15 October 2013

EIOPA Response to FSB Consultation

on the Application of the Key Attributes of Effective Resolution Regimes to Non-Bank Financial Institutions

1. EIOPA is responding to the Financial Stability Board (FSB) consultation on the Application of the Key Attributes of Effective Resolution Regimes to Non-Bank Financial Institutions (from now onwards, the "Consultative document") under the provisions of Articles 25 and 33 of Regulation No. 1094/2010 of 24 November 2010.

General observations

2. EIOPA welcomes the opportunity to contribute to the guidance on the application of the Key Attributes (KA) to the insurance sector. As such, this response does not address the other elements of the financial sector included in the FSB consultation. In addition to responding to the specific questions posed in the consultation, EIOPA would like to provide some general observations on recovery and resolution.

3. The European Commission launched on 5 October 2012 a Consultation on a possible recovery and resolution framework for financial institutions other than banks (from now onwards, the "EC consultation") to which EIOPA provided a comprehensive response.[1] The input provided to that consultation is also used in EIOPA's response to the FSB, along with other internal research carried out by EIOPA.

4. Overall, EIOPA supports the FSB approach of clearly distinguishing between the diverse elements of the financial sector and tailoring the Key Attributes accordingly. Insurance, by its very nature, is substantially different to other financial institutions and requires a tailor made approach that captures the specific features of this sector. This is particularly important with regard to its potential systemic relevance. Due to its relatively stable business model, relatively lower interconnectedness with other elements of the financial system and, in some cases, greater substitutability, (re)insurance has a different systemic relevance than the banking sector.

[1] See EIOPA's Response: https://eiopa.europa.eu/fileadmin/tx_dam/files/publications/submissionstotheec/EIOPA_Response-COM_Consultation_on_recovery_and_resolution_for_nonbank_financial_institutions.pdf

5. There are, however, activities undertaken by insurers that have systemic impact and these have been the focus of the IAIS work to identify systemically important insurers. The IAIS analysis highlights clearly the specific areas of activity that must be considered in framing policy on recovery and resolution.

Objective and scope of a resolution regime for insurance

6. When defining the objective of resolution, the Consultative document refers to Preamble and KA 2.3 which, in summary, mentions i) preserving financial stability and continuity of essential financial services; ii) consumer protection (protection of policyholders, in the case of insurance); iii) avoiding unnecessary destruction of value and minimising the overall cost of resolution; and iv) considering the impact in other jurisdictions.[2]

7. There is a clear distinction between recovery and resolution for (i) financial stability, and (ii) policyholder protection. In the context of financial stability, the objective is to reduce negative externalities on the financial system of a failure. In the context of policyholder protection, the objective is to mitigate the impact on the stakeholders of the individual undertaking, primarily the policyholders. Recovery and resolution arrangements designed for the purpose of financial stability, may not necessarily be optimal for the purpose of policyholder protection.

8. This potential trade-off brings up a related issue, i.e. the need to determine the hierarchy of objectives of resolution and when each one would be addressed. Further work is probably required in this field.

9. In addition to that, the Consultative document limits the scope of resolution regimes to "any insurer that could be systemically significant or critical if it fails and, in particular, all insurers designated as Globally Systemically Important Insurers" (G-SIIs). However, it defines at the same time the protection of insurance policyholders as a "statutory objective".

10. EIOPA agrees with the "statutory status" given to the protection of policyholders, but would like to draw the FSB's attention on the existence of a potential contradiction between this objective and limiting the scope to systemic relevant insurers. Indeed, if the protection of policyholder is considered to be the "statutory objective", it should be extended to all type of policyholders, regardless of the systemic nature of the insurer with whom they enter into a contract.

11. Furthermore, it has to be acknowledged that, if the broader economic implications of an insurance failure are considered, it is quite feasible that an insurer judged not to be systemically important could have a wider impact on some parts of the economy and, particularly, on the affected policyholders if it failed. This would be compounded if a number of insurers in a given market were to fail simultaneously.

12. In conclusion, EIOPA agrees with the view that the protection of policyholders should be considered as part of the resolution framework, together with financial stability. However, as stressed, further work is

[2] In addition to that, the consultation rightly highlights the relevant economic function provided by insurers. EIOPA agrees that the broader economic significance of the insurance sector should be acknowledged.

required to determine the hierarchy of objectives of resolution and when each one would be addressed. In addition, EIOPA believes that focusing only on systemically relevant insurers is possibly an overly narrow view of the context within which recovery and resolution policy for insurers should be considered.

The transition from recovery to resolution

13. The Consultative document provides guidance on the implementation of the KA in relation to resolution regimes for insurers. Still, EIOPA believes that the concept of "resolution" in insurance and its relation to "recovery" should be further clarified, which would supplement the guidance provided in paragraph 4.1 of the Consultative document ("entry into resolution").

14. An associated issue that would benefit from further consideration is the trigger mechanism for activation of resolution powers. As presented in paragraph 4.1 of the Consultative document, the trigger criteria are phrased in a qualitative form. Moreover, they are worded in a manner similar to that often seen in national legislation to trigger existing resolution powers.[3]

15. Qualitative triggers provide the resolution authority with flexibility to intervene according to expert judgement. At the same time, triggers of this nature could be challenged the earlier that resolution is triggered. Quantitative triggers, in turn, may be more easily to defend.[4] However, the use of solely quantitative triggers would lead to a mechanistic decision process that may not always be optimal. Furthermore, strict quantitative triggers may excessively restrict the flexibility of the resolution authority to intervene before the breach of the financial threshold. Against this background, EIOPA believes that the issue of the trigger mechanisms should be carefully considered with the aim of striking a proper balance between the objective nature of the quantitative triggers and the flexibility granted by qualitative triggers. It is important that legislation to implement the KAs is framed in such a way as to allow practical application of the triggers without undue risk that the decision be reversed under judicial review.

16. Perhaps the most challenging issue in this context is establishing the point of viability of an insurer, which is linked to the decision as to when a resolution authority should act. This is a challenging aspect which is usually constrained by national legislation and legal precedent. Resolution authorities will typically seek to avoid a situation where they face legal challenge for being pre-emptive in their actions. This being particularly likely where resolution powers are strongest and premature use could generate claims of expropriation of private property. On the other hand, resolution authorities will seek not to delay their actions unduly, especially where there are strong accountability arrangements where they must account for their actions. EIOPA considers that the KA Annex should give an

[3] In the particular case of 4.1 (v) EIOPA would like to draw the FSB's attention on the need to reformulate the sentence. In our view, 4.1 (v) should not refer to the run-off or portfolio transfer because both tools are actually mentioned in the KAs as tools to be used in a resolution and can, therefore, contribute to achieve the objectives of resolution.

[4] In this context, EIOPA would like to refer to the FSB document "Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Recovery Triggers and Stress Scenarios" (16 July 2013), which provides some guidance on qualitative and quantitative triggers for recovery action in which the Consultative document could build upon.

indication about the point of non-viability for (re)insurers, since this trigger point is different than in banking, considering that credit institutions do not have technical liabilities for policyholders' contracts.

17. The definition of recovery and resolution is also relevant in order to clearly allocate roles and responsibilities and avoid coordination problems between the different authorities involved in crisis management. As set out in KA 2, each jurisdiction should have a designated administrative authority or authorities responsible for exercising the resolution powers. This authority should have at their disposal a broad range of resolution powers in case of resolution. Considering that the resolution authority may not coincide with the supervisory authority, a clear definition of the concept of recovery and resolution would contribute to clarify when the resolution is triggered and, consequently, when –in the management of a crisis– the resolution authority takes over the responsibility from the supervisory authority.[5] This coordination problem may even take place if the resolution authority is part of the supervisory authority.

Specific questions posed in the Consultative document

Question 22: Are the general resolution powers specified in KA 3.2, as elaborated in this draft guidance, together with the insurance-specific powers of portfolio transfer and run-off, as specified in KA 3.7, sufficient for the effective resolution of all insurers that might be systemically important or critical in failure, irrespective of size and the kind of insurance activities (traditional and 'non-traditional, non-insurance' (NTNI)) that they carry out? What additional powers (if any) might be required?

18. It should be highlighted that there has been limited experience in Europe of resolving a large, complex insurance group with extensive cross- border operations. There is a strong possibility that traditional tools would prove inappropriate to deal with a sudden failure of a large and complex insurer or even to deal with the failure of several smaller insurers in a single jurisdiction when they represent a large portion of the national market.[6] Against this background, EIOPA welcomes the approach taken by the FSB to include a comprehensive set of powers in the toolkit.

19. EIOPA considers that resolution toolkit specified in KA 3.2, together with the insurance-specific powers of portfolio transfer and run-off, as specified in KA 3.7 are sufficient for the effective resolution of all type of insurers, as it combines more traditional tools (e.g. removal and replacement of senior management) with other more recent tools (e.g. the establishment of a bridge institution).

20. An internal research carried out by EIOPA confirms that the toolkit mentioned in the KA includes all relevant powers existing in the EU. Nevertheless an additional power that was mentioned in several cases

[5] As highlighted in EIOPA's crisis prevention and management framework there is a continuum of increasingly serious actions that can be taken. Supervision can go as far as recovery, as –for instance– set out in Directive 2009/138/EC, but if that fails then resolution is triggered.

[6] It has to be stressed, however, that multiple failures are not as likely to happen in the insurance sector as in the banking sector, due to the limited interconnectivity of insurance firms.

referred to supplementary contributions from Members, in case of non-life mutual and mutual-type associations with variable contributions.

21. In addition to that, the FSB could also consider the extension of the resolution powers to include the power to impose stays of various types in order to improve operational flexibility in the resolution process. Such extensions could include giving the resolution authority the power to stay to close-out netting and the power to bring derivatives contracts into the resolution process. Any extension of powers would need to carefully weigh the need for operational flexibility with the preservation of property and contract rights. For example, whether stays would be only temporary or could be extended would need to be examined.

22. The fact that the list is comprehensive, however, does not preclude that the use of specific powers may be hindered by the type of insurer the activity it engages in and the geographical spread of its business. Clearly, the resolution of a cross-border group with a complex structure and interconnections with other elements of the financial system that, at the same time, is also engaged in NTNI would be particularly challenging for a resolution authority and would require cooperation with all other relevant authorities. But the difficulty does not rely on the instruments themselves, but on what could be called "the surrounding conditions". Some of these issues are explored in the response to Question 26.

23. Interestingly, internal research carried out by EIOPA and focused on the EU shows that a) Member States have different tools available and, therefore, not all tools considered can be used in all Member States at this stage; and b) even if a specific power is available in several jurisdictions, there may be substantial differences in terms of the extent to which this power is available, the way in which it is exercised, the role played by the authority and, in general, the existing legal framework governing the resolution powers. The legislative programme that would be required to bring harmonisation or at least consistency across jurisdictions should not be underestimated.

24. Summing up, EIOPA considers that the mentioned powers constitute a comprehensive list but believes that considerable, detailed work is required to fully examine how some of the powers could be used or adapted to the insurance sector.

25. A practical example of how this issue could be approached could be the distinction between a sort of a base toolkit (e.g. powers in KA 3.3, 3.4 and 3.7) and an additional toolkit (e.g. bail-in) which is not sufficiently tested and which shall be used only if and when all the other measures in the base toolkit proved unhelpful or in a winding-up context.

Question 23: Should the draft guidance distinguish between traditional insurers and those that carry out NTNI activities? If yes, please explain where such a distinction would be appropriate (for example, in relation to powers, resolution planning and resolvability assessments) and the implications of that distinction.

26. As highlighted in the previous question, the type of insurer and the kind of activity are two examples of surrounding conditions in which resolution takes place. It could be argued that the guidance should differentiate for

different types of insurers, however, this could lead to something of a fragmented body of guidance.

27. EIOPA is in favour of general guidance that would address within it the specificities of dealing with NTNI activities but would focus on the insurance sector as a whole (i.e. without restricting it to systemically relevant insurers). This approach is consistent with the "statutory status" attributed to the objective of policyholder protection, which is an objective to be pursued regardless of the type of insurer and the type of business.

28. Furthermore, following the IAIS initial assessment methodology for G-SII, the engagement in NTNI activities is one of the categories that determine the systemic relevance of an insurer. As a consequence, NTNI considerations are already embedded in the determination of the systemic relevance of an insurer and there is no need for an explicit distinction which would create an additional –and, probably, unnecessary– cluster. As stressed, this does not preclude that specific references to NTNI are made when deemed necessary, in particular when it comes to powers and their usefulness according to the different business lines, resolution planning and resolvability assessment (e.g. separation of activities).

Question 24: Are the additional statutory objectives for the resolution of an insurer (section 1) appropriate? What additional objectives (if any) should be included?

29. This question was addressed in the general observations' section, as it affects the whole Consultative document. As stressed there, EIOPA agrees that the protection of policyholders should be considered as part of the resolution framework, together with financial stability, but considers that further work is required to determine the hierarchy of objectives of resolution and when each one would be addressed.

30. This is in line with the IAIS Insurance Core Principles (ICPs) which promote the protection of policyholders as the objective of prudential supervision of insurers.

31. In addition to that, the Solvency II Directive (2009/138/EC) very clearly sets out policyholder protection as its main overarching goal. This is outlined in Recital 16, "The main objective of insurance and reinsurance regulation and supervision is the adequate protection of policyholders 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", and further substantiated by articles 27 and 28 of the Solvency II Directive. Lastly, also the reorganisation and winding-up of insurance undertakings Directive (2001/17/EC) refers to the preferential treatment of policyholders in case of winding-up.

32. Assigning to the objective of policyholders' protection a similar weight to the one assigned to financial stability would have two main consequences:

    a) Unjustified harm to policyholders in resolution should be avoided in order not to undermine the confidence in the insurance business and hinder its economic and social function.

b) The scope of application should be broadened beyond systemically relevant insurers based on the proportionality principle and on the judgement of national supervisory authorities. The rationale for this is to ensure the equal treatment of policyholders and reflecting the possibility that some of the tools may also be relevant for other classes of firms.

Question 25: Is the scope of application to insurers appropriately defined (section 2), having regard to the recognition set out in the preamble to the draft guidance that procedures under ordinary insolvency law may be suitable in many insurance failures and resolution tools are likely to be required less frequently for insurers than for other kinds of financial institution (such as banks)?

33. There are two elements to this question. On the general assumption stated in the preamble, EIOPA also shares the view 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, among other methods.

34. These tools have traditionally been available for insurance resolution and have been tested in several jurisdictions. However, they are primarily designed to deal with "slow-burn", individual failures rather than multiple failures. They have not been extensively tested in dealing with complex cross-border groups or sudden deterioration in the viability of large and complex firms. This fact calls for an extension of the traditional toolkit in order to cope with potential new challenges.

35. The second issue refers to the scope of application. This question was partially addressed in the general part, as it affects the whole Consultative document. EIOPA understands that a resolution regime is especially relevant for those insurers whose failure can create important systemic disruptions or limit availability of critical insurance cover. Care needs to be taken, however, not to be too narrow in focus.

36. EIOPA is of the view that a comprehensive guidance on resolution should ideally be applicable to all type of insurers. This implies that authorities should take any measures and exercise the powers strictly following the proportionality principle.

37. This idea is consistent with paragraph 4.2 ("choice of resolution powers") that states that resolution authorities "should only use those powers that are suitable and necessary to meet the resolution objectives" and that they "should take into account insurance specifies and, in particular, the types of business the insurer engages in and the nature of its assets and liabilities".

Question 26: Does the draft guidance (section 4) adequately address the specific considerations in the application to insurers of the resolution powers set out in KA 3.2? What additional considerations regarding the application of other powers set out in KA 3.2 should be addressed in this guidance?

38. Section 4 is the crucial part of the Consultative document as it should ensure that the KA 3.2 is adequately applied to insurance. EIOPA would like to point out, however, that some of the elements considered in this section raise significant issues that may hinder the applicability of several powers.

39. EIOPA's response to the EC included a preliminary assessment where some of these issues were mentioned.[7] The paragraphs below build upon the content of such preliminary assessment.

40. Specific comments on the powers analysed in sections 3 and 4:

Power	Issues for further assessment
Removal and replacement of senior management	No additional remark.
Appointment of an administration	No substantial remarks. Several questions may however arise, such us the precise mandate of the administrator, its powers, etc.
Operate and resolve the entity including taking commercial decisions to restructure or wind down the entity's operations	The comments included in paragraph 4.3 point to a full control to resolution authorities. However, several legal issues may emerge. For example: – Is this a Court decision or a matter of administrative law? – What rights of appeal would be available to the owners of the entity?
Restructuring of liabilities	The liability restructuration techniques mentioned are quite comprehensive. This tool, however, may raise substantial issues in those jurisdictions without the power to amend the existing contracts before the winding-up and would require further analysis of the potential implications, not only from a legal point of view, but also in terms of changes in policyholders' behaviour. Before the restructuring of liabilities, other options foreseen in some national laws could be considered. For example: a) giving the authorities the power to recover commissions and remunerations from intermediaries; and b) the possible specific regime applicable to insurers for the annulment of fraudulent or voidable transfers or acts.[8]
Bridge institution	This tool could be especially interesting in the context of dealing with multiple failures, but would also raise important issues, such us the ownership of the entity, its mandate, etc. In order to ensure sufficient flexibility of the legal framework, these questions are probably better addressed in resolution and not necessarily directly in the legal framework.
Portfolio transfer	No remark in addition to some of the comments made to other powers (e.g. restructuring of liabilities).
Suspend insurance policyholders' surrender rights	A full suspension of surrender rights should not be considered. This power should only be applied on a temporary basis and in a proportionate way. For example, this tool would be very useful in terms of managing

[7] See EIOPA's response to EC, Annex 1.

[8] As the effect of the execution of both tools may take some time (incompatible with the necessary urgency of the resolution), the simple knowledge by the intermediary or the beneficiary of the transfer of the firm of the authority's intention to activate those tools may achieve by itself the recuperation of relevant funds in the benefit of the insurer.

	derivative portfolios in the context of resolution. However, it also exposes to complexities surrounding reinsurance contracts in a resolution (see answer to Question 29).

41. Specific comments on other powers mentioned in KA 3.2 and 3.7:

Power	Issues for further assessment
Separate non-performing assets into a distinct vehicle	This is very much a banking power, designed to "clean the balance sheet" of an ailing bank, thereby allowing it to focus on business rather than having to deal with asset recovery, provisioning and recapitalisation issues. Insurance is very much a liability led business, with a significant degree of matching between assets and liabilities. It is not clear how such separation would be done in a practical sense and what it would achieve.
Override rights of shareholders of the firm in resolution	This power could in principle be applicable. In fact, once the resolution authority takes control of the firm then shareholder rights are overridden. This is the cost of being able to take action in the broader public interest to resolve a firm. The question that arises in this context is exactly what shareholder right are overridden? Do they retain any rights in relation to a sale of the business, putting it into run-off etc.?
Bail-in	See comments made to restructuring of liabilities. This is primarily a banking tool and is probably less effective in insurance. Its success is dependent on the availability of liabilities that can be bailed-in and the identification of the optimal amount/proportion of liabilities to be bailed-in. In principle, the same logic can be applied to the use of such a tool for insurance, especially in relation to systemically important insurance undertakings for whom such an instrument could be particularly worthwhile. It is important in the context of bail-in, however, to restate the preferred status of policyholders who should not be included in the scope of any bail-in framework. As in the banking case, the level at which bail-in is imposed in a corporate structure is important.
Temporarily stay the exercise of early termination rights	Insurers, like other financial institutions, enter into a wide range of contracts both commercial and financial with other entities. These contracts may involve essential services supplied to the insurer (e.g. IT services, data provision) or financial contracts (e.g. derivatives) entered into with other financial institutions. As with all other resolution situation, disorderly termination of contracts in the event of a resolution action may undermine that purpose of the action.
Impose a moratorium on payment flows	This power is related to the power to temporarily suspend policyholders' surrender right. The application of a moratorium in relation to policyholder/beneficiary payments needs to be carefully considered. In some instances the payments are of a critical/essential nature (e.g. health insurance). Further exploration of the appropriate limitation of a moratorium is required. This

	examination should also take account of the potential for the insurance guarantee scheme to make payments and then be subrogated in the resolution process.
Effect the closure and orderly wind-down of the company	Further assessment of the appropriate institutional structure is required in terms of whether the resolution authority itself is responsible for actual liquidation of the company or whether it would be outsourced.

42. EIOPA considers that resolution authorities should have the legal and operational capacity to use one or a combination or resolution powers, with resolution actions being either combined or applied sequentially.

Question 27: Does the draft guidance deal appropriately with the application of powers to write down and restructure liabilities of insurers (paragraphs 4.4 to 4.6)? What additional considerations regarding the application of 'bail-in' to insurers (if any) should be addressed in the draft guidance?

43. Please see answer to Question 26. EIOPA would like to restate the need to give a high priority to policyholders' claims in resolution, in line with KA 5. Losses should only be allocated to them as a last resort and strictly respecting the hierarchy of claims. As stressed, due to the very nature of the insurance business, an excessive or unjustified harm to policyholders in resolution may undermine the confidence in the insurance business and hinder its economic and social function. Furthermore, in line with paragraph 9.4 (ii), a lack of confidence may potentially trigger a policyholder run, thereby contributing to financial instability.

44. In addition, the point in time at which this tool may be used is an important and not uncontroversial issue. There is an argument that the policyholder interest may be best served by allowing restructuring prior to winding up rather than waiting until the firm is in wind-up. Under the current legislation, however, amending existing contracts before the winding-up may raise substantial issues in many jurisdictions. In order to develop a framework that is operational, it will be important to explore what can be achieved in different legal environments.

45. Restructuring challenges prevailing contract law and, where contracts can be changed, consent of all parties is usually required. For the sake of public good, the resolution authority may want to suspend existing contracts without requiring the consent of all parties. Unilateral action on the part of the resolution authority may, however, have to be confined to specific circumstances and with a minimum of formal guarantees to the affected policyholders (e.g. "least bad" solution criteria, a transparent and public decision, etc.).

46. In any case, EIOPA considers of the utmost importance that all parties affected by the decision of the resolution authority are informed in a timely and appropriate manner.

Question 28: Is it necessary or desirable for resolution authorities to have the power to temporarily restrict or suspend the exercise of rights by policyholders to withdraw from or change their insurance contracts in order to achieve an effective resolution (paragraph 4.9)?

47. The ability to impose temporary standstills, moratoria or other measures is a necessary tool to gain control in a resolution situation. It buys time for the resolution authority to get to grips with the situation and being temporary in nature means that agents regain their rights in good time.

48. Nevertheless, as stressed above, EIOPA is of the opinion that any resolution measure should only affect policyholders as a last resort, when all other alternatives have proven to be insufficient. Please see answer to Question 26 and 27.

49. If this measure is implemented, it should only be on a temporary basis and in a proportionate way. Its rationale should also be clearly explained. EIOPA considers that a full suspension of rights should not be included in the toolkit.

Question 29: Are there any additional considerations or safeguards that are relevant to the treatment of reinsurers of a failing insurer or reinsurer, in particular to:

i.) The power to transfer reinsurance cover associated with a portfolio transfer (paragraphs 4.7 and 4.8); and

ii.) The power to stay rights of reinsurers to terminate cover (paragraph 4.10)?

50. The contract between the insurer and the reinsurer may be related to one or several portfolios. EIOPA is of the view that the conditions attaching to these contracts need to be carefully considered in order to effect a portfolio transfer successfully.

51. Transfer without the consent of the reinsurer raises some questions given the conditionality surrounding a typical reinsurance contract and may also raise potential conflicts with national law and property rights of reinsurers. Perhaps the conditions for transfer need to be considered in terms of preserving the characteristics of reinsurance contract in its entirety.

52. In addition, the fact that reinsurance contracts are usually written on a one year cycle puts a natural boundary on any stay of rights since the contract would close under law and the reinsurer could not be compelled to renew.

53. Giving the resolution authority the power to stay rights of reinsurers to terminate cover would be useful in effecting transfers but in order to avoid a subsequent withdrawal the transfer should ensure the original contract conditions can be met.

Question 30: What additional factors or considerations (if any) are relevant to the resolvability of insurers or insurers that carry out particular kinds of business (section ~~8~~ 9)?

54. EIOPA considers that that the elements included in the Consultative document address all relevant aspects for a proper resolvability assessment.

55. Furthermore, the list of effects on third parties and financial stability as a whole also appears to be comprehensive. Some of the issues mentioned there seem, however, very difficult to assess for an insurer.[9]

56. EIOPA would also like to raise again the issue of the scope of applicability. The Consultative document only refers to systemically significant or critical insurers. There is a clear rationale for systemic insurers to carry out resolvability assessments. A fundamental question is whether the resolvability assessments should be extended to a limited number of other firms in a proportionate manner. EIOPA considers that supervisors should be able to ask for resolvability assessments where deemed necessary.

Question 31: What additional matters (if any) should be covered by recovery plans or resolution plans for insurers or insurers that carry out particular kinds of business (section ~~9~~ 10)?

57. Recovery and resolution planning plays a crucial role in resolution. EIOPA would expect such plans to be detailed, realistic and drafted in a pre-emptive way, and that they would not assume access to any support from public funds.

58. KA 11 and Annex 3 have been adequately applied to insurers in the Consultative document. This section includes all relevant elements needed for recovery and resolution planning. EIOPA considers, however, that the institutions responsible for the drafting of the different plans could be explicitly mentioned. EIOPA understands that, whereas recovery plans should be developed by the firms themselves, resolution plans should be developed by resolution authorities. In this regard, an explicit mention to KA 11.4 could be useful.[10]

59. In the case of recovery plans, EIOPA sees the need to add an additional element, which is also included in the resolution plan, i.e. the sources of funding. This is an issue that may be particularly challenging for insurers in times of distress, as some undertakings may not be able to access capital markets in case of need. Furthermore, external borrowing is generally considered a non-insurance activity and therefore is subject to significant restrictions in most jurisdictions. In a majority of cases no short term credit facilities or, *de facto*, access to external funding is available to insurance undertakings. Insurers need to pay special attention on the funding options they have available. A funding strategy should therefore be included in KA 10.7, together with 10.7 (i) on the actions to strengthen the capital situation.

60. Last but not least, EIOPA would like to raise again the issue of the scope of applicability. Restricting the applicability to systemically relevant and critical insurers limits this relevant tool that supervisors have at their disposal and may raise level playing field concerns. A certain flexibility granted to supervisors to extend both plans to a limited number of other firms in a proportionate manner if needed seems to be a more balanced approach.

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[9] This is the case, for example, with regard to the assessment of the lack of confidence in other insurers triggering a policyholder run.

[10] KA 11.4 reads: "Jurisdictions should require that the firm's senior management be responsible for providing the necessary input to the resolution authorities for (i) the assessment of the recovery plans; and (ii) the preparation by the resolution authority of resolution plans".

Question 32: Are the proposed classes of information that insurers should be capable of producing (section ~~10~~ 11) feasible? What additional classes of information (if any) should insurers be capable of producing for the purposes of planning, preparing for or carrying out resolution?

61. Insurers should be able to produce both in normal times and during resolution all relevant data and information needed to make feasible the resolution of firms without severe systemic disruption. In addition to the information mentioned in section 11, EIOPA believes that information on the Group structure and the interlinkages should be included. This would include elements such as allocation of capital around the group and possibility of transferability, intra-group transactions, operational interconnections through "centres of excellence" and extensive use of shared services.

62. In addition to that, EIOPA misses some reference to the need to share information among all relevant parties. This element is included in the title of the KA but is not addressed in the main text. An adaptation of the content of KA 12.1 could be considered.[11]

Question 33: Does this draft Annex meet the overall objective of providing sector-specific details for the implementation of the Key Attributes in relation to resolution regimes for insurers? Are there any other issues in relation to the resolution of insurers that it would be helpful for the FSB to clarify in this guidance?

63. In general, EIOPA is of the view that the Consultative document meets the overall objective of providing sector-specific details for the implementation of the KA to insurers. The idiosyncratic nature of the insurance sector is reflected in the document, which will be incorporated into the KA as an additional Annex. EIOPA is of the view, however, that the document should be drafted in a way that –based on the core elements of the KA– it can be read as a stand-alone document, and that cross-references to the general KA text should be avoided to the extent possible, in order to avoid any potential misinterpretation. This approach would strike a proper balance between ensuring a homogeneous implementation across sectors in the financial system, while unequivocally addressing the specific features of the different sectors.

64. In the general observations' part, EIOPA made some comments on the objective and scope of a resolution regime for insurance and on the transition from recovery to resolution, which the Authority considers very relevant.

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[11] KA 12.1 reads: "Jurisdictions should ensure that no legal, regulatory or policy impediments exist that hinder the appropriate exchange of information, including firm-specific information, between supervisory authorities, central banks, resolution authorities, finance ministries and the public authorities responsible for guarantee schemes. In particular:

(i) the sharing of all information relevant for recovery and resolution planning and for resolution should be possible in normal times and during a crisis at a domestic and a cross-border level;

(ii) the procedures for the sharing of information relating to G-SIFIs should be set out in institution-specific cooperation agreements (see Annex I); and

(iii) where appropriate and necessary to respect the sensitive nature of information, information sharing may be restricted, but should be possible among the top officials of the relevant home and host authorities".

65. In addition to that, EIOPA would like to briefly refer to the "pari passu principle" in KA 5 ("Safeguards") of the Consultative document. According to this principle, a resolution authority may define sub-classes of policyholders and treat those subclasses of policyholders differently in resolution. As pointed out, there should be no differential treatment of policyholders within the same sub-class. Although from a theoretical point of view this proposal is appealing, EIOPA considers that treating policyholders in a different way would not be easy to justify and implement in practice. The only exception is, probably, the distinction between policyholders covered by a policyholder protection scheme vs. those who are not. In any case, if this principle is used, the reasons should be clearly explained.

66. EIOPA also sees a need to further clarify the cross-border effectiveness of resolution (paragraph 7.1), considering that, in many cases, cross-border firms is the type of institutions that will be affected by the resolution process. The implications of this paragraph are not totally clear and should, therefore, be further elaborated.

67. Last but not least, EIOPA would like to highlight that the impact on property rights and contracts certainty of some of the powers in the resolution toolbox would need to be thoroughly tested in legal and constitutional terms in Member States.