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From:	General Secretariat of the Council
To:	Working Party on Financial Services (Risk Reduction Measures)
Subject:	170922-AT-non-paper_acc_Article_21a

Strengthening the effectiveness of the supervision of m(FHCs)

AT-non-paper

Articles 3(3), 21a, 102, 104 CRD and Article 11 CRR

Outstanding issues

M(FHCs) should be supervised appropriately. Therefore, m(FHCs) are supervised on the basis of EU-law if they are part of a group of institutions or financial conglomerate (i.e. CRD/CRR/BRRD/SRMR/FICOD). Sometimes, m(FHCs) are of further importance for group supervision which should be addressed accordingly.

The RRM-proposal provides that all m(FHCs) shall be licensed and made responsible for the group. However, the legislative technique interferes with general principles of CRR/CRD and is not technically operational. Furthermore, shifts of competences between NCAs arise which may not be intended. From a better regulation perspective, the need for a cost-benefit analysis is evident.

All in all, only few m(FHCs) can be regarded as being able to significantly influence group decisions. Due to better regulation principles and to ensure appropriate supervision of groups, we favour a targeted approach against m(FHCs) by differentiating between relevant and other m(FHCs). In that regard, we do not support the shift of responsibilities from a credit institution which effectively influences group decisions (mother or central credit institution) to m(FHCs) which are not in this position. Likewise, but due to supervisory objectives, a shift of responsibilities should not arise from NCAs, which are responsible for a credit institution being able to influence group decisions, to NCAs which are responsible for m(FHCs) which are not in this position.

The main intend of this non-paper is to address the specific problems raised by MS, EC, ECB and SRB and to enable a more granular discussion of the topic. The legal amendments beneath could be helpful as a starting point for a common approach as they would be technically operational within the CRR/CRD-framework. Thereby, a swift progress of the negotiations should be enabled.

Following the discussions at the Working party and the written responses, we understand the following items as outstanding issues:

1. **Inconsistencies, discrepancies** and **overlapping** with the existing legislative acquis should be prevented (framing);
2. The **supervisory and resolution purposes** should be clarified and a cost-benefit analysis undertaken (objectives);
3. The **m(FHCs)** to be defined as direct supervisory objects should be identified (framing, objectives);
4. The **accountability and responsibility** of entities having significant influence for the group should be enhanced (framing, objectives);
5. The NCAs should be empowered by adequately **extend the supervisory tool-box** (effectiveness);
6. The **consolidating supervisor** for such groups should be determined (clear attribution of competences, effectiveness) and **transitional provisions** concerning the transfer of responsibilities for groups and NCAs introduced.

General remarks:

- *Article 21a is conceptually interlinked with **Article 21b**. However, as both topics are of high complexity we would propose to discuss them separately. A targeted approach in Article 21a would not interfere negatively with the objectives of Article 21b.*
- *The RRM-proposal addresses also **mixed**(FHCs) which leads to inconsistencies in conjunction with the **Financial Conglomerates Directive (FICOD)**. In this respect, it could be considered, whether the FICOD should be amended to address the objectives mentioned in the RRM-package.*
- *We do not propose **transitional provisions** to prevent further complexity at this stage. However, we have an open position for such provisions.*
- *Although Art. 21a does not provide a technically operational solution for the concept of licensing m(FHCs), it is in principle possible to foresee a **licencing** obligation with regard to business activities of m(FHCs). However, we consider such provisions as leading to further complexity and not needed for achieving the objectives of the RRM-proposal. We therefore replaced such approach by the "determination" of the relevance of a m(FHC) constituting a m(FHC) as a direct supervisory object.*

1. Addressing inconsistencies, discrepancies and overlapping (framing)

M(FHCs) are already addressed within the supervisory and resolution framework. In particular, the following provisions are of relevance:

- The parent institution and its relationship with its (mixed) parent holding company are addressed by Art. 10 and 14 CRD (**authorization** procedure) and Title III Chapter II CRD (**qualifying holdings, internal control mechanisms**);
- **Direct powers and information obligations of NCAs** are foreseen in Art. 65 Para 2 (**penalties** against the members of the management body and other natural persons), Art. 65 Para 3 (power **for information gathering and power to conduct all necessary investigations**), Art. 74 CRD (**Internal governance and recovery and resolution plans**), Art. 99 (**Supervisory examination program**), Art. 118 (**Checking information** concerning m(FHCs) in other MS), Art. 120 (**Supervision of mixed financial holding companies**), Art. 121 CRD (**Qualification of directors**) and Art. 122 (requests for information and inspections);
- The **application of requirements on a consolidated basis** thus also encompassing m(FHCs) is established in Section I CRR; in this respect Art. 119 CRD (**Inclusion of holding companies in consolidated supervision**) is of further relevance;
- Powers concerning m(FHCs) are foreseen in Art. 17 Para 5 BRRD (**Powers to address or remove impediments to resolvability**) and Art. 33 BRRD (**Conditions for resolution with regard to financial institutions and holding companies**).

In that respect, Art. 17(5)(h) BRRD is particularly remarkable, as it enables **NRAs to require an institution or a parent undertaking to establish a parent-FHC in a MS or a Union parent-FHC** to address or remove impediments to resolvability.

From a legislative perspective, it appears that the legislation technique in the RRM-proposal contributes to **inconsistencies**. In particular, Article 3 (3) CRD and Article 11 (1) CRR should be deleted to prevent inconsistencies, discrepancies and overlapping with the existing acquis.

2. Enhancing the effectiveness of the supervision of m(FHCs) (Framing, Objectives):

Many responses from Member States differentiated between the **status of the entity** and its **activity/role within a group of institutions**. If a m(FHC)¹ factually controls and manages the banking group (it is the **operating entity of main relevance**) it seems to be agreeable to **designate it as a supervisory object and as the entity which has to ensure group compliance with consolidated requirements**. However, m(FHCs) established primarily for the purpose of participation management, in the course of corporate law procedures (e.g. mergers) or due to fiscal matters may not necessarily play a decisive role in the management of the banking group. In this regard, it may be more appropriate to ensure that the mother institution or EU-mother institution remains responsible for ensuring group compliance with consolidated requirements.

Article 21a should be amended to address the supervisory and resolution purposes raised and to prevent inconsistencies, discrepancies and overlapping with the legislative acquis. Furthermore, **supervisory and resolution purposes** should be clarified and relevant **m(FHCs)** be designated as supervisory objects, directly responsible for compliance with applicable provisions. Thus, the **accountability and responsibility** of entities having significant influence would be introduced and could be used for fulfilling the respective objectives in both the supervisory and recovery & resolution framework.

To enable a framed approach, we propose that m(FHCs), which factually control and manage the banking group (**operating entity of main relevance**) should be **designated as supervisory objects and as the entities which have to ensure group compliance with consolidated requirements**.

3. Empowerment of NCAs (Extension of the supervisory tool-box)

Within the recovery and resolution framework, the NRAs are already empowered with regard to groups and m(FHCs) (Art. 17 Para 5, Art. 33 BRRD). **NRAs may require an institution or parent undertaking to establish a parent-FHC in a MS or a Union-FHC to**

¹ FHCs are financial institutions, whose subsidiaries are exclusively, or mainly institutions or financial institutions and where at least one of such subsidiaries is an institution (Article 4 point 20 CRR). Such FHC acquires holdings or pursues one or more of the activities listed in points (2) to (12) and point (15) of Annex I to Directive 2013/36/EU (Article 4 Para 1 point 26 CRR).

address or remove impediments to resolvability. Besides, some direct intervention powers of NCAs, m(FHCs) are mainly addressed via their mother or central institutions. However, NCAs could be further empowered to enable additional direct supervisory powers against m(FHCs).

4. Designation of the consolidating supervisor

In principle, the consolidating supervisor is determined as being the authority responsible for the entity which effectively exercises control over its subsidiaries thus being legally and economically capable of steering the group of credit institutions. If this entity is a m(FHC) being the operating entity of main relevance, it would seem to be consistent to designate the NCA of the MS as the consolidating supervisor, in which the m(FHC) is established. However, it should be considered if additional safeguards or transitional provisions are needed.

Proposed amendments

COMMISSION PROPOSAL	AT PROPOSAL	Rationale
<p>Amendments to the CRD</p> <p>Article 3 is amended as follows:</p> <p>(b) the following paragraph 3 is added:</p> <p>"3. For the purposes of applying the requirements of this Directive and of Regulation (EU) No 575/2013 on a consolidated basis and for the purposes of exercising supervision on a consolidated basis in accordance with this Directive and Regulation (EU) 575/2013, the terms "institution", "parent institution in a Member State", "EU parent institution" and "parent undertaking" shall also apply to financial holding companies and mixed financial holding companies that are subject to requirements laid down in this Directive and in Regulation 575/2013 on a consolidated basis and are authorised in accordance with Article 21a."</p>	<p>Amendments to the CRD</p> <p>(b) the following paragraph 3 is added:</p> <p>"3. For the purposes of applying the requirements of this Directive and of Regulation (EU) No 575/2013 on a consolidated basis and for the purposes of exercising supervision on a consolidated basis in accordance with this Directive and Regulation (EU) 575/2013, the terms "institution", "parent institution in a Member State", "EU parent institution" and "parent undertaking" shall also apply to financial holding companies and mixed financial holding companies that are subject to requirements laid down in this Directive and in Regulation 575/2013 on a consolidated basis and are authorised in accordance with Article 21a."</p>	<p>Article 3 (3) CRD should be deleted to prevent inconsistencies, discrepancies and overlapping with the existing acquis.</p>
<p>The following Articles 21a and 21b are inserted:</p> <p style="text-align: center;"><i>"Article 21a</i></p> <p style="text-align: center;"><i>Authorisation of financial holding companies and mixed financial holding companies</i></p> <p>1. Member States shall require financial holding companies and mixed financial holding companies to obtain authorisation from the consolidating supervisor determined in accordance with Article 111.</p> <p>Where the consolidating supervisor is different than the competent authority in the Member State where</p>	<p>The following Articles 21a and 21b are inserted:</p> <p style="text-align: center;"><i>Article 21a</i></p> <p style="text-align: center;"><i>Authorisation Direct responsibility of relevant financial holding companies and relevant mixed financial holding companies for the group</i></p> <p>1. Member States shall require ensure that relevant financial holding companies and relevant mixed financial holding companies to obtain authorisation from the consolidating supervisor determined in accordance with Article 111 ensure compliance with the prudential framework on</p>	<p>This version of Article 21a introduces a framed approach and would technically operate. M(FHCs) are designated as supervisory objects thus directly responsible for compliance with applicable provisions if in the interest of NCA or NRA. By this, accountability and responsibility of entities having significant influence would be introduced and could be used for fulfilling the respective objectives in the supervisory and recovery & resolution framework.</p>

<p>the financial holding company or the mixed financial holding company was set-up, the consolidating supervisor shall consult the competent authority.</p> <p>2. The application for authorisation referred to in paragraph 1 shall contain information concerning the following:</p> <p>(a) the structural organisation of the group of which the financial holding company or the mixed financial holding company is part, clearly indicating the subsidiaries and, where applicable, parent undertakings;</p> <p>(b) compliance with effective direction of the business and place of the head office requirements set out in Article 13;</p> <p>(c) compliance with shareholder and member requirements set out in Article 14.</p> <p>3. The consolidating supervisor may only grant an authorisation where it is satisfied that all of the following conditions are fulfilled:</p> <p>(a) the financial holding company or mixed financial holding company that is subject to requirements laid down in this Directive and in Regulation (EU) No 575/2013 is capable of ensuring compliance with those requirements;</p> <p>(b) the financial holding company or mixed financial holding company does not obstruct the effective supervision of the subsidiary institutions or parent institutions.</p> <p>4. Consolidating supervisors shall require financial holding companies and mixed financial holding companies to provide them with the information they require to monitor the structural organisation of the group and compliance with the authorisation requirements referred to in this Article.</p> <p>5. The consolidating supervisors may only withdraw the authorisation granted to a financial holding company or mixed financial holding company where</p>	<p><u>a consolidated level.</u></p> <p>Where the consolidating supervisor is different than the competent authority in the Member State where the financial holding company or the mixed financial holding company was set-up, the consolidating supervisor shall consult the competent authority.</p> <p>2.-<u>A financial holding company or mixed financial holding company is relevant if letter a) to c) or d) are fulfilled:</u> The application for authorisation referred to in paragraph 1 shall contain information concerning the following:</p> <p><u>(a) The financial holding company or mixed financial holding company is the financial holding company or mixed financial holding company which effectively exercises control over its subsidiaries and is legally and economically capable of steering the group of credit institutions;</u></p> <p><u>(b) The particular group structure could hinder effective supervision on a consolidated level;</u> (a) the structural organisation of the group of which the financial holding company or the mixed financial holding company is part, clearly indicating the subsidiaries and, where applicable, parent undertakings; (b) compliance with effective direction of the business and place of the head office requirements set out in Article 13; (c) compliance with shareholder and member requirements set out in Article 14.</p> <p><u>(c) The financial holding company or mixed financial company has a credible capacity to develop, put into effect and execute risk management and steering process at the consolidated level for the entire group of institutions;</u> or</p> <p><u>(d) The relevant resolution authority has determined a resolution strategy according to</u></p>	
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<p>such a financial holding company or mixed financial holding company:</p> <p>(a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has sold all its subsidiaries that are institutions;</p> <p>(b) has obtained the authorisation through false statements or any other irregular means;</p> <p>(c) no longer fulfils the conditions under which authorisation was granted;</p> <p>(d) is subject to requirements laid down in this Directive and in Regulation (EU) No. 575/2013 on a consolidated basis and no longer meets the prudential requirements set out in Parts Three, Four or Six of Regulation (EU) No 575/2013 or imposed under Article 104(1)(a) or Article 105 of this Directive or can no longer be relied on to fulfil its obligations towards its creditors;</p> <p>(e) falls within one of the other cases where national law provides for withdrawal of authorisation; or</p> <p>(f) commits one of the breaches referred to in Article 67(1).</p> <p>[..]"</p>	<p><u>Article 33(2) BRRD with the financial holding company or mixed financial holding company being the point of entry for resolution measures.</u></p> <p>4. Consolidating supervisors shall require financial holding companies and mixed financial holding companies to provide them with the information they require to monitor the structural organisation of the group and compliance with the authorisation requirements referred to in this Article.</p> <p><u>3. Before taking a decision about the relevance of a financial holding company or mixed financial holding company, the NCAs shall give the EU parent institution, EU parent financial holding company, EU parent mixed financial holding company, as appropriate, an opportunity to state its opinion on such decision.</u></p> <p>5. The consolidating supervisors may only withdraw the authorisation granted to a financial holding company or mixed financial holding company where such a financial holding company or mixed financial holding company:</p> <p>(a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has sold all its subsidiaries that are institutions;</p> <p>(b) has obtained the authorisation through false statements or any other irregular means;</p> <p>(c) no longer fulfils the conditions under which authorisation was granted;</p> <p>(d) is subject to requirements laid down in this Directive and in Regulation (EU) No. 575/2013 on a consolidated basis and no longer meets the prudential requirements set out in Parts Three, Four or Six of Regulation (EU) No 575/2013 or imposed under Article 104(1)(a) or Article 105 of this Directive or can no longer be relied on to fulfil its</p>	
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	<p>obligations towards its creditors; (e) falls within one of the other cases where national law provides for withdrawal of authorisation; or (f) commits one of the breaches referred to in Article 67(1).- [...]</p>	
	<p><i>Article 102 is amended as follows:</i> „1. Competent authorities shall require an institution, relevant financial holding company or relevant mixed financial holding company to take the necessary measures at an early stage to address relevant problems in the following circumstances: (a) the institution, relevant financial holding company or relevant mixed financial holding company does not meet the requirements of this Directive or of Regulation (EU) No 575/2013; (b) the competent authorities have evidence that the institution, relevant financial holding company or relevant mixed financial holding company is likely to breach the requirements of this Directive or of Regulation (EU) No 575/2013 within the following 12 months.“</p>	<p>The following amendments empowers NCAs by introducing additional direct supervisory measures against m(FHCs).</p>
<p>(21) Article 104 is amended as follows: (a) paragraphs 1 and 2 are replaced by the following: 1. For the purposes of Article 97, Article 98(4), Article 101(4) and Articles 102 and 103 and the application of Regulation (EU) No 575/2013, competent authorities shall have at least the following powers: [...] (c) to require institutions to present a plan to restore compliance with supervisory requirements pursuant to this Directive and to Regulation (EU) No 575/2013 and set a deadline for its implementation, including improvements to that plan regarding scope and deadline;</p>	<p>(21) Article 104 is amended as follows: (a) paragraphs 1 and 2 are replaced by the following: 1. For the purposes of Article 21a, Article 97, Article 98(4), Article 101(4) and Articles 102 and 103 and the application of Regulation (EU) No 575/2013, competent authorities shall have at least the following powers: [...] (c) to require institutions, relevant financial holding company or relevant mixed financial holding company to present a plan to restore compliance with supervisory requirements pursuant to this Directive and to Regulation (EU) No 575/2013 and set a deadline for its implementation, including</p>	<p>The following amendments empowers NCAs by introducing additional direct supervisory measures against m(FHCs).</p>

<p>[..] (e) to restrict or limit the business, operations or network of institutions or to request the divestment of activities that pose excessive risks to the soundness of an institution; (f) to require the reduction of the risk inherent in the activities, products and systems of institutions; [..] (h) to require institutions to use net profits to strengthen own funds; (i) to restrict or prohibit distributions or interest payments by an institution to shareholders, members or holders of Additional Tier 1 instruments where the prohibition does not constitute an event of default of the institution; [.]</p>	<p>improvements to that plan regarding scope and deadline; [.] (e) to restrict or limit the business, operations or network of institutions, relevant financial holding company or relevant mixed financial holding company or to request the divestment of activities that pose excessive risks to the soundness of an institution; (f) to require the reduction of the risk inherent in the activities, products and systems of institutions, relevant financial holding company or relevant mixed financial holding company; [.] (h) to require institutions, relevant financial holding company or relevant mixed financial holding company to use net profits to strengthen own funds; (i) to restrict or prohibit distributions or interest payments by an institution, relevant financial holding company or relevant mixed financial holding company to shareholders, members or holders of Additional Tier 1 instruments where the prohibition does not constitute an event of default of the institution; [.]</p>	
<p>Article 111 (Determination of the consolidating supervisor) [.] 2. Where the parent of an institution is a parent financial holding company or parent mixed financial holding company in a Member State or an EU parent financial holding company or EU parent mixed financial holding company, supervision on a consolidated basis shall be exercised by the competent authorities that granted authorisation. [.]</p>	<p>Article 111 (2) is amended as follows and paragraph 2a introduced: [.] 2. Where the parent of an institution is a parent financial holding company or parent mixed financial holding company in a Member State or an EU parent financial holding company or EU parent mixed financial holding company, supervision on a consolidated basis shall be exercised by the competent authorities that granted authorisation to the institution.</p>	<p>The following amendments enable a shift of responsibilities, if a m(FHC) is designated as the operating entity of main relevance.</p>

	<p><u>2a. Where the parent of an institution is a relevant parent financial holding company or relevant parent mixed financial holding company, supervision on a consolidated basis shall be exercised by the competent authority of the Member State, in which the relevant parent financial holding company or relevant parent mixed financial holding company is established. [...]</u>²</p>	
<p>Amendments to the CRR</p> <p>Article 11 is replaced by the following:</p> <p><i>„Article 11 General treatment</i></p> <p>1. For the purpose of applying the requirements of this Regulation on a consolidated basis, the terms 'institutions', 'parent institutions in a Member State', 'EU parent institution' and 'parent undertaking', as</p>	<p>Article 11 is replaced by the following:</p> <p><i>„Article 11 General treatment</i></p> <p>1. For the purpose of applying the requirements of this Regulation on a consolidated basis, the terms 'institutions', 'parent institutions in a Member State', 'EU parent institution' and 'parent undertaking', as the case may be, shall also refer to financial holding</p>	<p>Article 11 (1) CRR should be deleted to prevent inconsistencies, discrepancies and overlapping with the existing acquis.</p>

² For your convenience, we would like to mention the further process acc. Art. 111 Para 3-5 CRD:

„3. Where institutions authorized in two or more Member States have as their parent the same parent financial holding company, the same parent mixed financial holding company in a Member State, the same EU parent financial holding company or the same EU parent mixed financial holding company, supervision on a consolidated basis shall be exercised by the competent authority of the institution authorized in the Member State in which the financial holding company or mixed financial holding company was set up. Where the parent undertakings of institutions authorized in two or more Member States comprise more than one financial holding company or mixed financial holding company with head offices in different Member States and there is a credit institution in each of those States, supervision on a consolidated basis shall be exercised by the competent authority of the credit institution with the largest balance sheet total.

4. Where more than one institution authorized in the Union has as its parent the same financial holding company or mixed financial holding company and none of those institutions has been authorized in the Member State in which the financial holding company or mixed financial holding company was set up, supervision on a consolidated basis shall be exercised by the competent authority that authorized the institution with the largest balance sheet total, which shall be considered, for the purposes of this Directive, as the institution controlled by an EU parent financial holding company or EU parent mixed financial holding company.

5. In particular cases, the competent authority may, by common agreement, waive the criteria referred to in paragraphs 3 and 4 if their application would be inappropriate, taking into account the institutions and the relative importance of their activities in different countries, and appoint a different competent authority to exercise supervision on a consolidated basis. In such cases, before taking their decision, the competent authorities shall give the EU parent institution, EU parent financial holding company, EU parent mixed financial holding company, or institution with the largest balance sheet total, as appropriate, an opportunity to state its opinion on that decision. “

the case may be, shall also refer to financial holding companies and mixed financial holding companies authorised in accordance with Article 21a of Directive 2013/36/EU. [..]	companies and mixed financial holding companies authorised in accordance with Article 21a of Directive 2013/36/EU. [..]	
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