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WORKING PAPER

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From:	Presidency
To:	Working Party on Financial Services and the Banking Union (Insurance)
Subject:	Working Party on Financial Services and Banking Union (Financial Services) - (Insurance – Recovery & Resolution Directive), 14 December 2021 -Slovenian Presidency non-paper for the discussion market coverage, pre-emptive recovery planning, valuation, safeguards, relations with third countries, and amendments to the 2009/138-EC directive

Slovenian Presidency non-paper for the discussion market coverage, pre-emptive recovery planning, valuation, safeguards, relations with third countries, and amendments to the 2009/138-EC directive

TITLE VII, Amendments to Directive 2009/138/EC

1. What are your views on Article 83?

Main features of the proposal:

- **Original article 141:**

- **Supervisory powers in deteriorating financial conditions**

- Notwithstanding Articles 138 and 139, where the solvency position of the undertaking continues to deteriorate, the supervisory authorities shall 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. Those measures shall be proportionate and thus reflect the level and duration of the deterioration of the solvency position of the insurance or reinsurance undertaking concerned.

- The new version makes explicit references to the pre-emptive recovery plans.
 - In addition to the notification from the undertaking, the new version establishes a link with the SRP and the supervisory identification of deteriorating financial conditions.
 - One of the triggers for supervisory intervention can be also the judgment that the insurer is likely to breach the solvency capital requirement in the next three months.
 - In the most extreme case of non-compliance, the supervisory authority has the power to suspend variable remuneration, among other measure.
- Article 267 defines the scope of Title IV of Solvency II on the reorganization or winding-up procedures. The amendment extends the scope of the Title to reinsurers in the case of resolution.
- Articles 270 and 272 of Solvency II do not apply if an undertaking is under the resolution because the IRRD regulates the information flow.
- Article 268(a) in the Solvency II directive defines competent authorities in winding-up proceedings. The new paragraph adds the resolution authority to the list of "competent authorities."
- Article 268(c) in the Solvency II directive defines "reorganization measures." The new paragraph adds the application of resolution tools and the exercise of resolution powers to the list of such measures.

Scope of planning requirements and proportionality elements

2. What are your views on Article 4?

Main features of the proposal:

- Some undertakings can be granted simplifications in recovery and resolution planning.
- EIOPA will further develop eligibility criteria for such companies.
- Member states must inform EIOPA annually on the number of companies subject to recovery and resolution planning and on the use of such simplified obligations.
- EIOPA will publicly disclose information on the number of insurance companies subject to recovery and resolution planning, the number of companies that benefit from simplifications, quantitative information on the application of the criteria, a description of the applied simplifications, and the convergence of implementation.

3. What are your views on Articles 5(2) and 5(3)?

Main features of the proposal for pre-emptive recovery planning:

- The supervisor is to identify undertakings using specific criteria.
- The planning must cover 80% of the non-life market measured by gross written premium.
- The planning must cover 80% of the life market measured by technical provisions.
- Subsidiaries covered by group recovery plans count towards the percentages.
- The obligation to do resolution planning implies the obligation to do pre-emptive recovery planning.
- Low-risk undertakings are exempt from preemptive recovery planning.

4. What are your views on Article 9(2)?

Main features of the resolution plan market coverage:

- The resolution authority is to identify undertakings using specific criteria.

- Resolution planning must cover 70% of the market for non-life insurance measured by gross written premium.
- Resolution planning must cover 70% of the market for life insurance measured by technical provisions.
- Undertakings covered by group resolution plans count towards coverage percentages.
- Low-risk undertakings in the sense of Solvency II review are exempt from resolution planning.

Pre-emptive recovery planning

5. What are your views on Article 5?

Main features of the proposal for pre-emptive recovery planning:

- Insurers must develop plans of actions to take in deteriorating financial conditions.
- The extent and level of detail must be proportional to the size and complexity.
- EIOPA will issue guidelines on the methodology for the calculation of market coverage.
- There must be annual updates of the plans.
- Plans must contain essential information on the undertaking, indicators that monitor the financial condition, possible remedial actions, and the communication strategy.
- The plan must contain scenarios that indicate which remedial action to take under certain conditions.
- EIOPA will develop a list of essential quantitative and qualitative indicators in the pre-emptive recovery plans.
- EIOPA will develop further technical standards on the contents.

Review of assessment of the supervisory authorities of pre-emptive recovery plans

6. What are your views on Article 6?

Main features of the proposal:

- Supervisory authorities review pre-emptive recovery plans within six months.
- The review assesses how realistic the plans are, the likelihood of quick and effective implementation, and its effect on the financial system in the context of a more global economic downturn.
- Resolution authorities receive the pre-emptive recovery plans, provide comments, and make recommendations where actions may impede the resolvability of undertakings.
- Host supervisory authorities can request the recovery plans from the home supervisor, examine them, and make recommendations where actions would affect policyholders, the real economy or the financial stability in their member states.
- In case of deficiencies in the recovery plans, undertakings have two months to remedy them and submit an improved version.
- Supervisors direct undertakings to take appropriate measures if they do not remedy the deficiencies to the recovery plans in a reasonable time frame.

Group pre-emptive recovery plans

7. What are your views on Article 7?

Main features of the proposal:

- The ultimate parent undertaking in the group files the pre-emptive recovery plan for the entire group with the group supervisor.
- The recovery planning must cover all the insurance entities in the group.
- Arrangements to ensure the coordination and consistency of proportionate measures to be taken at the level of the group and the group entities are part of the plan.
- The plan must identify possible impediments to recovery actions.
- Supervisors can require a subsidiary to file a pre-emptive recovery plan in certain situations.
- Group supervisors share pre-emptive recovery plans with EIOPA, the group resolution authority, the members of the supervisory college and the resolution authorities of the subsidiaries.

Review and assessment by the group supervisor of the pre-emptive group plans

8. What are your views on Article 8?

Main features of the proposal:

- The group supervisor reviews the group's pre-emptive recovery plan.
- The group supervisor consults the members of the supervisory college of the group.
- The elements of the plan are as in Article 5.
- Joint decisions in the sense of Article 17 are preferable.
- Individual undertakings in the group draw up solo recovery plans if the college of supervisors makes such a decision or when no joint decision on the assessment of the group plan can be achieved.

CHAPTER II, Valuation

Valuation for the resolution purposes

9. What are your views on Article 23?

Main features of the proposal:

- The resolution authority must base its actions on a realistic, fair, and prudent evaluation of assets, liabilities, rights, and other obligations.
- A first valuation supports the determination that an undertaking is placed under resolution.
- After the placement under resolution, there must be a second valuation to:
 - Inform the decision on resolution action to be taken.
 - Ensure the full recognition of losses.
 - Inform any planned dilution or cancellation of shares or other instruments of ownership.
 - Inform any planned write-downs or conversion of unsecured liabilities.
 - Inform transfers under the application of the bridge undertaking tool or of the sale of the business.

- The two valuations of the undertaking are subject to appeal by concerned parties only where simultaneously directed against the resolution decision.

Requirements for valuation

10. What are your views on Article 24?

Main features of the proposal:

- Independent persons must carry out the valuations in Article 23.
- If such persons are not upfront, available, the resolution authority may carry out a provisional valuation until an independent valuation is carried out. A valuation need to be performed by an independent person to be considered final.
- Valuations are not to assume extraordinary public funding.
- A definitive valuation
 - includes an updated financial statement and an updated economic valuation of the Solvency II balance sheet information, a report on the financial position of the undertaking, including an actuarial report on the technical provisions, any additional information on the market values and accounting values of assets and other liabilities.
 - A subdivision of, and an estimation of the treatment of, creditors according to the priority order under the applicable national insolvency law.
- EIOPA will develop technical standards for the valuation methodology.

Provisional and definitive valuations

11. What are your views on Article 25?

Main features of the proposal:

- Valuations not meeting the requirements of Article 24 are provisional and must contain a buffer for possible additional losses.
- Resolution authorities must ensure a definitive valuation as soon as possible.

- If the definitive valuation is higher than the provisional valuation, the resolution authority may increase the value of claims due to creditors.
- EIOPA will develop technical standards to specify the methodology for calculating the buffer for losses.

NCWO safeguard

12. What are your views on Articles 53, 54, and 55?

Main features of the no creditor worse off (NCWO) principle:

- As a matter of principle, shareholders and creditors shall not incur more losses (or receive less in satisfaction of their claims) than they would have incurred (received) in a winding up under national insolvency proceedings. Where it is the case, they are entitled to the payment of the difference.
- An independent person should carry out the NCWO valuation as soon as possible after the resolution action or actions have been effected to assess whether shareholders and creditors would have received better treatment under regular insolvency proceedings.
- The independent person should compare the treatment that shareholders and creditors have received in the resolution and the treatment they would have received under national insolvency proceedings and determine whether there is any difference between the two treatments.
- In contrast to the two other valuations, the ex-post valuation of the NCWO counterfactual is challengeable apart from the resolution decision.
- EIOPA shall develop technical, regulatory standards specifying the methodology for the valuation of the counterfactual.

Safeguards for counterparties in partial transfers

13. What are your views on Articles 56?

Main features of the proposal:

- The Member States shall ensure appropriate protection of the counterparties to the following arrangements:
 - security arrangements, under which a person has by way of security an actual or contingent interest in the assets or rights that are subject

- to transfer, irrespective of whether that interest is secured by specific assets or rights or by way of a floating charge or similar arrangement;
- title transfer financial collateral arrangements, under which collateral to secure or cover the performance of specified obligations is provided by a transfer of full ownership of assets from the collateral provider to the collateral taker, on terms providing for the collateral taker to transfer assets where those specified obligations are performed;
 - set-off arrangements, under which two or more claims or obligations owed between the undertaking under resolution and a counterparty can be set off against each other;
 - netting arrangements;
 - unit-linked policies or other ring-fenced portfolios;
 - reinsurance agreements;
 - structured finance arrangements, including securitizations and instruments used for hedging purposes which form an integral part of the cover pool and which according to national law are secured, and involve the granting and holding of security by a party to the arrangement or a trustee, agent or nominee

Protection of financial collateral, set off and netting arrangements, and reinsurance agreements

14. What are your views on Articles 57?

Main features of the proposal:

- The Member States shall ensure that there is appropriate protection for title transfer financial collateral arrangements, set-off, and netting arrangements, and reinsurance agreements to prevent the transfer of some, but not all, of the protected rights and liabilities under a title transfer financial collateral arrangement, a set-off arrangement, a netting arrangement or a reinsurance agreement between the undertaking under resolution and another person and the modification or termination of protected rights and liabilities that under such a title transfer financial collateral arrangement, a set-off arrangement, a netting arrangement or a reinsurance agreement through the use of ancillary powers.
- Where necessary to better achieve the resolution objectives and in particular to ensure better protection of policyholders, resolution authorities may transfer, modify or terminate assets, rights, or liabilities

that are part of a title transfer financial collateral arrangement, a set-off and netting arrangement, or a reinsurance agreement.

Protection for security arrangements

15. What are your views on Article 58?

Main features of the proposal:

- The Member States shall ensure that there is appropriate protection for liabilities secured under a security arrangement to prevent one or more of the following:
 - the transfer of assets securing the liability, unless that liability and benefit of the security are also transferred;
 - the transfer of a secured liability, unless the benefit of the security are also transferred;
 - the transfer of the benefit of the security, unless the secured liability is also transferred;
 - the modification or termination of a security arrangement with the effect of terminating such an arrangement.
- Where necessary to better achieve the resolution objectives and, in particular, to ensure better protection of policyholders, resolution authority may transfer, modify or terminate assets, rights, or liabilities that are part of the same arrangement.

Protection for structured finance arrangements and other ring-fenced portfolios

16. What are your views on Articles 59?

Main features of the proposal:

- The Member States shall ensure that there is appropriate protection for structured finance arrangements or other ring-fenced portfolios, including arrangements referred to in Article 56(1), points (e) and (g), to prevent either of the following:
 - the transfer of some, but not all, of the assets, rights, and liabilities which constitute or form part of a structured finance arrangement or other ring-fenced portfolios, including the arrangements referred to in

Article 56(1), points (e) and (g), to which the undertaking under resolution is a party;

- the termination or modification through the use of ancillary powers of the assets, rights, and liabilities which constitute or form part of a structured finance arrangement or other ring-fenced portfolios, including arrangements referred to in Article 56(1), points (e) and (g), to which the undertaking under resolution is a party.
- Where necessary to better achieve the resolution objectives and in particular to ensure better protection of policyholders, resolution authority may transfer, modify or terminate assets, rights, or liabilities that are part of the same arrangement

Partial transfers: protection of trading, clearing, and settlement systems

17. What are your views on Articles 60?

Main features of the proposal:

- The Member States shall ensure that the application of a resolution tool does not affect the operation and rules of payment and securities settlement systems where the resolution authority does either of the following:
 - transfers some, but not all of the assets, rights, or liabilities of an undertaking under resolution to another entity;
 - uses the ancillary powers to cancel or amend the terms of a contracting party or to substitute a recipient as a party.

TITLE V, RELATIONS WITH THIRD COUNTRIES

Agreements with third countries

1. What are your views on Article 72?

Main features of the proposal:

- Under Article 218 TFEU, the Commission may submit to the Council proposals to negotiate agreements with one or more third countries regarding the means of cooperation between the resolution authorities and the third country authorities concerned.

- The agreements referred to in the previous point shall ensure the establishment of processes and arrangements between resolution authorities and the third country authorities concerned for cooperation in carrying out the tasks and exercising the powers referred to in Article 76 of the Proposal of IRRD.
- MS may enter into bilateral agreements with a third country regarding the matters referred to in the first and second point until the entry into force of an agreement referred to in point one to the extent that such bilateral agreements are not inconsistent with the IRRD.

Recognition and enforcement of third-country resolution proceedings

2. What are your views on Article 73?

Main features of the proposal:

- The resolution authority concerned shall decide whether to recognize and enforce third-country resolution proceedings relating to a Union subsidiary or a Union branch of a third-country insurance or reinsurance undertaking or a parent undertaking.
- MS shall ensure that resolution authorities have the powers to:
 - exercise the resolution powers concerning:
 - assets of a third country insurance or reinsurance undertaking or parent undertaking located in their MS or governed by the law of their MS;
 - rights or liabilities of a third-country insurance or reinsurance undertaking booked by the Union branch in their MS;
 - perfect a transfer of instruments of ownership in a Union subsidiary established in that MS,
 - exercise the powers in Article 47, 48, or 49 concerning the rights of any party to a contract, where such powers are necessary to enforce third-country resolution proceedings, and
 - render unenforceable any right to terminate, liquidate or accelerate contracts, provided that the substantive obligations under the contract continue to be performed.

Right to refuse recognition or enforcement of third-country resolution proceedings

3. What are your views on Article 74?

Main features of the proposal:

- The resolution authority may refuse to recognize or enforce third-country resolution proceedings pursuant to Article 73 in cases stated in Article 74.

Resolution of Union branches

4. What are your views on Article 75?

Main features of the proposal:

- MS shall ensure that resolution authorities have the powers necessary to resolve a Union branch.
- MS shall ensure that the resolution authorities may exercise the powers required in the previous point if they consider that action is necessary for the public interest and one or more of Article 75(2) conditions are met.
- Where a resolution authority takes an independent action in relation to a Union branch, it shall have regard to the resolution objectives and take action under the principles and requirements set out in the IRRD Proposal (Article 18, Article 22, Title III, Chapter II).

Cooperation with third-country authorities

5. What are your views on Article 76?

- EIOPA may conclude non-binding framework cooperation arrangements to frame bilateral arrangements concluded by national authorities in carrying:
 - The development of resolution plans following Articles 9 and 12 and similar requirements under the law of the relevant third countries;
 - The assessment of resolvability following articles 13 and 14 and similar requirements under the law of the relevant third countries;

- The application of powers to address or remove impediments to resolvability pursuant to Articles 15 and 16 and any similar powers under the law of the relevant third countries;
- The application of preventive measures according to Article 141 of S II Directive and similar powers under the law of the relevant third countries;
- The application of resolution tools and exercise of resolution powers and similar powers exercisable by the relevant third-country authorities.
- Supervisory or resolution authorities may conclude cooperation arrangements in line with the EIOPA framework arrangement with relevant third-country authorities.

Exchange of confidential information

6. What are your views on Article 77?

Main features of the proposal on this topic:

- MS shall ensure that relevant authorities exchange confidential information with relevant third-country authorities only if:
 - Those third-country authorities are subject to requirements and standards of professional secrecy, equivalent to those imposed by Article 64;
 - The information is necessary for the performance by the relevant third-country authorities of their resolution function under national law.
- Where confidential information originates in another MS, relevant authorities shall not disclose that information to relevant third-country authorities unless:
 - The relevant authority of the MS where the information originates (the originating authority) agrees to that disclosure;
 - The information is disclosed only for the purpose permitted by the originating authority.