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From:	Presidency
To:	Working Party on Financial Services and the Banking Union (CMDI) Financial Services Attachés
Subject:	CMDI - WP meeting (Attachés) on 17 Oct. 2024 - Presidency's Preparatory note for the first CMDI trilogue

Working Party on Financial Services and Banking Union

Review of the bank crisis management and deposit insurance (CMDI) framework

Brussels, 17 October 2024

Preparatory note for the first CMDI trilogue

1. Introduction

In line with the June 2022 Eurogroup Statement and with a view to further strengthening and completing the banking union, the Commission adopted the CMDI proposal to strengthen the crisis management and deposit insurance framework. The proposal aimed to enable authorities to organize the orderly market exit for a failing bank of any size and business model with a wide range of tools and to facilitate the use of industry-funded safety nets to protect depositors in banking crises. The overall objective of the package was to preserve financial stability, protect taxpayers and depositors, while supporting the real economy and its competitiveness.

The Parliament adopted its mandate at its Plenary session on 22-25 April 2024, and the Council adopted its negotiating mandate at the COREPER on 19 June 2024. However, the 2024 European Parliament (EP) elections and the beginning of the new institutional cycle have delayed the possible start of the inter-institutional negotiations.

The aim of the meeting today is to prepare for the first trilogue and to ensure that the Council is ready to start the negotiations as soon as possible.

The Hungarian Presidency understands the delicate balance achieved in the Council's negotiating mandate on the CMDI proposal and intends to continue the work while preserving this balance.

The Presidency proposes a categorisation of topics into political and technical. However, in order to manage the sequence of discussions, the political topics would be further split into main political and secondary political topics.

In this meeting to prepare the first political trilogue, the Presidency does not intend to discuss the main political items. Instead, it proposes discussing how to converge the **differing views on selected secondary political topics.** However, in order to provide a full picture of the differences between the EP and the Council negotiating mandates, the note also contains an overview of the main political issues.

Against this background, Member States are invited to (i) consider the differences between the EP and the Council negotiating mandates on secondary political topics (see point II below) (ii), and to indicate where, in their view, the Presidency could show flexibility.

2. Categorisation of the topics

The Hungarian Presidency categorised the CMDI topics by relevance into a three-tier system: main political, secondary political, and technical topics. (This categorisation has been presented to the Parliament for further discussion.)

As indicated below, the Presidency suggests splitting the category of political topics. The categorisation is based on the following underlying principles:

- **Main political topics (tier 1)**: The most important and controversial issues in the CMDI package, and where the initial negotiating mandates of the co-legislators are significantly different from each other.
- **Secondary political topics (tier 2)**: The political topics of second order would include: (i) political topics where the respective positions of the co-legislators are less far apart from each other; (ii) political topics with significant technical elements; and (iii) highly technical topics with significant political implications. These items would have to be

discussed in political trilogues first before mandating the technical level, as indicated in the procedural note.

- **Technical topics (tier 3)**: Highly technical topics likely to be less politically controversial, which can be delegated directly to the technical trilogues.

The indicative list of the main political and secondary political topics is proposed as follows:

Main political	Secondary political
Public Interest Assessment	Extraordinary Public Financial Support
Creditor Hierarchy	Restriction of MREL eligible instruments for retail clients
Least Cost Test	Selected articles from BRRD
Bridge the Gap	Selected articles from DGSD
Pecking order	
MREL calibration	
Preventive and Alternative Measures	
SRB governance	

This categorisation of topics is made for working methodological purposes only. The trilogue will focus primarily on discussing topics identified as political, while experts will be engaged with discussing and preliminarily agreeing on technical topics. The trilogue will, nevertheless, review the experts' recommendation and confirm any agreement reached at the technical level (see note on procedural aspects).

3. Main political topics (tier 1) - non-discussion item

The topics listed under this point concern the most important and controversial issues in the CMDI package. The order of the issues does not reflect any prioritisation; the questions listed here are interlinked with each other.

As highlighted in the introductory part of the non-paper, the Presidency does not intend to open a discussion on the main political topics at the 17 October meeting. The aim of this section is to contribute to a full overview of the main changes to the Commission proposal on the issues considered as political. At the first trilogue, the Presidency intends to present the reasoning behind the Council amendments to the proposal of the Commission.

3.1. Public Interest Assessment

BRRD:	
• Definition of critical functions and deposits • Protection of public funds • Resolution conditions • 2-step PIA • EBA report and RTS on PIA	• 2(1) 35 (Line 68); 2(1) 93a (Line 75) • 31(2) (Line 200-202); • 32 (1), (2), (4), (5), first subparagraph (Line 203-217); • 32(5) second and third subparagraph (GA) (Line 217b, 218 and 218a); • 32(5a) (EP) (Lines 218b – 218d)

As the CMDI package aims to extend the scope of resolution to small and medium-sized banks, **the Commission** extends the public interest assessment by proposing that national insolvency procedures should only be considered as the preferred strategy if their use is more effective (and not to the same extent) in achieving the resolution objectives. While insolvency proceedings remain the default option, the amendment increases the burden of proof for resolution authorities, as they will have to demonstrate that resolution is not in the public interest. The assessment of the public interest remains a case-by-case decision at the discretion of the resolution authority.

The main amendments made by the co-legislators concern the definition of critical functions, the resolution objective related to the protection of deposits, and resolution conditions. **The Council mandate** introduces a two-staged approach to broaden the scope of the assessment and make it more flexible. This would allow for most of the smaller institutions to be wound up. However, for institutions that are too large to be liquidated, resolution authorities will have an additional legal basis to place them in resolution. It deletes the resolution objective to protect depositors while minimising losses for the DGSs, as the principle of cost minimization is inserted in the second stage of the approach. Regarding the SRMR, the Council text introduced two rebuttable presumptions: a presumption in favour of positive PIA for SRB banks and a negative presumption for banks with simplified obligations (recital 20a).

Meanwhile, **the EP** deletes the provision of cost minimization and amends the objective to protect depositors by clarifying that only covered deposits and the uncovered part of eligible deposits of natural persons and SMEs should be covered to the extent possible. It also inserts a reference to Regulation 1059/20003 (EU) on territorial units for clarification purposes regarding the scope of regional level in the definition of critical functions. Furthermore, it introduces an exception for institutions that comply with the simplified obligations. In these cases, the resolution measure is to be presumed as not being in the public interest. However, this may be overruled if the winding-up of the institution would jeopardise the objectives of the resolution.

3.2. Creditor Hierarchy

BRRD:	
• Ranking of deposits	• 108(1), 108 (8), 108(9) (Line 426-434)

To put this issue in a broader context, insolvency procedures are not harmonised in the EU and remain regulated at the national level. However, in the aftermath of the financial crisis, the coverage level and scope of eligible deposits were harmonised, and Article 108 BRRD introduced a harmonised creditor hierarchy in case of insolvency. It defines a three-tier system of the ranking of deposits: covered deposits up to 100,000 EUR (with super-preference to refund DGS), eligible deposits above the covered part of individuals and SMEs, and all other deposits.

In the CMDI proposal, the **Commission** uses the creditor hierarchy, among other objectives, to unlock further DGS funding that might be necessary for the resolution of smaller institutions and thus suggests departing from the above-mentioned system. The Commission proposed introducing a single-tier system with a general depositor preference, thereby abolishing the super-preference of the DGS. This could facilitate the use of the DGS resources outside the payment of covered deposits. As a consequence, while DGS funds would likely be used more

often and/or to a greater extent in resolution than in liquidation, the Commission has argued that their use in resolution would be more economical compared to the pay-out function in liquidation.

Both co-legislators departed significantly from the original approach of the Commission.

The **Council** had lengthy discussions on this issue, and it was clear that it is crucial for many Member States to the payout function of DGS and its contribution to financial stability as an important safety net for covered deposits. Against this background, the Council has maintained the super-preference of the DGS to guarantee the recovery of the financial means of the DGS. The third tier of the existing 3-tier system has been split in two (below and above 1 year maturity), resulting in a new 4-tier system. According to the Council, this would facilitate the bail-in of MREL-eligible deposits. To ensure that DGS funds could still be used to support resolution, the Council expanded the scope of costs that should be considered in the LCT when calculating the payout counterfactual by adding the indirect costs that the 2nd and 3rd tiers would suffer in liquidation. The Council maintained a form of general depositor preference subject to derogations.

The **EP** has introduced a 2-tier system, which has all eligible deposits of individuals and SMEs (including the covered amount and the part above 100 000 Euro) in the first tier, thereby treating in the same way deposits of individuals and SMEs below and above the harmonised coverage level, including such deposits that are held in the branches of EU banks outside of the EU. The second tier in the EP text consists of all other deposits (non-eligible deposits and eligible deposits of corporates above the coverage limit). The general depositor preference is also preserved in the EP mandate.

3.3. Least Cost Test

DGSD:
• 11e (Line236-254); • 11e(2) b1) (GA) (Line 243a-244b); • 11e(4) second subparagraph (GA) (Line 247a); • 11e(4a) (EP) (Line 247b)

The Least Cost Test (LCT) has been implemented differently across Member States. Therefore, the **Commission proposal** introduced a harmonised approach for determining the maximum amount a DGS may contribute beyond its pay-out function, and to finance preventive, resolution, and alternative measures. It also clarifies the direct and indirect costs.

As indicated above, the **Council mandate** has modified the methodology for determining the LCT in a way that facilitates unlocking the DGS contribution to the financing of resolution. This has been done to reflect the amendments to the creditor hierarchy: maintaining the super-preference of the DGS reduces the amount of DGS contributions to finance preventive, resolution, and alternative measures, as the DGS would have priority to recover costs in the liquidation process. Therefore, two new elements have been introduced to widen the range of LCT factors: (i) the scaling factor (when estimating the cost of reimbursing depositors, the DGS shall multiply the expected recovery rate by 85%); and (ii) the recognition of indirect costs (DGS pay-outs to depositors in insolvency proceedings entail indirect costs, so the following factors must be taken into account: the cost of replenishing the DGS and the potential additional cost of funding and operational expenses for the DGS).

The **EP mandate** amends the basis of comparison for the estimation criteria of the costs of repaying depositors. First, it requires taking into account the potential costs for the DGS arising from potential economic and financial instability, including the need to use additional funds to protect depositors and financial stability. Furthermore, the EP mandate also removes from the calculation the replenishment costs of the DGS borne by the member credit institutions. To calculate the potential costs, it introduces a methodology that factors in the administrative costs associated with the process of repayment and the costs of mobilising alternative funding. It also clarifies that the methodology should take into account contagion effects, economic and financial risks, and any reputational damage to the banking system. Finally, it also introduces an obligation for the DGS to report to the competent authority, the resolution authority, and the designated authority on the calculation made when implementing alternative measures (summarising the net recovery rate derived from the estimated cost of repaying depositors for the DGS).

3.4. Bridge the Gap function of the DGS

BRRD:	
• Use of DGS in resolution	• 109(2b) (Line 453-455d) • 109(2b) a) b) (GA) (Line 453-453c); • 109(2b) third subparagraph (EP) (Line 454a); • 109(2b) fourth subparagraph a) b) (EP) (Line 455a-b); • 109(2b) fourth subparagraph (GA) (Line 455-455d); • 109(3) (Line 456-457),

Under the current rules, one of the main conditions for access to resolution funds is that the shareholders and creditors must first pay for the losses ('bail-in') with an amount equal to at least 8% of the total liabilities and own funds (TLOF) of the institution under resolution. The MREL capacity of the bank and, once it is depleted, liabilities of other creditors can be used to absorb losses up to the 8% threshold.

According to the **Commission**, one of the main objectives of the CMDI reform is to extend the scope of resolution to smaller and medium-sized banks and facilitate the use of industry-funded safety nets in resolution. To this end, the Commission proposes the DGS Bridge the Gap function in Article 109(2b) of the BRRD proposal, which comes into play in specific cases where the resolution authority considers that it is necessary to exclude non-covered deposits from bail-in (i.e., the conditions for such exclusions are met) and the bail-inable liabilities are not sufficient to absorb the losses up to 8% TLOF required by Article 44(5a) BRRD and which is required to meet the conditions for accessing the resolution financing arrangement (SRF in the banking union and the national resolution fund outside the Banking Union). The Bridge the Gap tool is subject to safeguards and is reserved for institutions not designated for liquidation and will exit the market after the resolution action.

The **Council mandate** introduces a number of additional safeguards compared to the Commission and the Parliament (see Article 109(2b) BRRD and Article 79(1)-(3a) SRMR).

The Council introduces in Article 109(2b)(a) that in order to access the Bridge the Gap tool, the MREL eligible liabilities of the institution shall be fully bailed in, with the exception of a maximum of 2.5% of the liabilities that can be excluded.

The Council also introduces in Article 109(2b)(b) that there shall be a clear exit strategy for the residual institution, i.e., it is either wound up under normal insolvency proceedings or, where the bridge institution tool is applied, its operations are terminated as soon as possible.

In Article 109(2b), last subparagraph, the Council introduces as an option for national resolution authorities to apply the Bridge the Gap tool only for an institution that has not breached its MREL requirement during the 8 to 36 months preceding the determination that the institution is failing or likely to fail. It is important to note that inside the banking union, this requirement is made mandatory for banks with total assets between 30 and 80 billion euros through Article 79(1b) SRMR.

In Article 109(2b)(i), the Council retains the EP exclusion that the Bridge the Gap tool cannot be applied to institutions that have been identified as liquidation entities, i.e., institutions with a negative Public Interest Assessment, and complements the EP text by limiting this exclusion to the two years preceding the resolution action.

In Article 109(2b)(ii), the Council mandate also excludes institutions in the transitional phase of building up MREL, except in the case of a systemic crisis. The Council essentially enlarges the exclusion in the EP text, which has limited the exclusion to institutions that have breached their intermediate or final MREL target in four quarters within four years ending 6 months prior to the resolution action.

Through the SRMR, the Council negotiating mandate introduces a differentiated conditionality in the Banking Union based on the size of the institution. It provides for a set of safeguards for banks with less than 30 billion euros in total assets and additional safeguards for banks between 30 and 80 billion euros in total assets. According to Article 79(1b) first subparagraph, banks that are larger than 80 bn euros in total assets are excluded from access to the Bridge the Gap tool.

Most importantly, the Council introduces a number of safeguards with respect to the amount of DGS contribution: the maximum amount of the DGS intervention is 2.5% TLOF for banks up to 30 billion euros in total assets (Article 79(1a) SRMR), and up to 1.25% TLOF for banks between 30 and 80 billion euros in total assets (Article 79(1b) second subparagraph SRMR). Furthermore, the total amount of the DGS contribution is by default limited to 62.5% of the target level of the DGS in the banking union, and it can only contribute more where, in the very extraordinary situation of a systemic crisis, the resolution authority decides that it is necessary (Article 79(2) SRMR). Outside the banking union, the limitation of the DGS contribution in relation to the target level of the DGS is a discretionary decision of the national resolution authority.

According to Article 79(1a) SRMR, for banks with up to 30 billion euros in total assets, there shall be a contribution of at least 6.5% TLOF over the 12 months before the declaration of failing or likely to fail.

For significant banks, i.e., banks with total assets between 30 and 80 bn euros, the Bridge the Gap tool is accessible in exceptional circumstances only, where it is necessary to preserve financial stability and avoid significant adverse effects on the financial system, and only for a period of 10 years from the date of entry into force of the SRMR. Furthermore, it is only accessible for those institutions whose deposits exceed 65% of their total liabilities, including their own funds, and where the own funds and liabilities counting towards MREL are at least

8% in the 12 months before the determination of failing or likely to fail (Article 79(1b) first subparagraph SRMR). Additionally, it is limited to those institutions where the shareholders and holders of other bail-inable liabilities have contributed to 8% of the loss absorption requirement over the last 12 months (Article 79(1b)(b)(i) SRMR).

While it is not strictly part of the so-called Bridge the Gap function, it should be mentioned that both the Council and the Parliament enlarge the scope of DGS intervention beyond contributing to reaching the 8% TLOF as proposed by the Commission. As a result, the DGS could effectively provide further funds after the resolution financing arrangement has contributed maximum a 5% TLOF, in other words, above the 13% TLOF threshold, in proportion to the contribution of the resolution financing arrangement. The Council negotiating mandate also foresees specific governance and approval procedures for the use of the DGS funds as a bridge (see Article 18(7) and 79(1b) SRMR).

The **EP** largely takes over the Commission proposal and introduces one additional safeguard, namely that the Bridge the Gap cannot be used for entities that did not comply with the MREL requirements in four quarters within four years ending six months preceding the start of resolution.

3.5. Pecking order

BRRD:	
• Use of DGS in resolution • Contribution by resolution financing arrangements	• 109(2b) second subparagraph, (Line 453c) • 44(5), 44(7), first and second subparagraph, 44a(8) (Line 291-300); • 44(7) third and fourth subparagraph (GA) (Line 298a-b)

The “Pecking order” regulates how – in what order and to what extent - industry funds, namely the funds of the national DGS and the resolution financing arrangements, and eventually alternative public funds, may contribute to the resolution of an institution.

The **Commission** proposes in Article 109(2b) of the draft BRRD that DGS funds may – under certain circumstances and subject to safeguards – contribute to reaching the minimum 8% bail-in of TLOF that is necessary to access the resolution funds in case an institution has been placed in resolution and the chosen strategy is sale of business or transfer to a bridge bank and market exit. For banks in the Banking Union with up to 30 billion euros in total assets, the contribution may be up to a maximum of 2.5% of TLOF, while for institutions with a balance sheet between 30 and 80 billion euros, the maximum contribution is 1.25%.

According to Article 44(5) of the BRRD proposal, the resolution authority may decide that the resolution fund may contribute up to 5% TLOF to the resolution of the institution after the 8% bail-in requirement was met, i.e., up to a maximum of 13% TLOF. In extraordinary circumstances, the resolution authority may seek further funding from alternative financing sources or/and the resolution fund may make further contributions from resources raised through ex-ante contributions if there is still a need for further financing of the resolution after the 5% TLOF limit is reached and the conditions of Article 44(7) are met.

The **EP** has deleted the amendments proposed by the Commission to Article 44(7) of the BRRD, essentially reverting to the status quo. At the same time, the EP has amended Article

109(2b) of the BRRD, proposing that in exceptional circumstances and above the 13% TLOF, the DGS must contribute to the resolution in proportion to the contribution made by the resolution funds above the 5% limit specified in Article 44(5), point (b).

The possibility to use alternative financing sources and/or resolution funds above the 5% limit (i.e., above the 13% TLOF) is already in the existing BRRD, under certain conditions. In case of the use of the Bridge the Gap tool, the **Council** provides for DGS contribution after the 5% limit for the resolution fund contribution is reached and before alternative financing sources and/or additional contribution from the resolution funds (Article 44(7)(a)(b) BRRD).

3.6. MREL calibration

BRRD:	
• Transfer strategies • Transitional arrangements • Transitional period for institutions to comply with the requirements of 45e, 45f	• 45ca (Line 324-338); • 45ca (1) point b (iiia) (iiib) (EP) (Line 331a-b); • 45ca(1)point c (iia) (EP) (Line 334a); • 45m (1a) (EP) (Line 347a-g) • 45m(4) (Line 349); 45m(4a) (GA) (Line 349a-b)

The Minimum Requirement for Own Funds and Eligible Liabilities (MREL) is the first line of defence to ensure the resolvability of an institution that is failing or likely to fail, as it aims to ensure that the institution has sufficient own loss-absorption capacity. The level of MREL is determined by the resolution authority, taking into account the preferred resolution strategy of the institution. Article 45c of the BRRD in force does not provide detailed provisions for cases where the resolution plan foresees a transfer strategy as the preferred resolution strategy. This may lead to legal uncertainty and diverging practices among resolution authorities.

Therefore, the **Commission proposes** introducing a new Article 45ca in the BRRD, which outlines the principles for calibrating the MREL in a proportionate manner when the resolution plan includes the use of the sale of a business tool or the bridge institution tool, as well as the exit of the institution from the market. The principles take into account the size, business model, funding model and risk profile of the resolution entity, the depth of the market in which the resolution entity operates, the shares, other instruments of ownership, assets, rights or liabilities to be transferred - taking also into account the core business lines and critical functions of the resolution entity, the liabilities excluded from bail-in, the safeguards, etc. The Commission also proposed setting MREL for banks subject to liquidation through alternative measures.

The **EP** extended the use of proportionate MREL calibration by deleting the requirement that the institution must exit the market. The EP has also modified the criteria to be taken into account when setting the MREL requirement by deleting the criterion related to the depth of the market in Article 45ca(1) of the draft BRRD and by complementing the criterion of risk profile in Article 45ca(1)(a) of the draft BRRD: it has to relate either to the risk profile of the whole institution or to the part of the institution that is subject to resolution. The EP mandate also introduces MREL floor levels.

In light of the divergences among Member States on the issue of the sufficient level of MREL and the doubts as to whether a lower MREL level could be proportionate, the **Council** has deleted the draft Article 45ca BRRD.

3.7. Preventive and Alternative Measures

DGSD:
• 11 (Line 188-200h); • 11(5) a) b) c) (EP) (Line 200a-200g); • 11(6) (GA) (Line 200h); • 11a (202-213h); • 11a(1fa) (EP) (Line 210a); • 11a(3) second subparagraph (EP) (Line 212a); • 11a(3) second subparagraph (GA) (Line 212b); • 11a(4) second subparagraph (EP) (Line 213a); • 11a(5) (GA) (Line 213h); • 11b (Line 214-221a); • 11b(1a) (GA) (Line 216a); • 11b(2a) (EP) (Line 217a); • 11b(3) a) b) c) d) (Line 218a-g); • 11b(5a) (EP) (Line 220a-b); • 11b(6a) (EP) (Line 221a); • 11ba (GA) (Line 221c-n) • 11c (Line 222-226); • 11c(1a) (GA) (Line 224a); • 11c (2) a) b) (GA) (line 226a-b); *Related topics:* *DGSD:* • 2(2) (line 340)**;** • 4(2) (Line 83a-d)**;** *BRRD:* • 30a(2b) (Line 182-182a); • 30a(4a) (EP+GA) (Line 191a);

For Member States that implemented the option to have DGS-financed preventive measures, the CMDI package aims to harmonise the conditions for the DGS to finance measures to prevent the failure of credit institutions through sufficiently early intervention, which can play an effective role in the continuity of crisis management tools, maintaining depositor confidence and financial stability. The **Commission** proposal clarifies the difference between preventive and alternative measures, amends the description of the procedure for the application of preventive measures, clarifies the role of each authority, sets precise conditions for their application, and defines different safeguards applicable to the measures.

The **Council** negotiating mandate amends the Commission proposal in a way that better reflects the current practises and provides for the continued applicability of preventive and alternative measures as part of a broad toolbox for crisis management specific regimes for IPSs. The main differences include a change in the timing of the preventive measure (keeping them possible as long as no resolution action has been taken), its linkage to resolution actions, and the requirement for the DGS to confirm that the cost of the measure does not exceed the hypothetical costs of a payout scenario. Another significant difference from the Commission proposal is the negotiating mandate's treatment of the accompanying note, essentially splitting it in two parts. The new "*post preventive measures plan*" contains all the important information, such as the measures that the supported credit institution undertakes to ensure or restore compliance with supervisory requirements. The Council mandate also aims to prevent conflicts

between the CMDI package and existing requirements for IPS from the Capital Requirements Regulation as well as to preserve their functioning, in line with the statement of the Eurogroup in inclusive format from 16 June 2022.

The **EP** mandate makes preventive and alternative measures a mandatory part of the national bank distress relief toolbox. It provides that preventive measures cannot be applied after FOLF declaration. Furthermore, it makes several significant changes to the Commission proposal. The EP would make it mandatory that available financial means of the DGS can be used for preventive and alternative measures in all Member States. It prohibits the use of preventive measures if the institution has already received extraordinary state support in the previous 5 years. The EP also modifies the provisions of the accompanying note, splitting it into a note and a "*reorganisation plan"*, as well as allowing the competent authority to require a remediation plan from the credit institution if it fails to comply with the reorganisation plan. The EP also provides for some specific rules for IPSs in deviation from the generally applicable rules, namely that where the institution belongs to an IPS, the reorganization plan needs to be approved by the IPS. The EP raises the threshold from 25% to 40% of the target level for raising extraordinary contributions from banks when the available means of the DGS fall after the application of preventive measures. The EP also expands the scope of the requirement to collect immediate contributions when the available financial means of a DGS fall below 2/3 of the DGS target level in two directions: when a need arises to use DGS funds not only for payout but also in resolution; (ii) not only in the case of the use of DGS funds for preventive measures but also for alternative measures. The EP makes it mandatory for Member States to use DGS funds for preventive measures when a list of criteria is fulfilled.With regard to alternative measures, then EP also limits their use in asset and liability transfer to covered deposits, eligible deposits from natural persons, and SME's. Furthermore, the EP proposed a requirement for IPSs to segregate additional funds that they might have, which is not part of either the Commission or the EP proposal.

3.8. Changes to the governance of the Single Resolution Board

SRMR:	
• Vote of Chair and Vice-Chair • Plenary tasks: Internal Audit, industry consultations • Term of office and suitability	• 43(2) (GA) (Line 360a-b); • 50(1)(n)(s) (Line 361-362j); 50(1) qa (EP) (Line 361b); 50(1) r) s) (GA) (Line 362d-e); • 56(5) (Line 373-375); 56(6a) (Line 378-380);

The changes in the SRMR largely mirror the changes in the BRRD. However, amendment to the governance of the Single Resolution Board is a specific SRMR aspect.

The **Commission** has clarified the appointment of the Internal Auditor, made the Vice-Chair a permanent member of the Board, and made the positions of the Executive Session (Chair, Vice-Chair, 4 full-time members) once renewable.

The **Council mandate** clarifies that the Vice-Chair has a vote. For the Executive Session, the renewable mandates have been retained as in the Commission proposal, albeit limited to 4+4 years. Furthermore, the Council has introduced an elaborate procedure to clarify the consultation between the Executive Session of the Board and its Plenary Session on matters

of general interest (like guidelines, general instructions). Under this procedure, the Executive Session of the Board is invited to make a reasoned written statement on the Plenary views expressed with which it disagrees, and the simple majority of Plenary Session is needed for the handling of the issues of general interest. In the absence of a simple majority, the Executive Session of the Board may nevertheless adopt the guidelines or public documents defining resolution practices or resolution planning methodologies, but the Plenary Session may express a written dissenting opinion if agreed by ¾ of its members representing the national resolution authorities. In case this happens, the SRB must also make public this discontent in the published documents.

The **EP mandate** keeps the current five-year non-renewable term of the positions in the Executive Session. It also requires observing a gender balance in the shortlist of candidates. Concerning the consultation procedure with the Plenary, the EP introduces a consultation process with national resolution authorities, but it does not provide details on how it should be performed and introduces a transparency element by requiring the publication of these documents (policies, guidelines, general instructions, guidance notes, and staff working papers on resolution in general and on the resolution practices and methodologies to be applied).

4. Secondary political topics (tier 2) - discussion item

In the view of the Presidency, an initial discussion is possible to explore the possibility of some flexibility on the issues listed under point 4. The Presidency therefore invites Member States to express their views, and explore possible initial room for manoeuvre on these items.

4.1. Extraordinary Public Financial Support (EPFS)

BRRD:
• 32c (Line 230-249); (Line 249a) (EP+GA)

The **Commission proposal** clarifies the existing rules on the application and forms of EPFS available to institutions without triggering a failing or likely to fail assessment. The scope is limited to cases outside of resolution: precautionary recapitalisation, preventive measures of DGS aiming to preserve the long-term viability and financial soundness of the institution, measures taken by DGS to preserve the access of depositors in the context of winding up, and state aid granted in the context of winding up. Where EPFS is used in any other situations outside resolution, the beneficiary institution should be considered as failing or likely to fail. In what concerns precautionary recapitalization, the Commission proposal introduced stricter conditions to ensure that this tool is not used to support institutions that are not financially viable and that the support is temporary in nature.

The Council mandate clarifies the types of extraordinary public financial support for failing institutions in extraordinary circumstances. In what concerns precautionary recapitalisation, it prefers asset quality reviews and on-site inspections to balance sheet evaluations. Another important change is that it removes the 2% TREA cap on CET1 acquisition. A one-time extension (no longer than 2 years) is also introduced for the exit strategy, subject to a remediation plan, but if the institution fails to comply with it or the competent authority is not satisfied, then the FOLTF assessment must take place (rather than the institution being declared FOLF, as in the Commission proposal).

The EP mandate also maintains the list of admissible EPFS but amends the conditions of granting an EPFS, namely that the disturbance in the economy of a Member State justifying precautionary recapitalisation must be exceptional and systemic in nature and that the DGS intervention must be cost-effective, removing from BRRD/SRMR the requirement that it aims to preserve the financial soundness and long-term viability of the credit institution. Furthermore, in precautionary recapitalisation, the exit strategy is clarified as the exit from the support measure, adding that no information regarding the strategy shall be disclosed until one year after concluding it, or after the implementation of the remediation plan, or after the FOLTF assessment.

A clarification is also added regarding the conditions for granting precautionary recapitalisation measures whereby the measures may not be used to offset the losses incurred over the next 12 months (instead of in the near future). In line with the Council mandate, the EP also prefers asset quality reviews and on-site inspections to balance sheet evaluations and adds that the competent authority shall make its best efforts to ensure that the quantification is based on the market value of the institution. A one-time remediation plan is also introduced, just like in the Council mandate, but without a specified time limit. If the institution fails to comply with it, the failing or likely to fail assessment must take place.

***Question 1**: What is the view of the Member States on the differences between the EP and the Council in respect of the EPFS?*

4.2. Restriction of MREL eligible instruments for retail clients

BRRD:
• 44a (6a) (6b) (6c) (7a) (EP) (Line 299a-i)

The **Commission proposal** and the **Council mandate** do not make any amendments to the sale of MREL eligible instruments.

However, the **EP mandate** introduces several additional restrictions for selling certain MREL-eligible instruments to retail clients in Article 44a BRRD compared to the legislation in force. The first criterion is that the eligible instruments qualifying as AT1, Tier 2 instruments, or eligible liabilities may only be sold to existing depositors who qualify as retail clients of the respective credit institution where, at the time of purchase, both of the following conditions must be fulfilled: (i) the client does not invest an aggregate amount exceeding 10% of its financial instrument portfolio in those instruments, and (ii) the initial investment amount in one or more investments is of at least EUR 30,000. A further provision is introduced regarding the eligibility of these instruments, namely that if these conditions were not met at the time of the purchase, then these instruments shall not count toward MREL, for as long as these instruments are held by the depositor to whom they were sold. Finally, a monitoring requirement is also introduced: eligible instruments should be monitored on an annual basis by the resolution authorities, which should report the results to the EBA. It is clarified that these provisions shall only apply to instruments issued 12 months after the entry into force of these amendments.

***Question 2:** How do Member States see the proposal of the EP to restrict MREL-eligible instruments for retail clients?*

4.3. Selected articles from BRRD

***Limbo banks: Effect of withdrawal of authorisation** (Art 32b(4), line 228)*

The 2019 Banking Package introduced Article 32b to the BRRD requiring Member States to ensure the orderly winding-up, in accordance with the applicable national law, of institutions and entities that are not subject to resolution action due to a negative public interest assessment. However, the implementation of this provision in national legal frameworks leads to divergent practices and uncertainties. For example, the triggers for commencing national insolvency proceedings are not always aligned with the failing or likely to fail determination under the BRRD, resulting in uncertainty as to whether insolvency proceedings can start ("limbo situations") or whether the procedure leads to ensuring market exit by the failing institution. To address the existing inconsistency, the **Commission proposal** provided further guidance and clarity. The proposal allows for the withdrawal of the bank's license when the bank is declared failing or likely to fail (and there are no alternative measures that would prevent the failure), but public interest assessment is negative (Article 32b (3)). In addition, the proposal makes the withdrawal of authorisation a sufficient condition to initiate to wind up the institution in an orderly manner in accordance with national law (Article 32b (4)).

The **Council mandate** makes some amendments to clarify the text of Article 32(1)-(3) and deletes Article 32b(4).

The **EP mandate** does not make any changes to the Commission proposal on Article 32b(4).

***Question 3:** Do Member States support retaining Article 32b paragraph (4)? Do Member States have any other suggestions?*

***Time to re-reach target level for the Resolution Financing Arrangement** (Art. 102(3), line 417)*

In order to take into account the end of the initial period for the build-up of the resolution financing arrangements and the consequent reduction in the amount of regular ex-ante contributions, the **Commission proposal** included amendments to decouple the maximum amount of ex-post contributions that may be raised from the amount of the regular ex-ante contributions, thus avoiding a disproportionately low cap on ex-post contributions, and to allow for a deferral of the collection of the regular ex-ante contributions if the cost of an annual collection would be disproportionate to the amount to be collected. According to the Commission amendments, resolution authorities may defer the collection of the regular contributions for one or more years if the amount collected is proportionate to the costs of the collection process. The timeframe for returning to the target level again (six years) when the available financial means have been reduced to less than two-thirds of the target level remains unchanged compared to the provisions in force.

The **EP mandate** specifies that the collection of ex-ante contributions cannot exceed three years and reduces the period for reaching the target level again (from six to four years) if the available financial means have been reduced to less than two-thirds of the target level.

The **Council mandate** does not make any substantial amendments. The deferral timeframe is kept as in the Commission proposal. However, regarding the timeframe for reaching the target level again – when the available financial means have been reduced to less than two-thirds of the target level – the Council inserts an obligation for the collection to be made within a reasonable timeframe, which should not exceed six years.

Question 4: *What is the Member States' view in relation to the changes between the EP and the Council mandates?*

4.4. Selected articles from DGSD

Exclusions from coverage of DGS protection *(Art 5(1), lines 100-103c)*

In order to harmonise the different scopes of protection across Member States and to clarify the placement of deposits related to terrorist financing, the **Commission** proposal amends the list of entities excluded from the protection of the DGS. . It includes an exemption on the non-eligibility of deposits where the holder has never been identified but where a holder requests payout and proves that the lack of identification was not caused by his or her action. Public authorities' deposits are now under the scope of the DGS's protection.

The **Council** general approach amends the inclusion of public authorities by stating that deposits of central or state governments should continue to be excluded from DGS protection. In the case of the account holder that has never been identified pursuant to Article 16 of the AMLR , the Council general approach replaces the burden of proof: a depositor is eligible if the credit institution or the DGS is not able to prove that the lack of identification was caused by the account holder's actions. The Council also requires that the depositor be verified before the payout.

The **EP** mandate largely retains the original Commission proposal, except that it adds an additional point to the list of exclusions, namely deposits by persons or legal entities subject to targeted financial sanctions.

Question 5: *What is the Member States' view in relation to the changes between the EP and the Council mandates?*

Build-up period for complying with target level after disbursements for the Deposit Guarantee Scheme *(Art 10(2), lines 170, 170a)*

The amendments in the original proposal of the **Commission** clarify that that existing requirement that when the target level has been reached for the first time and the available financial means have been reduced to less than two-thirds of the target level, the DGSs shall set a regular contribution at a level that allows the target level to be reached again within six years applies to cases of disbursement of DGS funds.

The **Council** mandate adds to this that rebuilding up to the target level should also take place in a maximum six-year period if the reduction in the target level is caused by an increase in the amount of covered deposits.

The **EP** mandate is similar to the original Commission proposal but reduces the timeframe for reaching the target level again, from six years to four. It also includes a rule that, when the target level has been reached for the first time and the available financial means- after a disbursement of DGS funds - have been reduced by less than one third of the target level, DGSs shall set the regular contribution at a level allowing for the target level to be reached within two years.

Question 6: *What is the Member States' view in relation to the changes between the EP and the Council mandates?*

Enforcement powers for designated authorities to impose sanctions *(Art 4(7), line 90a)*

The **Commission proposal** and the **Council mandate** do not change the powers of the designated authorities, which under current rules supervise the DGS to ensure compliance with the rules.

However, the **EP mandate** introduces further powers to designated authorities, which would enable them to impose sanctions on the DGS in the case of non-compliance with DGSD provisions.

Question 7: *Could Member States support a clarification of the sanctioning power, which may empower the designated or competent authority?*