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OPINION TO INSTITUTIONS OF THE EUROPEAN UNION

ON

THE HARMONISATION OF RECOVERY AND RESOLUTION FRAMEWORKS FOR (RE)INSURERS ACROSS THE MEMBER STATES

Table of Contents

Abbreviations

BRRD	Bank Recovery and Resolution Directive
CCP	Central counterparty
CSD	Central securities depository
ESRB	European Systemic Risk Board
EU	European Union
IAIG	Internationally Active Insurance Group
IAIS	International Association of Insurance Supervision
ICP12	Insurance Core Principle No 12
FSB	Financial Stability Board
G-SIFI	Global Systemically Important Financial Institution
G-SII	Global Systemically Important Insurer
HLA	Higher Loss Absorbency requirement
IGS	Insurance Guarantee Scheme
IRSG	Insurance and Reinsurance Stakeholders Group
MCR	Minimum Capital Requirement
NCA	National Competent Authority
NCWO	No Creditor Worse Off
NSA	National Supervisory Authority
ORSA	Own Risk and Solvency Assessment
SCR	Solvency Capital Requirement
SRP	Supervisory Review Process

Executive summary

In this Opinion to the institutions of the European Union (EU) EIOPA calls for the establishment of a minimum harmonised and comprehensive framework in the area of recovery and resolution of insurers and reinsurers (hereinafter collectively referred to as "insurers").

EIOPA is of the view that a **minimum degree of harmonisation** in the field of recovery and resolution for insurers would **contribute to achieving policyholder protection**, as well as maintaining financial stability in the EU.

Minimum harmonisation entails the **definition of a common approach to the fundamental elements of recovery and resolution** (e.g. objectives for resolution and resolution powers) which the national frameworks should address, while leaving room for Member States to adopt additional measures at the national level, subject to these measures being compatible with the principles and objectives set at the EU level. These additional measures at the national level might be required in order to better address the specificities of the national markets.

Harmonisation of existing frameworks would, to a considerable extent, **avoid the undesirable situation of having a fragmented landscape** of recovery and resolution practices across the Member States. A fragmented landscape could especially impede the orderly resolution process of particularly cross-border insurance groups. A fragmented landscape complicates the cooperation and coordination between foreign national authorities and might therefore result in suboptimal outcomes at the EU level stemming from uncoordinated actions.

Although Solvency II has reduced the likelihood of insurers failing in the future, it is not designed to completely eliminate this risk. Having in place a harmonised and effective recovery and resolution framework is also **particularly relevant in fragile market environments**, like the current low interest rate environment which poses risk to insurers. It is essential that Members States have a consistent framework and that national authorities are equipped with the necessary powers and tools to manage crisis situations effectively.

EIOPA believes that the scope of a harmonised recovery and resolution framework should in principle cover all (re)insurers within the scope of Solvency II. However, **proportionality should be a fundamental guiding principle** of a harmonised framework. In accordance with this principle, EIOPA considers that Member States should be given the possibility to waive certain requirements of the framework for specific insurers. This applies, in particular, to the requirements to develop and maintain pre-emptive recovery and resolution plans.

According to EIOPA's view, **the building blocks of a harmonised recovery and resolution framework include**: (i) Preparation and planning; (ii) Early intervention; (iii) Resolution; and (iv) Cross-border cooperation and coordination.

EIOPA's proposal for each of the building block is as follows:

I. *Preparation and planning*

- The purpose of adequate preparation and planning is, on the one hand, to reduce the probability of insurers failing by developing pre-emptive

recovery plans, and, on the other hand, to reduce the impact of potential failures by developing pre-emptive resolution plans.

- EIOPA is of the view that a harmonised recovery and resolution framework should include a requirement for **insurers to develop and maintain recovery plans in a pre-emptive manner** (i.e. during normal course of business).
- A harmonised recovery and resolution framework should also include a requirement for **resolution authorities to develop and maintain resolution plans in a pre-emptive manner** (i.e. during normal course of business).
- Resolution authorities should furthermore be required to **assess the resolvability of insurers** for which a pre-emptive resolution plan is drafted.

II. Early intervention

- EIOPA believes that a harmonised recovery and resolution framework should introduce a **common set of early intervention powers** for NSAs which are compatible with the Solvency II framework.

- NSAs should be able to exercise these powers **at a sufficiently early stage** in order to avoid the escalation of problems at insurers.

- The introduction of early intervention powers **should especially not result in a new pre-defined intervention level or capital requirement** beyond what is envisaged in Solvency II.

III. Resolution

- The purpose of adequate resolution measures is to reduce the impact of failing insurers by designating an authority responsible for the resolution of insurers, establishing the objectives and conditions for resolution and introducing effective resolution powers.

- Member States should have in place **a designated administrative resolution authority** for insurers.

- EIOPA advises to **clearly set out the objectives for resolution** in a harmonised recovery and resolution framework. The **protection of policyholders and financial stability** should be part of the resolution objectives, although the former objective is likely to be more prominent when resolving insurers.

- In resolution, resolution authorities should however have the **flexibility to balance the** objectives **for resolution as appropriate** to the nature and circumstances of each situation, without being bound to an *ex-ante* hierarchical order in the resolution objectives.

- EIOPA advises to include a **common set of conditions for entry into resolution** which, based on expert judgement and discretion of the resolution authority, provides for timely and early entry into resolution

before an insurer is balance sheet or cash flow insolvent and before all equity has been wiped out.

- EIOPA also proposes to broaden the existing resolution toolkit to **introduce a common set of resolution powers** with consistent design, implementation and enforcement features. These resolution powers should help to better achieve the resolution objectives, such as better protecting policyholders by enabling the continuity of insurance contracts and the continuity of payments to policyholders. Resolution actions can preserve value compared with normal insolvency procedures, thereby, improving outcomes for creditors and policyholders, who will be protected by adequate safeguards.

- The exercise of resolution powers should be made **subject to adequate safeguards**, including the safeguard that no creditor or policyholder should be worse off in resolution compared to liquidation.

IV. *Cross-border cooperation and coordination*

- EIOPA is of the view that **arrangements for cross-border cooperation and coordination**, including the exchange of information, should be established between foreign national authorities to effectively deal with crisis situations involving cross-border insurance groups. These arrangements could take the form of crisis management groups (CMGs) as currently exist for global systemically important insurers (G-SIIs).

EIOPA has conducted **a qualitative assessment of the need for minimum harmonisation and the building blocks**. Further quantitative cost-benefit analysis, may be required as part of the process of a new legislative action for a harmonised recovery and resolution framework in the EU.

Furthermore, EIOPA advises to carefully assess the application of a recovery and resolution framework to insurers which are part of a financial conglomerate. A consistent approach should be followed taking into account the already existing recovery and resolution framework for banks and the potential harmonised framework for insurers.

In the coming years, **EIOPA will monitor the progress made in the field of recovery and resolution** in Member States. Special attention will be devoted to the impact on policyholders.

Furthermore, EIOPA plans to **continue with its work in the field of recovery and resolution for insurers.** This refers, in particular, to two relevant and related areas, which are currently left out of scope and which require an in-depth analysis: (i) the potential harmonisation of resolution funding and (ii) the potential harmonisation of insurance guarantee schemes (IGSs).

1. Introduction

1.1 Legal basis

1. This Opinion is issued on the basis of Article 34 of the EIOPA Regulation[1], which lays down that EIOPA "*may, […] on its own initiative, provide opinions to the European Parliament, the Council and the Commission on all issues related to its area of competence.*"

2. Furthermore, the following articles are of relevance:

   - Article 8(1)(i) of the EIOPA Regulation sets out EIOPA's tasks and powers in the area of recovery and resolution of insurers by providing that EIOPA is responsible for "*[…] the development and coordination of recovery and* resolution *plans, providing a high level of protection to policy holders, to beneficiaries and throughout the Union, in accordance with Articles 21 to 26*".
   - Article 24(2) of the EIOPA Regulation bestows on EIOPA the responsibility to contribute to ensuring coherent and coordinated crisis management and resolution regime in the EU.
   - Article 25(2) of the EIOPA Regulation provides that "*[EIOPA] may* identify *best practices aimed at facilitating the resolution of failing institutions and, in particular, cross-border groups, in ways which avoid contagion, ensuring that appropriate tools, including sufficient resources, are available and allow the institution or the group to be resolved in an orderly, cost-efficient and timely manner*."

3. Against this legal background, EIOPA is competent to deliver on its own initiative this Opinion to the European Parliament, the Council and the European Commission with a view to contributing to the establishment of harmonised, high-quality regulatory and supervisory standards in the area of recovery and resolution of insurers within the scope of the Solvency II framework. [2]

1.2 Background and context

4. Following the failure of and the unprecedented public support to financial institutions during the past financial crisis, the viability of national recovery and resolution frameworks has gained increasing attention. Until the crisis, the recovery and resolution of financial institutions were dealt with at the national level, with national authorities being able to apply national resolution powers at the level of the entity located within their jurisdiction rather than at the level of cross-border groups. The financial crisis revealed the potential consequences of the lack of effective recovery and resolution

[1] Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).

[2] The scope of the Solvency II framework is defined in Article 2 of the Solvency II Directive (2009/138/EC) with Articles 3 – 12 laying down the exclusions from the scope.

frameworks and cross-border coordination arrangements between countries.[3]

5. At the global level, the G20 and the Financial Stability Board (FSB) have developed an extensive agenda for stabilising the financial system and the world economy more broadly. Initially, the focus was on the banking sector as banks were at the epicentre of the past financial crisis. In November 2011, the leaders of the G20 endorsed the recommendations issued by the FSB for a more effective resolution regime to deal with failing financial institutions: "Key Attributes of Effective Resolution Regimes for Financial Institutions" (hereafter, referred to as the "Key Attributes").[4]

6. At the EU level, the European Union legislators implemented the principles set out in the Key Attributes by adopting the Bank Recovery and Resolution Directive (BRRD)[5] in 2014. The BRRD establishes common European rules for the recovery and resolution of troubled credit institutions and investment firms in the EU.

7. The focus has, however, soon been extended to financial institutions other than banks. At the global level, the FSB supplemented the Key Attributes by including guidance on how the core principles for an effective resolution regime should be applied to the insurance sector.[6]

8. The International Association of Insurance Supervision (IAIS) has also initiated a number of initiatives in this field with the aim of improving the recovery and resolution measures that are available to national authorities and, hence, of contributing to the protection of policyholders and financial stability. These initiatives include:

    - The development of a methodology for identifying G-SIIs.[7] Insurers designated as G-SIIs are subject to a set of policy measures including: group-wide recovery and resolution planning and regular resolvability

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[3] European Commission, EU Bank Recovery and Resolution Directive (BRRD), Frequently Asked Questions (April 2014): "*The crisis also highlighted the lack of arrangements to deal effectively with failing banks that operated in more than one Member State. It was thus agreed that greater EU financial integration and interconnections between institutions needed to be matched by a common framework of intervention powers and rules. The alternative would be fragmentation and inefficiency in EU banking and financial services, something which would harm the single market and would impair its advantages for consumers, investors and businesses*."

And "*The high profile national and cross-border bank failures in the last few years (including Fortis, Lehman Brothers, Icelandic banks, Anglo Irish Bank and Dexia) revealed serious shortcomings in the existing tools available to authorities for preventing or tackling failures of systemic banks, those that are intrinsically linked to the wider economy and play a central role in the financial markets."* (See link: http://europa.eu/rapid/press-release_MEMO-14-297_en.htm?locale=en)

[4] Please see press release of the FSB: http://www.fsb.org/wp-content/uploads/pr_111104dd.pdf?page_moved=1

[5] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

[6] FSB Key Attributes of an Effective Resolution Regime for Financial Institutions.

[7] IAIS's G-SII Assessment Methodology (See link: http://www.iaisweb.org/page/supervisory-material/financial-stability-and-macroprudential-policy-and-surveillance).

assessments in accordance with the Key Attributes; potential Higher Loss Absorbency (HLA) requirement[8], and enhanced group-wide supervision. An updated list of G-SIIs was published in 2016 which identified five G-SIIs established in the EU.[9]

- The revision of the Insurance Core Principles (ICPs), including ICP 12. The ICPs provide a globally accepted framework for the regulation and supervision of the insurance sector[10], whereby ICP 12 (currently being revised) deals with the exit from the market and resolution of insurers.

9. In the EU, the European Commission consulted stakeholders on the possible framework for the recovery and resolution of non-bank financial institutions, including central counterparties (CCPs), central securities depositories (CSDs) and (re)insurers in 2012.[11] Following the consultation process, the European Commission decided to work on a proposal for an effective recovery and resolution regime for CCPs. For the insurance sector, it was decided to continue to monitor the situation carefully.[12]

10. The European Systemic Risk Board (ESRB) approaches the discussion from the perspective of systemic risk and has argued that *"an insurance recovery and resolution directive and an insurance guarantee scheme directive would form a holistic framework for dealing with insurer failure"* in its recent report on systemic risks in the EU insurance sector.[13] In this report, the ESRB identified four main channels in which insurers can be a source of systemic risks or amplify these. These include (i) the engagement in non-traditional and non-insurance activities, (ii) procyclicality in asset allocation and in the pricing and writing of insurance contracts (iii) the common vulnerability to a double-hit scenario and (iv) the lack of substitutes in vital lines of insurance business. Currently, the ESRB is continuing its work on recovery and resolution for insurers.

11. EIOPA, as the European authority for insurance and occupational pensions, has been proactively contributing to this discussion about effective recovery and resolution frameworks for insurers in the EU. On the one hand, by taking

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[8] IAIS publication of G-SII Policy Measures 18 July 2013 (See link: http://www.fsb.org/wp-content/uploads/FSB-communication-G-SIIs-Final-version.pdf).

[9] These include AEGON N.V., Allianz SE, Aviva plc., Axa S.A. and Prudential plc. For a full list, please refer to the press release of the IAIS (See link: http://www.fsb.org/wp-content/uploads/2016-list-of-global-systemically-important-insurers-G-SIIs.pdf).

[10] Revised ICP12 and ComFrame in ICP12 for consultation (See link: https://www.iaisweb.org/index.cfm?event=showPage&nodeId=64995.

[11] Please see consultation document of the European Commission (2012) "Consultation on a possible recovery and resolution framework for financial institutions other than banks" (See link: http://ec.europa.eu/finance/consultations/2012/nonbanks/index_en.htm)

[12] Extract from speech by Commissioner Jonathan Hill on 2016 priorities for an approach to resolution for CCPs, Centre for European Policy Studies (See link: http://europa.eu/rapid/press-release_SPEECH-16-274_en.htm).

[13] ESRB, "Report on systemic risks in the EU insurance sector", December 2015. The ERSB identified in its report four sources of systemic risk: 1) engagement in non-traditional and non-insurance activities, 2) procyclicality in asset allocation and pricing and writing of insurance, 3) common vulnerability to a double-hit scenario and 4) lack of substitutes in vital lines of insurance business. (See link: http://www.esrb.europa.eu/pub/pdf/other/2015-12-16-esrb_report_systemic_risks_EU_insurance_sector.en.pdf?d171a63f6e1d433f82e477d67416fbd5).

part in international working groups and providing input to the work of other (regulatory) bodies.[14] On the other hand, by carrying out work in accordance with its tasks and responsibilities as laid down in the EIOPA Regulation. The purpose of EIOPA's work is to achieve an adequate protection of policyholders, while maintaining financial stability and protecting public funds. In general, this could be achieved by measures which reduce the probability of insurers failing (recovery) and measures which reduce the costs and impact of an insurance failure if this cannot be avoided (resolution).

12. In light of this, EIOPA conducted a survey to obtain a better understanding of the crisis prevention, management and resolution approaches and practices in the different Member States in 2013[15], followed by an Opinion addressed to NCAs on Sound Principles for Crisis Prevention, Management and Resolution Preparedness of NCAs in 2014.[16] In 2016, EIOPA established a project group to further develop EIOPA's views on recovery and resolution for insurers. This present Opinion, addressed to EU Institutions, is the outcome of EIOPA's recent work in the area of crisis prevention, management and resolution.

1.3 Scope of Opinion

13. In this Opinion EIOPA expresses its views with respect to the potential harmonisation of recovery and resolution elements, including preparation and planning, early intervention, resolution and cross-border cooperation for crisis situations.

14. EIOPA has conducted a qualitative assessment of the need for minimum harmonisation and the building blocks. Further quantitative cost-benefit analysis, may be required as part of the process of a new legislative action for a harmonised recovery and resolution framework in the EU.

15. The potential harmonisation of resolution funding arrangements and IGSs – two relevant topics related to recovery and resolution– are left out of scope of this Opinion. However, in its survey on existing national recovery and resolution frameworks for insurers in the EU, EIOPA included some questions

[14] Examples are EIOPA's public responses to the consultation paper of the European Commission (2012) and the consultation paper of the FSB (2014). (See links:

https://eiopa.europa.eu/Publications/Responses/EIOPA_Response-COM_Consultation_on_recovery_and_resolution_for_nonbank_financial_institutions.pdf

and
https://eiopa.europa.eu/Publications/Responses/EIOPA_Response_to_FSB_Consultation_on_application_of_Key_Attributes_to_i.pdf)

[15] EIOPA report on *"Crisis Prevention, Management and Resolution Preparedness of NSAs"*, 29 November 2013 (See link:
https://eiopa.europa.eu/Publications/Reports/Report_on_Crisis_Prevention_Management_and_Resolution_Preparedness_of_NSAs.pdfhttps:/eiopa.europa.eu/Publications/Reports/Report_on_Crisis_Prevention_Management_and_Resolution_Preparedness_of_NSAs.pdf).

[16] Opinion on "Sound Principles for Crisis Prevention, Management and Resolution Preparedness of NCAs", 24 November 2014 (See link:
https://eiopa.europa.eu/Publications/Opinions/EIOPA_Opinion_on_Sound_Principles_Crisis_Prevention_Management_and_Reso.pdf).

to obtain an overview of the current situation, concluding that there are substantial differences between the IGSs in terms of their funding, mandate and coverage.[17] Other specific remarks on this particular topic are also discussed throughout this Opinion.

16. EIOPA has identified these two topics as areas for further work, requiring an in-depth analysis, including an assessment of the potential broader (economic) implications of harmonisation in the EU.

17. Furthermore, EIOPA has not analysed the potential application of a harmonised recovery and resolution framework to insurers which are part of a financial conglomerate. EIOPA considers that this should be carefully assessed whereby a consistent approach is followed taking into account the already existing recovery and resolution framework for banks.

18. It should be stressed that the Opinion does not enter into the discussion about which specific legislative tool should be employed for a potential harmonisation process. As such, it does not consider whether a separate directive dealing with recovery and resolution for insurers should be promoted or whether the main elements should be included as part of existing EU legislations such as Solvency II. In summary, the focus of the Opinion is on the relevance and substance of recovery and resolution measures in a potential harmonised environment.

1.4 Approach followed by EIOPA

19. In order to deliver this Opinion, EIOPA followed a gradual and pragmatic approach. Firstly, EIOPA conducted in the first quarter of 2016 a survey among NSAs with the aim of getting an overview of the existing national recovery and resolution frameworks. The results of this survey (hereafter referred to as "EIOPA's survey on existing recovery and resolution frameworks" or simply "EIOPA's survey") provided an overview of the current landscape of national frameworks and shed light on the differences between Member States and potential shortcomings in existing frameworks.

20. EIOPA used these insights to form its initial views on harmonising recovery and resolution frameworks for insurers. These views were expressed in the discussion paper "Potential harmonisation of recovery and resolution frameworks for insurers", which was published for consultation in December 2016.[18]

21. EIOPA further developed its initial views on the basis of the information received from stakeholder from the public consultation and did some further analysis on certain areas, including a mapping exercise between the proposals made in this Opinion and the recovery and resolution measures already included in the Solvency II framework (see Annex V).

[17] In some countries, the existing schemes have proven to work very efficiently in the resolution process. These experiences should be duly considered as part of the follow-up work.

[18] See link: https://eiopa.europa.eu/Pages/Consultations/EIOPA-CP-16-009-Discussion-Paper-on-Potential-Harmonisation-of-Recovery-and-Resolution-Frameworks-for-Insurers.aspx

1.5 Consultation of stakeholders

22. In the public consultation, stakeholders were asked to provide feedback on specific questions set out in the discussion paper "Potential harmonisation of recovery and resolution frameworks for insurers". The focus of the questions was on the proposed building blocks for a potential harmonisation.

23. Within this consultation process, EIOPA received responses from 29 stakeholders as follows:

    - 14 responses from associations and stakeholder groups (including EIOPA's Insurance and Reinsurance Stakeholders Group (IRSG)),
    - 6 responses from the industry,
    - 3 responses from ministries,
    - 3 responses from others, and
    - 2 responses from NSAs,
    - 1 response from an EU organisation.

24. A high level summary of the consultation feedback can be found in Annex IV.

1.6 Potential follow-up work and role of EIOPA

25. EIOPA plans to continue with its work in the field of recovery and resolution and will initiate further work on the two relevant and related areas which are currently left out of scope. These areas are: (i) the potential harmonisation of resolution funding and (ii) the potential harmonisation of IGSs.

26. Furthermore, as a European supervisory authority, EIOPA is responsible for:

    - Contributing to promoting and monitoring the efficient, effective and consistent functioning of the colleges of supervisors and fostering the coherence of the application of EU law among the colleges of supervisors (Article 21 of the EIOPA Regulation).
    - Contributing to ensuring coherent and coordinated crisis management and resolution regime in the EU (Article 24(2) of the EIOPA Regulation);
    - Contributing to the development and preventive measures to minimise the systemic impact of any failure, as well as identifying best practices in the field of recovery and resolution for insurers (Article 25 of the EIOPA Regulation);
    - Fostering common supervisory convergence across the EU with the aim of establishing a common supervisory culture (Article 29 of the EIOPA Regulation).

27. These responsibilities are particularly relevant in the context of ensuring a minimum harmonised EU framework for the recovery and resolution of insurers. For the purposes of developing such a framework, the minimum harmonisation approach should not lead to substantial differences following a potential framework implementation by Member States. From this point of view, EIOPA will monitor in the coming years the progress made in the field of recovery and resolution. Special attention would need to be devoted to the impact on policyholders, who stand at the core of EIOPA's activities.

28. Lastly, EIOPA reiterates its willingness and preparedness to provide technical advice, as well as to support any work the European Commission might undertake in the field of recovery and resolution in insurance. Some of the areas that may request additional technical analysis have been identified in the different building blocks of the Opinion.

1.7 Terminology

29. Throughout this Opinion, the term "harmonised recovery and resolution framework" is used to refer to key harmonised recovery and resolution elements. As highlighted, this terminology should not be regarded as prejudging the legislative tools for a potential harmonisation process in this field. The recovery and resolution elements referred to in the Opinion should be considered as essential building blocks for the recovery and resolution of insurers. The elements could be considered collectively forming a single framework or separately allowing for a more targeted approach to harmonise national frameworks.
30. Furthermore, the term "insurers" is used throughout the Opinion to refer to insurers, reinsurers and insurance groups, unless stated otherwise.

1.8 Structure of Opinion

31. The Opinion is composed of the main body of the Opinion and five annexes. The main body includes EIOPA's views with respect to the need for minimum harmonisation in the field of recovery and resolution for insurers followed by proposals for the building blocks of a potential harmonised recovery and resolution framework for insurers.
32. The annexes cover the following items:
    - Annex I provides an overview of the existing national recovery and resolution frameworks for insurers in the EU. This annex is based on the outcome of the survey conducted by EIOPA.
    - Annex II analyses in detail the arguments in favour of and against potential harmonisation of recovery and resolution frameworks for insurers taking into account the feedback from stakeholders.
    - Annex III looks into the proposed building blocks and further assesses their benefits and implications taking into account the feedback from stakeholders.
    - Annex IV provides a summary of the main comments received from stakeholders to the public consultation.
    - Annex V maps the proposed building blocks to the measures provided for in the Solvency II framework.

2. Opinion

2.1 Need for minimum harmonisation

33. EIOPA has analysed whether there is a need to harmonise national recovery and resolution frameworks for insurers in the EU, taking into account the Solvency II framework and currently existing national recovery and resolution frameworks for insurers in the EU.

34. Based on its analysis, EIOPA is of the view that the harmonisation of national recovery and resolution frameworks for insurers would contribute to adequately protecting policyholders, maintaining financial stability and protecting public funds by ensuring that all Member States have a common understanding and a similar approach in terms of objectives, and a common set of recovery and resolution measures. This is considered to be necessary to effectively deal with crisis situations.

35. One of the key benefits of harmonisation of national frameworks would be to enhance the cross-border cooperation and coordination by establishing a minimum harmonised approach towards the recovery and resolution of insurers. Furthermore, harmonisation would help to improve the level playing field in the insurance sector and further strengthen the single market.

36. Regarding the degree of harmonisation, EIOPA advises to aim for a **minimum degree of harmonisation**. Minimum harmonisation entails the definition of a common approach to the fundamental elements of recovery and resolution (e.g. objectives for resolution and resolution powers) which the national frameworks should contain, while leaving room for Member States to adopt additional measures at the national level if needed to better address the specificities of their national markets, subject to these measures being compatible with the principles and objectives set at the EU level. Furthermore, minimum harmonisation gives a certain degree of discretion to Member States with respect to some requirements (such as the designation of the resolution authority and the pre-emptive recovery and resolution planning), which could reduce the administrative costs and burdens for Member States. Further work would however be beneficial to assess the potential costs and benefits of the different elements of a harmonised framework by conducting a (quantitative) cost-benefit analysis.

37. Furthermore, EIOPA recommends that a potential harmonised framework is applied in a proportionate manner in order to avoid excessive (administrative) burdens for both insurers and national authorities.[19]

[19] A more detailed rationale including arguments in favour of and against harmonisation can be found in Annex II.

Box 1: The concepts of "recovery" and "resolution"

The concepts of "recovery" and "resolution" are in the recent years often used in crisis management. Although conceptually recovery and resolution refer to different stages of a crisis management process, both terms are associated to insurers experiencing a significant deterioration in their financial situation and should be seen as part of a continuum of supervisory or resolution activities. In practice, however, it is difficult to draw a clear line between recovery and resolution, which relate to a situation of, respectively, "going concern" and "gone concern". A possible way to differentiate between the two stages is to define recovery as the stage where the insurer is still in charge of the operations whereas in resolution a national (supervisory or resolution) authority will have likely (implicitly or explicitly) taken over from the insurer.(*)

The concept of "non-viability" is useful to shed some light on the transition from recovery to resolution. The FSB Key Attributes state that resolution should be initiated when an insurer is no longer viable or likely to be no longer viable, and has no reasonable prospect of becoming so (FSB Key Attributes 3.1). It could, therefore, be considered that an insurer experiencing financial problems is in recovery if it is still viable. The FSB Key Attributes also specify that the resolution regime should provide for timely and early entry into resolution before a firm is balance-sheet insolvent and before all equity has been fully wiped out.

Furthermore, several examples are provided to determine the non-viability, such as a breach in the minimum capital without reasonable prospects of restoring compliance, a strong likelihood that policyholders or creditors will not receive payments as they fall due or when the recovery measures have failed, or there is a strong likelihood that they will not be sufficient to return the insurer to viability.

Solvency II refers to the concepts of "reorganisation measures" and "winding-up" (defined in Article 268 of the Solvency II Directive):

- "Reorganisation measures" involve any intervention by the competent authorities which are intended to preserve or restore the financial situation of an insurer (e.g. suspension of payments or reduction of claims). Although to some extent these could be seen as early intervention measures, reorganisation measures are also linked to some of the elements of resolution as set out in the Key Attributes.
- The term "winding-up" involves the realisation of the assets of an insurer and the distribution of the proceedings among the policyholders, creditors, shareholders or members as appropriate. This term is usually used as synonym for liquidation, and liquidation is acknowledged to be one of the possible outcomes of the resolution process.

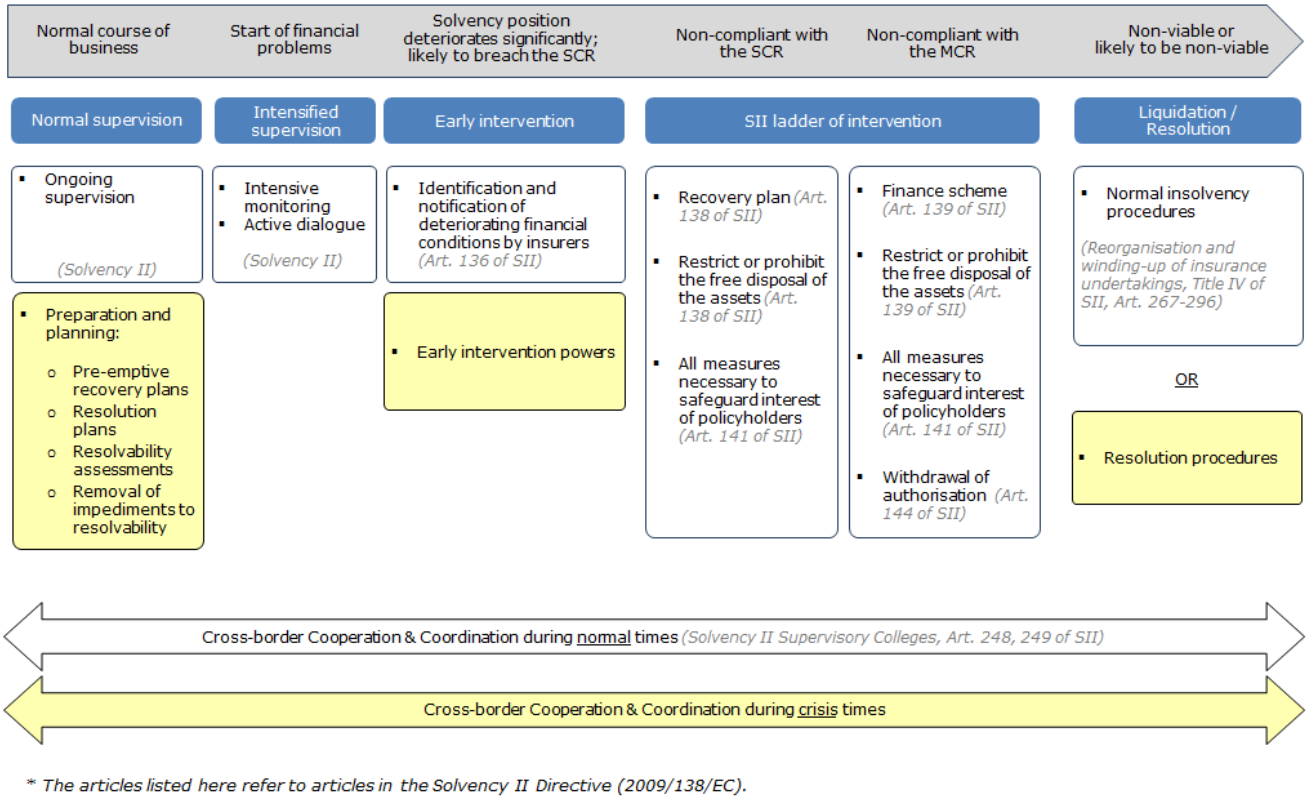
(*) It is difficult to find specific definitions of both concepts. As an example, the BRRD indirectly defines "recovery" as the situation where institutions are required to draw up and maintain plans to provide "for measures to be taken by the institution to restore its financial position following a significant deterioration to its financial situation" (Article 5 of the BRRD). The term "resolution" is formally defined in Article 2 of the BRRD as the application of a resolution tool or a tool that the BRRD itself defines in order to achieve one or more of the resolution objectives.

2.2 General principles of harmonised framework

2.2.1 Building blocks

38. EIOPA is of the view that in order to be effective a harmonised recovery and resolution framework should capture the relevant stages of a crisis management flow, to the extent that these are not yet harmonised at the EU level. A simplified crisis management flow chart is shown in chart 1. The chart identifies the areas which are captured by the Solvency II framework and the areas where EIOPA believes a harmonised framework could be help to better achieve the resolution objectives.[20]

Chart 1: Crisis management flow



** The articles listed here refer to articles in the Solvency II Directive (2009/138/EC).*

39. EIOPA believes that a harmonised recovery and resolution framework should therefore include the building blocks summarised in table 1. Each of the building blocks is described in more detail in the subsequent sections below.

[20] A detailed description of each of the stages in the crisis management flow can be found in Annex III, section 2 Building blocks.

Table 1: Building blocks of harmonised recovery and resolution framework

Building blocks	
Preparation and planning	1) Pre-emptive recovery planning
	2) Pre-emptive resolution planning
	3) Resolvability assessment
Early intervention	4) Early intervention conditions
	5) Early intervention powers
Recovery	*Solvency II ladder of intervention – out of scope*
Resolution	6) Resolution authority
	7) Objectives
	8) Conditions
	9) Powers
	10) Safeguards
Cooperation and coordination	11) Cross-border cooperation and coordination arrangements

2.2.2 Proportionality principle

40. In order to avoid excessive administrative burden for both insurers and national (supervisory and resolution) authorities, a harmonised recovery and resolution framework should have proportionality as a fundamental guiding principle.

41. The application of the proportionality principle to each of the proposed building blocks is discussed in the relevant sections below. The proportionality principle is particularly taken into account when determining the scope of each building block.

42. Moreover, the use of expert judgement and discretion by supervisory and resolution authorities is essential when dealing with crisis situations. In their decision-making process, supervisory and resolution authorities should also rely on their judgement of the situation and circumstances and use discretion appropriately and proportionately.

Box 2: Reinsurance in a harmonised recovery and resolution framework

EIOPA is of the view that the scope of a harmonised recovery and resolution framework should cover in principle all insurers that fall within the scope of the Solvency II framework, including reinsurers.

With respect to reinsurers, it should be acknowledged that reinsurance is a business to business activity and the specific characteristics of this sector should be fully taken into account in a harmonised recovery and resolution framework. This may require the development of additional guidance on how to apply the requirements and in particular the proportionality principle to reinsurers.

Although the failure of a reinsurer may not have a direct impact on policyholders, it could have an indirect impact on policyholders, pose systemic risks or might result in the discontinuance of services which could harm the financial stability and/or real economy.

On the sources of systemic risks caused by reinsurers, the ESRB[(*)] reports that reinsurance could cause systemic risks through different sources: (i) reinsurers increase the risk of contagion due to high interconnectedness between insurers and reinsurers, and between reinsurers themselves; (ii) the high concentration of reinsurers, both globally and in the EU, leads to substitutability concerns; and (iii) the transfer of risks to capital markets creates additional links between insurers and financial markets.

For these reasons, EIOPA considers that reinsurers should also be subject to a harmonised recovery and resolution framework, whereby the specific features of the business model are fully taken into account. The operational aspects of how the specificities of reinsurance can be taken into account require careful consideration.

[(*)]ESRB: "Report on systemic risks in the EU insurance sector", December 2015

2.3 Preparation and planning

43. EIOPA is of the view that a harmonised recovery and resolution framework should provide for preparation and planning measures. These measures increase the awareness of and preparedness for crisis situations which enables both insurers and national authorities to better deal with adverse situations and take timely and informed actions.

44. The purpose of adequate preparation and planning is to reduce the probability of insurers failing on the one hand by developing pre-emptive recovery plans, and to reduce the impact of potential failures on the other hand by developing pre-emptive resolution plans. As a result, the objectives of policyholder protection, financial stability and protection of public funds should be better achieved.

45. EIOPA considers that proper preparation and planning should include the requirement for pre-emptive recovery planning, pre-emptive resolution planning and resolvability assessments. Both recovery and resolution planning are essential as failure of insurers is a continuum.

2.3.1 Pre-emptive recovery planning

a) Requirement

EIOPA is of the view that a harmonised recovery and resolution framework should include a requirement for insurers to develop and maintain recovery plans in a pre-emptive manner.

Box 3: Difference between pre-emptive recovery plans and Solvency II recovery plans

It should be noted that a pre-emptive recovery plan is not the same as the recovery plan envisaged in Solvency II.

According to the provisions of Solvency II, insurers are required to develop a recovery plan within two months from the observation of non-compliance with the SCR.[(*)] This recovery plan is submitted for approval by the NSA and should set out the measures the insurer will take to achieve, within six months from observation of non-compliance with the SCR, the re-establishment of the level of eligible own funds covering the SCR or the reduction of the risk profile to ensure compliance with the SCR.

A pre-emptive recovery plan is drafted before the observation of non-compliance with the SCR, i.e. during normal times of business. The aim of pre-emptive recovery planning is to increase insurers' awareness of and preparedness for adverse situations. In a pre-emptive recovery plan, an insurer sets out the possible measures it could or would adopt to restore its solvency position following a (significant) deterioration. This includes, for instance, a review of its risk profile and funding sources. Developing pre-emptive recovery plans therefore allows insurers to make informed and timely decisions in times of crises.

(*) Please see Article 138 of the Solvency II Directive (2009/138/EC).

b) Scope and proportionality

46. Pre-emptive recovery plans should be developed at the group level or at the level of an individual insurance entity which is not part of a group.

47. The development of pre-emptive recovery plans at the group level, however, should not prohibit the possibility for solo supervisors to require the development of such plans at the solo level. Close collaboration with the group supervisor should exist if pre-emptive recovery plans are also requested from individual entities belonging to a group.

48. For pre-emptive recovery planning, EIOPA is of the view that the scope should be defined in a broad manner. The occurrence of adverse situations cannot be avoided and, hence, measures to increase insurers' awareness of and preparedness for crisis situations, such as the development of pre-emptive recovery plans, should be taken by a broad range of insurers.

49. The requirement to develop and maintain pre-emptive recovery plans should therefore in principle apply to insurers within the scope of the Solvency II framework, subject to the proportionality principle.

50. In accordance with this principle, EIOPA advises to include a power for Member States and/or NSAs to waive the requirement for certain insurers based on a set of harmonised criteria and expert judgment/discretion. These criteria would need to be further developed in order to promote convergence in the EU, but could, for instance, be related to the nature of the insurer's business, its risk profile, its size, the scope and complexity of its activities and its interconnectedness to other institutions or the financial system in general.

51. Harmonised criteria for waiving the requirement could, for instance, include:

    i. the *absolute* size of the insurer is below a certain threshold (e.g. the threshold for financial stability reporting purposes[21]);

    ii. the *relative* size of the insurer is below a certain threshold (e.g. a certain percentage of the market share in the Member State);

    iii. other relevant criteria such as complexity, interconnectedness, risk profile or capital ratios.

[21] The criteria to identify the insurers within the scope of reporting for financial stability purposes are laid down in EIOPA's Guidelines on reporting financial stability purposes (see link: https://eiopa.europa.eu/GuidelinesSII/EIOPA_EN_FS_GLs.pdf).

52. Nevertheless, the criteria should only be regarded as indicative guiding principles and not as hard thresholds. Where justified, NSAs should – using their expert judgement/discretion – still be able to:

    i. exempt insurers above the threshold(s) from the requirement to draft pre-emptive recovery plans;

    ii. submit insurers below the threshold(s) to the requirement to draft pre-emptive recovery plans.

53. Furthermore, the option to make use of simplified obligations when drafting the plans should be made possible for certain insurers (see further details in indicative content below).

c) Indicative content

54. Pre-emptive recovery plans should be regarded as supplementing the provisions in Solvency II and could be seen as a natural extension of the ORSA[22] and contingency planning[23]. The ORSA and contingency planning should therefore serve as a source of input for the drafting of the pre-emptive recovery plan. Box 4 provides an overview of the main differences between ORSA and pre-emptive recovery plans.

Box 4: Main differences between ORSA and pre-emptive recovery plans

The ORSA includes an assessment of continuous compliance with capital requirements and should allow for the identification of future (possible) breaches of the capital requirements in advance. The outcome of the assessment is documented in an (annual) report, according to the guidelines on ORSA(*) and only refers to recovery measures, e.g. if a breach of the SCR is foreseen proper management actions should be adopted in order to avoid this or to recover as soon as possible.

Pre-emptive recovery plans, in turn, are different in nature and broader in scope. Recovery plans are designed for eventual breaches of prudential requirements (contemplating not only capital breaches, but also non-solvency related issues, such as liquidity). The focus is on the identification of possible measures to be adopted to restore the financial position of the insurer. Also in case of breaches of the capital requirements or severe deterioration of the solvency position not foreseen by the ORSA (and especially in those cases), insurers would benefit from having an action plan and increase their crisis preparedness. The ORSA can provide useful information for the design of the pre-emptive recovery plan, but the measures to be included in the pre-emptive recovery plan may be newly designed, and the adverse scenarios broader and/or more severe. Pre-emptive recovery plans therefore serve as a roadmap for crisis prevention and management.

(*) EIOPA Guidelines on Own Risk and Solvency Assessment (See link: https://eiopa.europa.eu/GuidelinesSII/EIOPA_Guidelines_on_ORSA_EN.pdfhttps://eiopa.europa.eu/GuidelinesSII/EIOPA_Guidelines_on_ORSA_EN.pdf)

[22] Article 45 of the Solvency II Directive (2009/138/EC).

[23] Article 41(4) of the Solvency II Directive (2009/138/EC).

55. The exact content of pre-emptive recovery plans needs to be further defined, taking into account international developments in this area. Nevertheless, EIOPA considers that pre-emptive recovery plans should, at least, contain a strategic analysis with a description of the entities covered by the plan, identify a set of possible recovery options to be used across a range of stress scenarios.

56. The strategic analysis should include a detailed description of the insurer's legal structure, business model and core business lines. If relevant, a description of the essential functions whose disruption could harm the financial stability and/or relevant economy should be included.

57. Pre-emptive recovery plans should consider severe stress scenarios to the extent that these are not already covered in the ORSA. Stress scenarios should combine adverse systemic and idiosyncratic conditions and identify the available recovery options and their feasibility in the stressed scenario. In the stress scenarios the potential detriment to policyholders, including potential recovery measures to mitigate this risk, should be assessed. The focus of the assessment should be on the available recovery options and their feasibility in the stressed environment. Such measures could comprise de-risking and/or actions to increase liquidity and capital.

58. Furthermore, the pre-emptive recovery plan should include an assessment of the necessary steps and time needed to implement the recovery measures if needed, including the risks associated with the implementation of the measures. This assessment should also determine whether any preparatory actions might be needed to ensure that the recovery measures can be implemented in an effective and timely manner.

59. Finally, the pre-emptive recovery plan should include a communication plan covering the communication strategy of insurers with the authorities, public, financial markets, staff and other stakeholders.

60. In accordance with the proportionality principle, EIOPA believes that the framework should include the option to use simplified obligations for the development of pre-emptive recovery plans.

61. This means that eligible insurers would be allowed to develop recovery plans subject to simplified obligations with respect to, for instance, the content and the level of detail of the plans. The eligibility of insurers would need to be assessed by the NSAs (using expert judgement/discretion) based on a set of criteria. In order to have a consistent application across Member States, the set of criteria would need to be further developed.

d) Review by NSA

62. Pre-emptive recovery plans should be submitted to the relevant (group and/or solo) supervisors for a review. NSAs should check the completeness of the plans and assess whether the recovery options are credible and realistic.

63. In case the supervisor identifies material deficiencies in the plan or impediments in its implementation, the insurer should review the recovery plan and amend accordingly, where necessary.

64. Furthermore, NSAs should review whether insurers to the extent possible act in line with the pre-emptive recovery plans in case of the occurrence of a described scenario.

e) Update of plans

65. Moreover, pre-emptive recovery plans should be updated on a regular basis (e.g. annually) or when there are material changes which could have an impact on the pre-emptive recovery plans. These may include, but are not limited to, changes in the risk profile, business model or group structure of an insurer.

2.3.2 Pre-emptive resolution planning

a) Requirement

66. EIOPA is of the view that a harmonised recovery and resolution framework should include a requirement for the designated resolution authorities to develop and maintain resolution plans in a pre-emptive manner. Resolution authorities should draft the resolution plans in close cooperation with the (group) supervisors and insurers.

b) Scope and proportionality

67. Pre-emptive resolution plans should be developed for insurance groups and individual insurance entities which are not part of a group. The development of group resolution plans should, however, not prohibit the possibility to develop resolution plans for individual insurance entities belonging to a group. Close cooperation with the resolution authority responsible for the group resolution plan is essential in these cases.

68. When defining the scope for pre-emptive resolution planning, EIOPA is of the view that two considerations should be taken into account. First, it should be taken into account that the prospect of resolution might be rather remote for some insurers, especially where comprehensive pre-emptive recovery plans are in place and adequate measures are taken to prevent the occurrence of such a scenario. Second, resolution authorities should *ex-ante* assess whether the resolution objectives could be achieved to a greater extent in resolution compared to the situation where the insurer is liquidated by means of regular insolvency proceedings (the so-called public interest test).[24]

69. Based on these considerations, EIOPA believes that the scope of pre-emptive resolution planning should be narrower than the scope of pre-emptive recovery planning.

70. This means that the scope for pre-emptive resolution planning should similarly in principle cover insurers subject to the Solvency II framework, but will include a lesser amount of insurers, with the possibility to waive the

[24] See section 2.5.3 Conditions for entry into resolution for more details about the conditions for resolution.

requirement for some insurers based on a set of harmonised criteria, expert judgement and the public interest test.

71. Harmonised criteria for waiving the requirement could, for instance, include:

    i. the *absolute* size of the insurer is below a certain threshold (e.g. the threshold for financial stability reporting purposes[25]);

    ii. the *relative* size of the insurer is below a certain threshold (e.g. a certain percentage of the market share in the Member State);

    iii. other relevant criteria such as complexity, interconnectedness, risk profile or capital ratios.

72. Nevertheless, the criteria should only be regarded as indicative guiding principles and not as hard thresholds. Where justified, NSAs should – using their expert judgement/discretion – still be able to:

    i. waive the requirement to draft pre-emptive resolution plans for insurers above the threshold(s);
    ii. draft pre-emptive resolution plans for insurers below the threshold(s).

73. Furthermore, the option to make use of simplified obligations when drafting the plans should be made possible for certain insurers (see further details in indicative content below).

c) Indicative content

74. The exact content of pre-emptive resolution plans would need to be further defined, taking into account international developments in this area. Nevertheless, EIOPA believes that pre-emptive resolution plans should include, at least, a range of resolution actions which the resolution authority may take if an insurer enters into resolution. Resolution authorities should consider various stress scenarios, including the scenario that failure of an insurer might be idiosyncratic or may occur at a time of broader financial crisis or market stress.

75. For each of the scenarios, an assessment of the potential need for resolution funding, the sources of funding, the operational and practical arrangements for ensuring continuity of coverage and payment under insurance policies, and other relevant elements should be made. Resolution authorities should pay particular attention to the risk of potential losses for the policyholders of the insurer.

76. Finally, the pre-emptive resolution plan should include a communication plan covering the communication strategy of resolution authorities with the insurer, other authorities, public and other stakeholders.

77. In accordance with the proportionality principle, EIOPA believes that the framework should include the option to use simplified obligations for the development of pre-emptive resolution plans based on expert judgement/discretion of resolution authorities.

[25] The criteria to identify the insurers within the scope of reporting for financial stability purposes are laid down in EIOPA's Guidelines on reporting financial stability purposes (see link: https://eiopa.europa.eu/GuidelinesSII/EIOPA_EN_FS_GLs.pdf).

78. Furthermore, resolution authorities should try to limit the information/data requests from insurers when drafting the resolution plan in order to avoid excessive burdens for insurers. The information/data requests should be restricted 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.

d) Update of plans

79. Resolution plans should be updated on a regular basis (e.g. annually) or when there are material changes which could have an impact on the pre-emptive resolution plan. These may include, but are not limited to, changes in the risk profile, business model or group structure of an insurer.

2.3.3 Resolvability assessments

a) Requirement

80. EIOPA is of the view that a harmonised recovery and resolution framework should include a requirement for resolution authorities to assess the resolvability of insurers.

81. Resolvability assessments should be part of the pre-emptive resolution plans and aim to identify any impediments to the resolvability of insurers.

b) Scope and proportionality

82. The scope for resolvability assessments should be equal to that for pre-emptive resolution planning. This means that resolution authorities should assess the resolvability of insurers for which a resolution plan is drafted.

83. Resolution authorities should undertake resolvability assessments in a proportionate manner.

c) Indicative content

84. Resolvability assessments should contain an evaluation of both the feasibility and the credibility of the resolution strategies identified in the resolution plans. Resolvability assessments should also provide insights into potential impediments to the resolvability of insurers. These could for instance be structural (interconnectedness in the group structure), financial (intra-group liabilities or guarantees) or operational (IT, human resources).

85. In the feasibility assessment, resolution authorities should assess aspects such as the sources of support, the continuity of different service agreements, the availability of a transferee or purchaser for the insurer's portfolio, the capacity of an IGS or resolution fund to finance a potential transfer and the availability of human resources to run the resolution process.

86. In the credibility assessment, resolution authorities should evaluate the impact of the resolution actions on policyholders, third parties and financial

stability in general. It should, for instance, be assessed whether identified resolution strategies would result in losses for policyholders or a material adverse impact on economic activity. The latter could be caused by a disruption to the continuity of insurance cover and payments, a forced sale of distressed assets and/or by a lack of policyholder confidence.

d) Power to remove significant impediments

87. EIOPA believes that resolution authorities should be given the power to require the removal of material impediments to the resolvability of an insurer. The decision to impose any such requirement should take due account of the effect on the soundness and stability of an insurer's ongoing business. The exercise of the power should be duly justified and be taken in coordination with the relevant NSA.

88. There may be more than one way of removing a particular impediment to resolvability and the resolution authority could first give the insurer the opportunity to propose its own solution to removing the impediment to resolvability. 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 the decision of the resolution authority and seek impartial review of the proposed use of this power.

2.4 Early intervention

a) Common set of early intervention powers

89. Early intervention captures the stage where the solvency position of an insurer starts to deteriorate and where it is likely that it will continue to deteriorate and fall below the SCR if no remedial action is taken. Timely and effective interventions by NSAs could avoid the escalation of problems and, hence, the need for more intrusive actions.

90. EIOPA is of the view that a harmonised recovery and resolution framework should introduce a common set of early intervention powers which are compatible with the Solvency II framework. The introduction of early intervention powers should however not result in a new pre-defined intervention level or an implicit new capital requirement beyond what is envisaged in Solvency II. Hard, quantitative criteria for the use of early intervention powers should therefore be avoided. NSAs should assess each situation separately and decide upon the need for early interventions based on the circumstances of the situation and their supervisory judgement of the affected insurer.

91. EIOPA believes that (i) NSAs should have at their disposal a minimum set of common early intervention powers and (ii) a harmonised approach in using these powers should be developed. Some of these powers might already be captured in the Solvency II framework, whereas others might be or not explicitly be captured in existing regulation. Regardless of the fact whether these are existing or newly to be introduced powers, it is essential that the powers are exercised in a consistent and harmonised manner by NSAs in order to further achieve convergence and a level playing field in the EU.

92. The following set of listed early intervention powers should, at least, be considered in the harmonisation process:

    a) Require additional or more frequent reporting;

    b) Replace board members or persons who effectively run the insurer or have other key functions or require their dismissal if those persons are found unfit to perform their duties pursuant to Article 42 of the Solvency II Directive;

    c) Require insurers to limit variable remuneration and bonuses;

    d) For life insurers, temporarily suspend or limit the right of policyholders to surrender their contracts;

    e) Require the management or supervisory body of the insurer to implement within a specific timeframe one or more measures set out in the pre-emptive recovery plan or to update such a pre-emptive recovery plan when the circumstances which led to the early intervention are different from the assumptions set out in the initial pre-emptive recovery plan, and to implement within a specific timeframe one or more of the measures set out in the updated plan;

    f) Where the insurer has no pre-emptive recovery plan in place, require the management or supervisory body of the insurer to examine the situation, identify measures to overcome any problems identified and implement within a specific timeframe one or more of those measures (e.g. steps to raise own funds by using net profits to strengthen the solvency position).

93. Examples of the nature of measures which insurers could be expected to take under (c) and (d) are[26]:

    - Actions to raise own funds by using net profits to strengthen the solvency position;
    - Reinforcement of governance arrangements, internal controls and risk management systems;
    - Limit or restrict certain business lines and operations (e.g. to avoid certain risks, such as concentration, operational or liquidity risks);
    - Limit intra-group asset transfers and transactions and limit asset transfers and transactions outside the group.

b) Scope and proportionality

94. NSAs should be able to apply the early intervention powers at their disposal to all insurers within the scope of Solvency II. The potential use of the powers should not be *ex-ante* restricted to a specific type or a specific range of insurers.

95. Early interventions by NSAs should be appropriate and proportionate to the nature of the circumstances and be based on a forward-looking and risk-based approach. This means that NSAs should take into account the nature of the insurers and the circumstances which led to the deterioration in the

[26] These powers are more descriptive and not explicitly envisaged in the Solvency II framework.

solvency position of the insurer, especially in the presence of market-distorting factors. NSAs should consider the possibility of the markets normalising again and the impact that may have on the solvency position of the insurer.

2.5 Resolution

96. Resolution captures the stage of a crisis management flow where the insurer is deemed to be no longer viable or likely to be no longer viable (see crisis management flow chart in Annex III).

2.5.1 Resolution authority

a) Designation of resolution authority

97. EIOPA is of the view that each Member State should have a designated administrative resolution authority for insurers. This authority should have statutory responsibilities, transparent processes, sound governance and adequate resources in place.

98. The designation of a resolution authority with the adequate expertise and resources is important to ensure an orderly resolution process as well as to avoid confusion or potential conflict among various authorities.

b) Flexibility of Member States

99. According to EIOPA, Member States should be given the flexibility to decide which authority to designate as the resolution authority for insurers. This could for instance be the NSA or a specially appointed resolution authority.

100. However, Member States should ensure that resolution authorities are operationally independent, particularly, when established within the NSA. Appropriate checks and balances should be in place in order to avoid supervisory forbearance (i.e. the risk that NSAs may procrastinate the decision to put an insurer into resolution as this could be regarded by external observers as a sign of improper supervision).

2.5.2 Resolution objectives

101. EIOPA advises to clearly set out the objectives for resolution in a harmonised recovery and resolution framework, whereby appropriate consideration is given to the objectives of prudential regulation.[27] When exercising the resolution powers, resolution authorities should have regard to the following objectives:

[27] See Recital 21 of the Solvency II Directive (2009/138/EC): *"The main objective [of Solvency II] is the adequate protection of policyholders and beneficiaries. Financial stability and fair and stable markets are other objectives of insurance and reinsurance regulation and supervision which should also be taken into account but should not undermine the main objective".* This is further substantiated by Article 27 and Article 28 of the Directive.

- To protect policyholders;[28]
- To maintain financial stability, in particular, by preventing contagion and by maintaining market discipline;
- To ensure the continuity of functions whose disruption could harm the financial stability and/or real economy;
- To protect public funds.

102. EIOPA is of the view that resolution authorities should have the power to balance the objectives as appropriate to the nature and circumstances of each situation. Nonetheless, EIOPA expects that in practice the protection of policyholders will likely take precedence in resolution cases, unless there is strong evidence that other objectives for resolution are more relevant in that particular case. This might for instance be the case where financial stability might be in jeopardy due to the entry into resolution or failure of an insurer. An *ex-ante* ranking of the objectives is therefore not recommended in a recovery and resolution framework.

103. Furthermore, when pursuing these objectives, resolution authorities should try to minimise the cost of resolution and avoid destruction of value unless necessary to achieve the resolution objectives.

2.5.3 Conditions for entry into resolution

104. EIOPA is of the view that a harmonised recovery and resolution framework should clearly set out the conditions for entry into resolution, which should provide for timely and early entry into resolution before an insurer is balance sheet or cash flow insolvent and before all equity has been wiped out. The conditions should allow a sufficient degree of judgement by the resolution authorities; automatic resolution triggers should be avoided. Resolution authorities should use their experience and expert judgement to assess whether the conditions for entry into resolution are met and to initiate the resolution process.

105. EIOPA believes that the conditions for entry into resolution should include:

a) The insurer is no longer viable or likely to be no longer viable and has not reasonable prospect of becoming so;

b) Possible recovery measures have been exhausted – either tried and failed or ruled out as implausible to return the insurer to viability – or cannot be implemented in a timely manner;

c) A resolution action is necessary in the public interest.

106. With respect to condition (a), an insurer could be considered to be no longer viable or likely to be no longer viable based on the following, non-exhaustive set of criteria:

- The insurer is in breach or likely to be in breach of the MCR and there is no reasonable prospect of compliance being restored;

[28] Please note that policyholders refer to policyholders, beneficiaries and claimants.

- The insurer is in breach or likely to be in breach of other prudential requirements (e.g. requirements on assets backing technical provisions), there is no reasonable prospect of compliance being restored and such non-compliance will likely lead to balance sheet or cash flow insolvency;
- There is a strong likelihood that a policyholders and/or creditors will not receive payments as they fall due.

107. In order to promote a consistent application of the conditions, it is advisable to provide supervisory and resolution authorities more guidance to help them determine when an insurer is *likely* to be no longer viable.

108. With respect to condition (c), resolution actions should be considered necessary in the interest of the public if the resolution objectives could be achieved to a greater extent by putting the insurer into resolution compared to the situation where the insurer is liquidated by means of regular insolvency proceedings.

2.5.4 Resolution powers

a) Common set of resolution powers

109. EIOPA advises to broaden the existing resolution toolkit to introduce a common set of resolution powers with consistent design, implementation and enforcement features across the EU. These resolution powers should help to better achieve the resolution objectives, such as better protecting policyholders by enabling the continuity of insurance contracts and the continuity of payments to policyholders. Resolution actions can preserve value compared with normal insolvency procedures, thereby, improving outcomes for creditors and policyholders, who will be protected by adequate safeguards.

110. Further work is needed to fully assess the impact of the introduction of new resolution powers. Also, careful consideration should be given to the safeguards for exercising these powers. In particular the power to restructure, limit or write down insurance liabilities should be carefully considered and be made subject to adequate safeguards (see box 2 in section 2.5.5 Safeguards).

111. EIOPA considers that, at a minimum, the following set of resolution powers should be taken into account in the context of a harmonised recovery and resolution framework:

a) The power to withdraw the license of an insurer under resolution to write new business and put all or part of the insurance business contracts into run-off (i.e. requirement to fulfil existing contractual policy obligations for in-force business);

b) The power to transfer all or part of the assets, rights and liabilities of an insurer under resolution to a solvent insurer or a third party (including a bridge institution or management vehicle);

c) In relation to power (b), the power to override any restrictions to the (partial) transfer of the portfolio of an insurer under resolution under applicable law (e.g. requirements for approval by shareholders,

policyholders' consent for transfer of insurance contracts or consent of the reinsurer for transfer of reinsurance);

d) The power to create and operate a bridge institution to which the assets, rights and liabilities of an insurer under resolution is transferred;

e) The power to temporarily restrict or suspend the policyholders' rights of withdrawing their insurance contracts;

f) The power to stay the rights of reinsurers of a cedent insurer to terminate or not to reinstate coverage on the sole ground of the cedent's entry in recovery or resolution;

g) The power to stay the early termination rights associated with derivatives and securities lending transactions;

h) The power to impose a moratorium with a suspension of payments to unsecured creditors and a stay on creditor actions to attach assets or otherwise collect money or property from an insurer under resolution;

i) The power to ensure continuity of essential services (e.g. IT) and functions by requiring other entities in the same group to continue to provide essential services to the insurer under resolution, any successor or an acquiring entity;

j) The power to sell or transfer the shares of an insurer under resolution to a third party;

k) The power to prohibit the insurer under resolution to pay variable remuneration to the management;

l) The power to take control of and manage the insurer under resolution, or appoint an administrator to do so;

m) The power to restructure, limit or write down liabilities and allocate losses to shareholders and creditors;

n) The power to restructure, limit or write down reinsurance and insurance liabilities as a last resort option;

o) The power to initiate the liquidation of the insurer or part of it.

112. Resolution authorities should be able to apply the resolution powers listed above individually or in combination. They should also have the flexibility to exercise the powers at the level of an individual insurance entity or at the level of an insurance group holding company located within their jurisdiction.

113. The list of resolution powers should also not be regarded as an exhaustive list of resolution powers. In accordance with the minimum harmonisation principle, additional resolution powers could be adopted at the national level.

114. Furthermore, it should be noted that the powers listed above are not necessarily for exclusive use by the resolution authority. Some of the powers could be effectively used by the NSA at an earlier stage (i.e. before entry into resolution).

b) Scope and proportionality

115. Resolution authorities should be able to apply the resolution powers at their disposal to all insurers within the scope of Solvency II. The potential use of

the powers should not be *ex-ante* restricted to a specific type or a specific range of insurers.

116. EIOPA believes that traditional resolution tools, such as portfolio transfer or (solvent and insolvent) run-off, which have proven to be adequate in the past, should be given priority when resolving insurers. Nevertheless, the appropriateness of the choice and use of resolution powers should be assessed on a case by case basis by resolution authorities. The use of the powers should be proportionate to the nature, scale and complexity of the insurer and the circumstances.

2.5.5 Safeguards

117. EIOPA is of the view that the exercise of resolution powers should be made subject to adequate safeguards. EIOPA advises to make resolution actions subject to, at least, the following general safeguards:

    a) Resolution powers should be exercised in a way that respects the hierarchy of claims, while providing the flexibility to depart from the general principle of equal (*pari passu*) treatment of creditors of the same class;

    b) Creditors, in particular policyholders, should not incur a loss greater than they would have incurred in a winding-up under normal insolvency proceedings (the "no creditor worse off than in liquidation" (NCWOL) principle);

118. The NCWOL safeguard ensures that creditors, including policyholders, receive in resolution at a minimum what they would have received in a liquidation of the insurer under normal insolvency procedures.

119. Furthermore, the exercise of certain resolution powers might need to be surrounded with additional safeguards. This is particularly true for the power to restructure, limit or write down insurance liabilities and allocate losses to policyholders (see section 6.4 - Annex III). These additional safeguards can be found in Box 5.

Box 5: Additional safeguards for resolution power the power to restructure, limit or write down insurance liabilities and allocate losses to policyholders as a last resort option

When allocating losses to policyholders, resolution authorities should take into account the following safeguards:

a) All other feasible measures and options which could have averted (further) losses for policyholders have been exhausted or have been deemed unlikely to be successful.
b) The allocation of losses to policyholders should only take place as a last resort option.
c) The exercise of the power to restructure, limit or write down insurance liabilities is deemed necessary for other powers to be effective (for instance, to enable a portfolio transfer) and, hence, to limit the losses for policyholders.
d) Board members or persons who effectively run the insurer or have other key functions should be removed or dismissed if those persons can be found unfit to perform their duties pursuant to Article 42 of the Solvency II Directive.

e) Policyholders who are covered by IGSs or other mechanisms should be compensated to the extent possible.

Furthermore, EIOPA is of the view that policyholders should be informed of the existence of this power and the possibility that this power might be exercised in exceptional circumstances by, for instance, including a clause in the insurance contract explaining the potential risks and financial consequences for the policyholder and taking into account possible coverage under a national insurance guarantee scheme.

2.6 Cooperation and coordination

a) Cross-border cooperation and coordination arrangements

120. EIOPA is of the view that arrangements for cross-border cooperation and coordination, including the exchange of information, should be established between foreign national authorities to effectively deal with crisis situations involving cross-border insurance groups. Such cooperation and coordination between resolution authorities could facilitate a swift recognition and implementation of actions taken by foreign resolution authorities thereby increasing their chances of success.

121. Coordination and cooperation arrangements for the supervision of cross-border insurance groups are already arranged for in Solvency II, which requires NSAs to cooperate and coordinate with foreign NSAs through the establishment of supervisory colleges. These colleges are a platform for cooperation and coordination, including information sharing, between NSAs from all Member States in which entities of an insurance group are located. The aim of these supervisory colleges is to foster a common understanding of the risk profile of the group (entities) and to achieve a more efficient and effective supervision.[29]

122. EIOPA advises to establish similar arrangements to deal with crisis situations involving all relevant stakeholders, including (national and foreign) resolution and (group and/or solo) supervisory authorities. Where relevant and achievable given professional secrecy requirements, ministries and IGSs should be involved as well.

123. These arrangements could take the form of CMGs as currently exist for G-SIIS. These CMGs should be a means to ensure effective planning for crisis situations, decision-making and coordination during crises between foreign authorities when dealing with cross-border insurance groups. They would also help to achieve that the interests of each jurisdiction, including those where the parent company is located as well as those where the subsidiaries and branches are located, are given due consideration and are balanced appropriately.

124. However, in order for these arrangements to work effectively a number of aspects need to be agreed upon, such as the roles and responsibilities of the different authorities and the process for information sharing and decision-making before and during a crisis should be established.[30] Furthermore,

[29] Recital 139 Solvency II of the Solvency II Delegated Regulation ((EU) 2015/35).

[30] A detailed list of elements can be found in the Key Attributes: Key Attribute 9 and I-Annex 2.

confidentiality agreements would have to be established for the exchange of information between resolution authorities.

b) Scope and materiality

125. The scope for establishing cross-border cooperation and coordination arrangements should capture insurers which are active in more than one jurisdiction.

126. In the set-up of the cross-border group arrangements, the materiality and proportionality principle should be taken into account. The participation, role and responsibility of each national (resolution and supervisory) authority could be made proportionate to, for instance, the materiality of the insurer belonging to the insurance group for which the arrangements are in place. The concept of materiality would need to be further defined.

127. More generally, the home authority should have the ability to arrange cross-border arrangements and meeting in different configurations to ensure that the coordination process is carried out in the most effective manner.

c) Involvement of EIOPA in the recovery and resolution of cross-border institutions across the EU

128. In accordance with Article 21(1) of the EIOPA Regulation, EIOPA has to contribute to promoting and monitoring the efficient, effective and consistent functioning of cross-border supervisory cooperation through the colleges of supervisors, which are based on coordination arrangements (Article 248(4) Solvency II); and has a leading role in ensuring the consistent and coherent functioning of these colleges for cross-border institutions across the EU.

129. In order to perform the abovementioned responsibilities, EIOPA recalls that Article 21(2) of the EIOPA Regulation recognises it as "competent authority", and therefore EIOPA enjoys full participation rights in the colleges of supervisors for cross-border institutions across the EU.

Annex I: Overview of existing recovery and resolution frameworks

1. Introduction

1. EIOPA conducted a survey on existing national recovery and resolution frameworks for insurers in the EU. The survey was launched in the first quarter of 2016 and presents the situation in the Member States as of February 2016. In total, 30 NSAs responded to the survey.
2. It should be noted that most of the Member States do not have in place a formal recovery and resolution framework for insurers. In these cases, NSAs were asked to provide information about their current recovery and resolution practices taking into account all powers and tools available in their Member States.
3. The survey covered questions on (i) planning and preparation, (ii) early intervention and (iii) resolution, as well as on existing cross-border cooperation and coordination arrangements for crisis situations. Furthermore, NSAs were asked to report potential deficiencies that they have identified in their national frameworks and to provide information about their national IGS(s).
4. As is the case with other (qualitative) surveys, this exercise relies on the judgement of the respondents and the subsequent interpretation of the responses by EIOPA. Overall, the information provided was quite comprehensive and can be considered as a good representation of the situation in the Member States.

2. Preparation and planning

5. In this section, NSAs were asked whether insurers are required to prepare pre-emptive recovery plans (i.e. before the breach of the solvency capital requirement, SCR). Subsequently, NSAs were asked whether national authorities in charge of the resolution of insurers prepare resolution plans and assess the resolvability of insurers.
6. Pre-emptive recovery and resolution planning, including resolvability assessments, take place during normal times of business and help to enhance the awareness of and preparedness for stress or crisis situations.

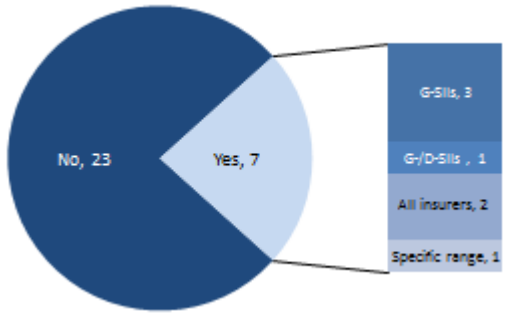
2.1 Pre-emptive recovery plans

7. Chart 1 shows that a majority of the NSAs do not require the development of pre-emptive recovery plans by insurers, although three of them indicated that they can require insurers to prepare and submit a recovery or contingency plan before the breach of the SCR, when necessary.
8. Seven NSAs indicated that insurers are required to prepare pre-emptive recovery plans in their Member State. In three of these Member States the requirement is laid down in the law or regulations, whereas in the other four

Member States the requirement is based on sound principles and/or international standards set for G-SIIs.

9. With respect to the scope of the requirement for pre-emptive recovery planning, three of these seven NSAs responded that the scope is limited to G-SIIs, while 1 NSA replied the scope includes insurers which are considered to be of systemic importance for both the global and domestic market. This NSA mentioned that the assessment of the domestic systemic importance is primarily based on the size of the insurer. Two other NSAs indicated that the scope captures all insurers and 1 NSA responded that the requirement applies to insurers with a significant share in the national insurance market, i.e. all insurers above a certain threshold measured in terms of the percentage of gross technical provisions or market share are included.

Chart 1: Is there a requirement to develop pre-emptive recovery plans?

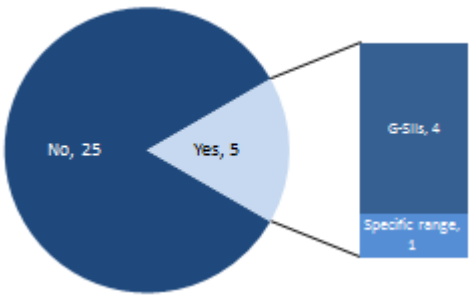


10. Finally, five of those seven NSAs mentioned that pre-emptive recovery plans are subject to a review by the NSA. There is, however, no requirement for pre-emptive recovery plans to be approved in any of those seven Member States, although three NSAs indicated that they can request insurers to make changes to the plan.

2.2 Pre-emptive resolution plans

11. As shown in chart 2, five NSAs reported that there is a requirement to develop pre-emptive resolution plans by authorities in charge of resolution of insurers in their Member State.

Chart 2: Is there a requirement to develop pre-emptive resolution plans?



12. In four Member States the scope includes G-SIIs only, although two NSAs indicated that there are plans to extent the scope of the requirement. One NSA mentioned that the scope covers insurers with a significant share in the national insurance market, i.e. all insurers above a certain threshold measured in terms of the percentage of gross technical provisions or market share are included.

13. Four other NSAs explained that pre-emptive resolution plans for insurers might be required in their Member State within three years from now or depending on the developments at the global and/or European level.

2.3 Resolvability assessments

14. The responses given by NSAs reveal that resolvability assessments are undertaken in those Member States where pre-emptive resolution plans are drafted. Therefore, the outcome is similar to the one above, i.e. five NSAs replied affirmatively to the question whether resolvability assessments are undertaken. The other NSAs replied that such a requirement is not available in their Member State.

15. Two NSAs provided additional information and indicated that they can require the insurer (and/or the group company) to take measures to remove impediments to its effective resolution. For instance, one of these two NSAs mentioned that the designated resolution authority is empowered to require the insurer to revise intragroup financing agreements or to limit or cease specific existing activities.

3. Early intervention

16. In this section of the survey, NSAs were asked to identify the powers they have at their disposal to intervene in a troubled insurer at an early stage, i.e. before the breach of the SCR.

17. In response to this question, some NSAs initially referred to Article 141 of the Solvency II Directive.[31] This article empowers NSAs to take all measures necessary to safeguard the interest of policyholders in case the solvency position of an insurer continues to deteriorate after it has breached the SCR. In a second stage, all NSAs were therefore asked to indicate whether the powers can be exercised before or only after the breach of the SCR.

18. Chart 3 shows the outcome for the powers aimed at restoring an insurer's capital adequacy. The chart shows that most of the powers are widely available across Member States, with the exception of the power to require the mandatory conversion of debt instruments. Reason for this might be that the issuance of debt instruments by insurers is not common in all Member States.

19. Despite the fact that most of the powers are widely available, a number of NSAs (see chart 3 for the exact number of NSAs for each of the powers) reported that their availability is subject to restrictions. One of the restrictions, which was often mentioned by NSAs, is the fact that the powers are not explicitly laid down in national regulation and, therefore, are only implicitly available, for instance, via general (direction-making) powers.[32]

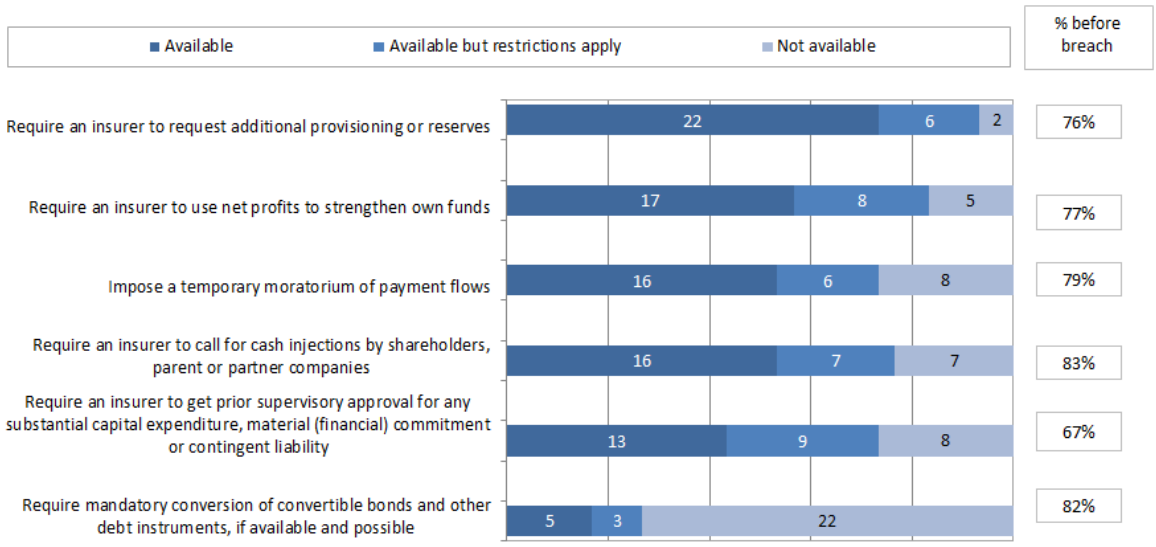
20. The figures on the right-hand side of the chart illustrate the percentage of NSAs which have indicated that the powers can be exercised before the

[31] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L 335, 17.12.2009, p.1.

[32] Examples of other restrictions are: one NSA explained that the power to impose a temporary moratorium of payments only applies to certain types of payments. One NSA mentioned that insurers can only be required to use net profits to strengthen own funds in case of a loss exceeding a certain percentage of the insurer's own funds. Another NSA explained that most of the powers available could only be exercised once a "special control measure" has been adopted.

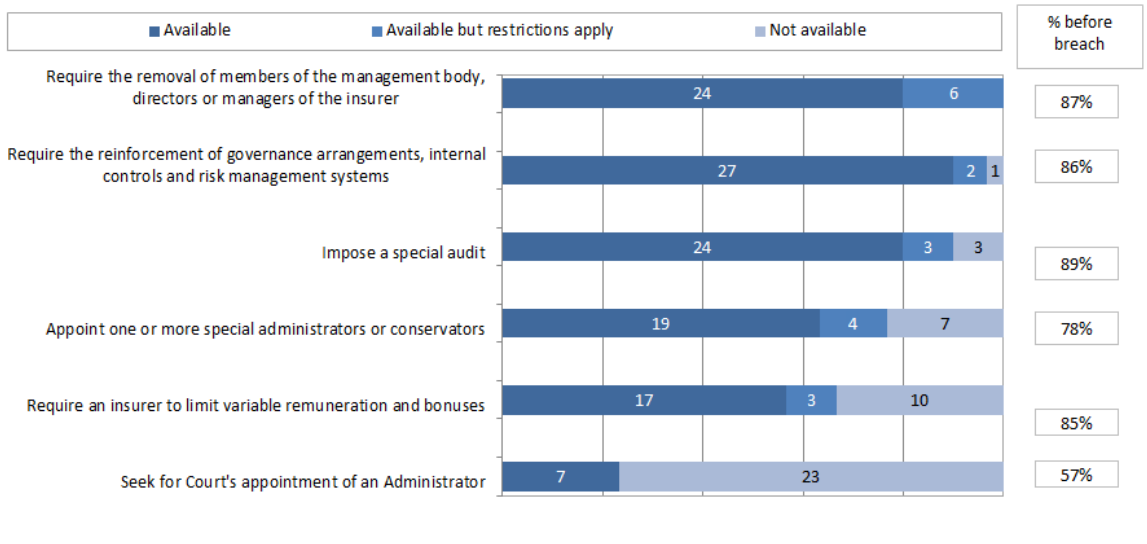
breach of the SCR. The results show that a majority of the NSAs can exercise the available powers before the breach of the SCR.

Chart 3: Powers aimed at restoring capital adequacy



21. Chart 4 shows the outcome for the powers affecting the management and governance of insurers. Overall, the chart shows that the powers are available to a majority of the NSAs, except for the power to seek for a court's appointment of an administrator. This might be explained by the fact that a large number of NSAs are themselves empowered to directly appoint an administrator. Only five NSAs replied that neither of the powers is available to them at an early stage. The chart also shows that on average more NSAs are able to use the powers affecting the management and governance of insurers before the breach of the SCR compared to the powers aimed at restoring capital adequacy (see chart 3 above).

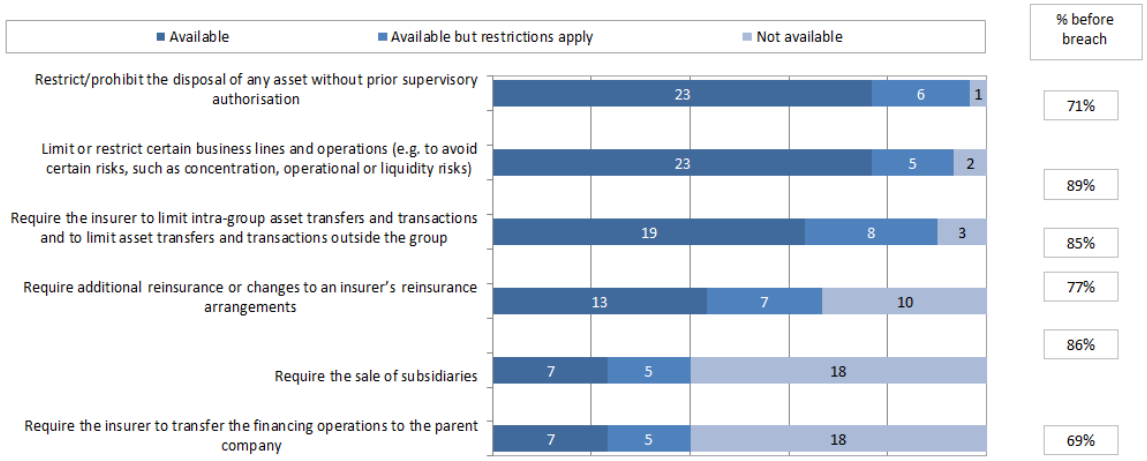
Chart 4: Powers affecting management and governance



22. Chart 5 shows the outcome for the powers affecting the business and organisation of an insurer. As can be seen, a majority of the NSAs do not have the power to require the transfer of the financing operations to the parent company, or to require the sale of subsidiaries; these powers might be regarded as rather intrusive measures to be taken at an early stage.

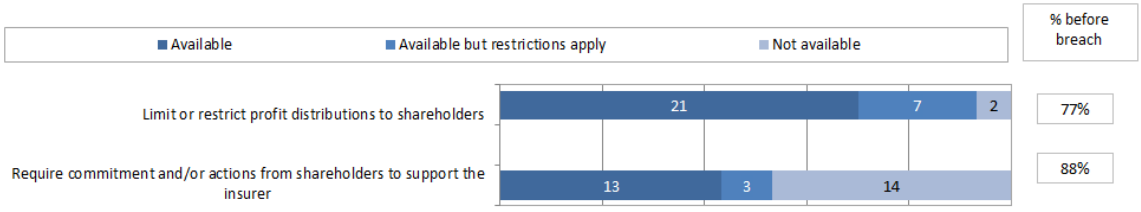
23. On the other hand, measures such as the power to require the insurer to limit intra-group transactions or to require a supervisory approval for the disposal of assets are available across Member States. Again, a diverse range of restrictions were reported by NSAs. For instance, it was reported that only temporary limitations or restrictions could be given.

Chart 5: Powers affecting the business and organisation



24. Chart 6 shows the outcome for the powers affecting the shareholders of an insurer. The chart shows that a majority of the NSAs can limit or restrict the payment of dividends to shareholders, even before the breach of the SCR. A smaller number of NSAs have the power to require shareholders to support an insurer in trouble, although the power is often not explicitly granted to NSAs. One NSA explained that it can summon and participate in shareholder meetings at any time and can propose measures to be approved in such meetings.

Chart 6: Powers affecting the shareholders



25. Finally, some additional early intervention powers not shown in the charts above were reported by a few NSAs, including the requirements:

- To make changes in an insurer's business strategy;
- To establish an obligation for the disclosure of specific data; and
- To prohibit or make subject to conditions the outsourcing of activities.

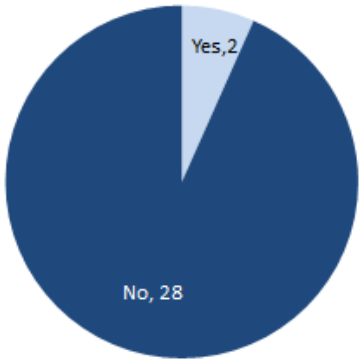
4. Resolution

26. This section covers the results of the questions on resolution. In accordance with the elements set out in the FSB Key Attributes, the survey included questions about the existence of a designated administrative resolution authority, the objectives of resolution, the conditions for entry into resolution, the resolution powers and safeguards.

4.1 Resolution authority

27. According to the FSB Key Attributes[33], each jurisdiction should have a designated administrative resolution authority, which should have statutory objectives, functions and operational independence. In the survey, NSAs were asked whether there is a designated administrative resolution authority for insurers in their Member States in accordance with the Key Attributes.

Chart 7: Is there a designated administrative resolution authority for insurers in your Member State?



28. The responses are shown in chart 7, which shows that most of the Member States do not have an officially designated administrative resolution authority equivalent to the description in the Key Attributes. Instead, usually the NSA and/or a relevant ministry, sometimes together with an administrator, handle the resolution of insurers.

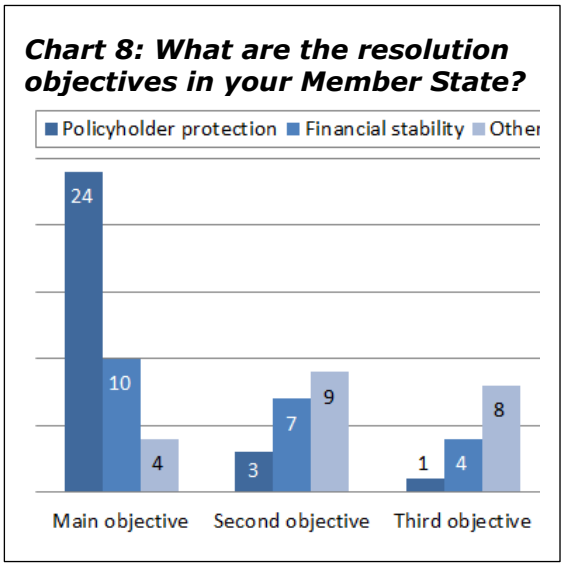
29. Only two NSAs replied affirmatively to the question, whereas another NSA explained that there is a designated administrative resolution authority for insurers which are considered to be of systemic importance to the national market.

4.2 Objectives of resolution

30. The responses to the survey reveal differences in (i) the number of objectives pursued by national authorities in charge of resolution, (ii) the (existence of a) ranking of the objectives and (iii) the objectives. With respect to the number of objectives, the results show that authorities in charge of resolution pursue on average three objectives when resolving insurers, with a maximum of five in one Member State. However, most of the NSAs clarified that the objectives of resolution are not specified in the national framework. The responses are therefore often based on general resolution practices and general supervisory objectives. Chart 8 shows the outcome of the responses.

[33] Please see FSB Key Attributes 2.

31. It can be seen from the chart that there is usually a hierarchy in the objectives pursued by national authorities in charge of resolution. However, two NSAs mentioned that there is no hierarchy in the objectives and explained that the relevant objectives are ranked equally. The objectives are balanced as appropriate to the nature and circumstances of the resolution process in these Member States.



32. Furthermore, the chart shows that the protection of policyholders is the main objective in a majority of the Member States, followed by financial stability. This is in line with the objectives set out in Solvency II. Other primary objectives reported by NSAs include the protection of public funds, the continuity of functions whose disruption could harm the financial stability and/or real economy and the minimisation of value destruction.

33. The protection of public funds and the continuity of functions whose disruption could harm the financial stability and/or real economy were also often mentioned as secondary and tertiary objectives.

34. NSAs which indicated that several objectives are pursued were also asked to indicate whether they see any potential for conflict or tension between the selected objectives. Seven NSAs answered that there could be a conflict or tension between the protection of policyholders and the protection of public funds, or between policyholder protection and financial stability.

4.3 Conditions for entry into resolution

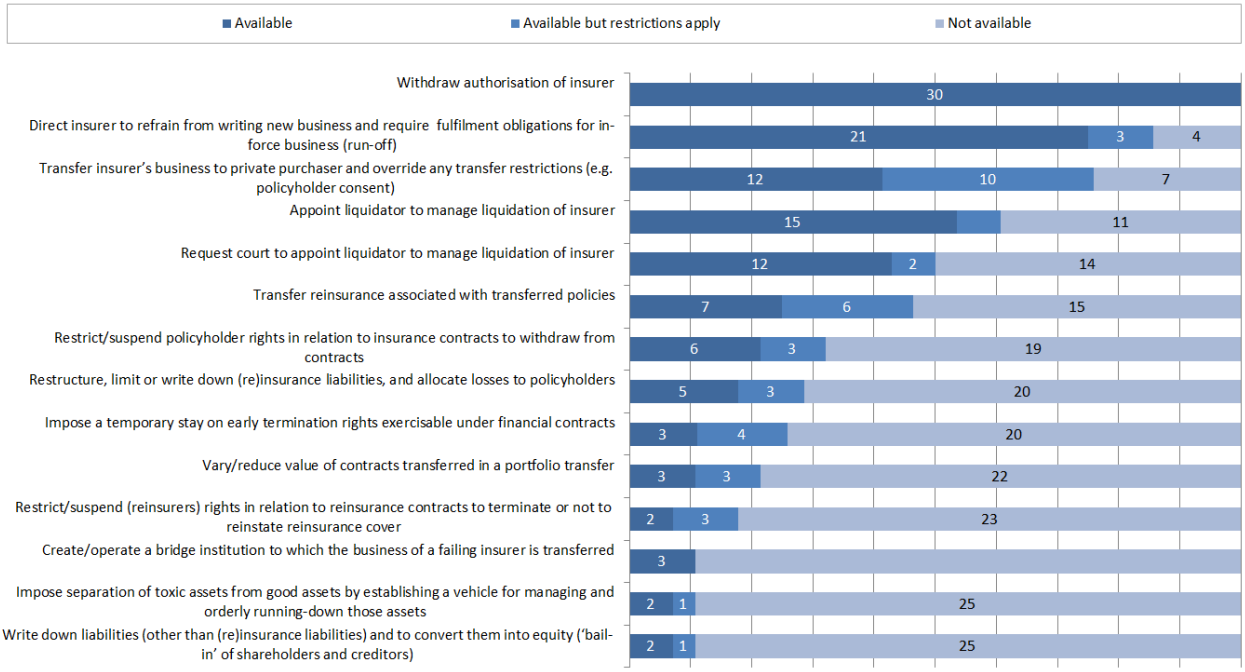
35. In order to find out when resolution processes are initiated in Member States, NSAs were asked what the conditions for entry into resolution are and whether these are different from the conditions for winding-up/liquidation. Winding-up/liquidation usually follows after the insolvency either on a balance sheet basis (the insurer's liabilities are greater than its assets) or cash-flow basis (the insurer is unable to pay its debts as they fall due).

36. The responses to the survey show that the national frameworks usually do not set out specific conditions for entry into resolution, other than the conditions for winding-up/liquidation and/or those related to the breach of Solvency II requirements. Nonetheless, some specific resolution conditions were mentioned, such as "the insurer is failing or likely to fail", "the insurer is likely to be no longer able to meet its obligations towards policyholders", and "a threatening development in an insurer's own funds, liabilities or solvency position has been detected". In addition, one NSA mentioned that resolution actions are subject to a public interest test, meaning resolution action is only taken if the national authority in charge of resolution is of the view that the objectives of resolution cannot be achieved to the same extent if the insurer was liquidated by means of regular insolvency proceedings.

4.4 Resolution powers

37. For an orderly resolution of insurers, it is essential that authorities in charge of resolution are granted with a broad set of resolution powers. Chart 9 shows the responses of the NSAs to the question whether the listed resolution powers are available in their Member State. The list of resolution powers was taken from the FSB Key Attributes.

Chart 9: Are these resolution powers available in your Member State?



38. It can be concluded that most of the resolution powers are not widely available in the EU. For instance, only a limited number of authorities in charge of resolution are able to impose a temporary stay on early termination rights in insurance or financial contracts. Similarly, the power to create and operate a bridge institution and the power to allocate losses to shareholders, creditors and policyholders are only available in a limited number of Member States.

39. On the other hand, the power to withdraw the authorisation of an insurer, the power to put an insurer into run-off and the power to transfer the portfolio of an insurer to a private purchaser is widely available. It should be noted that the power to withdraw the authorisation of an insurer is included in Solvency II.[34]

40. With respect to the power to transfer an insurance portfolio, twelve NSAs indicated that the national authority in charge of resolution has the power to transfer the portfolio and the power to override any transfer restrictions. Ten NSAs mentioned that the power is available but is subject to restrictions. For

[34] Please see Article 144 of the Solvency II Directive (2009/138/EC).

instance, in some Member States the approval of the court or a certain threshold of non-objections by policyholders is required before the portfolio can be transferred.

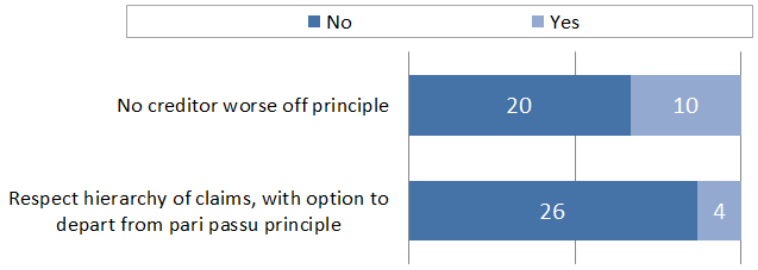
41. Furthermore, some NSAs clarified that the powers are only available in insolvency proceedings or after court approval in their Member State.

4.5 Safeguards

42. This section of the survey included questions on whether the exercise of resolution powers is subject to safeguards. NSAs were asked to specify whether the exercise of resolution powers is subject to the NCWO principle. The NCWO principle is a safeguard to ensure that creditors do not suffer a greater loss in resolution than they would have incurred in an insolvency procedure. In addition, NSAs were asked whether authorities in charge of resolution respect the hierarchy of claims while having the flexibility to depart from the general principle of equal (*pari passu*) treatment of creditors of the same class or policyholders of different types of policies (e.g. policyholders covered by an IGS versus those who are not covered) in order to maximise the value for all creditors, including policyholders, or to minimise the potential systemic impact of an insurer's failure.

43. The results are shown in chart 10. As can be seen, in one third of the Member States, the NSA reported that the exercise of resolution powers is subject to the NCWO principle. The chart also shows that the flexibility to depart from the *pari passu* principle is only available in four Member States.

Chart 10: Are these safeguards available in your Member State?



5. Cross-border cooperation and coordination

44. In the survey, NSAs were asked whether there are (formal) crisis management groups or equivalent arrangements in place between domestic and foreign authorities to deal with crisis situations of cross-border insurance groups.

45. The responses show that a formal crisis management group has been established or is being established for the G-SIIs headquartered in the EU. In addition, one NSA indicated that it has an equivalent arrangement for cross-border groups headquartered in its jurisdiction. However, the remainder of the NSAs replied that such cross-border cooperation and coordination arrangements do not exist for crisis situations.

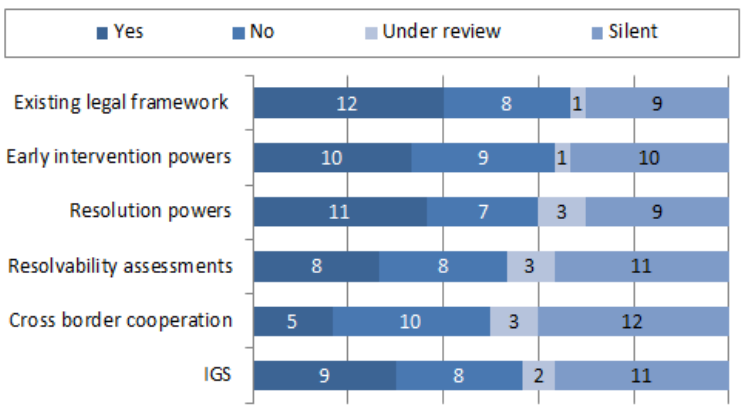
46. Furthermore, a number of other NSAs highlighted the fact that they have signed the EIOPA coordination arrangements for the colleges of supervisors, which include a section on coordination and cooperation in emergency situations.

6. Gaps and shortcomings

6.1 Gaps and shortcomings in existing frameworks

47. NSAs were also asked to report any gaps and shortcomings in their existing framework, focusing on the available powers and tools, cross-border arrangements and IGSs. Chart 11 shows the responses given by NSAs.

Chart 11: Are gaps and shortcomings identified?



48. As can be seen from the responses, a few NSAs explained that the topic is still under consideration; hence, no gaps or shortcomings had been identified so far.

49. With respect to overall deficiencies identified by NSAs in their existing framework, some general comments were made. For instance, several NSAs mentioned that there is no formal administrative resolution framework for insurers with a designated administrative resolution authority, resolution objectives, resolution conditions, resolution powers and safeguards, as set out in the FSB Key Attributes.

50. Looking at responses of the early intervention powers, two NSAs reported that some of the powers are not explicitly provided for in the regulation. Another NSA mentioned that the conditions for exercising the powers could be widened.

51. With respect to the resolution powers, much more gaps and shortcomings were reported. Eleven NSAs indicated that they have identified some deficiencies. For instance, a limited range of available resolution powers was mentioned.

52. Furthermore, the lack of recovery and resolution planning requirements, including resolvability assessments, were reported as shortcomings. Five NSAs also reported shortcoming in the cross-border cooperation with foreign authorities.

53. Finally, nine NSAs reported gaps and shortcomings with respect to the IGSs. In most cases, these relate to the limited scope of the IGSs or the way the IGSs operate and compensate.

6.2 Plans to reinforce existing frameworks

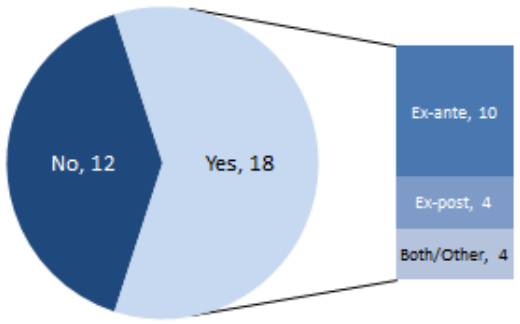
54. Seven NSAs indicated that there are initiatives to reinforce the national framework, although in most cases no concrete plans have been published or issued yet. Nonetheless, one NSA mentioned that the reinforcements are expected to be in-force in 2018, and in another Member State the proposal for a resolution regime for insurers is planned to be adopted in mid-2017.

55. One NSA explained that a comprehensive recovery and resolution framework for insurers had actually already been adopted in response to the identified gaps and shortcomings.

7. Insurance guarantee schemes

56. In the final section of the survey, NSAs were asked some questions about their national IGS(s). The results reveal that there are substantial differences between the IGSs in terms of their funding, mandate and coverage.

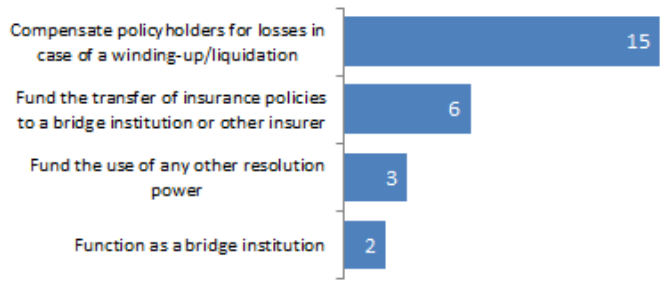
Chart 12: Is there an IGS in your Member State? If so, how is it funded?



57. It should be noted that the body for compensation established by Member States for damage caused by an unidentified vehicle or a vehicle for which the insurance obligation for vehicles has not been satisfied are excluded from these questions and the charts 12 to 14.[35]

58. Chart 12 shows that 18 Member States have in place one or more IGSs. More than half of the IGSs are funded on an ex-ante basis and mainly by contributions from insurers determined by the total premiums of insurers.

Chart 13: For what purpose can the IGS be used?



59. Furthermore, the responses show that the primary function of the IGSs is to compensate policyholders for losses in the

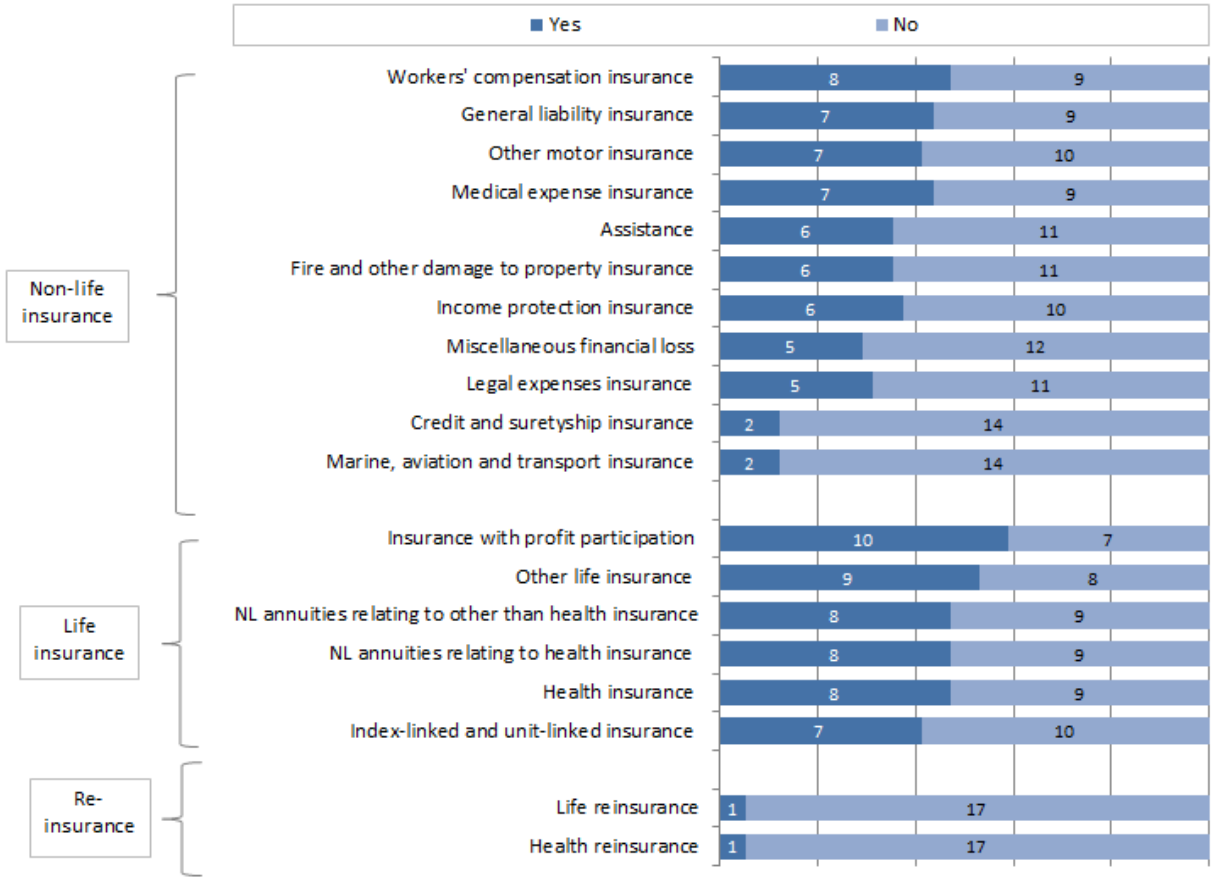
[35] The establishment of such a body follows from Article 10 of the Directive relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (Directive 2009/103/EC). Article 10 states that *"Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied."*

event of a winding-up/ liquidation, followed by the function to fund the transfer of an insurer's portfolio to a bridge institution or other insurer (see chart 13). Other functions of IGSs include the (non-mandatory) power to take necessary measures for the purposes of safeguarding the rights of eligible claimants when an insurer is in financial difficulties but before a default is declared, and the mandatory power to make arrangements to secure the continuity of long-term insurance contracts in case of a default.

60. With respect to the coverage of the IGSs, the responses reveal that in eighteen Member States the coverage is not limited to policies contracted with insurers whose head office is located in the domestic jurisdiction. This means that the IGSs provide coverage to branches of insurers whose head office is situated in other Member States. One NSA clarified, however, that this does not apply to motor liability insurance obligations, while another NSA clarified that only branches of non-EEA jurisdictions are covered.[36]

61. Finally, chart 14 provides an overview of the products which are covered by the IGSs across Member States. Obligations from motor vehicle liability insurance products are covered in most of the IGSs, whereas just one IGS covers reinsurance obligations.

Chart 14: Which products are covered by the IGS(s) in your Member State?



[36] In this last case, the NSA explained that the system also covers all insurance contracts issued by the insurer whose head office is located in the jurisdiction, regardless of whether these contracts are sold through a foreign branch or under free provision of services.

Annex II: Qualitative assessment for the need for minimum harmonisation

1. Introduction

1. One of the lessons learned from the past financial crisis is the need to have adequate recovery and resolution powers and tools in order to be able to handle failing institutions in an effective and orderly manner. In the banking sector, the financial crisis revealed that the existing frameworks were unsuitable to deal with banks in crisis. In response to the banking failures and unprecedented level of public intervention, the European Commission adopted the BRRD, a harmonised recovery and resolution framework for banks and large investment firms.[37]

2. Overall, the insurance sector has witnessed fewer failures than the banking sector. Although the introduction of Solvency II with its risk-based capital requirements and forward-looking supervision approach should considerably reduce the likelihood of insurance failures in the future, it cannot be ruled out that insurers might get into financial difficulties and eventually fail.[38] It is, therefore, essential that Member States have in place effective frameworks to deal with crisis situations in the insurance sector. The results of EIOPA's survey on existing recovery and resolution frameworks show that there is currently a fragmented landscape of recovery and resolution frameworks for insurers. Member States have to rely on their own national frameworks to deal with crises, which in some cases are limited to normal insolvency procedures.

3. EIOPA has analysed whether there is a need for harmonising the elements of recovery and resolution for insurers in the interest of policyholders, financial stability and other resolution objectives. EIOPA sought to carry out a balanced analysis, focusing on the potential benefits and drawbacks of harmonising recovery and resolution practices in the EU. Where available, the analysis is supported with empirical data, findings from EIOPA's survey and case studies. Nevertheless, it should be noted that the analysis generally remains at the conceptual level as the insurance sector experienced fewer failures of high profile national or cross-border insurance groups than the banking sector. Table 1 includes a summary of the arguments in favour of and against harmonisation which will be discussed in further detail.

4. Following the consultation process, EIOPA has further developed its analysis in order to take into account the feedback received from stakeholders. The main changes in the analysis include the addition of another argument against harmonisation (Solvency II already provides sufficient safeguards) and the enhancement of the existing arguments.

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[37] European Commission, EU Bank Recovery and Resolution Directive (BRRD): Frequently Asked Questions, 15 April 2014. (See link: http://europa.eu/rapid/press-release_MEMO-14-297_en.htm?locale=en).

[38] White Paper of the European Commission on Insurance Guarantee Schemes (COM (2010) 370): *Solvency II will not create a zero-failure environment. Neither the current (Solvency I) nor the future (Solvency II) EU solvency regimes create, or can create, a zero-failure environment for insurance companies. (See link: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0370&from=EN)*

5. However, the conclusion of the analysis of whether there is a need for harmonisation has not been altered after the consultation feedback. The feedback showed a mixed picture with some stakeholders agreeing with EIOPA on the need for minimum harmonisation, while others were of the view that it has not been demonstrated that existing legislation, including Solvency II, is insufficient to deal with failing insurers. Some of these stakeholders also questioned the need for the introduction of a separate framework on recovery and resolution and suggested that any necessary new measures should be considered within the framework of Solvency II and, hence, be subject to maximum harmonisation.[39]

Table 1: Overview of arguments

	Arguments
In favour of harmonisation	(A) Avoidance of fragmentation in the EU
	(B) Enhancement of cross-border cooperation and coordination
	(C) Consistency in implementing global standards and reinforcing frameworks
	(D) Fragile market environment and systemic risk
	(E) Increase in consumers choice
Against harmonisation	(A) Solvency II provides sufficient safeguards
	(B) Normal insolvency procedures might be suitable
	(C) No strong evidence for existing powers being ineffective in all Member States
	(D) National frameworks reflect national specificities in a better way
	(E) Administrative burdens and costs for insurers and national authorities

2. Analysis

2.1 Objectives

6. Prior to starting the analysis, it is helpful to set out the objectives against which the arguments in favour of and against harmonisation are assessed. In line with the objectives set in Solvency II[40], EIOPA considers that it should be assessed to what extent harmonisation contributes to the objective of adequately protecting policyholders. Additionally, the contribution to better

[39] As aforementioned, EIOPA does not make any proposals for the specific legislative tool to be employed for a potential harmonisation process (e.g. a separate directive dealing with recovery and resolution for insurers and/or amendments to existing EU legislations such as Solvency II). The focus of the Opinion is on the relevance and substance of recovery and resolution measures in a potential harmonised environment. The legislative tools to achieve the proposals made in this Opinion are out of scope.

[40] See Recital 16, *"The main objective of insurance and reinsurance regulation and supervision is the adequate protection of policyholders and beneficiaries. Financial stability and fair and stable markets are other objectives of insurance and reinsurance regulation and supervision which should also be taken into account but should not undermine the main objective"*, and Article 27 and Article 28 of the Solvency II Directive (2009/138/EC).

achieving other objectives should be taken into account. These other objectives include maintaining financial stability, protecting public funds and ensuring continuity of functions whose disruption could harm the financial stability and/or real economy.

7. Furthermore, as the development of a harmonised recovery and resolution framework could only take place within the framework set by EU law and national constitutional law, general EU objectives should be taken into account. This includes the principle of subsidiarity and the principle of proportionality. According to the principle of subsidiarity, "the EU may only intervene if it is able to act more effectively than EU countries at their respective national or local levels".[41]

2.2 Arguments in favour of harmonisation

(A) Avoidance of fragmentation in the EU

8. The lack of EU legislation governing the process of insurance resolution has resulted in a fragmented landscape of national recovery and resolution frameworks. EIOPA's survey on existing recovery and resolution frameworks revealed that there are substantial differences between national frameworks. There are, for instance, differences in terms of legal framework, powers and tools available to national authorities, conditions under which these powers can be exercised and objectives pursued when resolving insurers.

9. Prior to the introduction of the BRRD, the landscape of national recovery and resolution frameworks for banks was likewise fragmented which was seen as a significant impediment to the management of the past financial crisis. The financial crisis "highlighted the lack of arrangements to deal effectively with failing banks that operated in more than one Member State", according to the European Commission.[42] Additionally, the crisis revealed "serious shortcomings in the existing tools available to authorities for preventing or tackling failures of systemic banks".

10. It seems likely that the absence of an effective harmonised recovery and resolution framework would similarly lead to impediments and inefficiency in the resolution process of particularly cross-border insurance groups. Box 1 shows a hypothetical case study of the potential impediments in the resolution process of an insurance group with operations in more than one jurisdiction.

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[41] European Commission "The principle of subsidiarity" (See link: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:ai0017&from=EN).

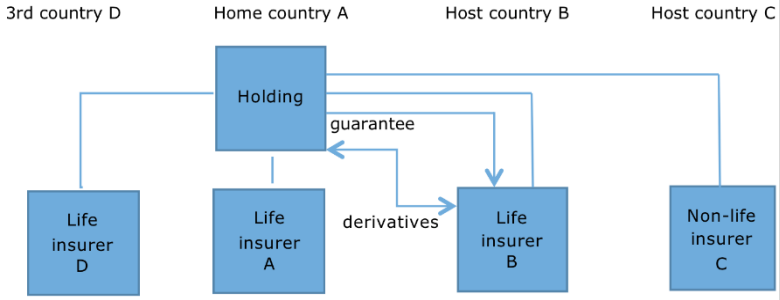
[42] European Commission, EU Bank Recovery and Resolution Directive (BRRD): Frequently Asked Questions, April 2014: "*The crisis also highlighted the lack of arrangements to deal effectively with failing banks that operated in more than one Member State. It was thus agreed that greater EU financial integration and interconnections between institutions needed to be matched by a common framework of intervention powers and rules. The alternative would be fragmentation and inefficiency in EU banking and financial services, something which would harm the single market and would impair its advantages for consumers, investors and businesses*." (See link: http://europa.eu/rapid/press-release_MEMO-14-297_en.htm?locale=en)

Box 1: Hypothetical case of a cross-border insurance group failure in a fragmented landscape

The case study is based on a hypothetical situation where the failure of a real-life cross-border insurance group in one of the Member States is simulated.

I. Scenario

Life insurer D outside the EU suffers severe losses. This induces the Holding company headquartered in the EU to move excess capital from EU insurers to life insurer D. A sharp fall in asset prices and a simultaneous decrease in interest rates push the solvency ratios of life insurers A and B below the minimum capital requirement. As a result, the group own funds fall below the required minimum level. Non-life insurer C is in good financial shape; its excess capital is therefore transferred to the Holding company.



The authorities in country A would like to put life insurer A into resolution. In country B, there is no resolution framework in place, other than a regular court-led bankruptcy procedure. There is however an IGS in place, which does not exist in country A.

The group is organised centrally such that human resources and administration issues are centralised at the group level with service agreements between the Holding company and the subsidiaries. Additionally, there are numerous intragroup transactions between both the Holding company and the subsidiaries and between the subsidiaries themselves, such as derivatives positions and a guarantee from the Holding company to life insurer B.

II. Potential problems in a fragmented landscape

a. Authorities in charge of resolution and administrators focus solely on the interests of creditors and policyholders in their own jurisdiction. This may lead to suboptimal outcomes. For instance, the authority in charge of resolution in country A has an incentive to keep the group capital in country A instead of using it to cover capital shortages in other countries.

b. The regulation in country B does not allow allocating losses to creditors of life insurer B in resolution, unless life insurer B is liquidated. In case liquidation of insurer B is postponed, the potential losses of policyholders of life insurer A might increase.

c. Life insurer B calls in the guarantee issued by the Holding company. This guarantee has to be paid in the end by the creditors of insurers D, A and C, in case the authority in country A cannot impose a moratorium on contractual payments.

d. Resolution of the Holding company stops the service provision of the Holding company to insurers B and C. This results in a halt of the sale of new insurance contracts and pay-outs in countries B and C, which destroys the value of the subsidiaries in these countries.

e. Authority in country A imposes a moratorium on payments following the derivative positions and calls in the termination clause given the failure of life insurer B. This limits the possibility to transfer the portfolio of insurer B.

III. Potential benefits of harmonisation

A harmonised recovery and resolution framework would:

a. Force authorities in charge of resolution to cooperate and coordinate in order to find the optimal resolution strategy for the group as a whole and thereby achieve the optimal solution for all stakeholders.

b. Ensure that a minimum set of resolution powers are available in all Member States in which the insurance group has operations. In that case, groups would have fewer incentives to structure themselves or move capital in order to avoid the use of specific resolution powers (i.e. avoidance of regulatory arbitrage).

c. Make ex-ante visible any intragroup positions and intragroup service contracts which may impede the effective resolution of insurers.

(B) Enhancement of cross-border cooperation and coordination

11. The financial crisis has also highlighted the importance of cross-border cooperation and coordination in times of crisis.[43] Cross-border cooperation and coordination is essential when dealing with crisis situations involving an insurance group which has operations in more than one jurisdiction. In order to avoid impediments to the resolution of cross-border groups it is essential that foreign national authorities are coordinated and work together in order to handle the situation in an effective and orderly manner.

12. A fragmented landscape of national frameworks, however, does not foster cross-border cooperation and coordination and might in fact lead to situations where national authorities concentrate on operations in their own jurisdictions solely. This could result in inefficient and competing resolution approaches by national authorities, affecting the functioning of the single market in the EU, and eventually lead to suboptimal results for all affected stakeholders including policyholders.

13. A common set of recovery and resolution powers with consistent design, implementation and enforcement features would foster cross-border cooperation and coordination and hence help to avoid any unnecessary economic costs stemming from uncoordinated decision-making processes between foreign national authorities and hence contributes to better achieving the objectives of protecting policyholders, maintaining financial stability and protecting public funds.

14. Solvency II requires NSAs to cooperate and coordinate with foreign NSAs during normal times of business, which is usually arranged through the establishment of supervisory colleges[44]. These colleges are a platform for cooperation and coordination, including information sharing[45], between NSAs from all Member States in which entities of an insurance group are located. The aim of these supervisory colleges is to foster a common understanding

[43] Please refer to European Commission, EU Bank Recovery and Resolution Directive (BRRD): Frequently Asked Questions, April 2014. (See link: http://europa.eu/rapid/press-release_MEMO-14-297_en.htm?locale=en).

[44] Please see Article 248 the Solvency II Directive (2009/138/EC).

[45] Please see Article 249 the Solvency II Directive (2009/138/EC).

of the risk profile of the group (entities) and to achieve a more efficient and effective supervision.[46]

15. Specific requirements for the cooperation and coordination between national authorities to deal with the resolution of insurers, such as crisis management groups, are however not explicitly contained in the provisions of Solvency II. As a result, most of the Member States do not have in place cooperation and coordination arrangement for crisis situations. According to EIOPA's survey on existing recovery and resolution frameworks, only five Member States have so far established a crisis management group or an equivalent arrangement. In four of these Member States, a crisis management group has been established for the G-SII located within their jurisdiction following the global standards for G-SIIs. In the other Member State an equivalent arrangement is in place for a cross-border insurance group. A harmonised framework requiring the establishment of cross-border cooperation and coordination arrangements would ensure that similar arrangements are in place in all Member States.

16. The importance of cross-border cooperation and coordination in the insurance sector is emphasised by the findings of a recent study on degree of internationalisation in insurance and banking in the EU (see chart 1).[47] The results of the study show that the degree of internationalisation in the insurance sector is relatively higher than in the banking sector. In the insurance sector, 29 percentage of the business is written by subsidiaries or branches controlled by foreign entities located in the EU (measured as gross written premiums), whereas in the banking sector this is only 17 percentage (measured as the amount of foreign lending).

17. Furthermore, the split between activities coming from subsidiaries and branches in the insurance sector reveals that subsidiaries are the main channel for the internationalisation in insurance. On average, about 25 percentage of the gross written premiums comes from subsidiaries and only 5 percentage from branches. Given that subsidiaries are separate legal entities operating in foreign jurisdictions which are not under the direct supervision of the group supervisor, cross-border cooperation and coordination is even more important in order to ensure an effective and orderly resolution process when required. This is particularly important because the stability of other group entities or the group as a whole might be affected by the failure of the parent company or one or more subsidiaries. It should however be noted that subsidiaries are separate legal entities (as opposed to branches). The risk of contagion in case of subsidiaries (i.e. risk of failure following the failure of the insurance group to which the subsidiary belongs) is therefore less pronounced.

18. However, cross-border cooperation and coordination is also crucial in the case of internationalisation through branches. EIOPA internal research showed that cooperation and coordination, including the exchange of information, between home and host countries are essential elements to

[46] Please see Recital 139 of the Solvency II Delegated Regulation ((EU) 2015/35).

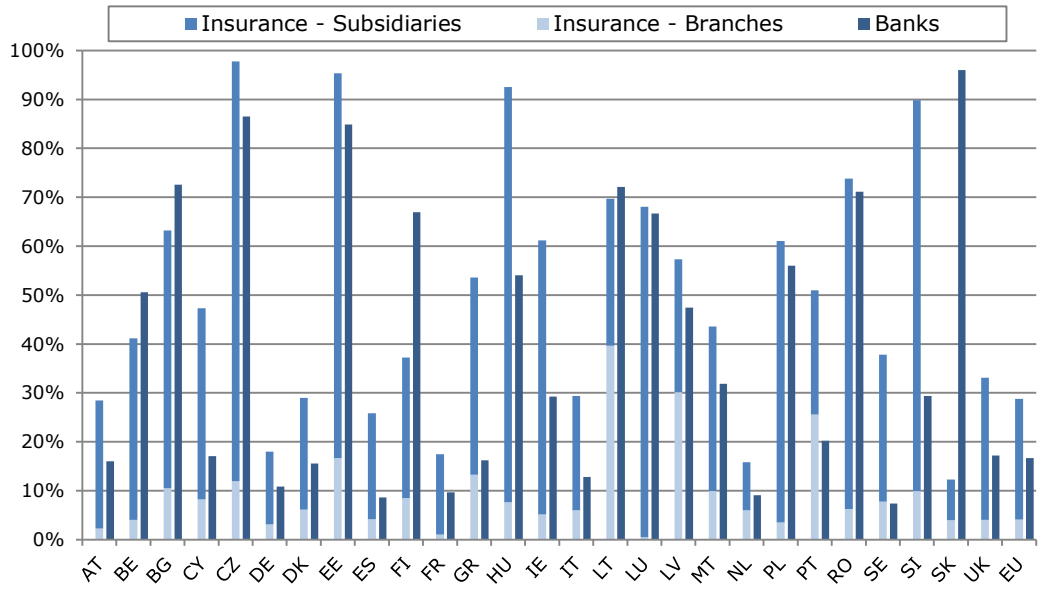
[47] Dirk Schoenmaker and Jan Sass, "Cross-border Insurance in Europe", November 2014. (See link: https://eiopa.europa.eu/Publications/Speeches%20and%20presentations/DSF%20Policy%20Paper%20No%2045%20Cross-border%20Insurance%20in%20Europe.pdf).

reduce the potential negative implications of branches on financial stability and the real economy.

19. Furthermore, internationalisation could also come from insurers operating under the freedom to provide services. A disorderly failure of these insurers could have negative implications for policyholders and the financial stability in the host countries where the services are provided. Cross-border cooperation and coordination is also of importance in these cases in order to adequately safeguard the interest of all affected policyholders and markets.

20. Finally, effective cross-border coordination leading to more integrated and coordinated resolution processes is also essential for reinsurance groups, as orderly resolutions may help to preserve international diversification and ensure contract certainty for reinsurance clients.

Chart 1: Degree of internalisation of insurance and banking markets in the EU



Data source: Schoenmaker and Sass (study 2014, data from 2012).

Notes:
- *Internationalisation in the insurance sector is as measured as the percentage of gross written premiums written by subsidiaries and branches controlled by foreign enterprises located in the EU. For the banking sector, internationalisation is measured as the total amount of foreign lending (assets) as percentage of total lending (assets). The chart illustrates the degree of internationalisation in the EU covering only subsidiaries and branches located in other EU countries only. Internationalisation through subsidiaries and branches located in non-EU countries has been removed from the chart.*
- *The Slovenian Insurance Supervision Agency (AZN) reported that the data used for Slovenia is incorrect or inaccurate.*

(C) Consistency in implementing global standards and reinforcing frameworks

21. Having in place an effective framework is essential for an effective and orderly resolution of failing institutions.[48] EIOPA's survey on existing

[48] Key Attributes of an Effective Resolution Regime for Financial Institutions of the FSB.

recovery and resolution frameworks revealed that most of the national frameworks do not contain the core elements which the FSB considers to be necessary for an effective resolution regime as prescribed in the Key Attributes. As a result of which 12 NSAs reported to the survey that they have identified some gaps and shortcomings in their national frameworks. One of these NSAs provided a real-life case study which illustrates the impediments they experienced when dealing with a failing national insurance group in their jurisdiction (see Box 2).

Box 2: Anonymised case study of an insurance group in financial distress

This box presents a real life case study of an insurance group in a Member State which faced some serious financial difficulties. Various recovery and resolution scenarios were investigated by both the insurance group and the NSA. Eventually, a buyer was found and the insurance group was saved, policyholders were protected and financial stability was maintained. Nevertheless, this case provides an example of the potential impediments to an orderly resolution in the absence of an effective recovery and resolution measures.

The case study is based on confidential information provided by the NSA. For confidentiality reasons, the data and statistics shown here are adjusted.

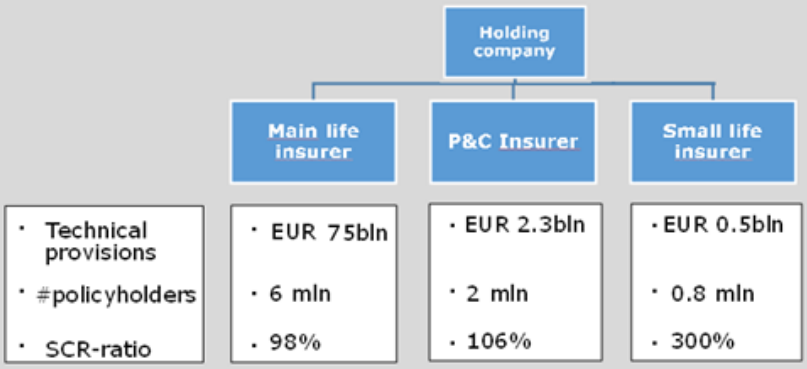
I. Background

Figure 1 shows the stylised organisational chart and some basic facts of the troubled insurance group. The main cause for the problems was the challenging market conditions, i.e. the combination of low interest rates, declining sales in the life insurance market and high competition/low profit margins in the non-life market. All of this put pressure on the business model and solvency position of the insurance group.

In order to restore its solvency position, based on Solvency II*, the insurance group tried to raise capital in the financial markets but was unable to succeed. Other options to raise additional capital were investigated, including the option to put the entire insurance group for sale. The number of interested buyers was however limited and a successful outcome of the sale process was highly uncertain.

Against this background, the NSA had to prepare for alternative resolution scenarios in close cooperation with the insurance group. The scenario of a viable stand-alone going concern was perceived to be an unfeasible option.

Figure 1: Insurance group



II. Impediments to orderly recovery and resolution

When developing alternative resolution strategies, the NSA encountered a number of impediments to the orderly resolution of the insurance group. These impediments include:

- *Defining the conditions for entry into resolution*

The existing framework did not set out clear conditions for resolution. The NSA had to decide when to intervene and what kind of intervention was warranted, as the insurance group was in compliance with the in-force Solvency I-requirements. Under the upcoming Solvency II regime, the MCR-ratio of the group would also be far above the threshold of 100%, but there were concerns about the solvency of the group in terms of its SCR-ratio.

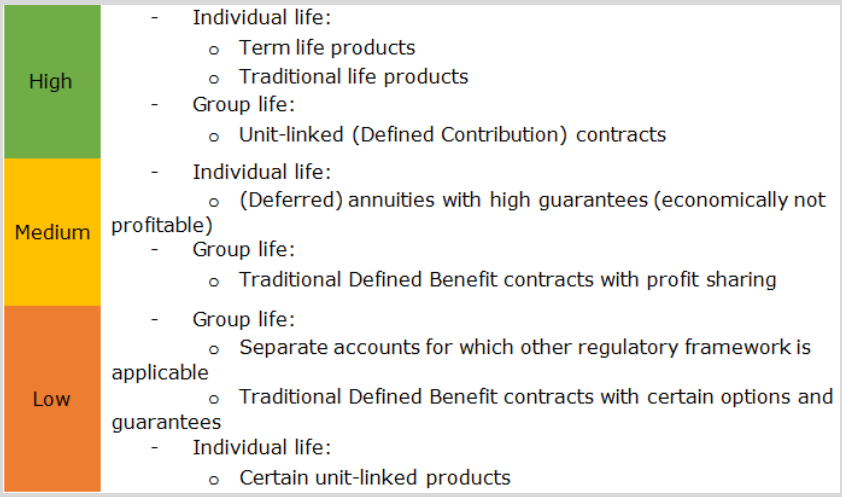
- *Cliff-effect between going and gone concern valuation*

There was a discrepancy in the valuation of the insurer's assets and liabilities moving from going concern to gone concern. This was caused – among others – by the use of different (market) parameters for the valuation of insurance liabilities and a change in the degree of recognition of deferred tax assets. This discrepancy caused a cliff-effect which further complicated a portfolio transfer to a third party.

- *Lack of transferability of insurance portfolios*

Detailed analysis of the life insurance portfolio showed that more than half of the policies were not transferable or only transferable after amending the characteristics of the products which was not accounted for (see figure 2). Additionally, analysis showed that transferability of the IT-systems used to service the products was also problematic and would take several months.

Figure 2: Degree of transferability - life portfolio



- *Intra group interconnectedness and interdependencies*

Analyses by the insurance group revealed that the entities within the group were highly interconnected and interdependent. For instance, the holding company was responsible for the IT, financial and regulatory reporting, legal, tax, treasury and human resources of the subsidiaries and, hence, crucial for the operational continuity of the subsidiaries in the short-term. In addition, the analysis revealed that a bankruptcy of the holding company might have been triggered if the life insurer was put into run-off. These findings introduced an additional layer of complexity to the management of the situation.

- *Early termination rights in financial and reinsurance contracts*

The early termination rights in financial derivatives contracts and reinsurance contracts were another impediment to the orderly resolution of the group, as many of its

derivatives and reinsurance contracts contained early termination options which could have been triggered by the chosen resolution strategy (e.g. run-off).

III. Missing powers and tools

During the management of the crisis situation, the NSA identified some gaps and shortcomings in the national framework. The NSA considered that the following powers and tools would have helped to better deal with the situation:

- *Require recovery and resolution planning in a pre-emptive manner*

Recovery and resolution planning was only done after the insurance group came into financial difficulties. Preparing for a potential crisis in a pre-emptive manner would have helped to reveal and remove some of the impediments described above at an earlier stage.

- *Create possibility to intervene at level of ultimate holding company*

The existing framework in the Member State did not allow the NSA to intervene at the level of the holding company, which complicated the resolution process.

- *Introduce the power to allocate losses to shareholders, creditors and policyholders*

The resolution planning process revealed that many portfolios would not have been transferable without amending the terms and conditions of the liabilities including insurance liabilities and allocate losses to shareholders, creditors and policyholders. The power to restructure, limit or even write down liabilities, including insurance liabilities, might be necessary in some exceptional circumstances in order to better achieve the resolution objectives.

- *Introduce the power to impose a stay on early termination rights*

Also, with respect to the power to put an insurer into run-off, the NSA experienced difficulties in its application without having the powers to impose a temporary stay on early termination rights.

22. The identification of gaps and shortcomings has led to initiatives to reinforce the national frameworks in some Member States.[49] Box 3 shows examples of national initiatives which aim to strengthen the national frameworks by introducing elements set out in the FSB Key Attributes (e.g. the requirement for pre-emptive recovery and resolution planning).

23. The emergence of national initiatives poses a risk for an increasing fragmentation of national frameworks in the EU, whereby the differences between Member States, especially with those lagging to reinforce their frameworks in line with the FSB Key Attributes, will grow. This might have further implications for the effective resolution of cross-border insurance groups. An initiative at the EU level to reinforce existing frameworks would avoid this fragmentation and ensure a consistent implementation and application of global standards in this field. These global standards include the principles set out in the Key Attributes, which was endorsement by the G20 leaders in 2011[50], and the ICPs, which are currently under review. In EIOPA's survey, some NSAs explicitly mentioned that an initiative at the EU

[49] Seven NSAs responded to EIOPA's survey that there are plans to reinforce national recovery and resolution frameworks.

[50] The FSB Key Attributes were endorsed by the G20 leaders at the Cannes Summit in November 2011.

level would be welcomed and facilitate the implementation of global standards at the national level.

24. Harmonisation would thus ensure that a minimum of effective recovery and resolution measures are introduced across the EU in the interest of policyholder protection but also financial stability, protection of public funds and level playing field in the EU.

Box 3: Examples of national initiatives to reinforce or establish national recovery and resolution frameworks for insurers

	France	**The Netherlands**	**Romania**
Action	• On 30 March 2016, the Ministry of Finance presented a draft law introducing a recovery & resolution regime for insurers. • When adopted (expected mid-2017), the regime will include: recovery and resolution planning for insurers whose balance sheet size is above a certain threshold; resolvability assessment; and resolution powers, in particular the power to transfer insurance portfolios and to create a bridge institution. The NSA will continue to have the power to write down life insurance liabilities prior to a portfolio transfer, if needed to facilitate the transfer.	• In the process of adopting reinforcements to the existing framework in accordance with the FSB Key Attributes. • A public consultation of the draft law on recovery and resolution for insurers was launched on 13 July 2016. • Regime includes powers to bail-in shareholders, creditors and policyholders.	• Adopted a recovery and resolution framework for insurers in accordance with the principles set out in the Key Attributes. • The framework includes recovery and resolution planning, early intervention and resolution. • Also, the insurance guarantee fund was changed to enable it to finance resolution actions.
Reason for action	• To introduce a resolution regime in France, more efficient than the current regime (which does not go far beyond (judicial) winding-up). • To foster a dynamic at EU level. • To comply with international standards, in particular with the commitment of the G20 to adopt a resolution regime for all financial institutions	• During the financial crisis, some domestic insurers had to be bailed-out. • Aim is to clarify resolution objectives and resolve problems identified in the current system (i.e. recoverability options for insurers turned out to be limited and available resolution tools were not sufficient in some cases).	• Primarily a response to adverse developments in the Romanian insurance market in 2014. • Aim was to enhance consumer protection, strengthen market conduct and address further adverse evolutions.

	that could be systemically significant if they fail. However, this was only a trigger to take action, as the intended scope goes beyond insurers which are or could be systemic at the point of failure.	• To introduce some missing resolution powers (e.g. the power to bail-in shareholders, creditors and policyholders).	
Scope	• All insurers (and insurance groups). • Proportionality applied.	• All insurers (and insurance groups). • Proportionality applied.	• Recovery planning applies to all insurers. • Resolution planning applies to insurers above a certain threshold. • Proportionality applied.
Source: Information is gathered from the respective NSAs.			

(D) Fragile market environments

25. The importance of having in place an effective recovery and resolution framework is notably high in a fragile market environment. The current environment with prolonged low interest rates combined with a risk of a sharp reversal in asset prices (so-called "double-hit scenario") has been identified by the ESRB as one of the sources of systemic risk in the insurance sector.[51] A double-hit scenario forms a potential risk for insurers in the EU and could lead to collective failures of predominantly life insurers due to common vulnerability to such a scenario. The ESRB is also of the view that in such a scenario *"an insurance recovery and resolution directive and an insurance guarantee scheme directive would form a holistic framework for dealing with insurer failures".*

26. Although insurers in some Member States have taken or are in the process of taking measures to adopt to the current environment of low interest rates (e.g. by making adjustments in the terms and conditions of insurance policies), insurers across the EU remain vulnerable to such a scenario. The results of the EIOPA stress test conducted in 2016 confirmed this vulnerability of the insurance sector.[52] Based on the outcome of the stress

[51] ESRB: "Report on systemic risks in the EU insurance sector", December 2015. The other main sources of systemic risk identified by the ESRB are: 1) engagement in non-traditional and non-insurance activities, 2) procyclicality in asset allocation, 3) procyclicality in the pricing and writing of insurance, and 4) lack of substitutes in vital lines of insurance business. (See link: http://www.esrb.europa.eu/pub/pdf/other/2015-12-16-esrb_report_systemic_risks_EU_insurance_sector.en.pdf?d171a63f6e1d433f82e477d67416fbd5).

[52] According to the stress test, the "double-hit" scenario had a negative impact on the balance sheet of insurers of close to €160 billion (28.9% of the total excess of assets over liabilities) with more than 40% of the sample losing more than a third of their excess of assets over liabilities. In the absence of long-term guarantee and transitional measures, almost 75% of the sample would lose more than one third of their excess of assets over liabilities in the double-hit scenario. (EIOPA (2016): "Insurance Stress Test 2016", 15 December 2016. (See link:

test 2016, EIOPA recommended that NSAs should assess whether these vulnerabilities pose a threat to the viability of the supervised entity and, collectively, to the system as a whole. Additionally, EIOPA stated that supervisory vigilance is required in order to avoid a misestimate of the risks due to the longer-term type of concerns implied by such a scenario.

27. Ensuring that national authorities are able to manage with the consequences of such a scenario by equipping them with a range of effective recovery and resolution powers is essential. When considering the deficiencies in national frameworks reported by some NSAs[53] and the general lack of specific cross-border cooperation and coordination arrangements for dealing with crisis situations, such as crisis management groups, it can reasonably be argued that existing frameworks might not be sufficiently viable to deal with the consequences of a severe stress scenario affecting several insurers and/or jurisdictions.

28. The financial crisis has shown that, where recovery and resolution measures prove to be ineffective to manage a crisis situation, governments might need to step in and offer public support to financial institutions in order to maintain financial stability. Over the course of the financial crisis, European insurers received a total of approximately EUR 6.5 billion from public authorities.[54] This is less than the public support received by banks[55], which were at the epicentre of the crisis, but still a significant burden on tax payers. Box 4 includes some examples of insurance and bancassurance groups which received state aid during the past financial crisis.

29. The introduction of viable and effective framework for the recovery and resolution of insurers in the EU could help to avoid or minimise the reliance on public support in times of crisis while encouraging market discipline and limiting moral hazard.

Box 4: Examples of public intervention in insurance during financial crisis

Insurer	**Public intervention**	**Reason for intervention**
Ethias Group (Belgium)	In 2008, Ethias received €1.5 billion from the Belgian government.	The state aid was required to enable Ethias to continue its operations and to develop a restructuring plan to ensure its long-term viability, as it experienced a sharp fall in the value of its financial assets and the withdrawal of a large number of investors.

https://eiopa.europa.eu/Publications/Surveys/EIOPA-BOS-16-302%20Insurance%20stress%20test%202016%20report.pdf).

[53] See Annex I Overview of existing recovery and resolution frameworks.

[54] European Commission: "Note for discussion by Expert Group on Banking, Payments and Insurance (EGBPI) meeting on 5 March 2015" (See link: https://www.eduskunta.fi/FI/vaski/Liiteasiakirja/Documents/EDK-2015-AK-3427.pdf).

[55] Between October 2008 and December 2012, the Commission approved €591.9 billion or 4.6% of EU 2012 GDP in state aid measures in the form of recapitalisation and asset relief measures. Source: European Commission, EU Bank Recovery and Resolution Directive (BRRD): Frequently Asked Questions, April 2014. (See link: http://europa.eu/rapid/press-release_MEMO-14-297_en.htm?locale=en).

KBC Group (Belgium)	In 2008, the EC approved Belgian authorities' plans to recapitalise KBC with €3.5 billion.	The capital injection was considered to be necessary to maintain the market's confidence in KBC and to ensure its contribution in providing loans to the real economy. The capital injection was, however, mainly aimed at supporting the banking part of the group (financial conglomerate).
AEGON (Netherlands)	In 2008, the EC approved a plan to recapitalise AEGON with €3 billion through a special type of securities.	The capital injection was considered to be necessary to maintain the markets' confidence in AEGON and to ensure its refinancing.
ING Group (Netherlands)	In 2008, a capital injection of €10 billion to ING Groep by the Dutch government was approved. A total of €2.8 billion was received by ING insurance.	The injection was considered to be necessary as a loss of confidence in a core institution as ING would have led to a further disturbance of the existing situation and harmful spill-over effects to the economy as whole.
SNS Reaal (Netherlands)	In 2008, SNS Reaal received a capital injection of €750 million from the Dutch government.	The capital injection was considered to be necessary to restore the markets' confidence in SNS REAAL and to ensure the contribution in providing loans to the real economy of its bank subsidiary.
Source: European Commission database (See link: http://ec.europa.eu/competition/recovery/cases.html)		

(E) Increase in consumer choice

30. A harmonised environment promoting convergence of recovery and resolution practices in the EU could increase the willingness of policyholders to contract with insurers from other EU countries. This would in turn improve the European competitiveness in the insurance sector.

31. A potential improvement of the level playing field would contribute to a further integration and enhancement of the single market and benefit the ongoing process of the creation of the Capital Markets Union.[56,57]

2.3 Arguments against harmonisation

(A) Solvency II provides sufficient safeguards

32. The adoption of Solvency II has brought considerable improvements to the supervision of insurers by introducing risk-based capital requirements and a forward-looking approach to supervision. It could therefore be argued that

[56] Green Paper of the European Commission on retail financial services, better products, more choice, and greater opportunities for consumers and businesses (COM(2015) 630): "*One of the priorities of the Commission is the achievement of a deeper and fairer Single Market.*"

[57] Please also refer to box 3 which illustrates the potential implications in the resolution of national insurance groups.

Solvency II provides sufficient safeguards for the protection of policyholder, and eventually for the financial stability and public funds. Solvency II has reduced the likelihood of failures in the insurance sector, which has already experienced fewer failures than the banking sector.

(B) Normal insolvency procedures might be suitable

33. On the banking side, it was argued that normal insolvency procedures are unsuitable to deal with failures of banks which operate on the basis of public trust. Therefore, in order to avoid a run on banks and to maintain the financial stability in the EU, it was agreed that national authorities should be given sufficient powers to respond in a rapid and decisive manner to failing banks. This agreement resulted in the introduction of the BRRD.[58]

34. For the insurance sector, however, it has not been demonstrated that in all Member States normal insolvency procedures would be unsuitable to deal with insurance failures as the insurance sector has not experienced a severe crisis like the banking sector, which was at the epicentre of the past crisis. That means that in some Member States failing insurers could be orderly resolved under normal insolvency procedures taking into account that an insolvency situation in insurance materialises over time and failure is usually a "slow burn" process taking several years.

35. Additionally, although fears of financial distress might similarly lead to a run on insurers in the form of mass surrenders by policyholders, the likelihood and the potential impact of such a scenario are lower compared to the banking sector.[59]

(C) No strong evidence for existing powers being ineffective in all Member States

36. As there are no cases of high profile national or cross-border insurance group failures in the EU, it cannot be conclusively concluded that existing powers and tools would be unsuitable to deal with severe stress scenarios in all Member States. Eight NSAs confirm this conclusion by their response to EIOPA's survey that they have not identified any gaps and shortcomings in their national framework.

37. Furthermore, currently existing resolution powers, such as the power to transfer the portfolio of an insurer to a third party and the power to put an insurer into (solvent) run-off, have been regularly used in the past and have proven to be adequate in dealing with the respective cases.

38. Any EU action to reinforce national frameworks could, therefore, be unwarranted and lead to undue administrative costs and burdens for those Member States which may already have adequate frameworks in place.

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[58] European Commission, EU Bank Recovery and Resolution Directive (BRRD): Frequently Asked Questions, April 2014. (See link: http://europa.eu/rapid/press-release_MEMO-14-297_en.htm?locale=en).

[59] For instance, the Ethias group experienced a withdrawal of a large number of investors during the financial crisis in 2008, which could be interpreted as a run on the insurer (see box 5).

(D) National frameworks reflect national specificities in a better way

39. In order to initiate a legislative initiative at the EU level, there should be a strong case that EU actions are more effective than actions taken at the national levels.[60] This also applies to any potential initiative of EU legislators to harmonise existing recovery and resolution frameworks for insurers.

40. It could be argued that some Member States are better equipped to reinforce their national framework by taking into account the specific characteristics of their national insurance market. National specificities might not be addressed to the same extent in a harmonised framework.

(E) Administrative burdens and costs for insurers and national authorities

41. Finally, harmonisation in the field of recovery and resolution might lead to additional administrative burdens for both insurers and national authorities. In particular, the requirements to develop pre-emptive recovery and resolution plans could be seen as entailing significant administrative burdens for, respectively, insurers, especially small and medium-sized insurers, and national authorities. Also the requirement for pre-emptive resolution plans might lead to a burden for insurers, as national authorities may request information from insurers when drafting the pre-emptive resolution plans.

42. Furthermore, the requirement for Member States to have in place a designated administrative resolution authority for insurers could mean additional costs, as the resolution authority would have to be equipped with sufficient sources.

43. Harmonisation would also require some amendments in national legislation which could create additional burdens and costs for Member States, especially, for those which have already started to reinforce or are in the process of reinforcing their existing national frameworks.

3. Conclusion

44. The past financial crisis has shown the importance of having in place adequate recovery and resolution measures, including arrangements for cross-border cooperation and coordination, in order to ensure an orderly resolution of failing institutions. Although Solvency II has reduced the likelihood of insurers failing in the future, it has not completely eliminated this risk. Therefore, despite the views of stakeholders that Solvency II already provides sufficient safeguards and that there is no need for further harmonisation, EIOPA is of the view that a certain degree of harmonisation of recovery and resolution practices in the EU would benefit policyholders, the insurance sector and more generally the financial stability in the EU.

45. Harmonisation would avoid a fragmented landscape of different national recovery and resolution frameworks, which could be a significant impediment to the management of crisis situations; precedents of which have been

[60] European Commission "The principle of subsidiarity" (See link: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:ai0017&from=EN).

observed in the banking sector. A harmonised environment would facilitate cross-border cooperation and coordination and help to avoid any unnecessary economic costs stemming from uncoordinated decision-making processes between foreign national authorities.

46. Furthermore, harmonisation could ensure a consistent implementation of the global standards, such as the FSB Key Attributes, and hence ensure that that all Member States have in place a viable and consistent framework to deal with crisis situations in insurance. An effective recovery and resolution framework is particularly relevant in fragile market environments where there is a risk of (collective or systemic) insurance failures, like the current low interest rate environment which poses a significant risk for insurers. In order to protect policyholders and to avoid unnecessary disruption to the financial stability, as well as to minimise reliance on public funds, it is essential that national authorities are equipped with the necessary powers and tools to manage such crisis situations effectively. In some Member States, the existing framework might already provide for sufficient measures to deal with crisis situations. However, this does not apply to all Member States as evidenced by the responses to EIOPA's survey on existing recovery and resolution frameworks.

47. EIOPA is therefore of the view that an initiative at the EU level to reinforce and align existing national frameworks would be desirable and contribute to the objectives of policyholder protection, financial stability and protection of public funds, as well as enhancement of the single market and level playing field in the EU. Nonetheless, in order to address the potential drawbacks of an EU initiative in this field, a potential **minimum harmonisation** process should be designed adequately. This means that it should fully respect the proportionality principle and only aim at minimum harmonisation, allowing Member States to address specificities of their markets at the national level, subject to being compatible with the objectives set in a potential EU framework.

Annex III: Qualitative assessment for building blocks

1. Introduction

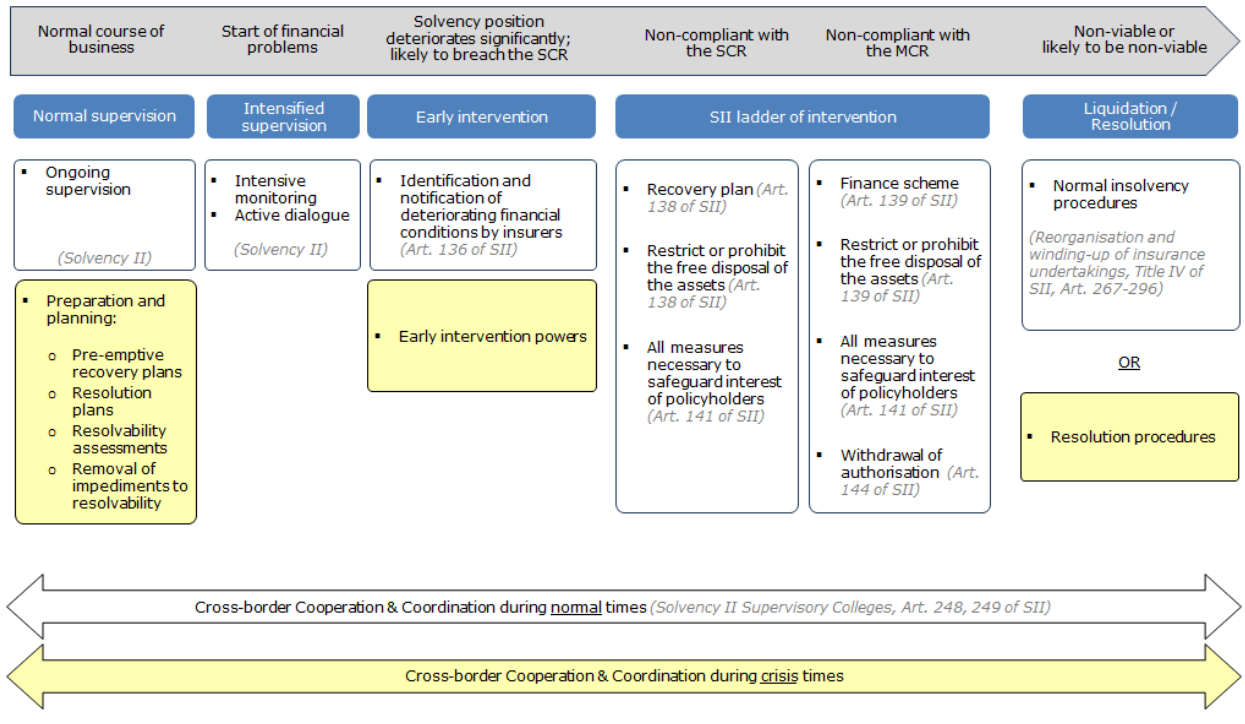
1. Based on EIOPA's conclusion that a minimum harmonised recovery and resolution framework for insurers is needed, EIOPA explored which recovery and resolution elements should be included in a potential harmonised framework. Each of the elements proposed in the Opinion is further examined in this annex, focusing on the potential benefits and implications.

2. In this qualitative analysis, the findings of EIOPA's survey on existing recovery and resolution frameworks are taken into account, as well as the feedback from the public consultation process.

2. Building blocks

3. In order to assess which crisis management tools and powers should be captured in a harmonisation process, EIOPA considered the different stages of a crisis management flow in a Solvency II environment. Chart 1 illustrates a crisis management flow.[61] Some of the stages, including the measures listed in these stages, are already harmonised by Solvency II, whereas others are not.

Chart 1: Crisis management flow



* *The articles listed here refer to articles in the Solvency II Directive (2009/138/EC).*

[61] It should be noted that the crisis management flow is different from the Supervisory Review Process (SRP). The SRP reflects the ongoing supervision process. If there is an insurer which requires intensive supervision, it should be identified in the Risk Assessment Process and reflected in the supervisory plan and detailed review.

4. The crisis management flow distinguishes the following stages:

   i. Normal/ongoing supervision: In the situation of normal supervision, the insurer is in normal course of business and compliant with its regulatory capital requirements. The type of supervision is normal and based on a proportionate, forward-looking, risk-based approach conform Solvency II.

      In addition to the requirements in Solvency II, preparatory and preventive measures could be taken in order to enhance the awareness of and preparedness for adverse situations (e.g. pre-emptive recovery and resolution planning).

   ii. Intensified supervision: At this stage, the insurer starts to face some financial or non-financial problems which might lead to future financial problems (such as problems in the system of governance). The NSA is likely to monitor the insurer more closely than under normal supervision but without intervening in the business and operations of the insurer. This is in line with the Solvency II approach of a forward-looking and risk-based supervision.

   iii. Early intervention: At this stage, the financial position of an insurer starts to deteriorate and the NSA considers that the insurer is likely to breach the SCR if no action is taken. According to Solvency II, the insurer should have procedures in place to identify deteriorating financial conditions and should immediately notify the NSA when such deterioration occurs.[62] The insurer is, however, still compliant with the SCR and, hence, the ladder of intervention in Solvency II does not apply.

      In order to avoid the escalation of problems and prevent the insurer from becoming non-compliant with the SCR, early remedial actions are usually taken by the NSA. There is currently, however, not a harmonised approach at the EU level regarding the timing and conditions for these actions, as well as the powers available to NSAs.

   iv. Ladder of intervention in Solvency II: At this stage, the insurer does no longer meet the SCR and/or MCR; the ladder of intervention of Solvency II is effective.

      - In case of non-compliance with the SCR, the insurer is required to submit a realistic recovery plan for approval by the NSA in which it explains what recovery measures it will take in order to restore its solvency position within the following six months. Non-compliance with the SCR occurs where there is a breach of the SCR or where there is a risk of non-compliance in the following three months.[63]
      - In case of non-compliance with the MCR, the insurer is required to submit a short-term realistic finance scheme for approval by the NSA in which it explains how it will restore compliance with the MCR within the following three months. Non-compliance with the MCR

[62] Article 136 of Solvency II Directive (2009/138/EC).

[63] Article 138 of Solvency II Directive (2009/138/EC).

occurs where there is a breach of the MCR or where there is a risk of non-compliance in the following three months.[64]

- In the event that the solvency position of the insurer in breach of the SCR or MCR continues to deteriorate, the NSA has the power to take all measures necessary to safeguard the interests of policyholders.[65] The measures which NSAs can take are not further specified in Solvency II, which has resulted in a different set of powers available to NSAs across the EU.
- In addition, NSAs have the power to restrict or limit the free disposal of the assets of an insurer in breach of the SCR or MCR.[66]
- Finally, NSAs are granted with the power to withdraw the authorisation of the insurer under a certain circumstances, including the case where the insurer is in breach of the MCR and the NSA considers that the finance scheme submitted is inadequate or the insurer fails to comply with the approved scheme within the required three months.[67]

v. Resolution/Liquidation: The final stage of the crisis management flow is resolution or liquidation. In this situation, the insurer is not viable or likely to be non-viable. National authorities can decide to put an insolvent insurer into judicial insolvency procedures (conform the title on "reorganisation and winding-up of insurance undertakings" in Solvency II) or in resolution (not harmonised at the EU level).

vi. Although cross-border cooperation and coordination is not a stage in a crisis management flow, it is an essential element when dealing with cross-border insurance groups. Cooperation and coordination, including the exchange of information, should be a continuous process between foreign national authorities with a higher intensity in case of an actual crisis situation involving a cross-border insurance group.

5. EIOPA is of the view that a minimum degree of harmonisation in the field of recovery and resolution should capture those measures which are not yet harmonised by the Solvency II framework in order to avoid the escalation of problems at an early stage or to effectively deal with a crisis situation if this cannot be avoided.[68] In fact, most of these measures are identified by the FSB as essential for an effective resolution regime.[69] The results of EIOPA's survey on existing recovery and resolution frameworks revealed that a majority of the national frameworks do not contain all of the measures which are shown in the chart and are considered to be necessary by the FSB.

6. In order to better achieve the objectives set out in Annex II, section 2.1 Objectives, EIOPA considers that a potential harmonised recovery and resolution framework should consist of the following building blocks: (i)

[64] Article 139 of Solvency II Directive (2009/138/EC).

[65] Article 141 of Solvency II Directive (2009/138/EC).

[66] Article 138 and Article 139 of Solvency II Directive (2009/138/EC).

[67] Article 144 of Solvency II Directive (2009/138/EC).

[68] The exact content of each stage is described in the subsequent sections below.

[69] See "Key Attributes of an Effective Resolution Regime for Financial Institutions" of the FSB.

preparation and planning, (ii) early intervention, (iii) resolution and (iv) cross-border cooperation and coordination.

7. EIOPA believes that harmonisation of these building blocks would be compatible with and further supplement Solvency II. In order to shed light on the differences between the proposals made in this Opinion and the measures already included in Solvency II, EIOPA carried out a mapping exercise. The results of this exercise can be found in Annex V.

8. Considering the four building blocks, the responses of stakeholders to the discussion paper show that they almost unanimously agree on the relevance of the last building block: cross-border cooperation and coordination. Stakeholders pointed at the importance of having in place arrangements which facilitate cooperation and coordination between home and host countries, as this would help to safeguard the interest of all affected countries while maintaining a level playing field in the EU. Some stakeholders were, however, of the view that cross-border cooperation and coordination could be arranged for without a harmonised environment for the recovery and resolution of insurers. Other stakeholders shared the view of EIOPA that a fragmented landscape could complicate cross-border cooperation and coordination, which would be easier to achieve in a harmonised environment.

9. A majority of the stakeholders have particularly raised their concerns with respect to the building block on early intervention. They pointed at the link between early intervention and Solvency II and questioned the need for the introduction of early intervention measures. This is further elaborated in the section on early intervention (see below section 5. Early intervention).

3. Scope and reinsurance

10. In the public consultation, stakeholders expressed different views with respect to the appropriate scope of a harmonised framework and its building blocks. Some stakeholders argued that only systemically important insurers or insurers above a certain threshold should fall within the scope, whereas others favoured a broad scope capturing all insurers within the scope of Solvency II.

11. A number of stakeholders also questioned whether reinsurers should be within scope as reinsurance is a business to business activity which separates them from insurance: (i) the failure or entry into distress of a reinsurer does not have a direct impact on policyholders and could only do so indirectly through the impact of the reinsurance failure on the direct writer; (ii) negative publicity surrounding financial difficulties for a reinsurance company and the corresponding impact on policyholders of such publicity will be significantly more limited than in the case of a direct insurer; and (iii) in the event of reinsurance default, the ceding company as a professional counterparty will be in an appropriate position to engage regarding any claim it may have on the failed reinsurer; it will not need a resolution authority to step in to protect or maximize its interests, as long as a clear legal framework is in place regarding the priority of claims on liquidation

12. EIOPA agrees with the stakeholders' comment that the risks and implications of failures in reinsurance are different from those in insurance. It is therefore of the view that supervisory and resolution authorities should take these differences into consideration when applying the proportionality principle. However, EIOPA does not share the view that reinsurers should be *ex-ante* excluded from the scope. As reported by the ESRB[70], reinsurance may also pose systemic risks, although through different sources. The ESRB argues that (i) reinsurers increase the risk of contagion due to high interconnectedness between insurers and reinsurers, and between reinsurers themselves; (ii) the high concentration of reinsurers, both globally and in the EU, leads to substitutability concerns; and (iii) the transfer of risks to capital markets creates additional links between insurers and financial markets. EIOPA is therefore of the view that a harmonised framework should include all insurers (including reinsurers) within the scope of Solvency II but with the discretion to waive certain requirements based on the proportionality principle.

4. Preparation and planning

4.1 Pre-emptive recovery planning

13. This sub-building block introduces the requirement for insurers to develop and maintain recovery plans in a pre-emptive manner, i.e. in normal times of business. The Solvency II framework already requires the development of a recovery plan. This is however an ex-post recovery plan, meaning that it is only required after the insurer breaches the SCR.[71] From a crisis management perspective, it is however important to be prepared for adverse developments.

14. The survey on existing recovery and resolution frameworks showed that currently seven Member States have in place a requirement for the development of pre-emptive recovery plans.[72] The scope of the requirement differs however in the respective Member States. In two Member States the scope captures all insurers while in the other five Member States the scope is limited to certain insurers (e.g. systemically important insurers or insurers above a certain threshold).

15. Pre-emptive recovery planning would help insurers to identify the appropriate measures which could be taken in order to restore the solvency position of insurers following a (significant) deterioration. The development of pre-emptive recovery plans would therefore increase the preparedness and awareness of both insurers and NSAs for and about adverse situations.

16. Additionally, the preparation of recovery plans in a pre-emptive manner would stimulate insurers to review their operations, risks and recovery

[70] ESRB: "Report on systemic risks in the EU insurance sector", December 2015.

[71] Non-compliance with the SCR occurs where there is a breach of the SCR or where there is a risk of non-compliance in the following three months (please see Article 138 of the Solvency II Directive (2009/138/EC)).

[72] See Annex I Overview of existing recovery and resolution frameworks.

options in stress scenarios. As such, pre-emptive recovery plans could be seen as part of the risk management process or as a natural extension of the ORSA. Under Solvency II insurers are required to develop an ORSA[73] in which they make an assessment of their overall solvency needs taking into account their specific risk profile, approved risk tolerance limits and business strategies. Insurers do not necessarily develop recovery options for different stress scenarios in an ORSA.

17. In the public consultation, some stakeholders agreed with EIOPA that pre-emptive recovery plans should be seen as an extension of the ORSA and, hence, should find their base in the ORSA. A majority of the stakeholders raised, however, their concerns about the scope for recovery planning and the potential administrative burdens for insurers if the scope is set to be broad. Different proposals were put forward with respect to the scope. Some stakeholders argued that the scope should be limited to certain insurers based on their systemically importance, size or financial health, whereas others proposed to include all insurers within the scope of Solvency II as preparation for adverse future developments would benefit all insurers.

18. Furthermore, a majority of the stakeholders supported the development of recovery plans by insurance groups (and individual insurance entities which are not part of a group), as they argue that the development of plans at the individual entity level would unduly increase the administrative burden while also destroying value and introducing potential conflicts between envisaged recovery measures on a group level versus solo level. Some stakeholders would also welcome the further guidance from EIOPA on the eligibility criteria for waivers and simplified obligations.

19. EIOPA agrees that pre-emptive recovery plans should be developed at the group level. However, EIOPA believes that adequate preparations are essential for a broad range of insurers as the risk of financial or non-financial problems in the future cannot be eliminated, even if insurers are currently in good financial conditions. Adequate preparation and planning would benefit insurers and NSAs, but also policyholders, financial stability and taxpayers as this could allow for swift and well-informed actions in times of financial stress.

20. Preparing and maintaining pre-emptive recovery plans would, however, entail cost and administrative burdens for both insurers and NSAs. In order to reduce the costs and administrative burdens for insurers, the requirement should be applied in a proportionate manner and insurers should be encouraged to use as much as possible information from other sources when developing pre-emptive recovery plans, such as the ORSA, the medium-term capital management plan and contingency and emergency plans for colleges, as well as the reporting on significant intragroup transactions and the disclosure on group structures.[74]

[73] Article 45 of the Solvency II Directive (2009/138/EC).

[74] Article 41, Article 245 and Article 256a of the Solvency II Directive (2009/138/EC).

4.2 Pre-emptive resolution planning

21. This sub-building block introduces the requirement for resolution authorities to develop and maintain resolution plans in a pre-emptive manner. According to EIOPA's survey on existing recovery and resolution frameworks, such a requirement currently exists in five Member States. In four of these Member States the requirement covers G-SIIs only, whereas in one Member State the scope includes all insurers above a certain threshold.

22. As with pre-emptive recovery plans, the development of pre-emptive resolution plans increases the awareness of and preparedness for crisis situations by identifying strategies on how to carry out a potential resolution in the most effective and efficient manner.

23. Pre-emptive resolution planning would therefore be beneficial for resolution authorities, policyholders, financial stability and taxpayers, as resolution authorities would be better prepared to avoid a disorderly failure of insurers which may decrease the (social) costs of a failure.

24. In the public consultation, most of the stakeholders commented on the scope for this requirement. Some argued that for many insurers the prospect of resolution may be considered to be remote, the costs of resolution planning disproportionate and the impact of failure on the overall financial system not significant (and also many NSAs do not have a 'zero-tolerance of failure'). In light of this, they agree that the scope for pre-emptive resolution planning could be narrower than for pre-emptive recovery planning based on the proportionality principle and supervisory judgement.

25. Nearly all stakeholders agreed on the need to apply the proportionality principle and suggested that the administrative burdens arising from this requirement should be limited for insurers. This means that 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. EIOPA agrees with stakeholders that the pre-emptive resolution planning should not result in disproportionate costs and burdens for insurers or resolution authorities.

4.3 Resolvability assessments

26. This sub-building introduces the requirement for resolution authorities to assess the resolvability of insurers and the power to require the removal of significant impediments. Resolvability assessments help to identify impediments to the resolvability of an insurer by assessing the feasibility and credibility of the resolution strategies.

27. According to EIOPA's survey, resolvability assessments are currently undertaken in the five Member States which also require the development of pre-emptive resolution plans. In two of these Member States, the NSAs could also require the insurer (and/or the group company) to take measures to remove impediments to its effective resolution.

28. EIOPA considers resolvability assessments to be part of the resolution planning, as planning in itself may not be sufficient to prepare for crisis situations. It is also important to assess whether an orderly resolution of an insurer can be ensured in accordance with the strategies set out in the resolution plan and to ensure that there no significant impediments to the resolvability of insurers.

29. Resolvability assessments are essential to obtain these insights and hence to better achieve the objectives for resolution. The impact of resolvability assessments is therefore assessed to be positive for policyholders, financial stability, taxpayers and resolution authorities. Resolution authorities would be better prepared to deal with crisis situations, but would also face costs and administrative burdens due to this new requirement. The proportionality principle should therefore be carefully taken into account.

30. In the consultation process, stakeholders mainly raised their concerns about the introduction of the power to require the removal of significant impediments. Stakeholders argued that this power should be limited to strong safeguards and only exercised in exceptional circumstances. EIOPA also believes that the power to require the removal of impediments should be subject to safeguards and be limited to significant impediments only. Furthermore, as reflected in the Opinion, insurers should be able to challenge the decision of the resolution authority and seek impartial review of the proposed use of this power.

5. Early intervention

31. The objective of the introduction of early intervention measures is to allow NSAs to intervene at an early stage so as to avoid the escalation of problems and, hence, the need for more intrusive actions at a later stage. As shown in the crisis management flow, early intervention captures the stage before the breach of the SCR as defined in the Solvency II framework. Once an insurer is non-compliant with the capital requirements, Solvency II is overall rather prescriptive with the actions to be taken by insurers and NSAs in order to restore the financial situation of the insurer. Before a breach of the SCR, Solvency II requires insurers to identify and notify the NSA in case of deteriorating financial conditions. It does not, however, prescribe what actions NSAs should or could take in order to avoid the potential escalation of the financial problems the insurer is facing.

32. As a result of this, different supervisory practices have arisen across Member States as was revealed by internal research carried out by EIOPA among NSAs.[75] The analysis revealed that nine NSAs have developed (internal) guidelines containing triggers for supervisory actions when an insurer is close to a breach of the SCR. Additionally, two NSAs responded that they have plans to develop such (internal) guidelines before mid-2017.

33. Six of these NSAs indicated that they take supervisory actions in case the SCR ratio falls within a certain range, while the remaining three NSAs

[75] In the third quarter of 2016, EIOPA conducted a brief stock taking exercise among NSAs on their supervisory actions and potential policies in case of a (near) breach of the SCR. In total, 28 NSAs responded to the exercise.

mentioned that other triggers are used. These include a combination of quantitative (e.g. the level of the SCR ratio and outcome of stress test exercises) and qualitative indicators (e.g. outcome supervisory review process).

34. With respect to the supervisory actions taken by NSAs in case the triggers are met, the responses reveal that other NSAs with no (internal) guidelines in place also might take remedial actions under certain (not defined) circumstances if needed. The most common supervisory actions reported by NSAs are the close monitoring of the insurer and the request for more intensive reporting. However, some NSAs have also mentioned that they may request for updates on an insurer's ORSA, capital management plan, insurer's strategy and/or product range. Also, the requirement for running stress test exercises, developing recovery plans, requiring pre-approval of dividend payments, doing on-site inspections and requiring additional meetings of the College of Supervisors were mentioned.

35. In addition to these results, EIOPA's survey on existing recovery and resolution frameworks provided further insight in the early intervention powers available to NSAs.[76] The survey showed a mixed picture with some early intervention powers being widely available to NSAs in the EU (e.g. powers affecting the management and governance of insurers), whereas others are only available to a limited number of NSAs or are subject to a variety of restrictions (e.g. the power to require the sale of subsidiaries, or the power to require the insurer to transfer its financing operations to the parent company).

36. The survey also revealed that ten NSAs have identified gaps and shortcomings with respect to the available early intervention powers.[77] From those ten NSAs, two NSAs reported that some of the early intervention powers are not explicitly provided for in the regulation, while another NSA mentioned that the conditions for exercising the powers are too strict and could be widened.

37. Based on the results of the survey and the stock taking exercise, it can be concluded that some NSAs have established policies or introduced powers to intervene in troubled insurers before a breach of the SCR. These policies and powers differ substantially across Member States and are not harmonised at the EU level. This could result in different actions taken by NSAs under different conditions which could complicate the recognition of these actions at the EU level.

38. The introduction of minimum harmonised early intervention measures would ensure that all NSAs have a minimum set of powers to intervene in a troubled insurer at an early stage. This would enhance the cross-border cooperation and coordination compared to the current situation and also help to reduce the risk of exposing policyholders and other stakeholders, including creditors and taxpayers, to losses by effectively avoiding the escalation of problems.

[76] See charts 3 to 6 in Annex I.

[77] In total, ten NSAs replied that they have not identified any gaps and shortcomings; two NSA mentioned that the issue is still under review; nine NSAs remained silent on the issue.

39. Furthermore, EIOPA believes that the introduction of early intervention measures would be compatible with Solvency II as it would further specify what measures NSAs could take when insurers and/or NSAs have identified a significant deterioration in the financial or non-financial position of insurers.

40. In the consultation process, a majority of stakeholders raised their concerns about the introduction of early intervention measures. Some pointed at the link between early intervention and Solvency II and questioned the need for the introduction of early intervention measures. Stakeholders argued that the ladder of intervention in Solvency II which consists of two levels of capital requirements – SCR and MCR – should be sufficient to deal with troubled insurers. However, the main concern was the fear that early intervention measures might result in a new pre-defined intervention level and, hence, a new capital requirement.

41. EIOPA agrees with stakeholders that the introduction of harmonised early intervention measures should not result in a new (pre-defined) intervention level. Hard, quantitative conditions for early interventions should therefore be avoided. NSAs should assess each situation separately and decide upon the need for interventions based on the circumstances of the situation, whereby proportionality is taken into account. Based on these conditions, EIOPA is of the view that early interventions could be effective for dealing with developing financial problems and hence contribute to better achieving the objectives of protecting policyholders and taxpayers, maintaining financial stability and ensuring continuity of functions carried out by the insurer.

6. Resolution

6.1 Resolution authority

42. For an effective and orderly resolution process it is essential to make an authority responsible for the resolution of insurers. This authority should have statutory responsibilities, transparent processes, sound governance and adequate resources in place in order to be able to manage resolution of failing insurers.

43. EIOPA's survey showed that a vast majority of the Member States do not have an officially designated administrative resolution authority for insurers at the moment. Usually, the NSA and/or a relevant ministry, where needed in cooperation with an administrator, are responsible for the resolution of insurers.

44. In the public consultation, a majority of the stakeholders considered that a designated resolution authority would be beneficial, whereby some argued that the NSA should be designated as the resolution authority. EIOPA believes it is not essential which authority is appointed as long as its operational independence is ensured. This would avoid any unnecessary interference with the existing institutional framework in Member States.

6.2 Resolution objectives

45. An effective recovery and resolution framework should therefore clearly set out the objectives of resolution. EIOPA's survey revealed that NSAs pursue on average three objectives when resolving insurers. It also showed that the protection of policyholders is the primary objective for resolution in a majority of the Member States, followed by financial stability. Other objectives often mentioned include the protection of public funds and the continuity of critical functions.

46. EIOPA proposes to include a number of resolution objectives, including the protection of policyholders and financial stability, without a specific ranking in a harmonised recovery and resolution framework.

47. The responses from stakeholders revealed that there are mixed views with respect to this proposal. Some stakeholders agree with this proposal and believe it would be appropriate to allow resolution authorities to balance the different resolution objectives according to the circumstances. Others stakeholders, on the other hand, have a strong preference to make policyholder protection as the primary objective for resolution in line with the objectives for supervision.

48. In practice, it can be reasonably expected that the protection of policyholders will prevail to be the primary objective in resolution even without an *ex-ante* ranking, as insurers usually pose less systemic risk. Additionally, EIOPA considers the allocation of losses to policyholders as a measure of last resort only.

49. However, in case multiple objectives are dominant in the individual circumstances and conflicting, for instance where the protection of policyholders conflicts with the protection of public funds or financial stability, EIOPA considers that resolution authorities should have the flexibility to balance the objectives as appropriate to the circumstances of the situation, taking into account that the allocation of losses to policyholders has to be considered a last resort measure. When balancing the different objectives, resolution authorities should take into account the safeguards for resolution, including the principle that policyholders (and creditors) do not incur a loss greater than they would have incurred in normal insolvency procedures (NCWOL principle).

50. It should be emphasised though that the objective of policyholder protection – even if it would be set as the primary objective – does not mean that policyholders will be fully protected under all circumstances. Policyholder protection does not exclude the possibility that losses might be absorbed by policyholders as a last resort, under exceptional circumstances and subject to strong safeguards. EIOPA considers that the definition of these safeguards is fundamental to protect policyholders, and has further elaborated on this in the Opinion.

6.3 Conditions for entry into resolution

51. As stated by the FSB in the Key Attributes, it is essential that insurers are put into resolution before it is balance sheet insolvent as, at this point, this might limit the choice of options for resolution and, hence, potentially yield

suboptimal outcomes for policyholders, financial stability and other stakeholders. An effective harmonised recovery and resolution framework should therefore include appropriate conditions for entry into resolution.

52. EIOPA's survey revealed that most of the existing national recovery and resolution frameworks do not set out specific conditions for entry into resolution; hence, conditions related to the breach of Solvency II requirements are often used by NSAs to determine whether resolution actions are needed.

53. In the Opinion, EIOPA lists conditions for entry into resolution which should be considered by resolution authorities. This includes the determination that the insurer is no longer viable or likely to be no longer viable, the condition that recovery measures have been exhausted and a public interest test.

54. In the public consultation, most stakeholders seemed to agree with the conditions for resolution and emphasised the importance that entry into resolution should be a last option, once all other intervention and recovery measures have been exhausted. They stated that, given the longer timeframe afforded to insurers in recovery and resolution (as opposed to banks), it is ultimately to the advantage of policyholders to exhaust all potential recovery options before concluding that an insurer has become non-viable and commencing resolution. Some stakeholders also stressed 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 and hence should be avoided at all times, even though legal certainty for insurers is essential.

55. EIOPA agrees with the comments made by stakeholders and believes that it is essential to provide further guidance to resolution authorities on the conditions for entry into resolution while leaving a sufficient degree of flexibility to assess the situation and determine whether resolution is needed.

6.4 Resolution powers

56. EIOPA believes it is essential that resolution authorities have a broad range of resolution powers at their disposal to resolve insurers in an orderly manner. There is, however, a need to distinguish between the *availability* of powers and the *exercise* of such powers. Whereas the former is not related to the type of insurer (i.e. the power is either available or not), the latter should be subject to expert judgement and discretion as well as proportionality (i.e. the supervisor or resolution authority should use a specific power depending on its judgment of the circumstances of the situation and on a proportionate manner).

57. EIOPA's survey on existing recovery and resolution frameworks showed that most of the powers listed in the FSB Key Attributes are currently not widely

available in the EU. In fact, 11 NSAs have replied to the survey that they consider this as shortcoming in their national frameworks.[78]

58. In the public consultation, a number of stakeholders stressed that traditional resolution tools, such as portfolio transfer or (solvent and insolvent) run-off, have proven to be adequate in dealing with "slow-burn", individual failures of small insurers in the past. Nonetheless, they supported the introduction of the stay and suspension powers, as these powers could create a limit to insurers' exposure to significant forced "fire sales" of assets and contagion. The tools of portfolio transfers and run-offs would therefore need to be combined with the exercise of stay and suspension powers and be given priority by resolution authorities, according to the views of stakeholders.

59. EIOPA agrees with stakeholders that traditional tools which have been used and proven to be adequate in the past could be given priority when resolving insurers. However, it is of the view that resolution authorities should be equipped with a broad set of powers as each resolution case could be different, requiring a certain degree of flexibility and potential use of other or additional powers, such as the stay and suspension powers. The case studies in box 1 illustrates that even the use of other, more intrusive powers could not be avoided under certain circumstances and that shareholders, creditors and policyholders might face some losses.

60. In the consultation process, stakeholders also provided some specific feedback on these powers to restructure, limit or write down liabilities, including (re)insurance liabilities, and allocate losses to shareholders, creditors and policyholders. A majority of stakeholders pointed at the he potential negative impact on consumer confidence in the event that losses are allocated to policyholders. Stakeholders therefore underlined the importance of having in place adequate safeguards, such as the NCWOL principle. Additionally, it was mentioned that the allocation of losses to policyholders should be considered as a last resort option only.

61. With respect to the power to restructure, limit or write down liabilities, it should be noted that some operational aspects require further analysis, some of which are addressed in box 1.

Box 1: Operational aspects in relation to the power to restructure, limit or write down liabilities

The power to restructure, limit or write down liability raises several operational issues which require further work. In essence, this refers to: a) the legal basis; and b) the technical details. This box does not seek to address all the issues, but sheds some light on some of these aspects.

a) Legal basis

The use of this power requires a strong legal basis as any of the other powers which would be introduced in the context of a harmonised recovery and resolution framework for insurers.

[78] Seven NSAs replied that they have not identified any gaps or shortcomings in the resolution powers available to them. Three NSAs mentioned that the issue is under review, while nine remained silent.

Powers to restructure, limit or write down liabilities (if available) are currently regulated under the national legal frameworks. The broad application of this power may raise issues in some Member States, especially those which do not have powers to amend existing contracts before winding-up procedures are initiated. The introduction of an EU legal act might therefore be needed (as it was also the case in the banking sector).

b) Technical details

There are some technical details which need to be considered to make this power operational. Examples include:

**** Liabilities to be considered*:** In case of insurance liabilities, a distinction has to be made between life and non-life contracts. With regard to life contracts, limiting or writing down liabilities would take mainly the form of limiting the policyholders' rights stemming from in force policies, e.g. performing a haircut to the face amounts that would be received at survival, death, or any other insured event. Using this power would pose challenges in terms of how this exercise would affect the future premiums to be paid by policyholders - if set at a too high level than market rates, it would change the policyholders' behaviour, e.g., by lapsing the products in case they become financially unattractive (increasing moral hazard, especially in health products), but if set at a too low level it would affect the profitability of the whole portfolio generating further losses.

With regard to non-life insurance, limiting or writing down liabilities could take the form of either writing-down incurred claims (which would be technically easy to be implemented) or limiting the policyholders' rights from in force policies, e.g. limiting the face amount of the coverages. Restructuring, limiting or writing down policyholders' rights from in force policies seems not to be feasible from a legal point of view especially when they provide compulsory insurance, as this might lead to policies which provide coverages less than the minimum required by law.

All in all, this could suggest that only incurred claims (life and non-life) and a subset of life contracts may be considered, such as products with no future premiums or products with only investment characteristics (e.g. unit-linked). However, in order to substantiate this conclusion further analysis is required.

**** Application of the NCWOL principle:*** The implementation of the NCWOL principle in practice requires careful consideration. In principle, to ensure that the treatment in resolution is not worse than a theoretical insolvency procedure, an external independent valuation should be carried out to ensure the NCWOL principle is not violated. Based on this independent valuation, the difference of losses under resolution versus the assumed losses under normal insolvency proceedings is ascertained. Certain creditors will thus be compensated for the losses incurred. However, this poses practical issues such as, among others, the adequacy of the assumptions to ascertain the "theoretical" treatment of creditors or shareholders under normal insolvency proceedings and the possibility of lawsuits thereof.

**** Interaction with the IGS:*** The interaction of this power, the existence of IGSs in some jurisdictions and the need to comply with the NCWOL principle requires careful consideration. In some Member States, the existence of an IGS which compensates policyholders in liquidation only, might lead to a situation where certain policyholders would always be better off in liquidation than in resolution, whereas other resolution objectives (e.g. financial stability) might have been achieved to a greater extent by avoiding a liquidation process.

62. EIOPA acknowledges the potential risks of allocating losses to policyholders and therefore advises to that this power should be used as a last resort subject to strong safeguards. Nevertheless, EIOPA believes that there might be situations where policyholders could be better off in resolution (i.e. after having been allocated some losses) than in liquidation, as the continuation of their insurance contracts – even at reduced or amended terms – could be more beneficial than having to replace their contracts with new ones at prevailing market prices. In some cases it may not even be possible to get replacement cover at all. A transfer – although at amended terms – could also ensure continuity of payments to policyholders.

63. The potential negative impact of allocating losses to policyholders should however be managed properly by resolution authorities. A loss of confidence in insurance could result in an increase of lapse rates and/or discourage consumers from entering into new insurance products; all of which could potentially harm the stability of the insurance sector. Clear and timely communication about the reasons and impact of allocating losses to policyholders is therefore crucial. From this point of view, lessons could be taken from the experiences on the banking side. Box 3 illustrates the lessons learned from Cyprus.

64. Moreover, some stakeholder pointed at the risk that allocating losses to creditors might have a negative impact on insurers' access to financial markets. Although this risk cannot be fully eliminated, EIOPA does not consider that the allocation of losses to creditors would have a major impact on insurers' access to financial markets. This stems from the fact that insurers generally own a limited amount of liabilities other than (re)insurance liabilities. Besides that, the Solvency II framework already includes provisions for eligible subordinated debt instruments to possess a principal loss absorbency mechanism to be triggered in the event of a significant non-compliance with the SCR.[79] This means that eligible subordinated liabilities should be written down or converted into equity at the trigger event.

Box 2: Case studies – Experiences of NSAs dealing with troubled insurers which resulted in losses being absorbed by shareholders, creditors and policyholders

The following information is based on the experiences of Member States and is abstracted from the information provided by NSAs to EIOPA in the context of EIOPA's work on recovery and resolution.

Case study 1: The case study relates to liquidation cases of insurers through public administration procedures. In the liquidation process, losses have been allocated to shareholders, creditors and policyholders. The main objective pursued in the process was the protection of policyholders, who were fully compensated by the national IGS. Before

[79] Please see article 71 of the Solvency II Delegated Regulation. The requirement to possess a principal loss mechanism only applies to eligible Tier 1 own fund items. The trigger event "significant non-compliance with the SCR" is defined as follows: (a) the amount of own-fund items eligible to cover the Solvency Capital Requirement is equal to or less than the 75 % of the Solvency Capital Requirement; or (b) the amount of own-fund items eligible to cover the Minimum Capital Requirement is equal to or less than Minimum Capital Requirement; or (c) compliance with the Solvency Capital Requirement is not re-established within a period of three months of the date when non-compliance with the Solvency Capital Requirement was first observed.

allocating losses to policyholders, the shareholder capital was fully written down. The main challenge of allocating losses to policyholders was reported to be the potential loss in consumer confidence.

Case study 2: In this Member States, the shareholders of insurers faced losses. The losses resulted from the sale of the insurers to third parties. The objectives pursued by the NSA were the policyholder protection, financial stability, protection of public funds and preservation of value. Although policyholders did not incur losses due to the transfer of the portfolios to another party, the NSA pointed at the challenges of finding a third party willing to take over the portfolio of the insurer without a cut in the liabilities, including (re)insurance liabilities. The importance of adequate preparations for adverse situations (e.g. pre-emptive resolution planning) was highlighted by the NSA.

Case study 3: This NSA reported to have experiences with applying powers to allocate losses to shareholders and policyholders. The main objectives pursued in the process were the protection of policyholders and financial stability. Prior to these actions, other measures were taken, such as the prohibition of any new businesses and the requirement for approval of the NSA for the disposal of assets. It was mentioned that, as a last resort, the allocation of losses to policyholders could help to ensure the sustainability of insurers and hence contribute to protecting policyholders who would be better off than in liquidation, as well as maintaining financial stability. The main challenge of allocating losses to policyholders was reported to be the potential loss in consumer confidence and the potential negative impact on financial stability. Furthermore, the NSA pointed at the difficult task of determining the appropriate valuation of the assets and liabilities of the insurer in resolution.

Case study 4: In this Member State, an insurer agreed with its policyholders to amend the terms of the insurance contracts in order to meet the regulatory capital requirements. The voluntary agreement between the insurer and its policyholders to amend the terms of the contracts was reported to be efficient, although it exposed the sector to reputational risk.

Box 3: Case study of Cyprus – Experience of the use of the bail-in tool in banking

The following case study is based on the information provided by the Superintendent of Insurance of Cyprus.

Disclaimer: Facts, statements and other information do not necessarily represent the view of EIOPA and should not be regarded as such.

I. Situation leading up to the banking crisis

The banking crisis of 2012-2013 in Cyprus was part of a wider economic crisis in the country mainly caused by the excess liquidity and overheating of the economy through excessive private and public borrowing. Following the period of Cyprus' entry into the EU in 2004, and especially after it joined the euro area in 2008, the banking system grew at an exceptional speed. In 2002 the ratio of banking assets to GDP was 2 to 1, which had increased to 5 to 1 in 2006 and to 8 to 1 in 2008. At the start of the crisis in 2012, the private sector debt amounted to 251% of the GDP while the public sector debt had risen to 85% of the GDP by 2012. In the end, this led to the insolvency of two major banks in Cyprus and the necessary use of the bail-in tool.

II. Lessons learned from banking crisis in Cyprus

Lesson 1: Careful consideration should be given to impact of allocating losses to stakeholders and creditors.

When applying the bail-in tool to depositors with savings above €100,000, no consideration was given to the different types of depositors in Cyprus. This means that all deposits above the threshold of €100,000 cut according to the defined haircut. Thus, pension funds and insurers were also treated as unified entities instead of collective-ownership-funds whose owners are individual members with each being a separate deposit owner. The level of social suffering because of this was unprecedented in Cyprus. Following the bail-in of bank deposits, many policyholders started surrendering their policies which led to substantial reductions of insurance funds and policies in-force.

Lesson 2: The bail-in of banks resulted in the loss of confidence in the whole banking system.

Following the application of the bail-in tool in March 2013, the attitude of the public towards the banking system has changed and is now "one of mistrust and disdain".

With respect to insurance, a trend of turning towards insurance-cover-only products and away from unit-linked investment products appeared and continues until now.

Lesson 3: The timing and the extent of the application of the bail-in tool can lead to severe economic disruption if combined with austerity measures imposed by the government at the same time.

In Cyprus, the exercise of the bail-in tool coincided with the imposition of severe austerity measures by the government. This resulted in a sudden reduction of the standard of living of people and in a large increase of the unemployment rate. Following the fall of household incomes, the banks in Cyprus currently face an unprecedented amount of non-performing loans on their balance sheets and a substantial reduction of new businesses.

Lesson 4: Consumers are not always able to assess the financial situation of banks and cannot evaluate the risks and impact of bail-in adequately.

During the banking crisis in Cyprus in 2012-2013, no clear public announcements had been made to inform the public about the financial situation of the affected banks and the potential actions by the authorities. Most of the affected depositors were therefore caught by surprise.

7. Cross-border cooperation and coordination

65. Having in place arrangements for cross-border cooperation and coordination is crucial when dealing with a crisis involving an insurance group with operations in more than one jurisdiction. Such cooperation and coordination between foreign national authorities would allow for the swift recognition and implementation of resolution actions by authorities outside their jurisdictions. As a result, any unnecessary economic costs stemming from uncoordinated decision-making processes between foreign national authorities could be avoided and the objectives of protecting policyholders, maintaining financial stability and protecting public funds could be better achieved.

66. Currently, such cross-border arrangements are in place for G-SIIs in the form of crisis management groups (CMGs), but are generally not in place for other insurance groups in the EU.

67. In the public consultation, nearly all stakeholders agreed on the need for establishing cross-border cooperation and coordination arrangements. Stakeholders argued that cooperation and coordination between relevant supervisors and resolution authorities within the EEA and third countries is essential. With respect to third countries, they stated that cooperation and

coordination between national authorities should extend both upstream – for those European insurers which are subsidiaries of a foreign group - and downstream to any insurance operations belonging to the European subsidiary. Stakeholders strongly advised that unilateral decisions should be discouraged, as they risk producing suboptimal outcomes. Stakeholders requested, however, that more information is provided on how cross-border cooperation and coordination will be achieved from a practical perspective and on whether further actions should be put in place to support this. In addition, they argued that EIOPA should allow for sufficient flexibility in organising cooperation agreements which is in line with the proposal made in this Opinion.

Annex IV: Summary of main comments by stakeholders

1. EIOPA consulted stakeholders on its initial views on the potential harmonisation of recovery and resolution frameworks for insurers. A total of 29 stakeholders responded to this public consultation process by providing input to the questions posed in the discussion paper "Potential harmonisation of recovery and resolution frameworks for insurers" which was published in December 2016.
2. A summary of the main feedback is given in this annex which follows the structure of this Opinion.[80]

Need for minimum harmonisation

3. The responses reveal that stakeholders have mixed views regarding the need for harmonisation of recovery and resolution approaches for insurers. Some stakeholders agree with EIOPA's conclusion in the discussion paper that a minimum degree of harmonisation would benefit policyholders, the insurance sector and, more generally, the financial stability in the EU. Other stakeholders, however, do not see a need for a harmonised framework and argue that the Solvency II framework already provides sufficient safeguards to protect policyholders. They also argue that failure of insurers is rather a remote scenario as insurers have proven to be resilient to crisis situations.
4. Some stakeholders also commented on the degree of harmonisation. Although most agree that a minimum degree of harmonisation should be aimed at, some are of the view that any action to be taken at EU level should be focused on applying the existing maximum harmonisation principle in accordance with the Solvency II framework. The supporters of minimum harmonisation, on the other hand, pointed out that the resolution of insurers is closely related to insurance bankruptcy regulation which in turn is dependent on general bankruptcy law which is not harmonised.

Scope of framework

5. Stakeholders have also diverging views regarding the scope of a potential harmonised framework, in particular, regarding that of pre-emptive recovery and resolution planning. Some stakeholders agree that the scope should be broad and capture all insurers within the scope of Solvency II subject to the proportionality principle, whereas others are in favour of a more limited scope focusing on a specific range of such as systemically important insurers or insurers with operations in more than one Member State.
6. Some stakeholders also questioned the need to make reinsurers subject to a harmonised recovery and resolution framework. They argue that reinsurers

[80] Please note that EIOPA made the responses from stakeholders available on its website, except where respondents specifically requested that their comments should be treated confidentially (see link: https://eiopa.europa.eu/Pages/Consultations/EIOPA-CP-16-009-Discussion-Paper-on-Potential-Harmonisation-of-Recovery-and-Resolution-Frameworks-for-Insurers.aspx).

should generally not fall within the scope as they do not have policyholders or pose a threat to financial stability according to their view.

Proportionality principle

7. Nearly all stakeholders underline the importance of the application of the proportionality principle within a potential harmonised framework. Some also pointed out that more guidance about the application of this principle should be provided by EIOPA.

Preparation and planning

8. On preparation and planning, most of the comments made by stakeholders relate to the scope of the requirements for pre-emptive recovery and resolution planning. Some stakeholders stressed the potential benefits of pre-emptive planning and argued that the scope should be broad, potentially even without the flexibility to waive the requirements for some insurers and/or introduction of simplified obligations. Other stakeholders, however, were more hesitant about the introduction of such requirements for financially healthy insurers. Some also argued that by limiting the scope of the requirements, the need for simplified obligations would disappear.

9. Most of the stakeholders agreed that pre-emptive recovery and resolution plans should be developed as much as possible on the basis of existing material such as the ORSA.

10. Furthermore, most stakeholders agreed that resolvability of insurers should be assessed in those cases where a resolution plan is drafted.

11. However, a substantial amount of stakeholders were quite critical about the introduction of the power to require the removal of impediments to the resolvability. They argued that the impact of this power could be quite intrusive when exercised in normal course of business. Therefore, they stressed that its use should be restricted and subject to strong safeguards.

Early intervention

12. Stakeholders raised a lot of concerns with respect to the early intervention measures in the discussion paper.[81] Stakeholders questioned the need for additional supervisory measures given that Solvency II has introduced a risk-based and forward looking supervisory framework. The main concern of stakeholders is that early intervention measures would *de facto* lead to an additional capital requirement. In their view, introducing early intervention conditions will create a new intervention level on top of the SCR and MCR.

13. Moreover, some stakeholders are of the view that the proposed early intervention powers in the discussion paper were quite intrusive when applied before a breach of the SCR.

[81] Please note that EIOPA has made substantial changes in its proposal for early intervention measures compared to its initial proposal in the discussion paper.

Resolution

14. Stakeholders who were generally in favour of harmonisation welcomed the introduction of common resolution powers. Others stakeholders were however more critical and argued that traditional resolution powers such as run-off and portfolio transfers are suitable to deal with the failure of most insurers. Nevertheless, the introduction of the stay and suspension powers was generally favoured by stakeholders.

15. Furthermore, stakeholders raised some concerns about the introduction of the power to restructure, limit or write down liabilities and to allocate losses to shareholders, creditors and particularly policyholders. They stressed that policyholders should only absorb losses as a last resort option. There are stakeholders who strongly opposed to the introduction of such a power to allocate losses to policyholders.

16. A number of stakeholders also pointed at the difference between insurance and reinsurance liabilities and suggested to differentiate the powers accordingly, i.e. when the powers are exercised on reinsurance liabilities, resolution authorities should only be allowed to write down the liabilities; stakeholders argued that the restructuring or limiting of reinsurance liabilities should not be allowed.

Cross-border cooperation and coordination

17. Majority of the stakeholders agree on the need to have in place cross-border cooperation and coordination arrangements. Stakeholders also raised the issue of confidentiality, cooperation with the college of supervisors and the application of the proportionality principle, which require further attention.

Annex V: Comparison of recovery and resolution framework with Solvency II

This table maps the recovery and resolution measures proposed in this Opinion with the measures included in Solvency II.

(The articles refer to articles in the Solvency II Directive (2009/138/EC)).

	Solvency II	**Proposal for harmonised recovery and resolution framework**
General principles		
Degree of harmonisation	• Maximum harmonisation	• Minimum harmonisation
Scope	• Insurers and reinsurers. • Excluded are small insurers with a gross premium income below EUR 5 million or technical provisions below EUR 25 million *(article 4 of SII)*	• Same as Solvency II with possibility to waive requirements for certain insurers
Responsible authority	• National competent authorities	• Designated resolution authorities
Objectives	• Main objective is policyholder protection *(article 27 of SII)* • Financial stability and fair and stable markets are other objectives should also be taken into account but should not undermine the main objective *(article 28 of SII)*	The objectives are defined as follows (without a ranking): • Protection of policyholders; • Financial stability; • Continuity of functions whose disruption could harm the financial stability and/or real economy; • Protection of public funds (by minimising reliance on extraordinary public support and enhancing the market discipline).
Proportionality	• Application of proportionality principle	• Application of proportionality principle

Main tools		
Tools in normal supervision	• Capital requirements (SCR and MCR) *(article 100 and article 128 of SII)* • ORSA *(article 45 of SII)* • Capital add-ons *(article 37 of SII)* • Regular supervisory reporting *(article 35 of SII)* • Public disclosure: Solvency and financial condition report *(article 51 of SII)* • System of governance (e.g. fit and proper requirements) *(article 41 to 50 of SII)* • Prudent person principle *(article 132 of SII)* • Supervisory Review Process *(article 36 of SII)* • Etc.	Preparatory and planning measures: • Pre-emptive recovery plans • Pre-emptive resolution plans • Resolvability assessments • Removal of impediments to resolvability
Early intervention (before breach of SCR)	• Identification and notification of deteriorating financial conditions by insurers *(article 136 of SII)*	• Require additional or more frequent reporting; • Replace board members or persons who effectively run the insurer or have other key functions or require their dismissal if those persons are found unfit to perform their duties pursuant to Article 42 of the Solvency II Directive; • Require insurers to limit variable remuneration and bonuses; • For life insurers, temporarily suspend or limit the right of policyholders to surrender their contracts; • Require the management or supervisory body of the insurer to implement within a specific timeframe one or more measures set out in the pre-emptive recovery plan or to update such a pre-emptive recovery plan when the circumstances which led to the early intervention are different from the assumptions set out in the initial pre-emptive recovery plan, and to implement within a specific timeframe one or more of the measures set out in the updated plan; • Where the insurer has no pre-emptive recovery plan in place, require the management or supervisory body of

		the insurer to examine the situation, identify measures to overcome any problems identified and implement within a specific timeframe one or more of those measures (e.g. steps to raise own funds by using net profits to strengthen the solvency position). •
After breach of SCR	• Recovery plan *(article 138 of SII)* • Restrict or prohibit the free disposal of the assets *(article 138 of SII)* • All measures necessary to safeguard interest of policyholders *(article 141 of SII)*	N.A.
After breach of MCR	• Finance scheme *(article 139 of SII)* • Restrict or prohibit the free disposal of the assets *(article 139 of SII)* • All measures necessary to safeguard interest of policyholders *(article 141 of SII)* • Withdrawal of authorisation *(article 144 of SII)*	N.A.

Resolution / liquidation	Reorganisation measures *(article 269 to 272 of SII)*: • Any intervention by the competent authorities which are intended to preserve or restore the financial situation of an insurance undertaking Winding-up *(article 273 to 284 of SII)*: • Realisation of the assets of an insurer and the distribution of the proceedings among the policyholders, creditors, shareholders or members as appropriate	Resolution powers: • The power to withdraw the license of an insurer under resolution to write new business and put all or part of the insurance business contracts into run-off (i.e. requirement to fulfil existing contractual policy obligations for in-force business); • The power to transfer all or part of the assets, rights and liabilities of an insurer under resolution to a solvent insurer or a third party (including a bridge institution or management vehicle); • In relation to the previous power, the power to override any restrictions to the (partial) transfer of the portfolio of an insurer under resolution under applicable law (e.g. requirements for approval by shareholders, policyholders' consent for transfer of insurance contracts or consent of the reinsurer for transfer of reinsurance); • The power to create and operate a bridge institution to which the assets, rights and liabilities of an insurer under resolution is transferred; • The power to temporarily restrict or suspend the policyholders' rights of withdrawing their insurance contracts; • The power to stay the rights of reinsurers of a cedent insurer to terminate or not to reinstate coverage on the sole ground of the cedent's entry in recovery or resolution; • The power to stay the early termination rights associated with derivatives and securities lending transactions; • The power to impose a moratorium with a suspension of payments to unsecured creditors and a stay on creditor actions to attach assets or otherwise collect money or property from an insurer under resolution; • The power to ensure continuity of essential services

		(e.g. IT) and functions by requiring other entities in the same group to continue to provide essential services to the insurer under resolution, any successor or an acquiring entity; • The power to sell or transfer the shares of an insurer under resolution to a third party; • The power to prohibit the insurer under resolution to pay variable remuneration to the management; • The power to take control of and manage the insurer under resolution, or appoint an administrator to do so; • The power to restructure, limit or write down liabilities and allocate losses to shareholders and creditors; • The power to restructure, limit or write down reinsurance and insurance liabilities as a last resort option; • The power to initiate the liquidation of the insurer or part of it.
Cross-border cooperation	• Colleges of supervisors *(article 248 of SII)* • Exchange of information arrangements *(article 249 of SII)*	• Cross-border cooperation and coordination arrangements for crisis situations • Exchange of information arrangements for crisis situations