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REPORT

From: Presidency

To: Permanent Representatives Committee (Part 2)

Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2014/59/EU as regards early intervention measures, conditions for resolution and financing of resolution action

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2014/49/EU as regards the scope of deposit protection, use of deposit guarantee schemes funds, cross-border cooperation, and transparency

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) No 806/2014 as regards early intervention measures, conditions for resolution and funding of resolution action

- Progress report

I. GENERAL REMARKS

1. **On 16 June 2022, the Eurogroup stated** that “*Today, we have agreed that, as an immediate step, work on the Banking Union should focus on strengthening the common framework for bank crisis management and national deposit guarantee schemes (CMDI framework). [...] We invite the co-legislators to complete any legislative work during this institutional cycle until early-2024*”. The Eurogroup further listed the broad elements which should underpin the strengthened Crisis Management and Deposit Insurance framework:

- *A clarified and harmonised public interest assessment,*
- *Broadened application of resolution tools in crisis management at European and national level, including for smaller and medium-sized banks, where the funding needed for effective use of resolution tools is available, notably through MREL and industry-funded safety nets.*
- *Further harmonisation of the use of national deposit guarantee funds in crisis management, while ensuring appropriate flexibility for facilitating market exit of failing banks in a manner that preserves the value of the bank’s assets. A harmonised least-cost test, administered by national authorities, to govern the use of DGS funds outside payout to covered depositors, to ensure consistent, credible and predictable outcomes.*
- *Harmonisation of targeted features of national bank insolvency laws to ensure consistency with the principles of the European CMDI framework.*

In addition to the above, it specified that “*the improved Crisis Management and Deposit Insurance framework will take due account of the specificities in the national banking sectors, including by preserving a functioning framework for institutional protection schemes to implement preventive measures*”.

2. **On 18 April 2023, to kickstart the legislative work, the European Commission (hereinafter, the Commission) adopted a proposal to adjust and further strengthen the existing European Union bank crisis management and deposit insurance framework.**

The aim of the Commission's proposal is to make the Crisis Management and Deposit Insurance framework more robust and credible, in particular to facilitate the recourse to transfer strategies in resolution with market exit for smaller and medium-sized institutions, also through a more effective use of industry funded safety nets to complement, when necessary, the banks' loss absorption and recapitalization buffers. The aim of the reform is to ensure a more robust financial system by: (i) improving the protection of financial stability; (ii) minimising the effects of failing institutions for the economy; (iii) improving depositor protection and iv) protecting taxpayers' money.

3. **The Crisis Management and Deposit Insurance package comprises the following legislative proposals:**

- Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 806/2014 as regards early intervention measures, conditions for resolution and resolution action financing (COM 226/2023) (**amends the Single Resolution Mechanism Regulation**);
- Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU as regards early intervention measures, conditions for resolution and financing of resolution action (COM 227/2023) (**amends the Bank Recovery and Resolution Directive**);

- Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/49/EU as regards the scope of protection of deposits, the use of deposit guarantee scheme funds, cross-border cooperation and transparency (COM 228/2023) (**amends the Deposit Guarantee Schemes Directive**);
- Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU and Regulation (EU) No 806/2014 as regards certain aspects of the minimum requirement for own funds and eligible liabilities (**Daisy Chains**).

4. **Discussions on these files have taken place in the Council Working Party on Financial Services and the Banking Union since May 2023:** After the first kick-off meeting held under the Swedish Presidency (on 24 May), the Spanish Presidency set out an ambitious work plan for the Working Party to cater for the importance, length and complexity of the initiative. The goal was to make as much substantial progress as possible, while encouraging thorough discussions among the delegations. To this end, the Working Party has held six meetings (on 7 July, 20 July, 18 September, 9 October, 31 October and 21 November). The joint efforts of both Presidencies and Member States, with the help of the European Commission, have allowed the Council to exchange views on many elements of the package. The discussions have been constructive and conducted in a spirit of reaching a compromise.

5. **The Presidency believes that significant progress has been made and that the outlines of a compromise have emerged in a number of areas.** Nevertheless, due to the complexity of the subject matter and to diverging views on core issues, further discussions on the proposals, on the possible alternatives and on the impact thereof are warranted in order to reach an agreement in all areas.
6. **Besides the Daisy Chains proposal which has been fast-tracked, the Spanish Presidency has focused on three building blocks:** (i) public interest assessment and scope of resolution; (ii) resolution funding and (iii) other selected topics. Out of those, the issue of the public interest assessment has advanced the most, and for this reason, the Presidency believes that there is merit in making a specific drafting proposal, included in Annex 1. On issues related to funding in resolution the Presidency's intention has been to identify certain key vectors on which to streamline discussions and seek convergence of views. Unfortunately, the Presidency notes that the Council is not close to reaching a compromise yet as the views of Delegations diverge across different topics. For this reason, this Progress Report will only describe the steps taken by the Presidency. Finally, as far as other topics are concerned, we would like to highlight advances in certain less controversial issues related to the Deposit Guarantee Schemes Directive and the Bank Recovery and Resolution Directive where convergence of views was achieved. On these, the Presidency has included a summary description of the situation in Section IV and a tentative drafting on the Deposit Guarantee Schemes Directive in Annex 2.

7. **This Presidency Progress Report summarizes the progress undertaken during the Spanish Presidency of the Council and aims to provide continuity and to outline a possible way forward, having regard to the opinions expressed by delegations.** With the aim to provide the next Presidency with a solid ground to steer the ongoing negotiations, it highlights the outcome of discussions at the Working Party, underlining the items that Member States broadly agree on, and recalls which elements need to be discussed further. It has been prepared under the responsibility of the Spanish Presidency and represents its view, although all delegations were given the opportunity to comment, and the Presidency has done its best to take all comments into account. However, this Report does not preclude nor prejudice any future decision by the Council regarding the package.
8. **Several drafting suggestions for amendments to the Commission's proposals are included as Annexes.** These amendments have been drafted based on Member States' comments, with the valuable technical support of the Commission services. The Presidency believes that the proposed amendments have gathered sufficient support among Member States and hence they can be of use for further work. The inclusion of these drafting suggestions does not pre-empt the right of the Working Party to revisit these topics and provisions in the way it deems more appropriate. Moreover, in accordance with the principle that *"nothing is agreed until everything is agreed"*, individual topics cannot be settled separately before the Council adopts its comprehensive position.

II. DAISY CHAINS

9. **The Daisy Chain proposal comes as a consequence of the mandate given to the Commission by Regulation (EU) 2022/2036 to review the implementation of the deduction approach for indirect subscription of internal Minimum Requirements of Own Funds and Eligible Liabilities (“MREL”) eligible resources across the different types of banking group structures (Daisy Chain).** The main topics covered by the Daisy Chain proposal as mandated by these above mentioned are: (i) the treatment of compliance with internal MREL on a consolidated basis; (ii) the treatment of entities whose resolution plan provides that they are to be wound up under normal insolvency proceedings; and (iii) the treatment of the limitations of deductions to the internal MREL of the issuing entity. The proposal needed to be fast-tracked because the relevant provisions which introduce the daisy chains deduction mechanism are already in force and will become applicable on 1 January 2024.
10. **The Daisy Chain proposal was fast-tracked, and a mandate for negotiations with the European Parliament was finally adopted by the Permanent Representatives Committee (COREPER) on 17 November.** The proposal was discussed in the Council Working Party meetings of 7, 20 July and 9 October, and on 21 November prior to the first political trilogue.

11. **A first political trilogue was held on 22 November, after the European Parliament adopted its report on the Daisy Chain proposal.** The main differences and positions of the Council and the Parliament were presented on the 21 November meeting by the Presidency, where Member States' feedback was asked for the preparation of the trilogue. In particular, the Council and the European Parliament mandates differed on the need to deduct from the internal MREL of intermediate entities the own funds they held from their liquidation entities subsidiaries. The political trilogue, together with the technical trilogue of November 29th, helped to gradually bridge the gap between the co-legislators.
12. **Finally, on December 6th, the Council and the European Parliament reached an agreement on the Daisy Chain proposal,** completing the fast-track process in little time and ensuring that it can be applied swiftly, meeting the time constraints to which this file is subject.

III. PROPOSAL FOR AN AMENDMENT OF THE BANK RECOVERY AND RESOLUTION DIRECTIVE AND THE SINGLE RESOLUTION MECHANISM REGULATION

13. **The Proposal for an amendment of the Bank Recovery and Resolution Directive and the Single Resolution Mechanism Regulation has occupied most of the work of the Working Party and most of the relevant topics have been discussed.** Among them, it is relevant to highlight: (i) Early intervention measures and preparation for resolution (Commission non-paper); (ii) Precautionary recapitalisation (Commission non-paper); (iii) Public Interest assessment (Presidency non-paper); (iv) Funding in resolution, including the use of Deposit Guarantee Schemes' funds to serve as a bridge for accessing the resolution fund for banks subject to transfer strategies with market exit, creditor hierarchy and the least cost test (Presidency non-paper); (v) Single Resolution Fund's irrevocable payment commitments (Commission non-paper); (vi) Minimum Requirements of Own Funds and Eligible Liabilities calibration for transfer strategies (Presidency non paper), (vii) Contributions to the Single Resolution Fund (Commission note); (viii) Accounting provisions and contingent liabilities (Commission note); (ix) Provisions in case of negative public interest assessment to avoid limbo situations (Commission presentation); (x) Deposit Guarantee Schemes' recoveries in liquidation on the basis of data from past payout cases (Commission presentation).

14. **The Presidency also invited authorities and delegations to make presentations at the Working Party meetings.** The European Central Bank and the Single Resolution Board have made presentations on the Crisis Management and Deposit Insurance general framework, and on the analysis on Crisis Management and Deposit Insurance funding and public interest assessment changes, respectively. Commission services provided further information on deposit structures in the European Union based on further analysis from the European Banking Authority. In addition, Member States made a number of presentations, such as the presentation on the experience on bail-in/losses on depositors shared by Denmark, Germany and Poland, and submitted non-papers such as the French delegation non-paper on Depositor protection within the Crisis Management and Deposit Insurance framework. All the above has been extremely useful to the Council Working Party to deepen the shared understanding of the issues at stake, as well as the different points of view and the national specificities which exist in the treatment of small and medium sized banks across the European Union. The Presidency sincerely thanks authorities and delegations for making such presentations.

15. **As a result of the above discussions, the Presidency is glad to note that Working party meetings have enabled us to move forward on several relevant elements of the Crisis Management and Deposit Insurance file.** However, not all elements have evolved evenly, and therefore it is necessary to recall that topics covered are very interconnected and individual topics cannot be settled separately before the Council adopts its comprehensive position: *“nothing is agreed until everything is agreed”*. Furthermore, it is essential to maintain the internal coherence of the Crisis Management and Deposit Insurance package that would be finally adopted.

Public Interest Assessment and scope of resolution

16. **The Commission proposal introduces several changes to the existing framework as regards resolution objectives and their interplay with public interest assessment.** In this respect, these amendments are mainly related to: (i) the inclusion of the “regional level” for the evaluation of the impact of a disruption of the entity’s critical functions on the real economy and financial stability; (ii) the comparison between resolution and national insolvency proceedings; (iii) a new reference to protect ‘the budget of a Member State’ in the resolution objectives; (iv) a reference to minimising losses for deposit guarantee schemes and protecting deposits in the resolution objectives; (v) and a new requirement to consider and compare all extraordinary public financial support that can reasonably be expected to be granted to the institution in liquidation.
17. **In general terms, the Presidency considers that Member States agree that the scope of resolution should be moderately expanded, but at the same time insolvency should be maintained as the default solution to ensure that institutions are wound up under national insolvency procedures, if resolution objectives are not at risk or if earmarking them for resolution is not proportionate.** In further detail:

- The Presidency considers that most Member States could agree on the Commission proposal for the inclusion of the “regional level” in the assessment of the critical functions and on the new reference to protecting the budget of a Member State in the resolution objectives.
- On the other hand, the Presidency considers that there has not been enough support in the Working party to change the definition of resolution objectives to explicitly refer in level 1 to the minimisation of losses for deposit guarantee schemes and to the protection of all deposits (instead of current Bank Recovery and Resolution Directive’s wording that refers to the protection of deposits covered under the Deposit Guarantee Schemes Directive). Nevertheless, most Member States can accept a recital that recalls that, under the current framework, the bail-in of certain non-covered deposits can have financial stability implications which might require resolution authorities to exclude or partially exclude them from bail-in under exceptional circumstances, accompanied by another recital which reminds that, also under the current framework, the bail-in of non-covered deposits is already possible and that the internal loss absorption and recapitalisation capacity of an institution should be used first, and, to the extent possible, exclusively. Other Member States consider that the current provisions of the Bank Recovery and Resolution Directive are sufficiently clear on this topic and don’t support the addition of a new recital, while other Member States have argued in favor of an explicit rule to protect depositor’s confidence and the introduction of an overall cost-minimization principle.

- Most Member States agree that resolution authorities would not be able to compare all extraordinary public financial support that can reasonably be expected to be granted to the institution in both events (resolution and winding up under national insolvency procedures). However, some Member States disagree because it would be incoherent to consider such extraordinary public financial support as a resolution objective but not include how resolution authorities should take it into account.
- Finally, regarding the comparison between resolution and national insolvency proceedings, after lengthy discussions and multiple options presented by the Presidency, the latter believes a landing zone may have been reached although more drafting might still be needed (for instance, some Member States would like further discussions on the addition of presumptions). This option, in the Presidency's view, would consist in breaking-up the public interest assessment into different stages, where the resolution authorities would (i) first, assess whether any of the resolution objectives would be at risk in case the institution would be wound up under normal insolvency proceedings, (ii) secondly, if (i) is met, assess if resolution is necessary and proportionate, (iii) thirdly, if (ii) is met, choose resolution if the winding up of the institution under normal insolvency proceedings would not meet the resolution procedures more effectively.

Annex 1 includes wording discussed in the Working parties that reflects the elements above.

Resolution funding

18. **To conduct a resolution process in a successful manner, it needs to build on resolution financing sources that are fit for purpose.** Moreover, some of the key elements of such resolution framework are also relevant for crisis management measures other than resolution. Under this block, the Presidency will provide the current state of play on the following topics which build the resolution financing framework proposal by the European Commission i.e., (i) MREL calibration for transfer and liquidation strategies; (ii) Deposit Guarantee Scheme bridge-the-gap; (iii) and Creditor hierarchy and Least Cost Test.
19. **The Presidency has tried to find a common ground on funding** in the two last working parties, presenting a proposal tapping the main aspects of funding in resolution in an internally consistent manner. However, the suggestions have not gathered a wide support. There are different sensitivities among Member States regarding the various elements of resolution funding, and, in particular, regarding the creditor hierarchy. A large group of delegations would like to retain super-preference of covered deposits, while another group supports the single tier proposed by the Commission. Among Member States in those two groups, a relevant number are open to discuss a two-tier depositor preference on the condition that sufficient Deposit Guarantee Schemes' funding is unlocked to bridge the funding gap. However, these Member States have diverging views on the composition of both tiers.

a. MREL calibration for transfer and liquidation strategies

20. **The Commission proposal introduces a new provision establishing certain criteria to calibrate the MREL for transfer strategies**, in particular, (a) entity size, business model, funding model and risk profile, and depth of the market it operates in; (b) shares and other instruments of ownership; (c) the expected value and marketability of shares and other instruments of ownership; (d) type of transfer strategy to be implemented; and (e) if the asset separation tool will also be used.
21. **All Member States agree that MREL is the first and main line of defense.** There is also broad support to include an article in the Bank Recovery and Resolution Directive clarifying which elements could specifically be taken into account when calibrating such requirement when the resolution strategy implies the use of transfer tools. However, there is less agreement on the criteria to be included and whether more safeguards should be included to ensure MREL is adequate.
22. **Additionally, the Commission proposal also envisages that, when an institution is to be wound-up under normal insolvency procedures**, and the Deposit Guarantee Scheme means are to be used for alternative measures (for ex. to finance a transfer of deposits and assets), the Minimum Requirement of Own Funds and Eligible Liabilities add-on should take into account the same elements as the ones established for transfer strategies in resolution. In this respect, the Presidency takes note that most Member States do not support the extension of the provision on MREL for transfer strategies to liquidation entities.

b. Deposit Guarantee Scheme as a way to bridge the funding gap

23. **The Commission proposal provides for the so-called Bridge the Gap”, where Deposit Guarantee Schemes’ funds can be used to cover the difference between assets and deposits included in a transfer and count towards meeting the 8% of Total Liabilities and Own Funds bail-in requirement to access funding by the resolution fund.** The Presidency considers that this is one of the most important tenets of the Commission proposal as it would enable and facilitate transfer strategies by allowing the use of Deposit Guarantee Schemes in the cases when the resolution authority has to deal with credit institutions meeting a positive public interest assessment that, at the point of resolution, lack sufficient effective loss absorption and recapitalisation capacity to access the resolution fund without bailing in deposits if they need to be excluded, despite that loss absorption capacity having been appropriately calibrated at the resolution planning stage, and subject to several conditions and safeguards that are in the Commission proposal.

24. **Member States have discussed if a funding gap would emerge where non-covered deposits need to be included in a transfer to a buyer or a bridge bank (i.e., excluded from bail-in), for instance, for financial stability reasons, and losses absorbed by own funds and liabilities belonging to the rest of the creditors are not sufficient to fulfill the condition for access to the resolution funds.** The Presidency considers that a majority of Member States broadly agree with the existence of this possible funding gap, because of possible financial stability concerns, as recent crisis have shown, and technical difficulties that may arise when bailing-in deposits. At the same time, they disagree over the means to close it. Other Member States also raise questions about the real size of such funding gap and even about its existence, arguing that non-covered deposits can suffer losses without financial stability implications, as practice has shown. In the view of some Member States, the use of Deposit Guarantee Schemes to bridge the possible funding gap could be considered a deviation from the 8% rule and thus not be in line with the permanence of the legal framework clauses in the Intergovernmental Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund and the European Stability Mechanism amendment. In this regard, the Presidency takes note that presentations in the working party have also indicated the existence in some Member States of voluntary industry-managed funds and schemes complementing the current Crisis Management and Deposit Insurance framework that aim at granting protection to a significant share of non-covered deposits. Some see this as hinting at the existence of a policy rationale to ensure that authorities have the option to protect depositors to a wider extent, if needed. Regarding the alternatives to close this funding gap, some

Member States favor higher MREL, while others believe the 8% Total Liabilities and Own Funds threshold to access the resolution funds should be revisited for smaller banks or a direct use of Deposit Guarantee Schemes overriding the least-cost test (ie. disconnected from the counterfactual losses in payout) could be authorised. Other Member States would like to discuss further alternatives. Finally, most Member States seem to be able to accept the use of Deposit Guarantee Schemes' resources to bridge the funding gap if enough and strong safeguards (and MREL) are provided.

25. This has been one of the most debated issues together with the creditor hierarchy to which it is highly connected since variations on the form of depositor preference would significantly expand or restrict the unlocking of the use of Deposit Guarantee Schemes' funds in resolution under the least cost condition. The Presidency has been actively involved in trying to find common ground among Member States, but due to its sensitive nature with countervailing positions it has been challenging to move forward. In this vein, the Presidency has suggested to move forward maintaining the Commission proposal on the use of Deposit Guarantee Schemes' funds to meet the condition for access to the resolution fund in case of funding gap, but including (i) a transitional period for entities changing strategy from insolvency to resolution, (ii) a systemic risk exemption, and (iii) a more balanced division of the cost of contributing to resolution between the Deposit Guarantee Schemes' and Resolution funds, in particular regarding the contribution to compensate the amount of covered deposits to be transferred. However, the proposal did not gather enough support of Member States and no common solution has been reached yet: further work is needed under the next Presidency to go forward.

c. Creditor hierarchy and Least Cost Test

26. **Member States have debated on creditor hierarchy of deposits.** The Commission proposal suggests the creation of a single-tier general depositor preference where all deposits (covered and non-covered) would rank *pari passu* above senior liabilities. This single-tier would lead to unlocking the most resources from the Deposit Guarantee Schemes under the least cost condition to contribute to the resolution financing and to bridge a possible funding gap. The Presidency believes that a majority of Member States cannot support the Commission proposal of a single tier, even though several others do support it (together with the European Central Bank and Single Resolution Board). However, many Member States are open to discussing a two-tier depositor preference where some deposits, meriting less protection, could more likely contribute to loss absorption and might rank below other deposits. Those deposits could be included in the junior tranche, but without implying that any non-covered deposit is automatically excluded from bail-in, nor that those included in the junior tier cannot be discretionally excluded from bail-in, as it is already embedded in the Bank Recovery and Resolution Directive. Nevertheless, at the same time, a large group of Member States are reluctant to remove the current super-preference of covered deposits and Deposit Guarantee Schemes subrogating to them, arguing the need to ensure that Deposit Guarantee Schemes' resources are sufficiently protected in insolvency scenarios in order to secure that they are able to perform their main function of pay-out. Moreover, in the view of some of these Member States, unlocking more Deposit Guarantee Schemes' funds to be used in resolution is not by itself a proper reason to change the hierarchy which has considerable effects also on the insolvency procedures.

27. **Member States have also discussed the Least-Cost Test**, which limits the contribution of Deposit Guarantee Schemes to resolution but also the financing of preventive and alternative measures outside resolution. The Presidency considers that many Member States see leeway to amend the least-cost test proposed by the Commission to ensure that, even with a 2-tier deposit preference framework, the Deposit Guarantee Schemes can provide funding for a potential bridge-the-gap situation in resolution and for interventions outside resolution. Moreover, among those Member States advocating for a 3-tier creditor ranking of deposits, some would support a more flexible least-cost test or even waiving it altogether to ensure that Deposit Guarantee Schemes can be used to bridge the funding gap, as well as in alternative and preventive measures.
28. **To attempt to close the existing divide between Member States, the Presidency has been working on different options based on a 2-tier deposit preference including an least-cost test sufficiently flexible by incorporating other indirect costs such as contagion risk.** However, the Presidency considers that although some Member States could support such proposal as a possible way forward to further explore, for many Member States maintaining the current super-preference of covered deposits and Deposit Guarantee Schemes subrogating to them is essential. For this reason, the Presidency considers that more work is needed. Nevertheless, regarding the least-cost test, the Presidency considers that most Member States could agree to extend the least-cost test to ensure that Deposit Guarantee Schemes' funds can be meaningfully unlocked in resolution (for instance, by including indirect costs due to contagion) and outside resolution following Deposit Guarantee Schemes Directive's preventive and alternative measures.

Other selected issues: Irrevocable Payment Commitments and preventive and alternative measures

29. **On preventive and alternative measures, where the Deposit Guarantee Schemes' resources are used outside both resolution and plain payout, the Presidency considers that there is broad support to harmonise the least-cost test for all Deposit Guarantee Schemes' interventions outside payout (i.e. preventive, alternative and resolution measures) as agreed in the Eurogroup and proposed by the Commission.** At the same time, the Presidency takes note of the Eurogroup statement referred to above which mentions that the improved Crisis Management and Deposit Insurance framework should take due account of the specificities in the national banking sectors, including by preserving a functioning framework for institutional protection schemes to implement preventive measures. While the Presidency considers that a flexible least-cost test could be of help to cater for both objectives, further work is needed in this regard.
30. **Regarding irrevocable payments commitments (IPC) to the resolution funds, which are alternative means institutions can use to pay their part of their required ex-ante contribution,** the Presidency considers that Member States agree with their irrevocable nature but are willing to discuss technical measures to prevent sudden impact on profit and loss accounts of the institutions having made use of them.

IV. DEPOSIT GUARANTEE SCHEMES DIRECTIVE

31. The Presidency treated most Deposit Guarantee Schemes Directive topics as technical issues during its 20 July, and 31 October meetings. In particular, the following topics were discussed and then covered by a Presidency non-paper presented on the 31 October meeting: (i) definitions, scope and membership (Articles 1, 2, 4, 5, 6, 8b); (ii) operational provisions around pay-out (Articles 7, 7a, 8, 8a, 8c, 9); (iii) financing of Deposit Guarantee Schemes' funds in all interventions (Article 10); (iv) cooperation between Deposit Guarantee Schemes within the Union (Article 14); (v) coverage of branches from and in third countries (Articles 1(2)(d), 15, 15a) and (vi) transparency (Articles 16 and 16a). Provisions related to preventive and alternative measures were discussed on the 9 October meeting, following a presentation and a paper prepared by the Commission: Articles 11a) Preventive measures, 11b) Note accompanying preventive measures, 11 c) Remediation plan, and Article 11 d) Transparency of marketing process in alternative measures. Finally, the Article regarding the least cost test provision, Article 11 e), was discussed within the relevant provision of the Bank Recovery and Resolution Directive as indicated above.

32. **The great majority of the Member States did not raise major issues on any of the above, except for some concerns raised by some Member States on specific issues.** In particular, some Delegations had concerns on the transfer of contributions between Deposit Guarantee Schemes, on the need to include a separate treatment for Institutional Protection Schemes (which in the view of some Member States is needed in order to preserve their functioning), and concerns with regard to Deposit Guarantee Schemes' protection to public sector entities and other topics as detailed below. Additionally, and as in the case of the Bank Recovery and Resolution Directive and the Single Resolution Mechanism Regulation, there was a high level of participation from Member States and there was a Slovak and Czech Republic non-paper on the extension of client funds deposits to other specific beneficiary account holders.
33. **The Presidency considers therefore that significant progress has been made on the proposal to amend the Deposit Guarantee Schemes Directive.** It understands that possible compromise texts are close to be reached in several of the topics of the Commission proposal. For this reason, the Presidency believes that there is merit in making a tentative drafting suggestion to some Deposit Guarantee Schemes Directive provisions as set out in Annex 2 that could serve to the next Presidency as a base for the upcoming discussions regarding this matter, thus facilitating the Working Party work.
34. **Overall, the most relevant topics that the Presidency would like to highlight here are:**
- (i) client funds protection and beneficiary accounts, (ii) transfer of contributions, (iii) Deposit Guarantee Schemes' protection to public sector entities, (iv) preventive and alternative measures and (v) Financing of Deposit Guarantee Schemes' funds.

Client funds and beneficiary accounts

35. **The Commission proposal introduces a new provision aimed at protecting client funds that financial institutions hold in bank accounts on behalf or for the account of their clients with the intention of building clients' trust in non-bank financial institutions and in their business continuity if a bank failure occurs.** From the different discussions in the Working Party the Presidency considers that the majority of Member States could agree with this Commission proposal and some of them also supported the need of extending this protection to the rest of accounts opened by other professionals (i.e. notaries, real estate agencies, etc.) on behalf of or for the account of their clients. Consequently, in the case that the client has an account in the same bank as the one open by the relevant professional, both amounts could be covered independently by the Deposit Guarantee Scheme.

Transfer of Contributions between Deposit Guarantee Schemes

36. **The Commission proposal clarifies the regime applicable when an institution ceases to be member of a Deposit Guarantee Scheme and joins a Deposit Guarantee Scheme in another Member State or if some of the credit institution's activities are transferred to a Deposit Guarantee Scheme of another Member State.** The proposal changes the current wording of the Deposit Guarantee Schemes Directive that sets out the obligation to transfer the contributions "paid" during the 12 months preceding the end of its membership to contributions "due". In relation to this proposal there were several comments by the Member States aimed at finding a different approach compared to the current status quo in consideration of: (i) situations where the target level has been reached and credit institutions are not paying contributions, as no amount of money would be then transferred if institutions changed domicile, (ii) and, the volume of covered deposits to be transferred that could be very relevant and have a significant impact on the Deposit Guarantee Scheme.

Considering those reasons, the Presidency, based on the comments received, suggested a different approach where contributions to be transferred would be based on the risk and the amount of deposits to be transferred, delegating on European Banking Authority the need to develop a methodology. Although this proposal gathered the support of some Member States, there was a strong opposition by others as they understood that it would promote the “branchification” and could have as well a significant impact on the available financial means of the Deposit Guarantee Scheme of origin. Moreover, some Members argue that further amendments would be necessary to clarify that the same rules also apply to situations where a credit institution changes affiliation to a Deposit Guarantee Scheme within the same Member State.

Public Sector entities and Deposit Guarantee Schemes’ coverage

37. **The Commission proposal includes under the scope of protection of the Deposit Guarantee Schemes all public sector entities, as opposed to the current situation where Member States may extend the protection to public entities with a budget equal or lower than EUR 500,000 as a national option.** Member States have different views over this proposal. Some Member States suggest excluding deposits of public entities, while others prefer maintaining the Commission proposal and a third group suggests including under the scope of protection non-sophisticated public sector entities (schools, hospitals, some local services etc.) but excluding more sophisticated ones, such as central/regional governments. The Presidency suggested excluding from the Deposit Guarantee Schemes’ coverage deposits made by central and regional governments, including a possible harmonized definition to that end. However, this issue needs more discussions.

38. **The Commission proposal specifies the reference for the consideration of available financial means and inserts flexibility for Deposit Guarantee Schemes to use alternative funding and ensuring that funding from public sources could be used only as a last resort.** Finally, (i) it clarifies requirements to ensure the sound management of Deposit Guarantee Schemes' funds and mandates the European Banking Authority to develop guidelines on the diversification of Deposit Guarantee Schemes' investment strategy; (ii), provides for the obligation of Member States to ensure that Deposit Guarantee Schemes' funds may be placed all or part of with their national central bank or national Treasury provided that those funds are kept on a segregated account and make sure that they are readily available for use by the Deposit Guarantee Schemes; and (iii) mandates the European Banking Authority to develop regulatory technical standards on the delineation of available financial means for Deposit Guarantee Schemes. From the different discussions in the Working Parties, the Presidency considers that there are still some concerns that would need to be addressed so the Presidency considers that further discussions are still needed, in particular on the potential sequencing of alternative funding arrangements for Deposit Guarantee Schemes.

39. **The Commission proposal intends to have a more harmonized approach in the use of preventive and alternative measures by the Deposit Guarantee Schemes.** These amendments, together with the ones proposed in the Bank Recovery and Resolution Directive and the- Single Resolution Mechanism Regulation, also intend to minimise distortions of competition arising from differences in nature of Deposit Guarantee Schemes. All these measures as mentioned above are subject to the least-cost test, which is harmonized to determine the maximum amount a Deposit Guarantee Schemes may contribute outside payout, to finance preventive, resolution and alternative measures. More in particular and regarding preventive measures, the Commission proposal (i) establishes a set of safeguards for their use and allocates the responsibilities among authorities for assessing whether preventive measures can be applied (ii) provides for the conditions underlying the note with the measures that a credit institution commits to undertake to ensure or restore compliance with prudential requirements (iii) establishes a remediation plan in case the credit institutions fails to comply with their commitments or fails to repay financial support granted with preventive measures and (iv) sets up the conditions for marketing of the bank's assets, rights and liabilities.

40. **During the last months, the Working Party had the chance to go over this proposal by means of presentations and additional documentation provided by Commission services, and the Presidency had the opportunity to receive some preliminary views.** The Presidency is of the opinion that most Member States did not express major concerns, apart from making clear the discretionary nature of these measures, and some comments regarding the Deposit Guarantee Schemes' funding of the measures as well as governance arrangements. However, some Member States did have strong concerns that the proposal, in their view, would impair the functioning of those Institutional Protection Schemes that also play the role of Deposit Guarantee Schemes. These Member States consider that a dedicated treatment of Institutional Protection Schemes in line with the Eurogroup statement to preserve their functioning is justified in substance due to the specific nature of Institutional Protection Schemes and important with regard to their requirements established in the Regulation on prudential requirements for credit institutions and investment firms. Further work is needed in this regard.

V. CONCLUSION

41. **The Presidency is very thankful for all the support received from the Delegations and Commission on this challenging file.** The thorough and productive discussions during these months have allowed the Presidency to move forward on some relevant topics of the Bank Recovery and Resolution Directive and the- Single Resolution Mechanism Regulation such as the public interest assessment, and on the Deposit Guarantee Schemes Directive, where technical amendments are proposed in the Annexes of this report, for the next Presidency to assess. However, the Presidency considers that still further work is needed regarding the Bank Recovery and Resolution Directive, the- Single Resolution Mechanism Regulation and some other topics of the Deposit Guarantee Schemes Directive such as the transfer of contributions.

42. **The Presidency believes that the most important topic to focus on the next months is funding in resolution.** The Presidency considers essential that the Crisis Management and Deposit Insurance file moves forward. For this reason, the Spanish Presidency encourages the Belgian Presidency to keep exploring possible acceptable solutions based on robust analysis.
43. **To that end, the Presidency considers that there is merit in further analysing in the coming months the structure of deposits and the potential impact of a revamped creditor hierarchy or of other possibilities such as including a direct mandate for Deposit Guarantee Schemes.** Indeed, the recent crises and Working Party discussions have evidenced the need to put several options on the table and better assess deposits differentiated protection worthiness, which is connected to their potentially different impacts on the real economy and in financial stability.

ANNEX 1 - Bank Recovery and Resolution Directive

Possible amendments to the Commission Proposal on Public Interest Assessment

Important note: the following wording is not to be considered a compromise text agreed by Member States, but rather a technical wording effort presented by the Presidency that has received preliminary support by Member States in the Working parties and that could serve as basis for the upcoming work for the next Presidency.

Track changes are shown with respect to the Commission proposal. Wording is the same to that included in the Presidency note on public interest assessment and resolution funding discussed in the 21/11 Working Party with few additions in **red** after considering the comments to this note from Member States.

- **Introduction of explicit reference to ‘national or regional level’ in the definition of ‘critical functions’ (Article 2(1), point (35), of Bank Recovery and Resolution Directive).** The Presidency believes there is broad support to keep the Commission proposal as currently drafted.

(35) ‘critical functions’ means activities, services or operations the discontinuance of which is likely in one or more Member States to lead to the disruption of services that are essential to the real economy or to disrupt financial stability at national or regional level, due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of an institution or group, with particular regard to the substitutability of those activities, services or operations

- **New reference to support provided from ‘the budget of a Member State’ in the resolution objective of protecting public funds (art. 31(2), point (c), of Bank Recovery and Resolution Directive and art. 14(2), points (c) of the Single Resolution Mechanism Regulation.**

The Presidency believes there is broad support to:

- Introduce wording in the recital 11 which is suggested to be drafted as follows:

*(11) The assessment of whether the resolution of an institution or entity is in the public interest should also reflect, to the extent possible, the difference between, on the one hand, funding provided through industry-funded safety nets (resolution financing arrangements or DGSs) and, on the other hand, funding provided by Member States from taxpayers’ money. Funding provided by Member States bears a higher risk of moral hazard and a lower incentive for market discipline. Therefore, when assessing the objective of minimising reliance on extraordinary public financial support, resolution authorities should, **in the exceptional case where internal funding proves to be insufficient**, find funding through the resolution financing arrangements or the DGS preferable to funding through an equal amount of resources from the budget of Member States. **In any case, the differentiation between both public and industry funding should not lead to the conclusion that extraordinary public financial support through the budget is to be expected after the possible use of industry-funded safety nets. When industry funds are considered part of the public budget, they should be used prior to any other budgetary sources.***

- Keep Article 31(2), point (c) of the Commission proposal as currently drafted.

(c) to protect public funds by minimising reliance on extraordinary public financial support, in particular when provided from the budget of a Member State

- **Changes to the resolution objective of protecting depositors (Article 31(2), point (d), of Bank Recovery and Resolution Directive) and art. Article 14(2), points (d) of the Single Resolution Mechanism Regulation. Most Member States were in favor of keeping the current Bank Recovery and Resolution Directive text which refers only to deposits covered by Directive 2014/49/EU. The Presidency believes there is broad support to:**

- Revert to the existing Bank Recovery and Resolution Directive text.

*'(d) to protect depositors ~~while minimising losses for deposit guarantee schemes~~ **covered by Directive 2014/49/EU** and investors covered by Directive 97/9/EC;'*

- Include a new recital mirroring recital 72 of the original Bank Recovery and Resolution Directive.

(X). In exceptional circumstances, resolution authorities should be able to exclude or partially exclude liabilities in a number of circumstances including where the exclusion of the application of the bail-in tool to these liabilities is necessary to avoid the spreading of contagion and financial instability which may cause serious disturbance to the economy ~~at a national or regional level~~. When carrying out this assessment, resolution authorities should give consideration to the consequences of a potential bail-in of non-covered deposit liabilities.

- Amendments to the comparison between resolution and national insolvency proceedings (Article 32(5), first subparagraph of the Bank Recovery and Resolution Directive and art. 18 (5) of the Single Resolution Mechanism Regulation). The Presidency believes there is broad support to:

- Include a new recital:

(X) Although a failing institution should in principle be liquidated under normal insolvency proceedings, such liquidation under normal insolvency proceedings might, in some cases, jeopardise financial stability and interrupt the provision of critical functions. This could be the case, for instance, when the institution is of a relevant size or when insolvency would likely imply losses on some deposits or significant difficulties in the continuity of access to some deposits, which are deemed by the resolution authority to have a significant impact on the provision of critical ~~services functions~~ or financial stability through contagion or on the real economy. In such cases it is highly likely that there would be a public interest in placing the institution under resolution and applying resolution tools rather than resorting to normal insolvency proceedings.

- Reword the proposed modification of *Article 32(5)*:

(5) In order to determine whether a resolution action shall be treated as in the public interest for the purposes of paragraph 1, point (c), the resolution authority shall, in a first stage, assess whether any of the resolution objectives would be at risk in case the institution would be wound up under normal insolvency proceedings. Resolution action shall be treated as not being in the public interest if none of the resolution objectives would be at any risk in case the institution would be wound up under normal insolvency proceedings.

In case the outcome of the assessment referred to in the first subparagraph is such that one or more of the resolution objectives would be at risk in case the institution would be wound up under normal insolvency proceedings, the resolution authority shall, in a second stage, assess whether a resolution action is necessary for the achievement of, and is proportionate.

In case the outcome of the assessment referred to in the second subparagraph results in a determination that resolution action is necessary and proportionate to one or more of the resolution objectives referred to in Article 31, a resolution action shall be in the public interest for the purposes of paragraph 1, point (c) if, in the assessment of the resolution authority, winding up of the institution under normal insolvency proceedings would not meet those resolution objectives more effectively.

~~For the purposes of paragraph 1, point (c), a resolution action shall be treated as in the public interest where that resolution action is necessary for the achievement of, and is proportionate to, one or more of the resolution objectives referred to in Article 31 and where winding up of the institution under normal insolvency proceedings would not meet those resolution objectives more effectively.~~

Annex 2 - Deposit Guarantee Schemes Directive

Technical comments and possible amendments to the Commission Proposal

Important note: the following wording is not to be considered a compromise text agreed by Member States, but rather a technical wording effort presented by the Presidency that has received preliminary support by Member States in the Working parties and that could serve as basis for the upcoming work for the next Presidency.

Track changes are shown with respect to the Commission proposal. Wording is the same to that included in the Presidency note on Deposit Guarantee Schemes Directive discussed in the 31/10 Working Party.

- **Definitions (Article 2)**

The Presidency considers that there is broad support to keep the Commission proposal.

- **Official recognition, membership and supervision (Article 4)**

The Presidency considers that there is a broad support to make the following amendments:

Recital 2

*The failure to comply with the obligations to pay contributions to DGSs or to provide information to depositors and DGSs could undermine the objective of depositor protection. DGSs, or where relevant, designated authority ~~can apply pecuniary sanctions~~ **charge statutory interest rate on the amount of contributions due** for late payment of contributions [...]*

Article 4 paragraphs 4, 4a and 5.

*4. Member States shall ensure that where a credit institution does not comply with its obligations as a member of a DGS, that DGS, **or where relevant, the designated authority** shall immediately notify the competent authority of that credit institution thereof. Member States shall ensure that the competent authority, in cooperation with that DGS, **or where relevant, the designated authority**, uses the supervisory powers laid down in Directive 2013/36/EU, and promptly takes all measures to ensure that the credit institution concerned complies with its obligations, including where necessary by imposing administrative penalties and other administrative measures in accordance with the national laws adopted in addition to ~~the implementation of~~ provisions of Title VII, Chapter 1, Section IV, of Directive 2013/36/EU.’;*

4a) *Members States shall ensure that where a credit institution fails to pay the contributions referred to in Article 10 and Article 11(4) within the timeframe specified by the DGS, that DGS **or where relevant, the designated authority** shall, for the period of the delay charge statutory interest rate on the amount due.'*

*'5. Member States shall ensure that the DGS, **or when appropriate the designated authority, informs the competent authority, designated authority** where the measures referred to in paragraphs 4 and 4a fail to restore compliance by the credit institution. Member States shall ensure that the DGS **or when appropriate, designated authority** assesses whether the institution still fulfils the conditions for a continued membership of the DGS and inform the competent authority of the outcome of that assessment.*

- **Eligibility of deposits (Article 5)**

The Presidency considers that there is a broad support to make the following amendments:

Article 5, Paragraph 1, point (i) of the amending text:

~~the introductory wording is replaced by the following:~~

~~'1. The following shall be excluded from any repayment by a DGS:'~~

Article 5, Paragraph 1 (d)

(d) deposits made by financial institutions as defined in point (26) of Article 4(1) of Regulation (EU) No 575/2013 ***on their own behalf and for their own account;***

Article 5, Paragraph 1, letter f)

*'(f) deposits the holder of which has never been identified pursuant to Article 16 of Regulation (EU) [please insert short reference – proposal for Anti-Money Laundering Regulation - COM/2021/420 final], where those deposits have become unavailable, except where a holder requests payout and proves that the lack of identification was not caused by his or her action. **In this case, the identity of the depositor should be verified before the payout;***

- **Coverage Level (Article 6)**

The Presidency considers that there is a broad support to make the following amendments:

Article 6.2.

*2. In addition to paragraph 1, Member States shall ensure that the following deposits are protected as a minimum to an amount of EUR 500 000 for 6 months after that amount has been credited or from the moment when such deposits become legally transferable **for each of the following cases;***

Article 6.2, letter a)

(a) deposits by natural persons ~~resulting from real estate transactions~~ relating to a sale or purchase of private residential properties ~~and deposits intended for such transactions,~~ provided that those transactions are concluded in the short term by a natural person, and provided that that natural person can provide documents proving such transaction;'

- **Determination of the repayable amount (Article 7)**

The Presidency considers that there is a broad support to make the following amendment:

Article 7.5 (reintroduced) with technical amendment.

5. Member States may decide that the liabilities of the depositor to the credit institution are taken into account when calculating the repayable amount where they have fallen due on or before the date on which a relevant administrative authority makes a determination as referred to in point (8)(a) of Article 2(1) or when a judicial authority makes a ruling as referred to in point (8)(b) of Article 2(1) to the extent the set-off is possible under the statutory and contractual provisions governing the contract between the credit institution and the depositor.

Depositors shall be informed prior to the conclusion of the contract by the credit institution whether such ~~where their~~ liabilities towards the credit institution are taken into account when calculating the repayable amount.

- **Burden of proof for deposit eligibility and entitlement (Article 7a)**

The Presidency considers that there is broad support to keep the Commission's proposal.

- **Repayment (Article 8)**

The Presidency considers that there is a broad support to make the following amendment:

Article 8.3

(3) By way of derogation from paragraph 1, Member States shall allow DGSs to apply a longer repayment period for the deposits referred to in Article 6(2), Article 7(3) and Article 8b, which shall not exceed 20 working days from the date on which those DGSs received the complete information or documentation they requested ~~from a depositor~~, to examine the claims and verify that the conditions for repayment are met.

- **Coverage of branches from and in third countries (Articles1(2)(d))**

The Presidency considers that there is broad support to keep the European Commission's proposal.

- **Branches of credit institutions that are established in third countries (Article 15)**

The Presidency considers that there is broad support among Member States in maintaining the European Commission's proposal.

- **Member credit institutions that have branches in third countries (Article 15a)**

The Presidency considers that there is broad support among Member States in maintaining the European Commission's proposal.

- **Depositor information (Article 16)**

The Presidency considers that there is a broad support to make the following amendments:

Article 16, Paragraph 2

“2. Member States shall ensure that credit institutions provide the information sheet referred to in paragraph 1 before they enter into a contract on deposit-taking and, subsequently, annually. ~~Depositors shall acknowledge the receipt of that information sheet.~~”

- **Information exchange between credit institutions and Deposit Guarantee Schemes, and reporting by authorities (Article 16 a)**

The Presidency considers that there is a broad support to make the following amendments:

Article 16 a)- Paragraph 4b

b) whether any of the measures referred to in Article 11(2), (3) and (5) have been applied and the amount of funds used in accordance with Article 8 ~~(4)~~ and Article 11(2), (3) and (5), and, where applicable and once available, the amount of funds recovered, the resulting cost for the DGS and the duration of the recovery process.