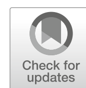
Recovery and Resolution of Insurance Companies and Director's Duties



Michele Siri and Arthur Van den Hurk

Abstract In this chapter, largely finalised before the presentation of a legislative proposal for a European Insurance Recovery and Resolution Directive, on September 2021, recovery and resolution frameworks of insurance companies and insurance groups are discussed. Currently, the insurance regulatory framework at the European level (Solvency II) does not contain a fully developed framework with respect to recovery and (orderly) resolution such as the Bank Recovery & Resolution Directive and the Single Resolution Mechanism. Recent developments at the international level on the initiative of the Financial Stability Board and International Association of Insurance Supervisors are discussed. It is the expectation that the Solvency II 2020 review will introduce minimum harmonising regulatory standards at the European level with respect to the recovery and resolution of insurers. In this chapter, the assumption is made that the legislative proposal of the European Commission will be based on the technical advice, provided by EIOPA in the context of the Solvency II 2020 review. Therefore, this chapter discusses this technical advice in some detail. Recovery and resolution frameworks, particularly ex-ante planning, requires insurance companies and insurance groups to expand their focus from the regular going concern focus to adverse circumstances, including the ability to recover and to be resolved in orderly manner. The chapter assesses the consequences this change of focus might have on the governance of insurance companies and groups.

M. Siri (✉)
Jean Monnet Professor of European Union Financial and Insurance Markets Regulation, Department of Law, University of Genoa, Genoa, Italy
e-mail: michele.siri@unige.it

A. Van den Hurk (✉)
Financial Law Centre, Radboud University, Nijmegen, The Netherlands

Aegon, The Hague, The Netherlands
e-mail: arthur.vandenhurk@jur.ru.nl

© The Author(s) 2022

P. Marano, K. Noussia (eds.), *The Governance of Insurance Undertakings*, AIDA Europe Research Series on Insurance Law and Regulation 6,
https://doi.org/10.1007/978-3-030-85817-9_7

1 Introduction

The governance of insurance companies and insurance groups is significantly more regulated and subject to supervisory scrutiny than the governance of companies outside the financial sector. Insurance regulatory frameworks, such as in the European Solvency II framework, include extensive requirements with respect to the system of governance. In the Solvency II framework these requirements form part of Pillar 2, within the 3 Pillar design of the Solvency II framework.[1] These requirements are, to a large extent, based on the assumption that insurance companies and insurance groups are operating and continue to operate on a going concern basis. Insurance supervision (going concern) has a similar key focus.

In particular, since the financial crisis of 2008–2009, supervision of the financial sector has increasingly focused on more adverse circumstances that financial undertakings, including insurance companies, could be faced with, such as a (threatening) breach of solvency requirements and the ability of insurance companies to recover from such as breach or threatening breach.

Furthermore, increasing attention is also paid to circumstances in which financial institutions, such as banks, central counterparties, as well as insurance companies, despite efforts to turn the situation around, are unable to recover by themselves, fail and consequently should be either liquidated in bankruptcy or resolved in an alternative manner. Although regulation and supervision aim to prevent the failure of financial institutions, these mechanisms are not equipped nor designed to prevent failures of financial institutions altogether.[2] Clearly, additional prudence increases costs and makes financial products such as insurance products more expensive.[3]

In both liquidation and resolution, supervisory authorities, dedicated resolution authorities, as well as trustees in bankruptcy, aim to ensure that losses to creditors, in particular the clients of financial institutions, such as insurance policyholders and beneficiaries, are limited to the minimum. Resolution should provide for an alternative to liquidation in bankruptcy, mainly to provide a better outcome than liquidation in bankruptcy would provide.

[1] Pillar 1 consists of the quantitative requirements, such as valuation, the calculation of technical provisions, investments, capital requirements and own fund requirements, Pillar 2 consists of the system of governance, risk management and internal controls, qualitative aspects of the prudent person principle, outsourcing and remuneration, the own risk and solvency assessment (ORSA) and supervisory review process (SRP) and Pillar 3 consists of regulatory reporting and public disclosure requirements.

[2] Solvency II (the Solvency Capital Requirement or SCR) is calibrated to 99.5% of the value at risk (VaR) over a one-year time horizon, the chance of a failure of 0.5% on that time horizon. Solvency II is therefore not a zero-failure regime.

[3] See also van Hulle (2019), pp. 236–237. The author is critical of the fact that some supervisors still carry on supervision with the objective or preventing all insurance failures by requiring a solvency ratio that is well above 100% of the SCR ratio, which is not necessarily in the interest of policyholders and beneficiaries, because it makes insurance more expensive.

Resolution regimes intend to provide an additional layer of protection to policyholders and beneficiaries, in addition to the protection that is already offered by 'regular' (primarily 'going concern') insurance regulation and supervision. While recovery frameworks aim to improve the chances of insurance companies to continue operating on a going concern basis, and can be considered part of regular supervision, resolution measures aim to reduce losses, once an insurance company has failed or is likely to fail. Recovery and resolution requirements are closely linked, and are therefore often part of a single regulatory package.

The development of a recovery and resolution regime can be characterised as the addition of a 4th pillar to the Three-Pillar structure, a pillar focused on recovery and resolution, including ensuring preparedness for such eventualities through ex-ante planning of recovery and resolution measures. The need to further develop crisis prevention and resolution mechanisms for insurers, comparable to those that have been in place at the European level for several years for banks and certain investment firms, became even more apparent last year, against the backdrop of the COVID-19 pandemic. This global event has made the need for reform of the insurance regulatory framework increasingly clear.[4] The crisis has led to greater supervisory scrutiny of corporate recovery and liquidation plans, with a particular focus on clear decision-making processes, early warning indicators, credible management actions to address financial difficulties and robust stress scenarios that test the recovery indicators and management actions identified by the insurer.

Both recovery and resolution measures can have a significant impact on the governance of insurance companies and insurance groups. This is most clear when insurance companies or insurance groups actually fail and management and oversight of the company are taken over by resolution authorities or by a trustee in bankruptcy, but measures can also impact the governance of the company at an earlier stage, when the company is still solvent and is operating on a going concern basis. As part of ex-ante recovery and resolution planning, companies might be forced by supervisory authorities or resolution authorities to take decisions that impact or even interfere with and be considered sub-optimal to the day-to-day management and corporate structure of the insurance company or insurance group.[5] Some arrangements (such as pooling of critical services in a group) may make perfect sense in a going concern situation, but because such services might need to be disentangled in a resolution scenario, could provide an additional challenge for a resolution authority.[6]

[4] EIOPA, *Background document on the opinion on the opinion on the 2020 review of Solvency II - Impact assessment*, EIOPA-BoS-20/751, 17 December 2020.

[5] For example, instructions by resolution authorities to remove material impediments that could prevent the orderly resolution of the company.

[6] Clearly, this requires a proportionate approach and balancing between a sustainable and efficient operating model in going concern, while limiting potential material impediments to orderly resolution.

2 State of Play in Insurance

Currently, the European insurance regulatory framework only provides for limited requirements with respect to recovery and does not include requirements for the resolution of insurance and reinsurance companies. In other words, in contrast to European banks and investment firms, European insurance regulation currently does not provide for an equivalent to the European Bank Recovery & Resolution Directive (BRRD) and/or the Single Resolution Mechanism (SRM). As part of the Solvency II 2020 review, this is expected to change. Together with the formal proposal of the European Commission for amendments to the Solvency II framework, which was published on September 22, 2021, a separate legislative proposal was published to introduce a recovery and resolution framework for insurers and reinsurers, on a minimum harmonisation basis, a proposal for a European Insurance Recovery & Resolution Directive, which we will refer to in this chapter as the IRRD-proposal. In fact, this is one of the most important material changes in the 2020 review of Solvency II.[7]

At the same time, several European countries have already introduced recovery and resolution regimes for insurance and reinsurance companies at the Member State level. Based on information from an EIOPA survey, conducted in the first quarter of 2016, three EU Member States (The Netherlands, France and Romania) had recently reinforced their national recovery and resolution frameworks. Similarly, the European landscape with respect to resolution funding and insurance guarantee schemes is based on national laws and consequently diverse.

3 International and European Context

At the international level, work on recovery and resolution of insurers and reinsurers is being undertaken by both the Financial Stability Board (FSB) and, as referred to above, by the International Association of Insurance Supervisors (IAIS).

[7] ECB, *The new EU framework for financial crisis management and resolution*, July 2011 and EIOPA, *Background document on the opinion on the 2020 review of Solvency II – analysis*, EIOPA-BoS-20/750, 17 December 2020. A legislative proposal for a European Insurance Recovery and Resolution Directive was published in September 2022 after the finalisation of this chapter. See European Commission, Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of insurance and reinsurance undertakings and amending Directives 2002/47/EC, 2004/25/EC, 2009/138/EC, (EU) 2017/1132 and Regulations (EU) No 1094/2010 and (EU) No 648/2012, COM/2021/582 final.

3.1 Financial Stability Board

In 2011, the FSB adopted the so-called FSB Key Attributes of Effective Resolution Regimes for Financial Institutions, which were adopted by the G20 in October 2011 at their Cannes meeting as the international standard for resolution regimes.[8] The 2011 FSB Key Attributes were supplemented in 2014 with additional guidance for specific types of financial institutions, including insurers. Annex II of the updated FSB Key Attributes[9] provides guidance on the implementation of the Key Attributes in relation to resolution regimes for insurers. It supplements the Key Attributes by indicating how particular KAs, or elements of particular KAs, should be interpreted when applied to resolution regimes for insurers. According to the FSB, while the general assumption is that traditional insurance activities and even some non-traditional insurance activities that are no longer viable will typically be resolved through run-off and portfolio transfer procedures, it may not be possible, however, to rely on these tools in all circumstances, and particularly in those cases in which the business model is complex or there is no corresponding market for portfolio transfers.[10] The objective of an effective resolution regime is to make the resolution of financial institutions feasible without severe systemic disruption and without exposing taxpayers to losses, while protecting vital economic functions through mechanisms which make it possible for shareholders and unsecured and uninsured creditors to absorb losses in a manner that respects the hierarchy of claims in liquidation.[11] Specifically for insurers, the protection of policyholders and beneficiaries is identified as an objective of a resolution regime.

3.2 International Association of Insurance Supervisors

The International Association of Insurance Supervisors (IAIS) is the international standard-setting body responsible for developing and assisting in the implementation of supervisory and supporting material for insurance supervision. As part of its

[8] It should be noted that the FSB Key Attributes state that any financial institution *that could be systemically significant or critical* if it fails should be subject to a resolution regime consistent with the Key Attributes. Therefore, it does not explicitly set expectations with respect to resolution regimes that are more generally applicable.

[9] Financial Stability Board, Key Attributes of Effective Resolution Regimes for Financial Institutions, 15 October 2014, https://www.fsb.org/wp-content/uploads/r_141015.pdf.

[10] Financial Stability Board, Key Attributes of Effective Resolution Regimes for Financial Institutions, 15 October 2014, https://www.fsb.org/wp-content/uploads/r_141015.pdf, p. 75. However, it should be noted that a run-off or a portfolio transfer is likely to be, in many cases, to be an appropriate resolution tool (either a solvent or insolvent run-off, or supplemented by other resolution tools (such as e.g. the transfer of an insurance portfolio to a bridge institution, restructuring of liabilities in resolution and/or suspension of policyholders' surrender rights).

[11] Financial Stability Board, Key Attributes of Effective Resolution Regimes for Financial Institutions, 15 October 2014, https://www.fsb.org/wp-content/uploads/r_141015.pdf, preamble, p. 3.

mission, it has issued the Insurance Core Principles (ICPs) as a globally accepted framework for insurance supervision. The ICPs seek to encourage the maintenance of consistently high supervisory standards in IAIS member jurisdictions. The latest updated version of the ICPs dates as of November 2019. The document also includes the Common Framework for the Supervision of Internationally Active Insurance Groups, adopted as per the same date.

IAIS has developed various principles that relate to both recovery and resolution. In particular, Insurance Core Principle (ICP) 12 (Exit from the Market and Resolution), ICP 25 (Supervisory Cooperation and Coordination) can be mentioned in relation to resolution, as well as the related ComFrame standards and guidance.[12] In terms of recovery planning, reference can be made to ICP 16 (Enterprise Risk Management for Solvency Purposes), ICP 23 (Group Wide Supervisor) and ICP 25, mentioned above, as well as the related ComFrame materials for IAIGs. The IAIS has also developed an Application Paper on recovery planning[13] and is in the process of developing an application paper on resolution powers and resolution planning.[14]

ICP 12 covers both the voluntary exit of insurers from the market and the resolution of insurers that are no longer viable or are likely to be no longer viable, and have no reasonable prospect of returning to viability. Contrary to the IAIS Glossary, 'Resolution' in the meaning of ICP 12 also includes 'liquidation.' We will not discuss the content of ICP 12 separately, as the content of ICP 12 is largely reflected in the EIOPA Opinion on the 2020 review of Solvency II that will be discussed later. Where appropriate, we will refer to the ICPs in that context.

ICP 16 (Enterprise Risk Management for Solvency Purposes) is also relevant in the context of recovery and resolution, given the links between enterprise risk management, the ORSA and recovery and resolution planning, and the specific reference in 16.15 to recovery planning in a group context. Lastly, ICP 23 (The Group-wide Supervisor) and ICP 25 (Supervisory Cooperation and Coordination) are also relevant in this context, due to the role of the group-wide supervisor particularly in recovery.

In addition to the relevant Insurance Core Principles, the IAIS has also developed an application paper on recovery planning,[15] and is in the process of developing an Application Paper on Resolution Powers and Planning.[16]

[12] ComFrame is the IAIS Common Framework for Internationally Active Insurance Groups (IAIGs), which provides standards and guidance in addition to the ICPs that apply to all insurance companies and groups, specifically for IAIGs. The latest version of the ICPs as well as the ComFrame material was adopted by the IAIS in its Annual General Meeting in November 2019.

[13] IAIS Application Paper on recovery planning, November 18, 2019, https://www.iaisweb.org/page/supervisory-material/application-papers//file/87519/application-paper-on-recovery-planning.

[14] IAIS, Draft Application Paper on Resolution Powers and Planning, November 9, 2020, https://www.iaisweb.org/page/consultations/closed-consultations/2021/application-paper-on-resolution-powers-and-planning.

[15] IAIS, Application Paper on Recovery Planning, November 18, 2019, https://www.iaisweb.org/page/supervisory-material/application-papers//file/87519/application-paper-on-recovery-planning.

[16] IAIS, Public consultation on draft Application Paper on Resolution Powers and Planning. A public consultation on this draft paper was held between November 9, 2020 and February 5, 2021,

According to the IAIS Glossary, 'resolution' means the following: Actions taken by a resolution authority towards an insurer that is no longer viable, or is likely to be no longer viable, and has no reasonable prospect of returning to viability.[17] The alternative to resolution for a failing insurance entity is typically 'liquidation': A process to terminate operations and corporate existence of the entity through which the remaining assets of the insurer will be distributed to its creditors and shareholders according to the liquidation claims hierarchy. Branches can also be put into liquidation, separately from the insurance legal entity they belong to.[18]

Furthermore, for completeness sake, it is also useful to mention the definitions of 'recovery plan': 'A plan developed by an insurer that identifies in advance options to restore its financial condition and viability under severe stress' and 'resolution plan': 'A plan that identifies in advance options for resolving all or part(s) of an insurer to maximise the likelihood of an orderly resolution, the development of which is led by the supervisor and/or resolution authority in consultation with the insurer in advance of any circumstances warranting resolution.'

Lastly, while the IAIS does not provide for a definition of insurance guarantee scheme or policyholder protection scheme (PPS), the latter term is referred to in the IAIS Insurance Core Principles and discussed in more detail in an IAIS issues paper.[19] A PPS intends to provide a minimum layer of protection to policyholders in the event that the safeguards within the supervisory regime are not sufficient, i.e. beyond the safeguards that the Solvency II regime provides.

PPSs are designed to protect policyholders and beneficiaries in the case of the insolvency of an insurer, serving as backstops against claims. Whilst PPSs' objectives focus on providing a minimum level of protection to policyholders, where the design of the PPS includes such functions, they can also contribute to the objectives of resolution regimes by: (i) facilitating the continuation of insurance; (ii) providing financial support to an insolvent insurer and/or an entity which intends to purchase an insolvent insurer or to which insurance policies will be transferred from an insolvent insurer; (iii) aiding in portfolio transfers; (iv) working as a bridge institution where no immediate purchaser of an insolvent insurer can be found.[20] Therefore, PPSs can play a relevant role in both the resolution and in the liquidation of insurers.

Arguably, the design and in particular the harmonisation of recovery and resolution frameworks, resolution funding and insurance guarantee schemes across the European Union is even more complex as it is or has been for banks. At the same

https://www.iaisweb.org/page/consultations/closed-consultations/2021/application-paper-on-resolution-powers-and-planning.

[17] IAIS Glossary.

[18] IAIS Glossary.

[19] IAIS, Issues Paper on policyholder protection schemes, October 2013, https://www.iaisweb.org/page/supervisory-material/issues-papers//file/34547/issues-paper-on-policyholder-protection-schemes.

[20] IAIS, Issues Paper on policyholder protection schemes, pp. 4–5.

time, the urgency and need for harmonisation may be perceived differently for the insurance sector than for banks. The dynamics of the failure and/or the resolution of an insurer is different from bank failures and resolution and many jurisdictions appear to have dealt with insurance failures or near-failures in many cases, even without a dedicated recovery and resolution regime.

It should be mentioned that, while currently only a few Member States have a specific recovery and resolution regime for insurers in place, many—if not all—Member States have dealt with failures or near-failures of insurance companies. Despite the absence of recovery and resolution frameworks, failures or near-failures do not appear to have led in all cases to significant detriment to policyholders/beneficiaries and the local insurance markets seem to have been able to absorb such failures in practice, with or without the presence of a PPS and/or resolution regime. At the same time, insurers' failures regularly involve insurers that operate on a cross-border basis, which creates additional challenges in regular supervision as well as in the case of failures of insurance companies and their liquidation or resolution.

At the international level, work on recovery and resolution of insurers and reinsurers is being undertaken by both the Financial Stability Board (FSB) and, as referred to above, by the International Association of Insurance Supervisors (IAIS).

3.3 European Context

Pursuant to, inter alia, Article 242(2) of the Solvency II Directive, the harmonisation of recovery and resolution and insurance guarantee schemes, at the European level, forms part of the Solvency II 2020 review. In that context, the European Commission has requested EIOPA for technical advice, to be provided to the European Commission by 30 June 2020.

Before this, on 5 July 2017, EIOPA had published an opinion to the institutions of the European Union on the harmonisation of recovery and resolution frameworks for (re)insurers across the Member States.[21] In this opinion, EIOPA argues that a minimum degree of harmonisation in the field of recovery and resolution of insurers would contribute to achieving policyholder protection, as well as maintaining financial stability in the EU.

EIOPA clarifies that 'minimum harmonisation' entails: 'the definition of a common approach to the fundamental elements of recovery and resolution (objectives for resolution and resolution powers) which national frameworks should address, while leaving room for Member States to adopt additional measures at national level, subject to these measures being compatible with the principles and objectives set at

[21] EIOPA Opinion to Institutions of the European Union on Harmonisation of recovery and resolution frameworks for (re) insurers across the Member States, EIOPA-BoS/17-148, 5 July 2017, https://eiopa.europa.eu/Publications/Opinions/EIOPA-BoS-17-148_Opinion_on_recovery_and_resolution_for_(re)insurers.pdf.

the EU level. These additional measures at the national level might be required in order to better address the specificities of the national markets'.[22]

On 30 July 2018, EIOPA published a discussion paper on resolution funding and national insurance guarantee schemes. EIOPA positions this discussion paper as a follow-up to the EIOPA Opinion on the harmonisation of recovery and resolution frameworks for (re)insurers across the Member States that EIOPA published in 2017. EIOPA considers resolution funding and IGSs as essential elements for the resolution of failing insurers. In the discussion paper, EIOPA distinguishes between resolution funding and insurance guarantee schemes. With respect to resolution funding EIOPA distinguishes between three sources of resolution funding: (i) the assets and liabilities of the failing insurers itself, (ii) national resolution funds and (iii) national IGSs or other policyholder protection schemes. EIOPA considers the primary function of IGSs to compensate policyholders for their losses in the event of insurance insolvency. At the same time, EIOPA recognises that some schemes have additional functions relating to the resolution framework. Some insurance guarantee schemes may also be used to fund resolution actions, such as the transfer of insurance policies to a third party or may function as a bridge institution. EIOPA has subsequently published a consultation paper on harmonisation of national insurance guarantee schemes on 9 July 2019,[23] in the context of the Solvency II 2020 review, building on its earlier work in this area,[24] and has recently dedicated a chapter of the EIOPA Opinion on the 2020 review of Solvency II on insurance guarantee schemes. In that opinion, EIOPA appears to have departed from the viewpoint that the primary function of an insurance guarantee scheme should be the compensation of policyholders and beneficiaries for their losses when an insurer becomes insolvent, and instead places the continuation of insurance policies on equal footing to compensation, given that they both meet the primary purpose to protect policyholders.[25]

In addition to the EIOPA work on recovery and resolution and on insurance guarantee schemes, EIOPA has published a series of three papers on systemic risk and macro-prudential policy in insurance in the period 2017–2018. In its first

[22]EIOPA Opinion to Institutions of the European Union on Harmonisation of recovery and resolution frameworks for (re) insurers across the Member States, EIOPA-BoS/17-148, 5 July 2017, p. 4, https://eiopa.europa.eu/Publications/Opinions/EIOPA-BoS-17-148_Opinion_on_recovery_and_resolution_for_(re)insurers.pdf.

[23]EIOPA, Consultation Paper on Proposals for Solvency II 2020 Review Harmonisation of National Insurance Guarantee Schemes, EIOPA-BoS-19-259, https://eiopa.europa.eu/Publications/Consultations/EIOPA-BoS-19-259_Consultation%20paper%20on%20Harmonisation%20of%20IGSs.pdf.

[24]EIOPA Discussion paper on resolution funding and national insurance guarantee schemes, EIOPA-CP-18-003, 9 July 2018, https://eiopa.europa.eu/Publications/Consultations/EIOPA-CP-18-003_Discussion_paper_on_resolution_funding%20and.pdf.

[25]EIOPA Opinion, paragraph 13.4.

paper,[26] EIOPA aims to identify and analyse the sources of systemic risk in insurance from a conceptual point of view, independent of the policy measures developed at the international level by the IAIS. The second paper[27] focuses on Solvency II tools with a macroprudential impact. While the Solvency II framework is designed to be a microprudential regime for the EU insurance sector, it contains elements as well that may have financial stability impact. In particular, reference is made in the paper to long-term guarantee measures[28] and measures on equity risk. In addition, while this is not a specific measure for the insurance sector, the measure that allows supervisory authorities to prohibit or restrict certain types of financial activities is considered in the paper. While these measures primarily serve their intended micro-prudential purpose[29]—according to EIOPA—they also contribute to limiting pro-cyclicality. Lastly, while not examined further in the paper, the prudent person principle, the own risk and solvency assessment and capital add-ons in specific circumstances are also mentioned. The third paper[30] explores potential new instruments and measures that could be included in a macroprudential framework, grouped in the following blocks: capital and reserving based tools, liquidity-based tools, exposure-based tools and pre-emptive planning. In the context of recovery and resolution, in particular pre-emptive planning (recovery and resolution planning), as well as capital surcharges,[31] and temporary freezes of redemption rights of policyholders are explored. Based on the work at international level, the EIOPA papers on systemic risk and macro-prudential policy, as well as the EIOPA Opinion on the 2020 Review of Solvency II, discussed in the subsequent paragraph, the European Commission has included several proposals to include macro-prudential tools in the formal proposal to amend the Solvency II Directive, which has been published on 22 September 2021.

3.4 EIOPA Opinion on the 2020 Review of Solvency II

On 17 December 2020, EIOPA has published its opinion on the 2020 review of Solvency II. The Solvency framework, which became applicable in EU Member States on 1 January 2016, provided that certain areas of the framework would need to

[26] EIOPA, Systemic risk and macroprudential policy in insurance, Publications office of the European Union, Luxembourg, 2017, also available on the EIOPA website.

[27] EIOPA, Solvency II tools with macroprudential impact, Publications office of the European Union, Luxembourg, 2018, also available on the EIOPA website.

[28] EIOPA, Solvency II tools with macroprudential impact, Publications office of the European Union, Luxembourg, 2018, also available on the EIOPA website.

[29] Ensuring sufficient loss absorbing capacity and reserving.

[30] EIOPA, Other potential macroprudential tools and measures to enhance the current framework, Publications office of the European Union, Luxembourg, 2017, also available on the EIOPA website.

[31] E.g. for systemic risk, such as higher loss-absorbing (HLA) capacity.

be reviewed by the European Commission at the latest by 1 January 2021. In that context, the European Commission has requested for EIOPA technical advice on the Solvency II 2020 review in February 2019 on nineteen main topics, including recovery and resolution, insurance guarantee schemes and on macro-prudential issues. With respect to these themes, the technical advice also builds on the earlier work of EIOPA, described above. The original deadline for the advice was the end of June 2020. However, the COVID-19 crisis has led to an extension of the response time to a holistic impact assessment that was undertaken by EIOPA in the context of the draft technical advice. Furthermore, to allow for an assessment of the COVID-19 crisis on the Solvency II review, the deadline for the technical advice was extended to the end of 2020. Evidently, the further development of a European framework on insurance recovery and resolution will depend on the European Commission's and co-legislators' willingness to consider the EIOPA advice. It is clear from the European Commission's proposals, published on 22 September 2021, that the European Commission, in line with the EIOPA advice, intends to proceed with a legislative proposal with respect to minimum harmonisation of insurance recovery and resolution. In addition, the European Commission has considered a minimum framework for Insurance Guarantee Schemes at the European level, but considers this not appropriate at this point in time, given the uncertainties created by the COVID-19 pandemic, and the need to focus on economic recovery. According to the European Commission, the introduction of such a framework could entail important implementation costs for insurers, in particular in member states that do not have such a scheme yet.

The EIOPA Opinion,[32] as well as the earlier papers of EIOPA on recovery and resolution have clearly taken the model that has been developed for the banking sector as a starting point: recovery and resolution planning requirements for banking and investment firms have evolved since the Bank Recovery and Resolution Directive (BRRD) and Single Resolution Mechanism Regulation (SRMR) came into effect in 2014. Subsequent guidance, technical standards and opinions issued by the European Banking Authority (EBA), European Central Bank (ECB), and European Commission have resulted in a mature regulatory landscape for Recovery Planning in particular. EIOPA and IAIS have, in recent years, published papers in respect of pre-emptive recovery planning, while the European Systemic Risk Board (ESRB) and Financial Stability Board (FSB) have also placed emphasis on the importance of recovery and resolution planning for insurers.

Under the BRRD framework, early intervention is described as supervisory measures in an early stage to address unsafe and unsound practices or activities that could pose risks to banks or to the banking system.[33] These early supervisory actions can range from supervisory measures that encompass moral suasion to more corrective sanctions, which are triggered when banks are deemed to be in danger of

---

[32] EIOPA, *Opinion on the 2020 review of Solvency II,* EIOPA–Bos-20/749, 17 December 2020.

[33] Article 27 of the BRRD. See also Recital 1 and 19 of the BRRD.

failing. On one hand, the use of early supervisory measures is part of the supervisory review process and is guided by forward-looking assessments, risk and impact frameworks and by the work of specialist supervisory teams. On the other hand, intervention is also undertaken using, as *ultimum remedium,* sanctions, often referred to as prompt corrective actions, which are needed to minimise the impact that an insolvent bank would have on deposit insurance schemes.

Through such forward-looking assessments, the areas of greatest concern regarding the bank's various business lines and risks, its associated strategies and the quality of its governance, management and internal controls are identified. The supervisory focus is directed to these areas to allow the supervisor to identify and address weaknesses at an early stage. Therefore, while appropriate methodologies and good sources of information are important, supervisory judgment will almost always be needed to interpret the information and assess the financial health of a bank.

Early intervention actions taken, therefore are not exclusively prompted by a formal early intervention/recovery framework that prescribes action, but are also taken as part of ongoing supervisory monitoring.[34]

Due to the sectorial nature of EU legislation, insurance companies do not fall under the scope of the BRRD. However, in light of the Solvency II 2020 Review, it is necessary to assess if the principles and rationale that informed the introduction of recovery and resolution planning for banks and investment firms subject to the BRRD also guide the choices and design of the future European recovery and resolution regime for insurers. In addition, it is necessary to ask whether the provisions of the BRRD are fit for the purpose to be used in the insurance regulatory framework.

According to the recitals of the BRRD there are at least two key factors that have led to the need to prepare a common set of rules for the recovery phase of a crisis and for management of the insolvency of banks: the need to preserve systemically important functions of institutions, subject to the BRRD[35] and the increased cross-

[34] Georgosouli (2013), pp. 209–220: '[. . .] judgement is based on hard, observable facts as opposed to the degree to which it is based on a view as to what might happen in the future'. In that sense, he concludes, 'judgement-led regulation equals to "forward-looking" regulation'. [. . .] scope of discretion for regulators and presupposes that regulators have the capacity and the willingness to use that discretion. Early intervention is arguably another key aspect of judgement-led regulation, rely on discretion, focus on outcomes and, at least in principle, secure an increased level of flexibility for regulators and regulatees alike'.

[35] Recital 1 BRRD: The financial crisis has shown that there is a significant lack of adequate tools at Union level to deal effectively with unsound or failing credit institutions and investment firms ('institutions'). Such tools are needed, in particular, to prevent insolvency or, when insolvency occurs, to minimise negative repercussions by preserving the systemically important functions of the institution concerned. During the crisis, those challenges were a major factor that forced Member States to save institutions using taxpayers' money. The objective of a credible recovery and resolution framework is to obviate the need for such action to the greatest extent possible.

border operations and interconnectedness of institutions.[36] While avoiding the term 'systemic importance' it is clear that insurers do provide important societal and economic functions and are increasingly active on cross-border basis. However, these critical functions consist exclusively of the prudent execution of the insurance business and activities, including most prominently the protection of the rights of policyholders and beneficiaries, as well as safeguarding the provision of specific forms of insurance cover. Other roles, such as the role that insurers play as e.g. institutional investor, are of course relevant as well, but should in our view not be considered critical functions in the same manner as for instance the responsibilities that banks bear for e.g. maintaining payment systems and payment infrastructure.

The BRRD introduced recovery and resolution planning, as well as specific tools and powers to resolution authorities allowing for failing institutions to be resolved instead of being liquidated, applying normal insolvency procedures. The preventive line undertaken by the BRRD is therefore based on three components: crisis preparation (with recovery and resolution plans), early intervention and resolution.[37]

In our view, resolution funding cannot be seen as separate from insurance guarantee schemes, to the extent the purpose of an insurance guarantee scheme is to facilitate a run-off/insurance portfolio transfer as an alternative to liquidation in ordinary bankruptcy proceedings. Therefore, the purpose of an insurance guarantee scheme does not necessarily have to ensure direct compensation of policyholders/ beneficiaries, such as is generally the case with deposit guarantee schemes in a banking context.

4 A European Recovery and Resolution Framework

In 2017 EIOPA published its opinion on the harmonisation of recovery and resolution frameworks for insurers across the European Union and, more recently, in 2019, issued a consultation paper on the review of Solvency II in 2020, including recovery and resolution planning considerations. In 2018 the IAIS issued a draft application

[36] Recital 3 BRRD: Union financial markets are highly integrated and interconnected with many institutions operating extensively beyond national borders. The failure of a cross-border institution is likely to affect the stability of financial markets in the different Member States in which it operates. The inability of Member States to seize control of a failing institution and resolve it in a way that effectively prevents broader systemic damage can undermine Member States' mutual trust and the credibility of the internal market in the field of financial services. The stability of financial markets is, therefore, an essential condition for the establishment and functioning of the internal market.

[37] EBA, *Discussion Paper - Application of early intervention measures in the European Union according to Articles 27-29 of the BRRD*, EBA/DP/2020/02, 26 June 2020, p. 4. See also: FSI, *FSI Insight - Early intervention regimes for weak banks,* April 2018; GOV.UK, *Bank Recovery and Resolution Directive (BRRD) implementation*, 3 November 2016; Basel Committee on Banking Supervision, Frameworks for early supervisory intervention, March 2018.

paper on Recovery Planning before issuing a final application paper on Recovery Planning in November 2019. The EIOPA and IAIS publications provide industry with a clear steer on the future expectations relating to recovery and resolution planning.[38]

If the EU legislator already in 2009 had noted the need to prepare a stronger protection apparatus in the insurance market with a view to the stability and solidity of the company with the introduction of a three-pillar system and which is divided into capital, risk control and market information, today, also in the light of a comparative look with the adjacent banking sector, this system seems to move towards the contingency of a fourth pillar such as that of forecasting and planning the crisis and insolvency. Prevention is other to the other goals of supervision, which include ensuring stability, solidity, and transparency.

In fact, the introduction of recovery and resolution plans, on the model of what has already happened for credit institutions and recipients of the BRRD directive, is one of the most important points of attention in the revision of Solvency II.[39]

The rest of this paper will take as an assumption that, following the EIOPA technical advice for the Solvency II 2020 review, the European Commission's forthcoming proposal for changes to the Solvency II framework, will include a certain level of harmonisation of recovery and resolution frameworks in the European Union, based on minimum harmonisation. EIOPA clarifies, as stated in its earlier publications, that 'minimum harmonisation' entails 'the definition of a common approach to the fundamental elements of recovery and resolution (objectives for resolution and resolution powers) which 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 to better address the specificities of the national markets'.

EIOPA observes that while Solvency II has improved insurance supervision, the risk of failures and near-failures still exists,[40] and in the absence of a harmonised framework at the EU level, the current landscape is fragmented, with some Member States having adopted frameworks at the national level, but the majority of Member

[38] IAIS, *IAIS Stakeholder Teleconference on Resolution*, 21 April 2020: The International Association of Insurance Supervisors (IAIS) is a voluntary membership organisation of insurance supervisors and regulators from more than 200 jurisdictions (p. 2) [. . .] (p. 4) The planned Application Paper on Resolution Powers and Planning will aim to provide guidance on supervisory practises related to resolution, which is defined in the IAIS Glossary1 as 'actions taken by a resolution authority towards an insurer that is no longer viable, or is likely to be no longer viable, and has no reasonable prospect of returning to viability' (p. 4). [. . .] Resolution can be seen as a final step taken by the supervisor and/or resolution authority, after all other preventive or corrective measures have proven to be insufficient to preserve or restore an insurer's viability (p. 7).

[39] ECB, *The new EU framework for financial crisis management and resolution*, July 2011 and EIOPA, *Background document on the opinion on the 2020 review of Solvency II – analysis*, EIOPA-BoS-20/750, 17 December 2020.

[40] Paragraph 12.40 of the EIOPA Opinion.

States have not.[41] As mentioned, it has not been the intention of Solvency II to take away the risk of failures or near-failures of insurers altogether.

According to EIOPA, the level of minimum harmonisation it envisages includes a framework consisting of four elements: (i) preparation and planning, (ii) early intervention, (iii) resolution and (iv) cross-border cooperation. In line with the EIOPA advice, these four elements also form key elements in the European Commission's IRRD proposal. For completeness' sake, we will discuss all four elements in this chapter: the first three are primarily relevant in terms of the governance of insurance undertakings and groups, while cross-border cooperation profile is of common significance and inherent to the principles fundamental to the EU internal market. Some bankruptcies of large insurers operating under the freedom to provide services, after obtaining authorisation in their home member state, have evidenced that the single market can only function properly if supervision is coordinated and the risk of regulatory arbitrage is mitigated.[42] The IRRD proposal should be seen as an extension and reinforcement of the Solvency II framework, which provides for a robust prudential framework for insurers and reinsurers in Europe, reducing the likelihood of failures and enhancing the resilience of the insurance and reinsurance sector. The IRRD proposal aims to provide authorities with a credible set of resolution tools to intervene sufficiently and quickly if insurers are failing or are likely to fail to ensure a better outcome for policyholders, while minimising the impact on the economy, the financial system, and any recourse to taxpayers' money.[43] The scope of application of the IRRD proposal (Article 1) is aligned with the scope of the Solvency II Directive (insurance and reinsurance undertakings established in the European Union and falling within the scope of Article 2 of the Solvency II Directive) and additionally includes a group dimension to the recovery and resolution framework (Articles 67–71). A novelty envisaged by the IRRD proposal is the requirement for member states to establish a resolution authority (Article 3). This could either be a dedicated and independent resolution authority or be function within a pre-existing authority, including a national central bank or supervisory authority. If the latter is the case, adequate structures should be in place to avoid conflicts of interests that might arise with the other functions conducted by such an authority. In addition, the resolution authority is required to be operationally independent, which includes having separate staff, reporting lines, and decision-making processes, from any supervisory or other functions of that authority. The introduction of this new category of authorities will require amendments to the EIOPA (EU) Regulation no. 1094/2010 to also include, where appropriate, references to these authorities (in particular in Articles 83–88). In the final provisions of the IRRD proposal (Title VII), amendments are proposed to the Solvency II Directive, which underlines the notion that the IRRD should reinforce Solvency II and be

[41] 12.41. This is obvious, as the Solvency II framework, as any other regulatory framework, has not been designed to provide a zero-failure framework.

[42] Impact Assessment, p. 11.

[43] Explanatory memorandum to the IRRD proposal, p. 1.

aligned with the prudential framework for insurers and reinsurers in Europe and complement the existing intervention powers of the Solvency II framework. The amendments to the Solvency II Directive consist in particular of a clarification of the concept of supervisory powers in deteriorating financial conditions (Article 141 of the Solvency II Directive) and proposals that suggest amending company law provisions and other national rules that could pose obstacles in the effective use of the resolution tools in the IRRD proposal.

4.1 Preparatory Measures and Corporate Governance Rules

Preparatory measures can be distinguished in measures, aimed to facilitate the recovery under the responsibility of the insurer to restore its financial position and viability in the event the insurer comes under severe stress, and measures that should enable the resolution actions of the resolution authority towards an insurer that is no longer viable, or is likely to be no longer viable, and has no reasonable prospect of returning to viability. The key differences between these two phases are the objectives (recovery versus resolution) and who is in charge of the process (the insurance company and its corporate bodies or the resolution authorities). The IRRD proposal provides that at least 80% of the insurance market of member states should be subject to recovery planning. Low-risk profile undertakings should be excluded. 70% of the insurance market should be subject to resolution planning. Again, low-risk profile undertakings should be excluded.

4.1.1 Pre-emptive Measures with Respect to Recovery

Pre-emptive measures with respect to recovery generally focus on the preparation of an ex-ante or pre-emptive recovery plan. According to the IAIS, the objective of such a recovery plan is twofold: (a) to aid the insurer in understanding its own risks from severe stress scenarios, and (b) to be better prepared to provide an effective response.

The focus of a recovery plan is on situations that pose a serious risk to the viability of the insurer or any material part of its business.[44]

Pre-emptive recovery planning is different from a recovery plan, referred to in Article 138 of the Solvency II Directive, which insurers are required to develop within two months after a breach of the SCR. However, it is expected that pre-emptive recovery planning will allow insurers to make better informed and timely decisions in times of crisis. Through the process of pre-emptive recovery planning, insurers will have already identified and assessed a range of recovery measures expected to be available to them in times of crisis, which should make the

[44] IAIS, Application Paper on Recovery Planning, November 2019, paragraph 2.

development of the recovery plan in accordance with Article 138 of the Solvency II Directive more efficient.[45]

The preparation of an ex-ante recovery plan is the responsibility of the insurance undertaking and/or the insurance group, subject to supervisory scrutiny. Therefore, it is the undertaking itself that assesses, describes and determines how it intends to recover from severe stress scenarios without failing and triggering the withdrawal of its insurance license (in case of the recovery of a licensed insurance company). In terms of governance actions, the supervisory authorities will assess if the scenarios and described recovery measures can be considered realistic and are expected to be achievable in stress scenarios. As an example, suppose the insurance company relies on external reinsurance or access to capital markets in a recovery scenario, are the assumptions that the undertaking has access to such facilities in a stress scenario realistic, has it already made preparatory arrangements—if needed—to ensure access to such facilities? As part of a future recovery framework, it is reasonable to expect that supervisory authorities will have the ability to take supervisory action if a recovery plan is not realistic and instruct the company to amend the plan. Conceptually, such supervisory action is expected to be largely in line with regular expectations of the supervised entity. Although views might differ between the supervisory authorities and the corporate bodies of the undertaking, the undertaking remains in charge of the development of the plan and the objectives of the undertaking are aligned, namely, to continue the undertaking as a going-concern enterprise. The IRRD proposal introduces explicit requirements with respect to ex ante recovery planning, subject to proportionality. 'Low-risk profile undertakings', a concept introduced through the Solvency II proposals, can benefit from proportionate application of Solvency II requirements. The IRRD proposal contains a provision that allows for simplified obligations for certain undertakings (Article 4 of the IRRD proposal). Simplified obligations will apply in any case to 'low-risk profile undertakings' in the meaning of the Solvency II proposals, which will take account of the nature of these undertakings, and avoid unnecessary administrative burdens (see Article 5(3) of the IRRD proposal). National authorities will be obliged to report annually to EIOPA on application of Article 4.

4.1.2 Pre-emptive Resolution Planning

Pre-emptive resolution planning consists of two elements: the development of resolution plans and of resolvability assessments. Resolvability assessments are part of the resolution planning process and aim to identify any impediments to the resolvability of undertakings.[46] A resolution plan is developed by the resolution

[45] EIOPA Analysis, pp. 638–639.

[46] EIOPA Analysis, p. 653.

authority, not by the undertaking itself, nor by the supervisory authority.[47] As mentioned, a resolution plan is, according to the IAIS Glossary, a plan that identifies in advance options for resolving all or part(s) of an insurer to maximise the likelihood of an orderly resolution, the development of which is led by the supervisor and/or resolution authority in consultation with the insurer in advance of any circumstances warranting resolution. Interestingly, the IAIS leaves open the possibility that a resolution plan is developed by the supervisory authority, rather than a resolution authority. In general, we believe it is advisable that the development of a resolution plan is dealt with by a separate authority or a department within the supervisory authority that is operationally independent from regular supervision. The objectives of going concern supervision and gone concern resolution differ, which could lead to different choices and potentially conflicts of interests.

In itself, the development of a resolution plan does not impact the insurance undertaking or the insurance group. It is not up to the undertaking 'to rule over its grave' and to decide how the undertaking will be resolved. However, a resolution plan will require close cooperation between the resolution authority and the undertaking (and with the supervisory authority), and the impact of the resolution plan may be felt by the undertaking in going concern as well, mainly due to the resolvability assessment by the resolution authority. Through resolution planning, the resolution authority intends to ensure that the undertaking is resolvable in an orderly manner. This will involve the identification of potential impediments to resolution. In case the resolution authority identifies the presence of material impediments to resolution, it may have to adapt the resolution strategy or require such impediments to be removed by the insurance undertaking ex-ante. This will require close cooperation with the supervisory authorities and the undertaking itself and a thorough assessment if the ex-ante removal of such impediments is in fact necessary. Impediments to resolution (gone concern) might well be efficiencies on a going concern basis (e.g. shared services within a group) and the ex-ante intervention by a resolution authority may be disproportionate if other solutions are also feasible (such as the continuation of such services during resolution).[48]

Both the process of ex-ante recovery planning, particularly ex-ante resolution planning, can have a significant impact on insurers. Where insurers are generally focused on running their operations on a going concern business, both recovery and resolution planning are aimed at the situation where this is no longer the case. To be prepared for such circumstances may require different choices than if the focus is strictly on the going concern circumstances of the operations.

[47] The resolution authority and supervisory authority can be part of the same authority or be entirely separate. If combined in the same authority, they are usually operationally independent from the supervisory authority, given the different tasks of the resolution authority.

[48] Continuation of essential services might be realised as well by proper internal documentation of such services through service-level agreements or other internal outsourcing agreements. Resolution authorities are expected to have the power to ensure the continuity of essential services by requiring other entities to continue to provide such services (see EIOPA Opinion, paragraph 12.18).

The IRRD proposal provides resolution authorities with powers to require the insurer to remove, *ex ante*, substantive impediments to resolution. However, the IRRD proposal currently uses inconsistent terminology (material impediments, substantive impediments, impediments) to indicate the impediments may need to be removed upon the instruction of the resolution authority. It should be clear that these powers only relate to 'substantive' impediments, due to the potential intrusive nature of this power to the going concern operations of the insurer. Furthermore, we believe this power should be limited to the continuity of critical functions. The IRRD proposal includes, in addition to the concept of critical functions, references to core business lines (Article 9(6) c and the requirement, as part of the resolution plan, to demonstrate how core business lines (in addition to critical functions) can be separated. We doubt if the reference to core business lines is relevant and suggest that this should be removed. Safeguarding core business lines should not be an objective of resolution, but only the preservation and continuity of critical functions. The inclusion of core business lines might have been inspired by the BRRD framework, where the emphasis of resolution is on the preservation of the bank and/or the entities in the group. The key concern for resolution authorities in the insurance sector should not be the preservation and continuity of the insurer or the insurance group, but instead safeguarding the rights of policyholders and beneficiaries, which might well be affected without the preservation of the group or entities in the group (e.g. by portfolio transfers and run-offs).

5 Triggers to Place an Insurer or Reinsurer in Resolution and Director's Duties

A crucial component of a resolution framework is the trigger for entry into resolution. This is the moment on which the insurer transitions from 'going concern' to 'gone concern'.[49] After this point, the insurer no longer forms part of the regular commercial economic circumstances. At this point, the resolution authority typically takes full control of the insurer. Therefore, this moment is also crucial for the corporate bodies of the insurer, as well as for the investors/shareholders. Clearly, such a decision should not be taken lightly and therefore the conditions for taking such a decision should be as clear as possible.

According to the FSB Key Attributes, resolution should be initiated when an undertaking is no longer viable or likely to be no longer viable and has no reasonable prospect of becoming so. 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. There should be clear standards or suitable indicators of

[49] EIOPA, background document on the opinion of the 2020 review of Solvency II, analysis, EIOPA-BoS-20/750, 17 December 2020, page 629.

non-viability to help guide decisions on whether firms meet the conditions for entry into resolution.[50]

The FSB uses the term 'non-viability' to identify the transition from going concern to gone concern (i.e. from recovery to resolution). This means that all possible recovery measures must have been exhausted and failed or ruled out.

In accordance with the FSB Key Attributes, EIOPA proposes to set—at the EU level—triggers for entry into resolution as follows:

a. The undertaking is no longer viable or likely to be no longer viable and has no reasonable prospect of becoming so.
b. Possible recovery measures have been exhausted—either tried and failed or ruled out as implausible to return the undertaking to viability—or cannot be implemented in a timely manner.
c. A resolution action is necessary in the public interest.[51]

According to EIOPA, the triggers should be judgment-based and allow for sufficient discretion to assess the situation and decide on the need for resolution actions.[52]

According to EIOPA, an undertaking 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 undertaking is in breach or likely to be in breach of the MCR and there is no reasonable prospect of compliance being restored.
– The undertaking 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 policyholders and/or creditors will not receive payments as they fall due.[53]

It is our impression that the first, and part of the second condition, are likely to be the most relevant conditions to determine the (expected) non-viability of licensed insurance and reinsurance entities.[54] Furthermore, there appears to be some overlap

[50] FSB Key Attributes of Effective Resolution Regimes for Financial Institutions, 15 October 2014, paragraph 3.1.

[51] EIOPA Opinion, paragraph 12.3.3.

[52] EIOPA Opinion, paragraph 12.31.

[53] EIOPA, background document on the opinion of the 2020 review of Solvency II, analysis, EIOPA-BoS-20/750, 17 December 2020, page 670.

[54] The FSB makes a distinction between 'insurer', which refers to an insurance company or a holding company and an 'insurance company', which means any legal entity (including its branches) that assumes insurance risks in exchange for a premium payment and is licensed under a jurisdiction's legal framework as an insurance company for any type of insurance product (for example, reinsurance, life insurance, non-life insurance, etc.): FSB, Key Attributes Assessment Methodology for the Insurance Sector Methodology for Assessing the Implementation of the Key Attributes of Effective Resolution Regimes for Financial Institutions in the Insurance Sector, 25 August 2020, page 5.

between cash-flow insolvency in the second condition and the likelihood that policyholders will not receive payments as they fall due in the third condition. Lastly, we believe the balance sheet is mainly relevant to determine if other entities (non-insurance companies, such as holding companies or service companies) in a group have failed or are likely to fail. In our view, it would be more appropriate to split the second condition into two separate conditions and combine one part with the first condition. The third condition could be limited to creditors in general[55] as this condition is likely to be relevant to for the resolution of non-insurance entities (e.g. holding companies, service-companies) in the context of the resolution of an insurance or reinsurance entity.

– The undertaking is in breach or likely to be in breach of the MCR, and/or 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 in such a manner that there are objective indications that this would justify a withdrawal of the insurance or reinsurance license in the near future.
– The liabilities of the undertaking exceed the assets of the undertaking or there are objective indications that the liabilities will exceed the assets of the undertaking in the near future that this will lead to balance-sheet insolvency.
– There are objective indications that creditors will not receive payments as they fall due.

When reworded in this manner, the first condition is focused on the non-viability of licensed insurance and reinsurance entities (and linked to the intervention ladder of Solvency II)[56] and the second and third condition are focused on the non-viability of other entities in an insurance group in the context of the resolution of an insurance or reinsurance entity (balance-sheet insolvency[57] and cash-flow insolvency[58]), which appear to be less relevant to determine the non-viability of a licensed insurance entity. The IRRD-proposal offers, with slightly different wording, the same criteria as EIOPA suggests.

Furthermore, as indicated, EIOPA advises to introduce 'judgment-based' triggers for the entry into resolution, as opposed to 'rules-based' triggers. We doubt if the distinction between judgment-based and rules-based triggers is useful as it could unnecessarily create uncertainty with respect to moment at which resolution can be triggered. The criterion 'failure or likely to fail' already inherently provides for a judgment-based trigger that requires supervisory discretion and is not necessarily an automatic, mechanic trigger.[59]

[55] Although not excluding policyholders/beneficiaries.

[56] Whereby in particular an irreparable breach of the MCR will lead to the withdrawal of an insurance license.

[57] Second condition.

[58] Third condition.

[59] EIOPA suggests that rules-based triggers are inflexible. As explained, we doubt if this is truly the case.

It is our impression that the European Commission does not follow EIOPA's advice for 'judgement-based triggers'. Resolution actions, in accordance with the IRRD proposal, can be taken only when cumulatively a number of conditions have been met (Article 19 IRRD proposal). These conditions each allow for discretion, which means that these triggers are, to a certain level, still 'judgement-based', but not to the extent as proposed by EIOPA.

A related issue is that EIOPA suggests to define triggers for resolution in such a way that they allow for resolution before an undertaking is balance sheet or cash-flow insolvent and before all equity has been wiped out.[60] As explained before, we believe the criterion related to balance-sheet insolvency is relevant in particular for the possibility of including other—non-insurance—entities in the resolution of an insurance entity and we do not see a justification for triggering the resolution of such entities before the resolution of an insurance or reinsurance entity is triggered. In the context of the resolution of a licensed insurance entity the criterion 'before all equity has been wiped out' does not have much added value. The relevant intervention level should be related to the coverage of the MCR and the impossibility of the insurance company itself to avoid an irreparable breach of the MCR.

Furthermore, EIOPA suggests that the resolution authority should have the authority to withdraw the license of the insurer.[61] We doubt if this authority should indeed be granted to the resolution authority, or instead should be left with the supervisory authority that has granted the license and might be best positioned to withdraw the license as well, obviously in close consultation with the resolution authority. The EIOPA Opinion is silent on the withdrawal of the insurance license, if the insurer would enter into ordinary bankruptcy proceedings.

5.1 *Triggers for the Entry Into Recovery and Preventive Measures*

EIOPA advises maintaining the current triggers for the entry into recovery that are currently already included in the Solvency II Directive.[62] Apart from informing the supervisory authorities, the entry into recovery implies the preparation and

[60] Paragraph 12.176 Background Document. In the same sense: IAIS, draft Application Paper on Resolution Powers and Planning, 9 November 2020, paragraph 24: 'The resolution regime should have a forward-looking trigger that would provide for entry into resolution before an insurer is balance sheet insolvent or is unable to pay its obligations as they come due.' It should be noted that 'insurer', in the IAIS terminology, means 'insurance legal entity or insurance group' (IAIS Glossary, November 2019, page 6) and is therefore intended to have a broader scope than only licensed insurance entities.

[61] Paragraph 12.18 of the EIOPA Opinion.

[62] Non-compliance with the SCR or a risk of non-compliance in the following three months. It should be noted that EIOPA, in the EIOPA Opinion, only refers to non-compliance with the SCR, but we assume that this is meant to include a risk of non-compliance in the subsequent three months as well, as currently worded in the Solvency II Directive.

submission, within two months, of a realistic recovery plan to the supervisory authorities. This recovery plan should lead to the re-establishment of a sufficient level of own funds to cover the SCR. In addition, supervisory authorities have the power to prohibit the free disposal of assets located within their territory when recovery is triggered.[63]

5.2 *Preventive Measures*

In addition, notwithstanding the obligation to submit a recovery plan, where the solvency position of the undertaking continues to deteriorate, supervisory authorities have the power to take all measures necessary to safeguard the interests of policyholders in the case of insurance contracts or the obligations arising out of reinsurance contracts. These measures should be proportionate.[64] These preventive measures are already included in the current Solvency II framework.[65] However, EIOPA proposes to articulate such measures more explicitly under the heading 'preventive measures' and to introduce appropriate 'triggers' at the EU level for the use of preventive measures.[66] Currently, EIOPA observes divergent approaches by national competent authorities which it considers not be in line with the principle of supervisory convergence and raises concerns about the level playing field in insurance.[67]

EIOPA suggests to introduce the following set of measures used in Solvency II: (a) Require more intensive dialogue with the undertakings, scheduling regular meetings with the company's management in order to better understand the strategy of the company, recent technical and financial results, recent changes in insurance products and investment and their impact on the solvency position as well as to have up to date information on measures taken or measures to be taken by the company in order to improve the SCR coverage ratio (e.g. conservative dividend policy, increase of own funds, de-risking), including any recent dialogue between the undertakings and its qualifying shareholders/owners on the possibility of capital support; (b) Require additional or more frequent reporting; (c) Require the administrative, management, or supervisory body of the undertaking to take preventive measures within a specific timeframe in case of concrete risk of progressive and structural deterioration of its capital position that may put the undertaking under stress and the undertaking's inaction leads to an increased risk to policyholders. This could also include a requirement to update the pre-emptive recovery plan when assumptions set

[63] Article 140 Solvency II Directive.

[64] Article 141 Solvency II Directive.

[65] Article 141 of the Solvency II Directive. ICP 10.2 also refers to preventive measures if the insurer seems likely to operate in a manner that is inconsistent with regulatory requirements.

[66] EIOPA Opinion, paragraph 12.25.

[67] EIOPA Analysis, p. 649.

out in the initial plan do not appear realistic, and to take the measures set out in the updated plan; (d) Require the undertaking to limit variable remuneration and bonuses.[68]

EIOPA suggests that, similar to the resolution triggers, triggers for the application of preventive measures should be 'judgment-based' and allow for sufficient supervisory discretion, contain relevant qualitative and quantitative factors, but should not result in a new pre-defined intervention level.[69] According to EIOPA, relevant factors that would need to be taken into consideration by NSAs in their assessment for intervening preventively include, for instance: (1) Solvency ratio and historical volatility of the SCR ratio; (2) Trends in the financial statement figures; (3) Business plan, including information about the products, risk mitigation techniques, investment plan and dividend policy; (4) The possibility and likelihood for the undertaking to raise additional capital; (5) ORSA, particularly, the three year projection of the SCR and MCR coverage ratios, the change in risk appetite and risk tolerance and the change in the investment strategy—business plan; (6) Financial plans and strategy of the company, including recent changes in them that could cause risk of non-compliance with capital requirements; (7) Impact of the sensitivity analysis on the SCR trigger and MCR trigger; (8) Conclusions from inspections and meetings with the Administrative, Management or Supervisory Body (AMSB); (9) Other issues or aspects (market triggers), such as interest rate volatility and the widening of the credit spread.[70]

It is clear from the wording used by EIOPA[71] and the factors mentioned that it envisages a high level of discretion and flexibility for supervisory authorities for the application of preventive measures. The question can be raised if these factors truly result in the EU-level triggers. We doubt if such a degree of flexibility will effectively prevent the observed divergence of national approaches.[72]

As mentioned, the IAIS refers to preventive measures if the insurer seems likely to operate in a manner that is inconsistent with regulatory requirements. The way EIOPA articulates preventive measures seems to allow for a broader application of preventive measures.

Furthermore, a preliminary question may be raised as well: The use of preventive measures is presented by EIOPA as a supervisory tool of national competent authorities in deteriorating financial conditions. This means the supervisory power, in deteriorating financial conditions, to take all measures necessary to safeguard the

---

[68] EIOPA Opinion, paragraph 12.8.

[69] EIOPA Opinion, paragraphs 12.26 and 12.27. EIOPA refers to 'soft triggers', allowing for a sufficient degree of supervisory judgment and discretion according to different products and national market specificities, EIOPA, background document on the opinion of the 2020 review of Solvency II, analysis, EIOPA-BoS-20/750, 17 December 2020, page 667.

[70] EIOPA, background document on the opinion of the 2020 review of Solvency II, analysis, EIOPA-BoS-20/750, 17 December 2020, page 667.

[71] E.g. 'judgment-based', 'soft triggers', 'supervisory judgment and discretion', 'for instance.'

[72] EIOPA, background document on the opinion of the 2020 review of Solvency II, analysis, EIOPA-BoS-20/750, 17 December 2020, paragraph 12.156.

interests of policyholders, notwithstanding the power of supervisory authorities to require a short-term financing plan or recovery plan.[73] In accordance with Article 136 of the Solvency II Directive, undertakings should have procedures in place to identify deteriorating financial conditions and notify the supervisory authorities when such deterioration occurs.[74] This provision appears to assume the primary responsibility of the undertaking and its corporate bodies to determine when deteriorating financial conditions occur, not of the supervisory authority.[75] These procedures are obviously subject to supervision by the national competent authorities.

The question is how the proposal of EIOPA to introduce adequate triggers at the EU level for the use of preventive measures relates to the own responsibility of insurers (and their governance arrangements) to have procedures in place to identify deteriorating financial conditions? Are the factors mentioned by EIOPA intended to be factors to be considered for the procedures to be maintained by undertakings (and therefore subject to ex-ante supervision) or is it the intention of EIOPA that supervisory authorities have the discretion to intervene in deteriorating financial conditions if they come to the conclusion that the undertaking is facing deteriorating financial conditions, independent from the internal procedures of the undertaking pursuant to Article 136 of the Solvency II Directive? We believe the use of preventive measures by supervisory authorities should be linked to the internal procedures of the undertaking to identify deteriorating financial conditions, subject to ex-ante supervisory oversight. This contributes to the predictability of the use of supervisory measures (i.e. when the undertaking has identified such deteriorating financial conditions) and leaves the primary responsibility of the undertaking in deteriorating financial conditions, when the undertaking is still operating on a going concern basis, with the undertaking.

It should be borne in mind that it is likely that, when deteriorating financial conditions are observed and notified to the supervisory authorities, it is likely that the insurance company is also taking action or will soon take action by means of the preparation and execution of a recovery plan or short-term financing plan. It should be avoided that measures taken by supervisory authorities in deteriorating financial conditions interfere with the execution of the recovery plan.

6 Resolution Objectives

EIOPA proposes that Solvency II should clearly set out the objectives for resolution, without an ex-ante predefined ranking.[76] This proposal is also included in the IRRD-proposal, in article 18. These objectives are the following: (a) To protect

[73] Article 141 of the Solvency II Directive.

[74] Article 136 of the Solvency II Directive.

[75] Or potentially in exceptional circumstances, where the undertaking fails to observe and/or notify such conditions to the supervisory authority.

[76] EIOPA Opinion, paragraph 12.11.

policyholders, beneficiaries and claimants; (b) To maintain financial stability, in particular, by preventing contagion and by maintaining market discipline; (c) To ensure the continuity of functions of undertakings whose disruption could harm the financial stability and/or real economy; (d) To protect public funds.

The question may be raised, what is meant by EIOPA with the notion 'without an ex-ante predefined ranking'. We consider resolution to be an alternative to liquidation[77] that should be considered and applied when the objectives mentioned above cannot be achieved in a similar way in ordinary bankruptcy proceedings. This is also the intention of the IRRD proposal. However, in the IRRD proposal the choice between resolution and bankruptcy proceedings is placed in the context of the public interest test. In our view, these objectives should always include the protection of policyholders, beneficiaries, and claimants, possibly together with one of the other objectives.[78] However, it should be recalled that the critical functions that insurers fulfill consist (only) of the prudent exercise of their insurance business, which suggests that objective (a) and (c) overlap to a large extent and the added value of objective (b) is limited. Financial stability is only at stake when policyholder rights are threatened (a), which likely coincides with a critical function (c). Therefore, as well as in accordance with Recital 16 of the Solvency II Directive,[79] the emphasis should always be on policyholder protection and/or the protection of specific types of insurance cover, which implies in our view a predefined ranking with respect to this objective.

7 Bail-in Tool in Insurance

Probably the most intrusive and painful resolution powers, as suggested by EIOPA, is the power to restructure, limit or write down liabilities, including (re)insurance liabilities and allocate losses to shareholders, creditors and policyholders.

According to EIOPA, the exercise of the resolution powers should be subject to adequate safeguards:

[77] E.g. an alternative to ordinary bankruptcy proceedings. According to the IAIS is liquidation a process to terminate operations and corporate existence of the entity through which the remaining assets of the insurer will be distributed to its creditors and shareholders according to the liquidation claims hierarchy.

[78] See for example also Article 3A:85 of the Dutch Financial Supervision Act that adopts this ranking of objectives.

[79] Recital 16 reads as follows: 'The main objective of insurance and reinsurance regulation and supervision is the adequate protection of policy holders and beneficiaries. The term beneficiary is intended to cover any natural or legal person who is entitled to a right under an insurance contract. *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.*' (italics added).

i. The hierarchy of claims should be respected, while providing the flexibility to depart from the general principle of equal (*pari passu*) treatment of creditors of the same class.
ii. Creditors, including 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).[80]

Furthermore, when allocating losses to policyholders, resolution authorities should consider the following safeguards:

a) The allocation of losses to policyholders should only take place as a last resort option, i.e. all other feasible measures and options that could have averted (further) losses for policyholders have been exhausted or have been deemed unlikely to be successful.
b) The exercise of the power is deemed necessary for other powers to be effective (for instance, to enable a portfolio transfer) and, hence, to limit the losses for policyholders.
c) Policyholders who are covered by IGSs or other mechanisms should be compensated to the extent possible.[81]

It is clear that the allocation of losses to policyholders and beneficiaries should only take place as a last resort measure when all other measures have failed. However, in case of insurance failures, it might be unavoidable to resort to this tool to effect resolution tools such as a portfolio or share transfer to another insurer or to effectuate a run-off. A bail-in of policyholders might be more beneficial to policyholders than a liquidation in bankruptcy proceedings, in which losses to policyholders might be worse. An important safeguard for policyholders in this respect is the respect of the NCWOL-principle, as referred to above. To determine if the NCWOL-principle is respected is complex, as it will require a reliable calculation of the entitlements of policyholders and beneficiaries in liquidation. This will determine the level of the possible bail-in of policyholders and beneficiaries.

The EIOPA Opinion does not cover the valuation of insurance liabilities in insolvency. We believe it is essential that this point is also addressed in the EU framework, as it is crucial to determine if the insurer fails or is likely to fails, the extent to which bail-in can be applied to insurance liabilities and the need to additionally rely on resolution funding and/or entitlements may exist on an insurance guarantee scheme, if such a scheme is available in Member States. Lessons could potentially be learned from existing resolution frameworks, such as has been developed in the Netherlands, where valuation principles have been developed in the

[80] EIOPA Opinion, paragraph 12.20.

[81] EIOPA, Background Document on the Opinion on the 2020 review of Solvency II, box 12.5 on p. 663, EIOPA-BoS-20/750, 17 December 2020.

Dutch Act and lower legislation,[82] as well as good practices have been developed by the insurance industry.[83] Furthermore, in the Dutch resolution framework, a mechanism has been developed whereby a provisional insolvency valuation is being undertaken at or close to the moment the insurance entity fails or is likely to fail, followed by a final valuation when the resolution process or liquidation is finalised. The provisional valuation serves as the basis for the potential for bail-in and to determine if provisional payments to policyholders can continue to be made during the resolution process. These provisions are supported by a backstop-facility in the form of resolution funding on an ex-post basis by the insurance industry that provides a safeguard against breaches of the NCOWL-principle. The IRRD-proposal seems to be largely in line with the Dutch framework, in terms of valuation (chapter VII), with nuanced differences. According to the IRRD-proposal, a first valuation is done before the insurer is placed in resolution. This valuation serves to determine if the conditions for resolution (failing or likely to fail) have been met. A second valuation takes place after the the insurer is placed in resolution. This (provisional) valuation forms the basis for the resolution action to be taken, which includes the extent to which the bail-in tool can be applied, while respecting the NCWOL-principle. These provisional valuations are followed by a 'definitive valuation' (article 24(5)), which will still be based on estimates of the treatment of creditors in ordinary bankruptcy proceedings and which does not prejudice the final valuation, referred to in article 54, which takes place at the end of the resolution process. A safeguard for shareholders and creditors in case of a breach of the NCWOL-principle is included in article 55. However, it is not specified in the IRRD-proposal to whom creditors and shareholders have such entitlement.

8 Concluding Remarks

Based on the current regulatory framework above described, which does not fully consider the IRRD-proposal in all respects, multiples challenges might occur from the expectation that insurance companies and groups should ensure they are recoverable and resolvable in the context of directors' duties, which have a focus on running the company on a going concern basis.

While in ordinary times the directors must always consider and balance the interests of shareholders and policyholders, on the contrary, in deteriorating financial conditions, one could say that the balance shifts more towards the protection of policyholders, but that is already more or less inherent to the subordinate position of

[82] Article 3A:89-3A:91 of the Dutch Financial Supervision Act, Decree Valuation Insurance Liabilities in bankruptcy, 10 July 2019.

[83] Dutch Association of Insurers, Good practice calculation bankruptcy value https://www.verzekeraars.nl/media/7925/good-practice-berekenen-faillissementswaarde.pdf.

shareholders/privileged position of policyholders (shareholders bear losses first, policyholders last).

In the context of recovery and resolution, it is appropriate to ask whether the 'regular' director duty of care is suitable to inform decisions by that are needed in adverse financial circumstances as well as to inform preparatory decisions such as with respect to ex-ante recovery planning and ex-ante removal of impediments to resolution. An interesting point is how to judge the preparation for resolution (ex-ante removal of impediments to resolution). This might happen when the company is still running on a going concern basis and the decisions that need to be taken do not necessarily make sense from a going concern perspective: making an insurance company resolvable might make it less efficient than when you would only consider the going concern.

References

Basel Committee on Banking Supervision, *Frameworks for early supervisory intervention*, March 2018

Communication from the Commission to the European Parliament and the Council on the review of the EU prudential framework for insurers and reinsurers in the context of the EU's post pandemic recovery, https://ec.europa.eu, https://ec.europa.eu/info/publications/210922-solvency-2-communication_en (2021)

Commission Staff Working Document accompanying the documents Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/138/EC as regards proportionality, quality of supervision, reporting, long-term guarantee measures, macro-prudential tools, sustainability risks, group and cross-border supervision and Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of insurance and reinsurance undertakings and amending Directives 2002/47/EC, 2004/25/EC, 2009/138/EC, (EU) 2017/1132 and Regulations (EU) No 1094/2010 and (EU) No 648/2012 SWD/2021/260 final Assessment Report, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021SC0260 (2021)

Dutch Association of Insurers, *Good practice calculation bankruptcy value* https://www.verzekeraars.nl/media/7925/good-practice-berekenen-faillissementswaarde.pdf

EBA, *Discussion Paper - Application of early intervention measures in the European Union according to Articles 27-29 of the BRRD*, EBA/DP/2020/02, 26 June 2020

ECB, *The new EU framework for financial crisis management and resolution*, July 2011 and EIOPA, *Background document on the opinion on the 2020 review of Solvency II – analysis*, EIOPA-BoS-20/750, 17 December 2020

EIOPA, *Background document on the opinion on the opinion on the 2020 review of Solvency II - Impact assessment*, EIOPA-BoS-20/751, 17 December 2020a

EIOPA, *Consultation Paper on Proposals for Solvency II 2020 Review Harmonisation of National Insurance Guarantee Schemes*, EIOPA-BoS-19-259, https://eiopa.europa.eu/Publications/Consultations/EIOPA-BoS-19-259_Consultation%20paper%20on%20Harmonisation%20of%20IGSs.pdf

EIOPA, *Discussion paper on resolution funding and national insurance guarantee schemes*, EIOPA-CP-18-003, 9 July 2018., https://eiopa.europa.eu/Publications/Consultations/EIOPA-CP-18-003_Discussion_paper_on_resolution_funding%20and.pdf

EIOPA, *Opinion on the 2020 review of Solvency II,* EIOPA–Bos-20/749, 17 December 2020b

EIOPA, *Opinion to Institutions of the European Union on Harmonisation of recovery and resolution frameworks for (re)insurers across the member states*, EIOPA-BoS/17-148, 5 July 2017., https://eiopa.europa.eu/Publications/Opinions/EIOPA-BoS-17-148_Opinion_on_recovery_and_resolution_for_(re)insurers.pdf
EIOPA, *Other potential macroprudential tools and measures to enhance the current framework*, Publications office of the European Union, Luxembourg, 2017, also available on the EIOPA website
EIOPA, *Solvency II tools with macroprudential impact*, Publications office of the European Union, Luxembourg, 2018, also available on the EIOPA website
EIOPA, *Systemic risk and macroprudential policy in insurance*, Publications office of the European Union, Luxembourg, 2017, also available on the EIOPA website
European Commission, Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of insurance and reinsurance undertakings and amending Directives 2002/47/EC, 2004/25/EC, 2009/138/EC, (EU) 2017/1132 and Regulations (EU) No 1094/2010 and (EU) No 648/2012, COM/2021/582 final
Financial Stability Board, *Key Attributes Assessment Methodology for the Insurance Sector Methodology for Assessing the Implementation of the Key Attributes of Effective Resolution Regimes for Financial Institutions in the Insurance Sector*, 25 August 2020
Financial Stability Board, *Key Attributes of Effective Resolution Regimes for Financial Institutions*, 15 October 2014., https://www.fsb.org/wp-content/uploads/r_141015.pdf
FSI, *FSI Insight - Early intervention regimes for weak banks,* April 2018
Georgosouli A (2013) Judgement-led regulation: reflections on data and discretion. J Bank Regul 14:209–220
GOV.UK, *Bank Recovery and Resolution Directive (BRRD) implementation*, 3 November 2016
IAIS, *Application Paper on recovery planning*, 18 November 2019., https://www.iaisweb.org/page/supervisory-material/application-papers//file/87519/application-paper-on-recovery-planning
IAIS, *Draft Application Paper on Resolution Powers and Planning*, 9 November 2020., https://www.iaisweb.org/page/consultations/closed-consultations/2021/application-paper-on-resolution-powers-and-planning
IAIS, *IAIS Stakeholder Teleconference on Resolution*, 21 April 2020
IAIS, *Issues Paper on policyholder protection schemes*, October 2013., https://www.iaisweb.org/page/supervisory-material/issues-papers//file/34547/issues-paper-on-policyholder-protection-schemes
IAIS, *Public consultation on draft Application Paper on Resolution Powers and Planning*. https://www.iaisweb.org/page/consultations/closed-consultations/2021/application-paper-on-resolution-powers-and-planning
Van Hulle K (2019) Solvency II requirements for EU insurers, Solvency II is good for you. Intersentia, Cambridge, Antwerp, Chicago

Open Access This chapter is licensed under the terms of the Creative Commons Attribution 4.0 International License (http://creativecommons.org/licenses/by/4.0/), which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.