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From:	Presidency
To:	Working Party on Financial Services and the Banking Union (CMDI) Financial Services Attachés

Subject:	Presidency note on Daisy Chains trilogues (CMDI Working Party on 21.11.23 - Agenda Item 2)
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Presidency note on Daisy Chains trilogues

WP CMDI 21-11-2023

1. Introduction

After studying the European Parliament (EP) text and the comments sent by Member States (MS) to the 4-column table (4CT), the Presidency considers that the EP and the Council (COU) views on the Daisy Chain file are very aligned. Nevertheless, the Presidency has identified a number of points where EP and Council text differ. The Presidency is committed to defend the COU text but, at the same time, is willing to reach a compromise that will be acceptable to all parties.

The objective of this note is to highlight those relevant differing issues and assess them in terms of importance to guide its negotiation stance in the trilogue of 22 November 2023.

For simplicity, this note follows the agenda circulated for the trilogue of 22 November.

Agenda item 3.1.

Article 45c(2a), 2nd subpara, introductory part, BRRD;

Lines 34 and 67

Article 12d(2a), 2nd subpara, introductory part, SRMR

derogation from not determining MREL for liquidation entities

- introductory part

Recital 10

Line 20

Lines 34 and 67 (as well as the Recital 10 in line 20) refer to the possibility of setting an MREL add-on for liquidation entities in justified cases. Both COU and EP draft coincide that resolution authorities shall evaluate whether the add-on is justified based on any possible impact on financial stability and the risk of contagion to the financial system, despite with a different draft.

The main difference is that COU text explicitly includes a subcomponent of such impact on financial stability and risk of contagion by adding “*including regarding the financing capacity of deposit guarantee schemes*”. The rationale of COU text is that some institutions earmarked for liquidation may lead to a depletion of DGS funds, leading to eventual risks for financial stability and contagion. In such cases, some RA, want to ensure that an MREL add-on can be required for these institutions.

Although a few MS can accept with both drafts and a few MS prefer the EP text, most MS prefer the COU text, being for some MS a red line.

Q1. Can MS agree with the suggested way forward?

Agenda item 3.2.

Article 45c(2a), 4th subpara, BRRD;

Lines 39 and 72

Article 12d(2a), 4th subpara, SRMR

- *“holdings of own funds instruments or holdings of liabilities” (EP)*

vs *“holdings of liabilities that do not qualify as own funds*

instruments” (the COU) not to be deducted under Art 72e(5) CRR

Recital (8)

Line 18

Lines 39 and 72 (as well as Recital 8 in line 18) apply to liquidation entities that do not have to comply with an MREL add-on. In COM and EP text, these lines 39 and 72 regulate that *“holdings of own fund instruments or holdings of liabilities”* issued by a subsidiary and held by an intermediate subsidiary do not have to be deducted according to art 72e(5) CRR. If such holdings are not deducted they are risk weighted.

The COM and EP draft deviates from the original Daisy Chains proposal (Regulation 2022/2036) where the intermediate subsidiary is required to deduct the full holdings of internal MREL. For the Council, the problem would be that, if the intermediate subsidiary risk weights its holdings of own funds issued by the subsequent subsidiary, the intermediate subsidiary may not be able to absorb the losses emerged when its subsidiary fails. This issue is be one of the main concerns for the EP.

COU is stricter and is more aligned with the logic of the original Daisy Chains proposal and therefore more prudent, since these own fund instruments have to be deducted by the intermediate entity. However, the COU approach is more complex because, while in the application of prudential framework, no deductions will take place, the resolution framework will require the deduction of own funds with direct consequences on reporting, disclosure and monitoring by banks and resolution authorities.

Most MS strongly disagree with the EP text and stress the importance of keeping the COU text. The Presidency would like to understand the EP logic, to better assess the need to depart from standard treatment of daisy chains. However, the Presidency currently considers that the proposed EP amendment is considered key for the EP (probably the most relevant issue). Hence, the Presidency expects that maintaining the COU on this matter, will imply conceding elsewhere. In case the EP refuses to accept the COU text, we would like to know if MS could accept a middle ground solution: preserving some elements of COU text and some elements of the EP text.

In addition, the COU text on recital 8 (line 18) refers to the treatment of entities permanently affiliated to a central body. Indeed, in this case, an entity will be considered liquidation entity, not only because no write-down and conversion powers are planned to be exercised, but also because no other measures, such as merger, are planned. This is to ensure that some institutions remain resolution entities in case a merger is decided by the resolution authority before other resolution powers are applied. The PCY will explain carefully the rationale to the EP, in order to convince them of the technical necessity of the provision.

Q2. Can MS agree with the suggested way forward?

Agenda item 3.3

Article 45f(1), subpara 3a, point (a)(i), 3rd indent, BRRD;

Article 12g(1), subpara 3a, point (a), (i), 3rd indent, SRMR

Lines 47 and 80

Council mandate: "subject to the requirements set out in this article or to the requirement referred to in article 45c" (BRRD; and similar wording in SRMR)

Lines 47 and 80 refer to HoldCo structures only. This is, when at the top there is a holding company that owns the banking group. This Holdco structures are required in certain MS to facilitate resolvability of the group.

COM and EP are very strict in the conditions that HoldCos need to comply to allow the proportionate regime established in the proposal. In particular, both text require that *"the resolution entity does not hold directly any subsidiary institution or entity as referred to in Article 1(1), points (b), (c) or (d), other than the subsidiary concerned"*. This is to say that only 1 banking subsidiary can exist below the HoldCo.

However, COU text is more flexible with regards of the possible structures subject to the proposed proportionate regime (i.e. subconsolidated internal MREL for intermediate entities complying with the required conditions). Indeed, such proportionate regime can be applied as long as the HoldCo only has below one subsidiary subject to MREL requirements, but it allows the HoldCo to own other subsidiaries, which are not required to hold MREL, such as entities providing shared services.

The COU rationale is that CRR3 changes the definition of financial institutions, so new types of companies will be included in such definition. These new institutions, such as entities providing shared services, do not have to comply with MREL requirements by their very nature. Therefore, the COU text allows to retain the logic of the original Daisy Chains logic by taking into account the new definitions of CRR3 and, thus, ensure that the proposed text can function well in the near future and be neutral in terms of the different banking group models.

Most MS support the COU text although some can accept or favor the EP drafting. The Presidency suggests maintaining COU text clarifying to the EP the rationale for the different wording.

Q3. Can MS agree with the suggested way forward?

Agenda item 3.3 (2nd)

Article 45f(1), subpara 3a, point (b), introductory part, BRRD; Line 49 and 82
 Article 12g(1), subpara 3a, point (b), introductory part, SRMR
The main difference being « in a significant way » in EP text

All three texts allow a proportionate regime for OpCo structures, consisting in the application of the MREL requirements on a consolidated basis at the level of the intermediate. However, the conditions to apply such proportionate regime differ.

The EP text allows the consolidated approach as long as it *“does not negatively affect in a significant way”* the resolvability (next Agenda item 3.3 (3rd) explains this). The COM text also referred to *“does not negatively affect in a significant way”*.

However, the COU refers to *“does not impair in a negative way”*. PCY considers COU text stricter, since EP text allows the application of the proportionate regime in more cases. EP text allows the proportionate regime unless the resolvability is negatively affected in a significant way. The COU text frames this issue in a stricter manner, because it allows the proportionate regime only when there is not any negative impact (instead of when there is no negative significant impact).

The Presidency understands the intention of the COU text is to establish a stricter framework but, at the same time not to render unusable, the subconsolidation internal MREL regime for intermediate entities in OpCos.

Most MS support the COU text (and even consider it a red line) but some MS could accept the EP text. Hence, the Presidency expects that maintaining the COU on this matter, will imply making concessions elsewhere. In case the EP refuses to accept the COU text, we would like to know if MS could accept a middle ground solution: preserving some elements of COU text and some elements of the EP text.

Q4. Can MS agree with the suggested way forward?

Agenda item 3.3 (3rd)

Article 45f(1), subpara 3a, point (b)(i), BRRD; Lines 49a, 82a
 Article 12g(1), subpara 3a, point (b)(i), SRMR Line15
 Corresponding recital (5)
EP : resolvability of resolution group / Council : credibility and feasibility of the group’s resolution strategy
Council deleted “in a significant way”

This agenda item refers to the first condition (first out of three) that needs to be preserved to allow the proportionate regime for OpCo structures. EP text refers to *“the resolvability of the resolution group”* whilst the COU text *“the credibility and feasibility of the group’s resolution strategy”*. The EP considers their text more robust and COU could accept it in the context of the package.

Q5. Can MS agree with the suggested way forward?

Agenda item 3.3 (4th)

Article 45f(1), subpara 3a, point (b)(iii), BRRD;
Article 12g(1), subpara 3a, point (b)(iii), SRMR

Lines 49c and 82c

*The difference being « effectiveness » in Council mandate
(effectiveness of the internal loss transfer and recapitalisation
mechanism)*

EP text refers to “*the internal loss transfer and recapitalization mechanism [...]*”, whereas COU text refers to “*the effectiveness of the internal loss transfer and recapitalization mechanism [...]*”.

The Presidency considers that, when speaking about resolvability, what is relevant is the effectiveness of the mechanism. In the EP text, the proportionate regime may not impede the internal loss transfer mechanism, but may reduce its effectiveness so it would not be fit for purpose. This is what COU text intends to capture.

MS support the COU text (and even consider it a red line) while some MS could accept the EP text. Hence, the Presidency expects that maintaining the COU on this matter, will imply making concessions elsewhere. In case the EP refuses to accept the COU text, we would like to know if MS could accept a middle ground solution: preserving some elements of COU text and some elements of the EP text.

Q6. Can MS agree with the suggested way forward?

Agenda item 3.4.

Article 3(1), point (24aa), SRMR, *Council has in the definition of* Line 62
liquidation entity “established in the Union” instead of “in a
participating Member State” - broadening of the scope for
liquidation entities under SRMR

The BRRD applies to all institutions in the EU whereas the SRMR indeed applies only to Banking Union MS (participating MS). EP defines a liquidation entity for the purpose of SRMR as “*a legal person established in a participating Member State in respect of [...]*”. The COU definition considers “*liquidation entity’ means a legal person established in a participating Member State the Union in respect of [...]*”. T

The rationale of COU text is that SRMR should capture liquidation entities in non-banking union MS that belong to BU banking groups. This is SRMR covers banking groups based in the Banking Union and these banking groups may have subsidiaries that are liquidation entities in a non-banking union MS.

PCY will explain the rationale to EP, so it can be accepted.

Q7. Can MS agree with the suggested way forward?

Agenda item 3.5.

Article 4 of the amending act: application date of Article 2,
points (1) and (2) and Article 2, point (3)
Corresponding recital (13)

Lines 97 and 97a

Line 23

*Article 2, point (3), being amendments to Article 12g of SRMR
(MREL on a consolidated basis for intermediate entities
/subsidiaries disproportionately affected by the deduction rules
under Article 72e(5) CRR)*

Both texts allow 6 months to transpose the changes in BRRD. The COU text considers that both BRRD and SRMR changes should apply 1 day after the transposition day. However, EP text considers that the proportionate regime for HoLCos and OpCos in SRMR should apply immediately.

Views are split between MS. Some favor the COU text (to ensure alignment of treatment of SRMR/BRRD) while other MS favor the EP because it speeds up application in such a time dependent dossier.

The Presidency suggests accepting the EP text but, in such a case, the definition of liquidation entities and MREL requirement for liquidations entities can also be applied immediately.

Q8. Can MS agree with the suggested way forward?

Agenda item 3.6.

Lines 13a and 23a

Recitals 3a and 23a (in EP mandate)

EP text introduces a new Recital 3a (line 13a) that introduces the criteria that Resolution Authorities should follow when determining a subsidiary of a resolution group as a liquidation entity. MS views differ on the need and correctness of this recital.

Some MS oppose some of the criteria included and how the new recital is drafted. However, the Presidency suggest accepting the amendment (or a slightly revised wording) with the exception of the last sentence since it appears to be important for the EP and should be considered as a concession in the context of the package.

EP text also introduces a new Recital 23a (line 23a) reading “(13a) *This amending Directive should respect the principles of the original review mandate to the Commission by the European Parliament and the Council to ensure proportionality and a level playing field between different types of banking group structures.*”. MS do not understand the purpose of this recital, so PCY will first of all ask for explanations.

Q9. Can MS agree with the suggested way forward?

Agenda item 4 (1st)

Article 45f(1), subpara 3a, introductory part, BRRD;
 Article 12g(1), subpara 3a, introductory part, SRMR:
*subsidiary as an intermediate entity and confirmation by a
 resolution authority (EP)*

Lines 42 and 75

PCY assessment

Despite the order of sentences is different, our understanding is that the meaning does not differ much. The EP text specifies that the Resolution authority must confirm all the conditions.

The Presidency suggests conceding to the EP on this point.

Q10. Can MS agree with the suggested way forward?

Agenda item 4 (2nd)

Recitals 3, 4, 6 and 9

Lines 13, 14, 16 and 19

PCY assessment

Both texts are similar in meaning and are technical, so should be left for technical meetings.

In recital 4 (line 14) some MS stress their opposition with the last sentence “*However that approach should not be chosen where it would unduly increase the internal MREL target, in particular because of the prevalence of liquidation entities within the subgroup*”, because of possible inconsistency with other conditions the subconsolidated MREL.

The Presidency suggests treating these items with flexibility.

Q11. Can MS agree with the suggested way forward?