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THE NEW EU INSURANCE RECOVERY AND RESOLUTION DIRECTIVE

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THE NEW EU INSURANCE RECOVERY AND RESOLUTION DIRECTIVE

The new EU recovery and resolution directive (IRRD) will create a harmonised recovery and resolution planning framework for EU insurance and reinsurance companies and groups. It will give new resolution authorities powers to resolve insurance and reinsurance companies and their holding companies where they are failing or likely to fail, as an alternative to normal insolvency proceedings. IRRD will also require insurance and reinsurance companies and their holding companies to include new bail-in and resolution stay recognition clauses in many contracts governed by the law of a non-EU state.

IRRD was published in the Official Journal on 8 January 2025 alongside the accompanying **Directive** amending the Solvency II Directive. Insurance companies and groups will need to take action to comply with their new obligations under IRRD. This may be particularly burdensome for insurance companies in Member States which do not already have a similar regime and for larger, more significant insurance companies and groups that will be subject to the new recovery and resolution planning process (especially as they may also be required to take action to remove impediments to recovery or resolvability), but all entities covered by the new regime will need to consider whether they need to make changes to their contracts or to revise their capital market disclosures.

In this briefing, unless otherwise indicated, references to insurance companies are to EU insurance companies, including EU reinsurance companies, references to insurance groups cover groups including an insurance company subject to group supervision in the EU, including financial conglomerates. and references to the EU include the EEA, where applicable.

When will the new rules begin to apply?

IRRD enters into force on 28 January 2025 and will require Member States to adopt their national implementing rules by 29 January 2027 (24 months after IRRD enters into force) and to apply the new requirements to entities covered by the Directive from 30 January 2027.

The Directive only sets minimum harmonisation rules and Member States may add to the requirements described in this briefing when implementing IRRD into national law. The practical application of IRRD will also depend on how it is implemented and applied in each Member State.

IRRD will require the European Insurance and Occupational Pensions Authority (EIOPA) to consult on and publish guidelines and deliver drafts of regulatory technical standards (RTS) and implementing technical standards (ITS) for adoption by the Commission (see Box). The Commission may amend EIOPA's draft RTS and ITS and the RTS adopted by the Commission will not come into force until after expiry or early termination of the European Parliament and Council no-objection period. As a result, some details of firms' obligations under the Directive may not be available at the time those obligations begin to apply.

Key issues

- IRRD will cover EU (re)insurance companies and certain EU holding companies
- New insurance resolution authorities will have harmonised powers
- Insurers and holding companies will have new recovery and resolution planning obligations
- Supervisors will have new preventive powers
- There will be harmonised objectives and triggers for resolution of failing entities
- A common set of resolution tools (solvent run-off, sale, bridge undertaking, asset separation, bail-in) will apply
- Safeguards will be available to shareholders and creditors
- Member States must establish new industry-funded financing arrangements for resolution funding
- Insurers and holding companies will need to include bail-in and resolution stay recognition clauses in many contracts governed by the law of a non-EU state
- Member States must apply the new rules from January 2027
- The current UK government has not yet confirmed its plans for a specific UK resolution regime

Deadlines for EIOPA to publish guidelines and deliver draft RTS and ITS		
Ref	**Form**	**Content**
Deadline: 29 July 2026		
Art 5	RTS	Recovery plans: criteria and methods for selecting coverage and information to be included in plans.
Art 9	RTS	Resolution plans: content of individual resolution plans.
Art 10	RTS	Resolution plans: content of group resolution plans.
Art 12	ITS	Resolution plans: procedures and templates for providing information to resolution authorities.
Art 70	RTS	Resolution colleges: operational functioning of colleges.
Deadline: 29 January 2027		
Art 5	Guidelines	Recovery plans: scenarios and indicators.
Art 9	Guidelines	Resolution plans: criteria for identifying critical functions.
Art 13	Guidelines	Resolvability assessments: further matters and criteria for assessments.
Art 66	Guidelines	Confidentiality: disclosure of information in summary or collective form.
Deadline: 29 July 2027		
Art 4	Guidelines	Recovery and resolution plans: criteria for applying simplified obligations.
Art 15	Guidelines	Resolvability assessments: measures to address impediments to resolution.
Art 24	RTS	Valuations: independence of valuer and separation of valuations.
Art 25	RTS	Valuations: methodology for calculating buffer for additional losses.
Art 40	RTS	Bail-in: valuation of derivatives liabilities.
Art 52	RTS	Resolution stays: content of contractual clauses.
Art 56	RTS	NCWO compensation: valuation methodology.

What are the objectives of IRRD?

The Commission's explanatory statement in its 2021 legislative proposal for IRRD noted that:

> The disorderly failure of insurers can … have a significant impact on policy holders, beneficiaries, injured parties or affected businesses, especially where critical insurance services cannot be substituted in a reasonable amount of time and at a reasonable cost. The management of a near-failure or the failure of certain insurers, particularly large cross-border groups, or the simultaneous failure of multiple insurers can also lead to or amplify financial instability.

The Key Attributes of Effective Resolution Regimes for Financial Institutions published by the Financial Stability Board (FSB) in 2011 (and updated in 2014 and 2024) set out the core elements that national regimes should have to allow authorities to resolve failing financial institutions, including insurance companies, in an orderly manner without taxpayer exposure to loss from solvency support, while maintaining continuity of their vital economic functions. In August 2020, the FSB published its methodology to guide the assessment of the compliance of a jurisdiction's insurance resolution framework with the Key Attributes and, in December 2024, the FSB published a list of 13 insurers reported by FSB members for inclusion in the list of insurers subject to resolution planning standards consistent with the FSB Key Attributes. The International Association of Insurance Supervisors has also published standards on market exit and resolution.

However, Member States have taken very different approaches to addressing the risk of failures of insurance companies. Some, like France, the Netherlands and Romania, have adopted regimes aligned with the Key Attributes, while others rely on insolvency and reorganisation proceedings.

The European Commission published its legislative proposal for IRRD in September 2021, alongside its proposals for reform of Solvency II. This followed the Commission's February 2019 call to EIOPA for advice on the review of Solvency II and EIOPA's advice to the Commission in December 2020 supporting the adoption of a harmonised resolution regime, despite a widespread industry view that such a regime is unnecessary.

The IRRD aims to ensure that EU authorities have a harmonised, credible set of resolution tools to intervene sufficiently early and quickly if insurance companies are failing or likely to fail, to ensure a better outcome for policy holders, while minimising the impact on the economy, the financial system and any recourse to taxpayers' money. In many respects, IRRD is modelled on the 2014 EU bank recovery and resolution directive (BRRD), which created a resolution regime for the banking sector aligned with the FSB's Key Attributes. However, there are many differences between IRRD and BRRD, reflecting the different issues presented by the insurance sector.

There are many differences between IRRD and BRRD, reflecting the different issues presented by the insurance sector

What is the coverage of the new regime?

The new regime will apply to EU insurance and reinsurance companies covered by Solvency II, EU insurance holding companies and EU mixed financial holding companies, i.e., EU holding companies heading groups covered by the EU financial conglomerates regime. However, IRRD does not, unlike BRRD, apply to other EU holding companies (such as 'mixed-activity insurance holding companies') or other financial institutions that are subsidiaries of holding companies covered by the Directive. Some provisions also apply to group entities that provide goods or services needed to maintain the continuous functioning of the operations of an insurance company or to ensure continuity of insurance coverage and to EU branches of non-EU insurance companies.

There may be an overlap between the recovery and resolution planning process under IRRD and BRRD where groups contain both an EU insurance company and an EU bank (or a qualifying EU investment firm). EU mixed financial holding companies may be subject to planning requirements and resolution powers under both regimes.

The IRRD requires supervisory and resolution authorities to take a proportionate approach when applying the regime, taking into account an individual entity's business, ownership structure, legal form, risk profile, size, legal status, interconnectedness and the scope and the complexity of its activities.

Who will be the new resolution authorities?

IRRD will require each Member State to have an insurance resolution authority equipped with a minimum harmonised set of powers (these are national authorities: there will be no EU-level or eurozone body corresponding to the Single Resolution Board in the banking sector). These authorities will play an important role in the ongoing regulatory relationships of insurance companies and insurance groups.

If the authority has existing supervisory or other functions, there must be adequate structural arrangements to avoid conflicts of interest and to ensure the operational independence of the insurance resolution function. Member States will not be able to create a single, integrated resolution authority covering both the insurance and banking sectors, although the Directive allows some sharing of staff in limited circumstances.

For insurance groups, the group-level resolution authority will be the resolution authority in the Member State where the group supervisor is located. IRRD also provides for the creation of resolution colleges which will play a role in the decision-making process to address cross-border issues for insurance groups. The college will be chaired by the group-level resolution authority and will include, amongst others, EIOPA, the resolution authorities of the home Member States of all group insurance companies and of the Member States in which those companies carry on significant cross-border activities and the group supervisor and the supervisory authorities in each Member State whose resolution authority is a member of the college.

Where the group is or is part of a financial conglomerate, the relevant bank resolution authorities designated under BRRD will be invited to participate as observers in the insurance college established under IRRD and the relevant insurance resolution authorities will be invited to participate as observers in the resolution college under BRRD. IRRD also creates other arrangements for information sharing on recovery and resolution issues in relation to financial conglomerates between insurance and bank supervisory and resolution authorities.

What are the new recovery planning obligations?

Member State supervisors may require (stand-alone) insurance companies that are not part of an insurance group to prepare individual pre-emptive recovery plans and group supervisors may require the ultimate EU parent undertaking of an insurance group to prepare a group pre-emptive recovery plan. Supervisors will determine the application of these requirements based on the size, business model, risk profile, interconnectedness, substitutability, economic importance and cross-border activity of the insurance company or companies concerned but supervisors will have to ensure that these plans cover at least 60% of the relevant insurance markets in a Member State and include all insurance companies subject to resolution planning.

Recovery and resolution plans must be updated biannually and on any material change to the business

Supervisors may also require insurance companies or holding companies within a group to prepare pre-emptive recovery plans where no group plan exists or if the supervisor determines that the group plan does not adequately consider an individual company given its significance and if other conditions are met. Insurance companies classified as small and non-complex undertakings under Solvency II (as amended) will be exempt from pre-emptive recovery planning unless the supervisor considers that they represent a particular risk at national or regional level.

Entities will have to submit the plans to their supervisor or the group supervisor for review. They will have to update them at least every two years or when there is a material change in their or their group's legal or organisational structure, business or financial situation or such a change to its financial position becomes foreseeable (for example, as a result of an acquisition or other corporate restructuring).

The plans will have to address the remedial action that the company or group may take, against a framework of indicators of the points at which remedial action will be considered, in the context of a range of scenarios of severe macroeconomic and financial stress, including system-wide events, idiosyncratic stress events and combinations of both events. Member States must ensure that breach of an insurance company's Solvency Capital Requirement (SCR) results in appropriate remedial action in line with the plan. Plans may not assume access to any extraordinary public support.

EIOPA will adopt guidelines on the criteria for determining when simplified planning obligations can apply to smaller or less significant insurance companies or groups. The supervisory authority will have powers to direct the remediation of deficiencies in the plan and impediments to recovery.

Solvency II already requires insurance companies to submit realistic recovery plans for approval by their supervisors within two months of a breach of their SCR. IRRD will require insurance companies that have submitted such a recovery plan in the last ten years to include that plan in their recovery plan under IRRD along with an assessment of the measures taken to restore compliance with the SCR.

How will resolution authorities carry out resolution planning?

Resolution authorities will have powers to prepare resolution plans for insurance companies not part of a group subject to group resolution planning and the group-level resolution authority will have powers to prepare group resolution plans for insurance groups, in each case where they assess it is more likely (when compared to other insurance companies under their remit) that resolution action would be in the public interest in the event of an insurance company's failure or if they assess that an insurance company performs a critical function (broadly, a service or activity performed for third parties that cannot be readily substituted and where the inability to perform the service or activity would be likely to have a significant impact on the financial system or the real economy). These assessments will take into account the company's size, business model, risk profile, interconnectedness, substitutability and cross-border activity but supervisors will have to ensure that these plans cover at least 40% of the relevant insurance markets in their Member State.

Resolution authorities may also prepare resolution plans for insurance companies or holding companies within a group where no group plan exists. Insurance companies classified as small and non-complex undertakings under Solvency II (as amended) will be exempt from resolution planning

Resolution authorities will update the resolution plan at least every two years or when there is a material change in the legal or organisational structure, business or financial situation of the company or group or such a change in financial position becomes foreseeable (for example, as a result of an acquisition or other corporate restructuring). Insurance companies or group holding companies will have to provide extensive information to their resolution authority or group resolution authority to enable the authority to prepare the resolution plan as well as information on developments that might trigger the need for an update.

Resolution plans will, among other things, set out the options for applying resolution tools and resolution powers to the insurance company or group, demonstrate how critical functions and core business lines can be separated, identify potential impediments to resolution and measures required to remove those impediments, identify measures necessary to facilitate group resolution and identify available sources of funding (including from resolution financing arrangements or insurance guarantee schemes). Plans may not assume access to any extraordinary public support. EIOPA will adopt guidelines on the criteria for determining when simplified planning obligations can apply to smaller or less significant insurance companies or groups.

When preparing or updating resolution plans, the resolution authority will also assess the resolvability of the insurance company or group, i.e., whether it is feasible and credible for the relevant entities to be wound up under normal insolvency proceedings or for the resolution authority to resolve them using the resolution tools and powers under IRRD without extraordinary public support (besides, where available, resolution financing arrangements or insurance guarantee schemes) and taking into account the detailed list of resolvability dimensions set out in the Annex to IRRD. Where the resolution authority assesses that resolution action may be in the public interest, it must

IRRD does not require companies or groups to maintain a minimum level of own funds and eligible liabilities to facilitate resolution

select the preferred resolution actions to achieve the resolution objectives, assess the feasibility of and identify potential impediments to that action, and assess the credibility of that action, taking into account its likely impact on Member State and EU financial systems and economies and the interests of policy holders, beneficiaries and claimants, with a view to ensuring the continuity of critical functions of the company or group.

Insurance companies and groups may need to carry out restructuring or other actions to remove impediments to resolvability. The resolution authority will have powers to direct the taking of measures to address or remove substantive impediments to resolvability.

Unlike BRRD, IRRD does not require insurance companies or groups to maintain a minimum level of own funds and eligible liabilities (MREL) to facilitate resolution (or restrict the sale of subordinated eligible liabilities to retail investors).

What are the new preventive powers for supervisors?

Solvency II already creates a ladder of intervention under which supervisory authorities have powers to intervene to protect policy holders when the solvency position of an insurance company deteriorates. The Solvency II amending directive will ensure that supervisors have a minimum set of additional powers in these circumstances, including powers to direct an update to or activation of the pre-emptive recovery plan under IRRD and to suspend or restrict variable remuneration and bonuses, dividends and other distributions on own funds instruments and repayment and repurchases of own funds items.

Supervisors will have powers to suspend bonuses, dividends and share repurchases

Unlike BRRD, IRRD does not provide a specific preventive power allowing the removal of management or the appointment of a temporary administrator. It also does not provide a specific regime to facilitate parent undertakings providing intragroup financial support to subsidiaries that meet the conditions for the exercise of preventive powers by supervisors.

What are the objectives and principles governing resolution action?

When using their resolution powers, resolution authorities will have regard to the resolution objectives of protecting the collective interest of policy holders, beneficiaries and claimants, maintaining financial stability, ensuring the continuity of critical functions and protecting public funds, while minimising the cost of resolution and avoiding unnecessary value destruction.

Resolution authorities will also take steps to ensure that resolution respects specified principles. Shareholders should bear first losses, creditors should bear losses after shareholders in order of priority of their claims in normal insolvency proceedings, creditors of the same class should be treated equally and no shareholder or creditor should incur greater loss than if the company had been wound up under normal insolvency proceedings (the NCWO principle). In addition, senior management should be replaced (except where its retention is necessary for resolution), management should provide necessary assistance to resolution, and natural and legal persons responsible for failure should be made liable under civil and criminal law.

What are the conditions for resolution action?

IRRD aims to ensure that resolution authorities can take resolution action at an earlier stage than normal insolvency proceedings in relation to all insurance companies and holding companies covered by the Directive, even if they are exempted from recovery and resolution planning. The resolution authority will be able to take resolution action where the insurance company or holding company is failing or likely to fail, there is no reasonable prospect of other actions preventing failure in a reasonable time and resolution is necessary in the public interest.

Resolution action can be taken at an earlier stage than normal insolvency proceedings

An entity is failing or likely to fail when it breaches or is likely to breach its Minimum Capital Requirement (MCR) under Solvency II (and there is no reasonable prospect of compliance being restored), the entity no longer meets the conditions for authorisation or is in serious breach of its obligations, the assets of the entity are less than its liabilities, the entity is unable to pay its liabilities when due, or the entity requires extraordinary public financial support (or there are objective elements indicating that the entity will, in the near future, be in serious breach of its obligations justifying withdrawal of authorisation, balance sheet insolvent or unable to pay its liabilities when due).

Resolution is in the public interest where it is a necessary and proportionate way of achieving the resolution objectives and normal insolvency proceedings would not achieve those objectives to the same extent. If the other conditions are met but resolution is not in the public interest, the failing entity will have to be placed in winding up proceedings or other proceedings under national law opened and monitored by the supervisory authority.

The resolution authority will also be able to take resolution action against holding companies where the conditions for resolution are met with respect to a subsidiary insurance company, that subsidiary's failure threatens another group insurance company or the group as a whole (or the insolvency law of the relevant Member State requires that groups be treated as a whole) and resolution action at the holding company level is necessary for the resolution of the subsidiary insurance companies or the group as a whole.

What powers will resolution authorities have?

Where the conditions for resolution are met, the resolution authority will be able to use the five resolution tools (see Box). These are modelled on the BRRD with the exception of a new tool, solvent run-off.

The resolution tools	
Solvent run-off	• Prohibition on writing new business. • Run-off of existing contracts. • If its authorisation is withdrawn, entity must still comply with MCR at outset and certain other Solvency II rules on ongoing basis.
Sale-of-business	• Transfer of shares or all or part of assets/liabilities to a purchaser on commercial terms. • If a partial transfer, residual entity wound up.
Bridge undertaking	• Transfer of shares or all or part of assets/liabilities to a bridge undertaking controlled by public authorities or (at Member State option) an insurance guarantee scheme. • Bridge undertaking may write new business and aim is to achieve an eventual sale. • Insurance guarantee scheme may not write new business and aim is to guarantee settlement of claims. • If a partial transfer, residual entity wound up.
Asset and liability separation	• Transfer of all or part of assets/liabilities to asset and liability management vehicles(s) controlled by public authorities. • Aim to maximise value by sale or orderly wind down.
Write-down and conversion (bail-in)	• Power to write-down capital instruments and eligible liabilities (or convert them to shares). • All insurance and other liabilities are eligible except certain secured, short-term and operational liabilities and certain liabilities arising from compulsory motor insurance.

IRRD states that the tools may be used individually or in any combination, except for the asset and liability separation tool, which may only be used together with another resolution tool. However, unlike BRRD, the IRRD does not state that the bail-in tool can be used by itself to recapitalise an entity to enable it to continue its business. Instead, IRRD only requires Member States to ensure that the bail-in tool can be used to facilitate a solvent run-off or a transfer of liabilities to a purchaser, bridge undertaking or asset and liability management vehicle.

IRRD also provides that the bail-in tool must be used to write-down and convert both capital instruments and (unlike BRRD) all eligible liabilities whenever resolution action would result in losses being borne by creditors, in particular policy holders. This could, for example, require the write-down of liabilities beyond just capital instruments in the case of a partial transfer of business. However, the bail-in tool can only be used to

convert insurance claims into capital instruments where the resolution objectives cannot be achieved by other means or conversion provides better protection to policy holders.

Member States may also exclude certain liabilities arising from insurance claims from bail-in where they are covered by assets or arise under certain private health and long-term care policies. Resolution authorities can also exclude liabilities from bail-in specified situations, including where necessary to protect third parties covered by compulsory third-party liability insurance.

Like BRRD, IRRD requires resolution authorities to close-out derivative contracts before applying the bail-in tool to the net liability resulting from the close-out. It also requires Member States to ensure that all claims resulting from own funds items have a lower priority ranking in normal insolvency proceedings than any claim that does not result from an own funds item (so as to facilitate bail-in of own funds items without triggering claims for NCWO compensation). However, unlike BRRD, IRRD does not require resolution authorities to write down capital instruments at the point of non-viability where resolution action is not being taken.

Resolution authorities will have other powers to support resolution action, including powers to:

- restructure insurance claims, cancel or reduce insurance claims and otherwise cancel or modify contracts;
- control the entity under resolution, exercise rights of shareholders and directors, replace management and appoint a special manager; and
- require group entities to provide operational services or facilities to support the entity under resolution.

Member States must also give resolution authorities powers to ensure that goods or services provided by group entities and needed to maintain the continuous functioning of the operations of an insurance company or to ensure continuity of insurance coverage can continue to be provided where the provider is insolvent (or will become insolvent in the near future). This may include allowing resolution authorities to use resolution powers in relation to the supplier.

IRRD will override certain contractual clauses triggered by the exercise of preventive or resolution powers (e.g., change of control, acceleration or termination clauses). The resolution authority will also be able to stay the performance of obligations, the termination of contracts or the enforcement of security interests for a short period after (but not, unlike under BRRD, before) taking resolution action. In addition, it will have the power to temporarily restrict or suspend redemption rights of policy holders in relation to life insurance contracts.

Supervisory authorities may only adopt measures with respect to an entity under resolution with the agreement of the resolution authority and may be required to terminate existing measures that hinder the use of resolution tools.

What are the safeguards for shareholders and creditors?

Where the resolution tools are used to transfer part of the business of an entity under resolution to a purchaser, bridge undertaking or asset and liability management vehicle or to write down or convert claims into equity, IRRD will ensure that NCWO compensation is paid to shareholders, policy holders, beneficiaries, claimants and other creditors whose claims are not transferred or whose claims are written down or converted, if a valuation shows that they are worse off than if the entity had been wound up under normal insolvency proceedings.

Shareholders and creditors will be compensated if they are worse off than in normal insolvency proceedings

Additional safeguards will apply where the resolution tools are used to transfer part of the business of an entity under resolution to a purchaser, bridge undertaking or asset and liability management vehicle or where resolution authorities make use of the ancillary power to cancel or modify contracts. These safeguards include:

- protection against a transfer of some but not all rights and liabilities under a title transfer collateral, set-off or netting arrangement or a reinsurance agreement (and against the modification or termination of rights protected by the arrangement or agreement);
- protection against a transfer of a secured liability without the assets to which security applies or of those assets without the secured liability (and against a modification or termination resulting in a secured liability ceasing to be secured);
- protection against a transfer of some but not all of the assets, rights and liabilities constituting a structured finance arrangement or unit-linked insurance or other ring-fenced portfolio (and against a modification or termination of assets, rights and liabilities which constitute or form part of such an arrangement or portfolio); and
- protection for clearing, settlement and other systems designated under the Settlement Finality Directive.

What are the arrangements for resolution funding?

IRRD requires each Member State to establish financing arrangements which can be used to satisfy claims of shareholders or creditors for NCWO compensation, funded by upfront or after-the-event contributions from insurance companies authorised in that Member State and branches in that Member State of non-EU insurers. The Directive gives Member States discretion as to the design of these arrangements, including the possibility of using them to cover other costs associated with the use of resolution tools.

Unlike in the banking sector, there is currently no existing harmonised system of insurance guarantee arrangements that can support resolution and Member States have differing arrangements for protecting policy holders of failed insurance companies. IRRD will require the Commission, by 29 January 2027 (24 months after IRRD enters into force) and after consulting EIOPA, to submit a report to the European Parliament and to the Council on the appropriateness of setting minimum common standards for insurance guarantee schemes, accompanied by a legislative proposal, if appropriate.

Is there any special treatment for (re)insurance claims?

Resolution authorities will be able to use the resolution tools to transfer or bail-in both insurance and reinsurance claims on insurance and reinsurance companies, in much the same way as other liabilities.

The resolution objective of protecting the collective interest of policy holders is only one of the resolution objectives (of equal significance with the others), but the recitals to the Directive state that both insurance and reinsurance claims should only be subjected to bail-in as a last resort and that resolution authorities should carefully consider the consequences of bail-in on claims under insurance contracts held by natural persons and micro, small and medium-sized enterprises. As already mentioned, IRRD also does impose some restrictions on the use of the bail-in tool to convert insurance claims into capital instruments.

In any event, the resolution principles envisage that creditors should bear losses after shareholders in order of priority of their claims in normal insolvency proceedings and that no shareholder or creditor should incur greater loss than in normal insolvency proceedings. Accordingly, direct insurance claims have some protection from bail-in or loss resulting from a partial transfer of business because of their super-priority position in the creditor hierarchy in normal insolvency proceedings. Solvency II requires Member States to ensure that direct insurance claims have priority over other creditors of an insurance company through an absolute priority claim on the insurance company's assets representing its technical provisions and/or a general priority in relation to all the company's assets (subject to limited classes of preferential claims). The extent to which reinsurance claims are protected from bail-in or losses resulting from a partial transfer will principally depend on their position in the creditor hierarchy in normal insolvency proceedings under national law.

When bailing-in direct insurance claims, the resolution authority will have a specific power to restructure the related insurance contracts (alongside its general power to cancel or modify contracts), but must take into account that compulsory minimum coverage levels under applicable law are met after the contract has been restructured. IRRD leaves it to national law to protect the rights of written-down policy holders to obtain compensation for the full amount of their claim under national insurance guarantee schemes.

When using resolution powers to transfer insurance or reinsurance claims to another entity, resolution authorities may also transfer rights under related reinsurance policies. However, some classes of unit-linked insurance and other ring-fenced portfolios and reinsurance agreements benefit from specific safeguards in the case of partial transfers and the use of the ancillary power to modify or cancel contracts. As already mentioned, resolution authorities will have powers to temporarily restrict or suspend redemption rights of policy holders in relation to life insurance contracts.

Insurance and reinsurance claims should only be subjected to bail-in as a last resort

Will insurers have to include new clauses in their contracts?

Like BRRD, IRRD includes provisions to address the risk that non-EU courts may not give effect to the application of resolution powers in relation to contracts not governed by the law of a Member State unless the contract includes clauses under which the counterparty agrees to recognise and be bound by the application of those powers. These provisions will apply to insurance companies and holding companies even if it is unlikely that they will be subject to resolution action given their size or significance.

IRRD will require insurance companies and holding companies that may be subject to resolution powers to include bail-in recognition clauses in their contracts governed by the law of a non-EU state if the contract relates to a liability that is capable of being bailed-in. Resolution authorities may require legal opinions as to the effectiveness of these clauses. However, unlike BRRD, IRRD does not provide any exemption for existing contracts or for contracts where it may be impracticable to include the clause and does not require the adoption of technical standards to specify the contents of the required clauses.

In addition, IRRD will require insurance companies and holding companies that may be subject to resolution powers to include resolution stay recognition clauses in their financial contracts governed by the law of a non-EU state. This requirement will only apply to contracts creating new obligations or materially amending existing obligations after entry into force of the relevant national implementing provisions. It will also only apply if those contracts provide for termination rights or security enforcement rights affected by the IRRD override or stay. Member States may also require ultimate parent companies to ensure that certain non-EU subsidiaries also include resolution stay recognition clauses in certain financial contracts governed by the law of a non-EU state.

The definition of financial contracts includes securities, derivatives and certain other financial markets contracts (but probably does not cover insurance or reinsurance contracts). Technical standards will specify the contents of the required clauses, but these standards may not come into effect until after companies are required to implement these provisions.

Insurance companies and holding companies may also need to include new risk disclosures in their capital markets offering materials to reflect the potential impact of IRRD on investors, even if the transaction is governed by the law of a Member State. Insurance companies may also need to address concerns of customers and counterparties as to the potential impact of the new regime on their insurance or reinsurance contracts.

Many contracts governed by non-EU laws will have to include bail-in recognition and resolution stay recognition clauses

What is the treatment of non-EU insurers?

IRRD will allow Member State resolution authorities to recognise and give effect to comparable resolution actions taken by non-EU authorities in relation to EU subsidiaries, EU branches of non-EU insurance companies and parent companies. It will also allow Member State resolution authorities to take their own resolution action against EU branches of non-EU insurance companies. In addition, IRRD provides that, where a non-EU group includes subsidiaries established in two or more Member States

or a non-EU entity has significant branches in two or more Member States, the resolution authorities in those Member States may establish a European resolution college to coordinate activities in relation to the group or entity.

What changes were made to the original legislative proposal?

The final text of IRRD makes changes to the Commission's original 2021 legislative proposal, including:

- extending the deadline for national implementation from 18 months to 24 months after entry into force of the Directive;
- giving EIOPA more time to develop some of the guidelines and technical standards under the Directive;
- reducing the minimum coverage of recovery planning: plans for both insurance companies and groups will only have to cover 60% (instead of 80%) of Member States' insurance markets;
- reducing the minimum coverage of resolution planning: plans will only have to cover companies and groups where the use of resolution tools is more likely to be in the public interest in the event of their failure and, for both insurance companies and groups, 40% (instead of 70%) of Member States' insurance markets;
- reducing the frequency of mandatory periodic updates to recovery and resolution plans (every two years instead of annually);
- setting out a detailed list of resolvability dimensions that resolution authorities must consider when assessing resolvability;
- permitting bridge undertakings to continue to write new insurance business and allowing transfers of business to insurance guarantee schemes;
- providing for restrictions on the scope of bail-in to exclude liabilities arising from some kinds of insurance;
- providing for the closing out of derivatives subject to bail-in;
- restricting the ability of supervisory authorities to take measures that might conflict with resolution action;
- giving resolution authorities powers to require group companies to continue providing essential goods or services even where the supplier is insolvent;
- requiring each Member State to establish industry-funded financing arrangements to support resolution;
- requiring the Commission to report to the European Parliament and to the Council on whether to set minimum common standards for insurance guarantee schemes,
- providing for information-sharing and cooperation arrangements between insurance and banking resolution and supervisory authorities in relation to financial conglomerates; and
- providing for the establishment of European resolution colleges in relation to non-EU groups and entities with subsidiaries or branches in the EU.

What is the UK regime for failing insurers?

UK law provides a choice of restructuring options for failing UK insurers: run-off, transfer of business under Part 7 of the Financial Services and Markets Act 2000 (FSMA) and a scheme of arrangement or restructuring plan under Part 26 or 26A of the Companies Act 2006. It also provides a range of insolvency options, including administration, compulsory or voluntary liquidation and a court approved write-down of contracts under section 377 of FSMA.

The Financial Services and Markets Act 2023 made amendments enhancing the regime for a court-approved write-down of contracts by clarifying and extending the court's powers, creating a new role of 'write- down manager' to oversee the process and protecting written-down policy holder rights to obtain compensation for the full amount of their claim under the Financial Services Compensation Scheme. It also created a new moratorium regime to accompany write-down and insolvency proceedings restricting the exercise of termination rights in service contracts and financial contracts and a stay (suspension) of the surrender rights of life policy holders.

In 2023, HM Treasury consulted on the introduction of a specific resolution regime for failing insurers aligned with international standards. Following the consultation, the previous government had indicated that it planned to legislate to introduce the new regime when parliamentary time allows but the current government has not yet confirmed its plans in this regard.

The new UK government has not yet confirmed its plans to legislate for a specific resolution regime for failing insurers

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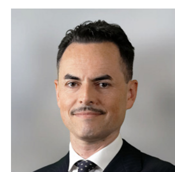

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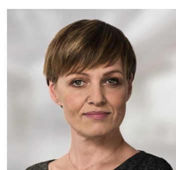

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