full. As EIOPA notes in the Discussion Paper, the resolution authority should balance the objectives of resolution appropriately. Insurance Europe would nevertheless emphasise that an insurer should not be placed in resolution for reasons of policyholder protection when in fact that objective could be better achieved by using other available frameworks.

Q24) Should the objectives be ranked? If yes, how should this look like and which objective should be the primary objective? If no, how could potential conflicts between the objectives be resolved (e.g. between policyholder protection and financial stability)?

Policyholder protection is the very purpose of prudential regulation; the current level of protection offered by Solvency II and national insolvency law already provides very adequate safeguards. In particular, the SCR ensures a high level of protection for policyholders, and Solvency II already provides for the development of recovery plans long before there is a real risk that policyholders will not be protected in full. As EIOPA notes in the Discussion Paper, the resolution authority should balance the objectives of resolution appropriately. Insurance Europe would nevertheless emphasise that an insurer should not be placed in resolution for reasons of policyholder protection when in fact that objective could be better achieved by using other available frameworks.

Q25) Do you agree with the conditions for entry into resolution?

Insurance Europe agrees with the conditions for entry into resolution as they are established by the Financial Stability Board (FSB) Key Attributes and now proposed by EIOPA. Many of the resolution conditions described could serve to protect the interests of policyholders before actual insolvency proceedings are initiated. Insurance Europe therefore agrees that entry into resolution should be the last option, once all other intervention and recovery measures have been exhausted.

Insurance Europe always maintained that rigid pre-defined triggers (an absolute obligation for the authority to intervene when a specific situation arises) for entry into resolution are not appropriate, as an assessment of when an insurer's liabilities exceeds its assets requires significant judgment on the part of the resolution authority (this is because asset values fluctuate and so do liabilities, which are merely best estimates of expected claims/maturities rather than certain amounts). Insurance Europe believes that it is important to avoid disrupting the ladder of supervision already provided by Solvency II.

While it is essential that a resolution framework provides strong legal certainty for undertakings, Insurance Europe believes that flexibility is important when determining points (and underlying conditions) of entry into resolution. It is necessary that resolution authorities have enough flexibility to also determine the most appropriate resolution strategy conducive to the optimal outcome for the point of entry they choose (as opposed to being bound by the original strategy). The development of a preferred resolution strategy that best achieves the resolution objectives may depend on many factors, such as the existing structure and business model, the need for recapitalisation, the necessity for preservation of diversification, or the degree of internal interconnectedness within the group. Not making use of some resolution tools may even be the best solution, as insurance resolution normally does not have the same urgency as bank resolution.

Further clarity is required surrounding the intention of the third bullet point as it seems to link public interest to the choice of approach to resolution, which is an outcome rather than a trigger for entry.

Q26) Do you agree with the conditions for determining the point of "non-viability" (i.e. where an insurer is no longer viable or likely to be no longer viable)?

Insurance Europe has always argued that resolution should be a measure of last resort, which should only be employed once all recovery options have been exhausted.

Entry into resolution should not occur before the insurer has reached the point of non-viability. A premature entry into resolution would rule out several recovery options that might produce a better outcome for the insurer and its policyholders (including run-off and portfolio transfer). While an insurer is balance sheet solvent, it should be possible to address it as a viable concern, in accordance with prudential rules and in close cooperation with its supervisor where necessary. On the other hand, Insurance Europe agrees that entry into resolution could be necessary before an insurer is balance sheet insolvent, if a formal "wind-up" would yield suboptimal outcomes for policyholder protection and continuity of cover. The focus of resolution should in any case be on those actions that are necessary where the firm is no longer viable and actions provided for in Solvency II are deemed insufficient.

The specification of the point of non-viability as *"The insurer is in breach of or likely to be in breach of the MCR, assets backing technical provisions, or other prudential requirements*" and *"There is a strong likelihood that policyholders or creditors will not receive payments as they fall due"* seems generally sensible. However, the inclusion of "likely" in the first statement should be removed as it introduces uncertainty. The condition should be aligned to the Solvency II ladder of supervisory intervention, and therefore should refer to an irrecoverable breach of the MCR.

Q27) What other conditions could be used to define the point of "non-viability"?

The specification of the point of non-viability as *"The insurer is in breach of or likely to be in breach of the MCR, assets backing technical provisions, or other prudential requirements*" and *"There is a strong likelihood that policyholders or creditors will not receive payments as they fall due"* seems generally sensible. However, the inclusion of "likely" in the first statement should be removed as it introduces uncertainty. The condition should be aligned to the Solvency II ladder of supervisory intervention, and therefore should refer to an irrecoverable breach of the MCR.

Q28) Do you have general comments on the powers listed above?

In Insurance Europe's view, resolution powers need to be well-defined and targeted, so as to avoid forcing resolution authorities into taking sub-optimal actions. They should be based on circumstances and changing macroeconomic factors. Likewise, special rules applying in a resolution context should be well-defined and targeted since Solvency II mostly deals with recovery.

Run-offs and portfolio transfers are sufficient to deal with the large majority of insurance failures. Therefore, these should be the most preferred tools and authorities should clearly justify the need for more intrusive tools and why run-off or portfolio transfers are not sufficient to meet the objectives of resolution. Insurance Europe would also like to re-emphasise that, since failures take longer in insurance, rapid intervention will not prove a good reason for the choice of resolution tools, especially because fire-sales of assets or the crystallisation of their value could result in unnecessary value destruction.

Insurance Europe views **stay and suspension powers** favourably, precisely because they preserve value and can very often prevent the need to use more drastic measures within the resolution toolkit. In addition, this tool has proven its effectiveness in the few cases when it was used. Although mass lapses are extremely unlikely in practice, such powers would create an absolute limit to insurers' exposure to very significant forced "fire sales" of assets and contagion. In the unlikely case of individual company mass lapses, supervisors should be able to intervene unilaterally after the SCR has been breached as part of the ladder of intervention. Intervention should only be possible before the SCR has been breached if requested by the company. Insurance Europe would add that stay and suspension powers could not only be applicable to cashing out annuities, but also to switching or to service and infrastructure contracts. Appropriate discretion should be applied over when these powers should be exerted and the possible detrimental consequences of using these powers should be duly considered.

Run-offs and portfolio transfers should go hand in hand with stay and suspension powers. For this reason, these intervention powers should be given clear priority and only if they cannot be applied or are deemed insufficient, other tools may be considered.

Control, manage and operate the insurer or bridge institution. In a situation where the insurer is no longer viable, the power to continue to carry on some of the insurer's business, for example making payments to annuitants would be consistent with policyholder protection. However, the aim should be to establish appropriate adjustments in value, where required, as soon as practicable so as to prevent conflicts of interests arising between different policyholder groups. Insurance Europe agrees that control, management and operational powers are necessary, but would point out though that in insurance, establishing a bridge institution is another means to undertake a portfolio transfer.

Finally, Insurance Europe would point out that supervisory powers need to be facilitated to review capital requirements in times of stress i.e. if there is a major market turning event, a number of firms might fall below the SCR requirements but because of the nature of the event the market will right itself. This would be consistent with Article 138(4) of Solvency II and the "Final Report on public consultation No. 14/046 on Guidelines on the extension of the recovery period in exceptional adverse situations". However, to allow businesses to maximise the opportunities available to them, the existing capital requirements might need to be reduced (or applied less vigorously).

Insurance Europe has the following comments on the powers described in table 4 in relation to reinsurance:

Restructure, limit or write down liabilities, including insurance and reinsurance liabilities, and allocate losses to creditors and policyholders, where applicable and in a manner consistent with statutory creditor hierarchy and jurisdiction's legal framework: Buyers of insurance purchase protection against financial losses that are incurred by the occurrence of the insured risk. Insureds pay a premium to mitigate risk, whereas investors take risk to earn a premium. Therefore, insureds are entitled to higher protection in resolution (and liquidation) than investors.

Stay the rights of reinsurers of a cedent insurer to terminate or not reinstate coverage on the sole ground of the cedent's entry in recovery or resolution: Insurance Europe considers that this resolution power may be appropriate where the cedent enters resolution. It is however important to introduce adequate safeguards. Reinsurers should not be made liable to pay for losses beyond those covered by contracts existing at the time of the loss. Any reinstatement of coverage must be carried out at market prices. In the absence of comparable market prices, the reinsurer should be able to use its existing pricing mechanisms. Reinsurers can provide valuable capacity in off-loading risk. Where the implementation of such a framework creates legal uncertainty or moral hazard risks in the case of recovery this could limit reinsurers' willingness to get involved when firms are in financial difficulty.

Q29) Should other powers be considered? If yes, what are these powers?

Insurance Europe does not support any further resolution powers.

Q30) Do you have specific comments on the power to bail-in shareholders and creditors?

Applying the bail-in tool in an insurance context would not be appropriate. Any such tool should be based on existing local corporate restructuring legislation. If authorities are looking to adjust creditor liabilities, as with writing down policy benefits, corporate restructuring arrangements already exist and they require creditor and court agreement. Since insurers' resolution happens in an extended period, an agreement is likely to be reached. Insurance Europe does not believe that the power to restructure liabilities should fall to regulators alone, as this encroaches on ownership rights protected under almost all jurisdictions as fundamental rights, and so Court approval would be needed. In addition, Insurance Europe would point out that bailing in bondholders would make a very small contribution to the resolution of insurers, who finance themselves primarily through up-front premiums and investment returns.

A bail-in tool which includes the conversion of shares must be excluded for mutual insurers and mutual holdings, since they do not have shareholders. In mutual insurance companies, the policyholders are also the owners of the company, which means that there are no conflicts of interests between policyholders and owners in such companies.

In any case, it should be a national prerogative to interpret how such powers are met, as these may be addressed through existing ordinary corporate restructuring arrangements as noted above. Finally, it should also be kept in mind that a bail-in tool may have negative impacts on access to financial markets and market confidence.

Q31) In your view, what are the benefits and what could be the potential (wider) implications or side effects of the power to bail-in shareholders and creditors?

Applying the bail-in tool in an insurance context would not be appropriate. Any such tool should be based on existing local corporate restructuring legislation. If authorities are looking to adjust creditor liabilities, as with writing down policy benefits, corporate restructuring arrangements already exist and they require creditor and court agreement. Since insurers' resolution happens in an extended period, an agreement is likely to be reached. Insurance Europe does not believe that the power to restructure liabilities should fall to regulators alone, as this encroaches on ownership rights protected under almost all jurisdictions as fundamental rights, and so Court approval would be needed. In addition, Insurance Europe would point out that bailing in bondholders would make a very small contribution to the resolution of insurers, who finance themselves primarily through up-front premiums and investment returns.

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Q32) Do you have specific comments on the power to bail-in policyholders?

Everything should be done by policymakers (through applicable law) and supervisors to avoid being in a situation where policyholders share some of the losses. In other words, policyholders should be in scope of bail-in through ordinary corporate restructuring arrangements only as a measure of last resort, given the invasiveness of this resolution tool. In any case, the principle of No Creditor Worse Off than in Liquidation (NCWOL) should apply.

If authorities are looking to adjust creditor liabilities or to write down policy benefits, corporate restructuring arrangements already exist and they require creditor and court agreement. Since insurers' resolution happens over an extended period, this allows for such an agreement to be arrived at. Insurance Europe does not believe that the power to restructure liabilities (including allocating losses to policyholders) should fall to regulators alone, as this encroaches on ownership rights protected under almost all jurisdictions as fundamental. Lastly, as explained in questions 30-31, it is unclear how a bail-in tool including the conversion of shares would work for mutual insurers, since they do not have shareholders.

Q33) In your view, what are the benefits and what could be the potential (wider) implications or side effects of the power to bail-in policyholders?

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Q34) Do you think that other safeguards are needed on top of the above mentioned safeguards and restrictions?

Insurance Europe fully supports the no creditor worse off and pari passu safeguards and believes that any departures from these general principles should require a substantive explanation from the supervisor. This is all the more necessary because deviations from the pari passu principle may deter bondholders from investment in insurers. Departing from the NCWOL principle would also encroach on property rights as enshrined in the European Convention on Human Rights.

Insurance Europe would suggest that stronger tests and disincentives for authorities to use powers going beyond run-off and portfolio transfer are needed. For example, approval of the Courts might be required for the use of certain powers. There should also be a provision for sufficient independent oversight and challenge surrounding the process of resolving an insurer.

The fulfilment of policyholder receivables before other receivables, as laid down in Article 275 of Solvency II should not be altered.

Q35) Do you agree on the need to have cooperation and coordination arrangements (e.g. crisis management groups or equivalent arrangements) in place for cross-border insurance groups?

Insurance Europe agrees with the concept of cooperation agreements and believes that cooperation and coordination between relevant supervisors and resolution authorities within the EEA and third countries is important. With respect to third countries, cooperation and coordination between supervisors should extend both upstream – for those European insurers that are subsidiaries of a foreign group - and downstream to any insurance operations belonging to the European subsidiary. Unilateral decisions should be explicitly discouraged, as they risk producing sub-optimal outcomes. Such cooperation and coordination between supervisors should allow for the swift recognition and implementation of decisions of resolution authorities outside their jurisdictions thereby increasing their chances of success. However, any cross-border cooperation must be defined in accordance with the rule of law. Given that cooperation will not be a legal requirement, more information should be provided on how this will be achieved from a practical perspective and on whether further actions should be put in place to support this. In addition, EIOPA should allow for sufficient flexibility in organising cooperation agreements.

Q36) How should these cooperation arrangements be organised in order to allow for an efficient decision-making process?

Insurance Europe would like to emphasise the following points:

- Cooperation arrangements between supervisory and resolution authorities, within the insurance sector and between the insurance sector and other financial sectors, should be clearly defined.
- Arrangements should be made for an appropriate separation of the supervisory and resolution functions, which may/or may not be part of the same authority.
- Where different rules may apply (e.g. banking vs insurance resolution), arrangements should be made to ensure that relevant resolution requirements apply to entities in a group and to the group. For example, an insurance led conglomerate should not be resolved in accordance with bank resolution rules.

- The cooperation arrangements should be led and organised by the group supervisor, as foreseen in Articles 218 and 239 of Solvency II.
- There should be a focus on all material entities within the group and involve the supervisors of those entities within the EEA as well as third countries' when applicable – this could be achieved through a sub group of the college of supervisors.
- In considering the exchange of information between supervisors on a cross border basis, it is important that there are clear confidentiality agreements in place.

Q37) What other issues need to be considered in order for the cooperation arrangements to work more effectively and efficiently?

As stated in the FSB guidance on resolution planning for systemically important insurers, reinsurers should be resolved according to their resolution strategy, which may seek the preservation of diversification. A point-of-entry at group level is a prerequisite for reinsurers, and therefore, adequate mechanisms should be in place to ensure the cooperation of resolution authorities up to and during resolution, for instance through cooperation agreements.

Q38) In your view, how and/or to what extent should third countries be involved in these cooperation arrangements?

With respect to third countries, cooperation and coordination between supervisors should extend both upstream – for those European insurers that are subsidiaries of a foreign group - and downstream to any insurance operations belonging to the European subsidiary. So, if there are material entities within the group subject to third country supervision, these should be included within any cooperation and coordination arrangements.

Article 260 Solvency II on equivalence results in reliance on group supervision exercised by third-country supervisors. This effect should extend to pre-emptive recovery and resolution planning for groups. Third-country equivalence would be undermined if pre-emptive recovery and resolution plans are required for groups at EU level, for example through the creation of an EU sub-group. EIOPA should promote the group-wide supervisor being responsible for group resolution, in particular for equivalent non-EU supervisors.