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## **WORKING DOCUMENT**

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### **Commission services' note on amendments to Article 32b BRRD**

#### **1. Background and justification for the proposed amendments**

In line with the June 2022 Eurogroup statement, the Crisis management and deposit insurance (CMDI) proposal aims to ensure that resolution can potentially be applied to any failing institution where this is the most effective way to achieve the resolution objectives. Nevertheless, the resolution of many institutions will not be in the public interest and those institutions would be wound up in accordance with national law. The current landscape of national insolvency proceedings in the European Union reveals significant heterogeneity across Member States. There is no uniform approach across Member States as to how a failure of an institution or entity would be managed in case resolution is not chosen by the resolution authorities.

A key concern is that national winding up procedures may not necessarily lead to a market exit of the institution or entity concerned, as it should, following a failing or likely to fail (FOLF) determination and a negative public interest assessment (PIA). This could result in a prolonged period of restructuring during which the institution or entity continues to operate while it has been deemed as no longer fit to do so.

To address potential 'limbo' situations, Article 32b BRRD was introduced in the 2019 Banking Package. This article requires Member States to ensure the orderly winding up, in accordance with national law, of failing institutions or entities that cannot be placed in resolution due to a negative PIA. However, the implementation of Article 32b in its current form leaves uncertainties over:

- whether the national legal framework would address any residual risk of standstill situations, particularly in those cases where the institution or entity was declared FOLF on the basis of forward-looking triggers (*'likely to fail'*),
- what *'winding up in accordance with national law'* entails (only insolvency laws or also other national procedures available)
- within what timeframe a market exit should occur.

Therefore, the Commission has proposed amendments to Article 32b BRRD to provide further clarity and framing to ensure that applicable national procedures lead to a timely market exit for failing institutions or other entities, while preserving a degree of diversity in procedures at the national level. These amendments do not aim at harmonizing national insolvency rules but rather

focus on ensuring that there is a clear exit mechanism within a reasonable timeframe. They also leave room for manoeuvre to decide at national level how this market exit should occur and strengthen the link between the FOLF determination and the withdrawal of the authorisation by the competent authority when no resolution ensues due to a negative PIA.

## **2. Detailed explanations of the proposed amendments to Article 32b BRRD**

The scope of Article 32b BRRD is retained, i.e., it applies to institutions and entities referred to in Article 1(1), points (b), (c) and (d).

On substance, the proposal addresses the risk of potential standstill situations after FOLF determination and ensures orderly winding up and market exit through the following rules:

- **empowering national authorities to initiate the relevant winding-up procedure following FOLF determination and negative PIA** (*Article 32b(1)*)

As under the existing Article 32b, the proposed provision is agnostic about the specific national procedure – it could be a national insolvency or liquidation procedure, sale of the institution's assets and liabilities and liquidation of the remaining entity, or other. The choice to use this open language in BRRD II was the result of a specific decision of co-legislators to avoid excessively limiting the avenues available at national level while considering that national winding-up procedures remain unharmonised.

To address the issue of uncertainty surrounding what actions should be taken and by which authority when it is decided that a failing institution or entity should not be resolved, instead of the current text of Article 32b which requires that the institution or entity '*shall be wound down*', the first paragraph now provides that the relevant national administrative or judicial authority has the power to initiate without delay the relevant winding-up procedure.

- **ensuring timely market exit when an institution or entity is being wound-up** (*Article 32b(2)*)

The new paragraph requires that an institution or entity which is wound up under national law must exit the market or its banking activities should be terminated within a reasonable timeframe. The emphasis is on the need to avoid prolonged periods of restructuring that do not necessarily improve the institution's viability while the institution does not exit the market. The provision recognises the complexities and diversity of national legal frameworks and does not require that the market exit should be achieved through the immediate liquidation of the institution or entity. Other national procedures could also be applied as far as they ensure market exit in an orderly manner and within a reasonable timeframe.

- **ensuring that FOLF determination provides stand-alone grounds for withdrawal of authorisation along with other conditions under Article 18 CRD** (*Article 32b(3)*)

The proposed amendments make the FOLF determination sufficient grounds for the competent authority to withdraw the authorisation when there is no reasonable prospect that any alternative private sector measures or supervisory action could prevent the failure of the relevant institution

or entity within a reasonable timeframe and a resolution action is not necessary in the public interest.

In this respect, it should be noted that Article 18 CRD is proposed to be amended by the Banking package, and in particular an additional point (g) on the link between FOLF determination and license revocation is added to Article 18(3) CRD. The Commission proposal has not been amended in the mandates of the Council and the European Parliament. The Council has only proposed amendments to the relevant recital to clarify further that *'there should be no automaticity between FOLF and the withdrawal of the authorisation, as for other cases where the competent authority may withdraw the authorisation'*.

Once the Banking package is adopted, co-legislators should consider revising the proposed paragraph 3 of Article 32b BRRD to ensure alignment with the amendments in Article 18(3) CRD and prevent any overlap or inconsistency.

- **ensuring sufficiency of authorisation withdrawal for the initiation of winding-up procedures** (*Article 32b(4)*)

The amendments clarify that the withdrawal of authorisation is a sufficient condition for the relevant national administrative or judicial authority to initiate the national winding-up procedure, i.e. regardless of the existing triggers for national winding up procedures Member States should ensure that the withdrawal of the license of an institution or entity by the competent authority is an independent condition for the start of the procedure. At the same time, it is important to underline that making the withdrawal a sufficient condition is not intended to lead to an automatic triggering of winding-up upon such withdrawal but rather making sure that the national authority concerned is empowered to do so solely on that basis.