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WORKING DOCUMENT

From:	Presidency
To:	Working Party on Financial Services and the Banking Union (Insurance)

Subject:	Valuation - Presidency Non-Paper
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Valuation

Cover note

- The topics of Valuation (Articles 23-25, Article 53-55) were discussed during the Council working party meetings of 14 December 2021, 27 April 2022 and 13/14 October 2022.
- Topics discussed related to (i) the need to update valuations, ii) the need for further specification of the valuation standards used, in level 1 iii) the choice whether and which mandate to provide to EIOPA to formulate further details valuation standards (articles 23-25) and iv) the need to include, in level 1, a reference to replacements costs as part of the insolvency counterfactual necessary to determine compliance with the NCWO (articles 53-55)
- On warranting timely updates of valuation. During the discussion it was clarified that there is no restriction, in the Commission's proposal, on updating valuations until the moment of implementation of the resolution tools. The need to base decisions on up-to-date valuations 1 and 2 follows from Article 23(1) and recital 34. While some Member States expressed openness to improve to existing formulation in order to increase clarity on the need to update valuations, others indicated that the text was sufficiently clear or expressed doubt whether modifications were necessary. The Presidency proposes to keep the present text as is, in Article 23 and recital 34 IRRD.
- On reference to specific valuation standards at level 1: Various Member States have stressed the need to specify at level 1 the valuation standards, in particular by making a reference to the valuation approach referred to in Article 75 SII. The Commission has explained that while the proposal does not give preference to a specific valuation standard in order to allow for maximum flexibility for different valuation approaches, the inclusion of a link to SII is possible as a starting point for valuation 2 as long as sufficient scope for alternative approaches to valuation remains for both valuation 1 and valuation 2.



- With regard to valuation 1, alternative approaches to valuation may be needed as a FOLTF decision cannot only be caused by non-compliance with SII prudential requirements (Art. 19(3)a IRRD).
- With regard to valuation 2, while one of the resolution objectives is continuity of insurance coverage, through the use of resolution tools, for the benefit of policy holders, a state of affairs that bears substantial resemblance with the going concern assumption and subsequent arms-length principle that underlies SII valuation principles, the resemblance is likely not big enough to always assume a going concern outcome, with regard to the use of resolution tools.
- The Presidency's proposal is therefore to use a reference to SII as a starting point but to actively accommodate the need for flexibility, in comparison to the SII valuation approach, valuation 2.
- On taking into account replacement costs as part of the NCWO valuation (Articles 53-55 IRRD). A substantial majority of Member States supports the inclusion of replacement costs in level 1, while some Member States expressed concerns regarding the methodological challenges of calculating replacement costs. The Presidency, therefore, proposes to include a reference to replacement costs at level 1, in combination with, a mandate for EIOPA to formulate RTS that will set out rules on how to estimate replacement costs.

**Draft amendment***Article 23***Valuation for the purposes of resolution**

1. Resolution authorities shall ensure that any resolution action is taken on the basis of a valuation ensuring a fair, prudent and realistic assessment of the assets, liabilities, rights and obligations of insurance or reinsurance undertakings.
2. Before the resolution authority places an insurance or reinsurance undertaking under resolution, it shall ensure that a first valuation is carried out to determine whether the conditions for resolution under Article 19(1) or Article 20(3) are met.
3. After the resolution authority has decided to place an insurance or reinsurance undertaking under resolution, it shall ensure that a second valuation is carried out to:
 - a. inform the decision on the appropriate resolution action to be taken;
 - b. ensure that any losses of the insurance or reinsurance undertaking are fully recognised at the moment the resolution tools are applied;
 - c. inform the decision on the extent of the cancellation or dilution of instruments of ownership;
 - d. inform the decision on the extent of the write-down or conversion of any unsecured liabilities, including debt instruments;
 - e. where the bridge undertaking tool referred to in Article 32 is applied, inform the decision on the assets, liabilities, rights and obligations or instruments of ownership that may be transferred to the bridge undertaking, and inform the decision on the value of any consideration that may be paid to the insurance or reinsurance undertaking under resolution or, where relevant, to the holders of the instruments of ownership;
 - f. where the sale of business tool referred to in Article 31 is applied, inform the decision on the assets, liabilities, rights and obligations or instruments of ownership that may be transferred to the third party purchaser and to inform the resolution authority's understanding of what constitutes commercial terms for the purposes of Article 31.
4. The valuations referred to in paragraphs 2 and 3 of this Article may be subject to an appeal in accordance with Article 65 only together with the decision to apply a resolution tool or to exercise a resolution power.

*Article 24***Requirements for valuation**

1. Member States shall ensure that the valuations referred to in Article 23 are carried out by any of the following:
 - b. person independent from any public authority and from the insurance or reinsurance undertaking;
 - c. the resolution authority, where those valuations cannot be carried out by a person as referred to in point (a).



2. The valuations referred to in Article 23 shall be considered definitive where they have been carried out by the person referred to in paragraph 1, point (a), of this Article and all the requirements laid down in paragraphs 3 to ~~56~~ of this Article are fulfilled.
3. **The valuation referred to in Article 23(3) is carried out in accordance with article 75 of directive 2009/138/EC and complemented with information stemming from alternative valuation methods that are necessary to reflect the specific circumstances related to the use of the resolution tools as referred to in article 26(3).**

3.4 Without prejudice to the Union State aid framework, where applicable, a definitive valuation shall be based on prudent assumptions and shall not assume any potential provision of extraordinary public financial support from the point in time at which resolution action is taken.

4.5. A definitive valuation shall be supplemented by the following information held by the insurance or reinsurance undertaking or entity referred to in Article 1(1), points (b) to (e):

- a. an updated financial statement and an updated Solvency II economic valuation of the balance sheet of the insurance or reinsurance undertaking or entity referred to in Article 1(1), points (b) to (e);
- b. a report on the financial position of the insurance or reinsurance undertaking, including an evaluation by an independent actuarial function of the technical provisions referred to in Title I, Chapter VI, Section 2 of Directive 2009/138/EC of insurance or reinsurance undertaking or entity referred to in Article 1(1), points (b) to (e);
- c. any additional information on the market and accounting values of the assets, technical provisions, referred to in Title I, Chapter VI, Section 2 of Directive 2009/138/EC, and other liabilities of insurance or reinsurance undertaking or entity referred to in Article 1(1), points (b) to (e).

5. 6. A definitive valuation shall indicate the subdivision of the creditors in classes in accordance with their priority levels under the applicable insolvency law. The definitive valuation shall also contain an estimation of the treatment that each class of shareholders and creditors would have been expected to receive if the insurance or reinsurance undertaking or entity referred to in Article 1(1), point (b) to (e), were wound up under normal insolvency proceedings.

The estimate referred to in the first subparagraph shall not prejudice the valuation referred to in Article 54.

6. 7. EIOPA shall develop draft regulatory technical standards to specify:



- a. the circumstances in which a person is deemed to be independent from both the resolution authority and the insurance or reinsurance undertaking for the purposes of paragraph 1 of this Article;
- b. the methodology for assessing the value of the assets and liabilities of the insurance or reinsurance undertaking in the context of resolution;
- c. the separation of the valuations under Articles 23 and 54 of this Directive.

EIOPA shall submit those draft regulatory technical standards to the Commission by [PO – add 18 months after entry into force].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1094/2010.

Article 25

Provisional and definitive valuations

1. Valuations as referred to in Article 23 that do not meet the requirements laid down in Article 24(2) shall be considered provisional valuations.

Provisional valuations shall contain a buffer for additional losses and an appropriate justification for that buffer.

2. Resolution authorities that take resolution action on the basis of a provisional valuation shall ensure that a definitive valuation is carried out as soon as possible.

The resolution authority shall ensure that the definitive valuation referred to in the first subparagraph:

- a. allows for full recognition of any losses of the insurance or reinsurance undertaking in its books;
 - b. informs a decision to write back creditors' claims or to increase the value of the consideration paid, in accordance with paragraph 3.
3. Where the definitive valuation's estimate of the net asset value of the insurance or reinsurance undertaking is higher than the provisional valuation's estimate of the net asset value of the insurance or reinsurance undertaking, the resolution authority may:
 - a. increase the value of the claims of affected creditors which have been written down or restructured;
 - b. require a bridge undertaking to make a further payment of consideration in respect of the assets, liabilities, rights and obligations to the insurance or reinsurance undertaking under resolution or, as the case may be, to the owners of the instruments of ownership.
 4. EIOPA shall develop draft regulatory technical standards to specify, for the purposes of paragraph 1 of this Article, the methodology for calculating the buffer for additional losses to be included in provisional valuations.



EIOPA shall submit those draft regulatory technical standards to the Commission by [PO – add 18 months after entry into force].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1094/2010.

Article 53

Treatment of shareholders and creditors in the case of partial transfers and application of the write-down or conversion tool

1. Member States shall ensure that, where one or more resolution tools as referred to in Article 26(3) have been applied, except in a situation described in the second subparagraph, and where resolution authorities transfer only parts of the rights, assets and liabilities of the undertaking under resolution, the shareholders and the creditors whose claims have not been transferred, receive in satisfaction of their claims at least as much as what they would have received if the undertaking under resolution had been wound up under normal insolvency proceedings at the time when the decision referred to in Article 62 was taken.
2. Member States shall ensure that, where one or more resolution tools as referred to in Article 26(3) have been applied and where resolution authorities apply the write-down or conversion tool, the shareholders and creditors whose claims have been written down or converted to equity do not incur greater losses than they would have incurred if the undertaking under resolution had been wound up under normal insolvency proceedings immediately at the time when the decision referred to in Article 62 was taken.

Article 54

Valuation of difference in treatment

1. For the purposes of assessing whether shareholders and creditors would have received better treatment if the undertaking under resolution had entered into normal insolvency proceedings, Member States shall ensure that an independent person carries out a valuation as soon as possible after the resolution action or actions have been effected. That valuation shall be distinct from the valuation carried out under Article 23.
2. The valuation in paragraph 1 shall determine:
 - a. the treatment that shareholders and creditors, or the relevant insurance guarantee schemes, would have received if the undertaking under resolution with respect to which the resolution action or actions have been effected had entered normal insolvency proceedings at the time when the decision referred to in Article 62 was taken
 - b. the actual treatment that shareholders and creditors have received, in the resolution of the undertaking under resolution;



- c. whether there is any difference between the treatment referred to in point (a) and the treatment referred to in point (b).
3. The valuation shall:
- a. assume that the undertaking under resolution with respect to which the resolution action or actions have been effected, would have entered normal insolvency proceedings at the time when the decision referred to in Article 62 was taken;
 - b. assume that the resolution action or actions had not been effected;
 - c. **take into account a commercially reasonable estimate of the direct replacement costs of already purchased insurance policies for the group of policyholders as a whole at the time when the decision referred to in Article 62 was taken;**
 - e)d** disregard any provision of extraordinary public financial support to the undertaking under resolution.
4. EIOPA shall develop draft regulatory technical standards specifying the methodology for carrying out the valuation in this Article, in particular the methodology for assessing the treatment that shareholders and creditors would have received if the undertaking under resolution had entered insolvency proceedings at the time when the decision referred to in Article 62 was taken.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1094/2010.

Article 55

Safeguard for shareholders and creditors

Member States shall ensure that where the valuation carried out under Article 54 determines that any shareholder or creditor referred to in Article 53, or, where relevant, the insurance guarantee scheme in accordance with the applicable national law, has incurred greater losses than it would have incurred in a winding up under normal insolvency proceedings, it is entitled to payment of the difference.