



Council of the European Union
General Secretariat

**Interinstitutional files:
2021/0296 (COD)**

Brussels, 22 September 2023

WK 12062/2023 INIT

LIMITE

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From:	Presidency
To:	Working Party on Financial Services and the Banking Union (Insurance) Financial Services Attachés
Subject:	IRRD: working party 29.09.23 - Presidency non-paper: Scope of the Directive and resolution authority



Presidency non-paper

Scope of the Directive and resolution authority

1. Scope of the IRRD

The scope of the IRRD is established in Article 1 of the Commission's proposal. As per Article 1(1), the IRRD shall be applied to all insurance and reinsurance undertakings established in the Union which fall within the scope of Article 2 of Directive 2009/138/EC and to other entities that are part of the insurance group, including branches. While the Parliament does not present any significant amendment to the scope, the Council proposes a new point (g) to Article 1(1), described below.

1.1. Essential services providers

The Council agreed to include a new point (g) within Article 1(1) of the IRRD, namely, "**group entities that provide essential services to undertakings under resolution**". This amendment implies an extension of the scope of the Directive proposed by the Commission.

The Council does not propose a definition of "essential services providers" within Article 2¹. However, reading Recital (36) in conjunction with Article 20, also amended by the Council, helps to spell out its meaning and the aim for including it in the scope of the Directive. As per Recital (36), *essential service provider* refers to those "**group entities that provide services to an undertaking (...) which are essential for ensuring the continuity of insurance coverage**". As far as the purpose of this amendment, the aim seems to be ensuring that "**the resolution authority (is) able to take resolution action with respect to such essential services provider in case it is failing or likely to fail as a result of the failing of an insurance or reinsurance undertaking within the same group and such action is necessary to preserve the continuity of insurance coverage provided by other group entities**".

Accordingly, the Council provides an amendment to Article 20(1) to ensure that resolution authorities may take resolution action against these essential services providers:

*1. Member States shall ensure that resolution authorities may take resolution action in relation to **any of the entities** referred to in Article 1(1), points (b) to (e), where the conditions laid down in Article 19(1) are met and in relation to an entity referred to in Article 1(1), point (g), where that entity meets any of the conditions laid down in Article 19(3).*

¹ The notion of "essential service providers" is neither provided by the Solvency II Directive, so establishing a linkage with it would not be possible.

The concept of “essential services” is used in the FSB Key Attributes (see point 3.2 (iv), on *General resolution powers*) and in the IAIS Common Framework to outline the scope of an IAIGs in resolution². It should be noted that IAIS clarified the term referring to IT services³.

The Parliament did not propose any amendment to Article 1(1).

1.2. Information to EIOPA (Article 1(2))

Neither of the co-legislators proposes significant amendments to Article 1(2). Therefore, the flexibility provided by the Commission to Member States to “*adopt or maintain rules that are stricter or additional to those laid down in this Directive and in the delegated and implementing acts adopted on the basis of this Directive, provided that those rules are of general application and do not conflict with this Directive and with the delegated and implementing acts adopted on its basis*” are kept in both proposals.

Nevertheless, an amendment is proposed by the Parliament to this paragraph, consisting of the mandate to the Member States to inform EIOPA of using this discretion:

*2. Member States may adopt or maintain rules that are stricter or additional to those laid down in this Directive and in the delegated and implementing acts adopted on the basis of this Directive, provided that those rules are of general application and do not conflict with this Directive and with the delegated and implementing acts adopted on its basis. **When Member States adopt or maintain such rules, they shall inform EIOPA thereof.***

It is, therefore, left out of the Directive the possibility to adopt less strict rules or provide for general exemptions from its provisions since neither of the co-legislators proposes amendments for this purpose.

Questions to Member States:

- 1. Would you support further clarification of "essential services providers" in a recital?***
- 2. What is your view on the EP addition to "inform EIOPA" when Member States make use of the possibility to adopt or maintain stricter or additional rules in virtue of Article 1(2)?***

² CF 12.7.a: *The powers that the supervisor and/or resolution authority may exercise, subject to adequate safeguards and proportionality, for the resolution of an IAIG include, at least, the following: (...)*

• *take steps to provide continuity of **essential services** and functions including:*
*requiring other legal entities within the IAIG (including non-regulated entities) to continue to provide these **essential services** to the entity in resolution, any successor, or an acquiring entity (...)*

³ CF 12.7.a.2: *Essential services mentioned under CF12.7a include, in particular, IT.*

2. Designation of resolution authorities and competent ministries (Article 3)

Both co-legislators propose amendments to Article 3 on the designation of resolution authorities and competent ministries. While they are fully aligned about the essence of this mandate⁴, other changes put forward by the co-legislators within Article 3 give rise to two different approaches regarding resolution authorities.

The Parliament introduces a significant amendment in Article 3(2). This amendment aims to ensure that each resolution authority designated under Article 3 is embedded within an existing authority; *id est*, that the Member States should not create separate entities for this purpose. Thus, the Parliament proposes the following drafting to Article 3(2) (the changes are marked in bold):

*“2. Resolution authorities shall ~~be-operate~~ **independently within** national central banks, competent ministries, public administrative authorities or authorities entrusted with public administrative powers. **Member States shall refrain from the creation of separate entities.***

This amendment is consistent with point (7) of Article 2(2), where the Parliament proposes to amend the definition of resolution authority, by including "**a separate service or department within a national authority designated by a Member State in accordance with Article 3**". The Parliament proposes to amend consequently Article 3(3)⁵ to ensure consistency with the above provision by adding "*within which the resolution authority is established*".

*3. Adequate structural arrangements shall be in place to avoid conflicts of interest between the functions entrusted to the resolution authority pursuant to this Directive and all other functions entrusted to the authority **within which the resolution authority is established**, without prejudice to the exchange of information and cooperation obligations required by paragraph 6.*

On the contrary, the Council does not preclude the creation of new resolution authorities as per Article 3(2), keeping the flexibility provided in the Commission's proposal. Furthermore, the Council agreed two concrete amendments in Article 3(4) that regulate the possibility of combining functions in one organisation: convergence of reporting lines at the highest or senior management level and the possibility to share staff devoted to "other functions", including supervisory functions, to meet temporarily high workloads. The Parliament does not propose any changes in this regard.

Lastly, a slight difference comes up regarding the due notification that a Member State shall provide EIOPA when it designates more than one resolution authority, which is explicitly allowed in Article 3(1). While the Council proposed that this notification should also be provided to the Commission, the Parliament keeps the Commission drafting.

⁴ Neither of them proposes any amendment to Article 3(1). Hence, Article 3(1) would remain as provided by the Commission proposal, namely: *Each Member State shall designate one or, exceptionally, more resolution authorities that are empowered to apply the resolution tools and exercise the resolution powers.*

⁵ Article 3(3) Council GA: *Where a resolution authority is entrusted with other functions including supervisory functions, adequate structural arrangements shall be in place to avoid conflicts of interest between the functions entrusted to the resolution authority pursuant to this Directive and supervisory or other functions, without prejudice to the exchange of information and cooperation obligations required by paragraph 6. In particular, Member States shall ensure that those arrangements ensure effective operational independence, including separate staff, reporting lines and decision making processes of the resolution authority from any supervisory or other functions of that resolution authority.*

Questions to Member States:

3. *What are your views regarding the amendments for resolution authorities proposed by the Parliament in Article 3? Would you agree that national discretion should be kept under Article 3(2)?*

