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From:	General Secretariat of the Council
To:	Working Party on Financial Services and the Banking Union (CMDI) Financial Services Attachés
Subject:	Working Party on Financial Services and the Banking Union Crisis Management and Deposit Insurance (CMDI) on 27 February 2024 - Item 5: Presidency non-paper on some BRRD technical topics

Presidency non-paper on some BRRD technical topics

CWP CMDI 27-02-2024

1. Introduction

The Presidency intends to address several technical provisions of the CMDI proposal through written procedures. In this note, a first selection of provisions amending the BRRD has been made. They can be divided into two groups: provisions that have already been discussed in Council Working Parties (2. Selected topics with a proposal) and those that have not yet been discussed (3. Selected topics based on the Commission's proposal).

For the topics in section 2. 'Selected topics with a proposal', the Presidency has reviewed the comments and drafting suggestions already provided by Member States and the Commission under the previous Presidencies and, where appropriate, presents, drafting proposals as a possible way forward.

For the topics in section 3. 'Selected topics based on the Commission's proposal', the Presidency launches the written procedure for a first round of comments.

If, following the written procedure, it appears that a particular issue merits a more in-depth discussion, the Presidency will facilitate such a discussion by placing it on the agenda of a subsequent Council Working Party.

2. Selected topics with a proposal

In all the subsections below, the Presidency listed the remarks of the Member States that suggested modifications to the Commission's text. The Presidency proposes to accommodate some of these remarks and, where appropriate, proposes drafting suggestions. The proposed changes are marked against the Commission's proposal.

2.1. Article 10(8a) and 12(5a) BRRD / Recital 4 'Resolution plans: entities being wound up'

In the CMDI-proposal, the Commission proposed to insert a new Article 10(8a) BRRD stipulating that resolution authorities shall not adopt resolution plans where an institution is being wound up under national law.

Some Member States understood the Commission's proposal by interpreting the scope of this Article to include entities being earmarked for liquidation. However, this is not the Commission's intended interpretation. The Presidency would therefore like to clarify in the Article as well as in Recital 4 that this Article concerns the situation where an entity already failed and is therefore being wound up. It should also be made clear that this new Article is only relevant in the context of the execution phase and not the planning phase. In addition, since Article 12 on group resolution plans is the counterpart of Article 10 on resolution plans for (individual) institutions, changes to Article 10 should also be reflected in Article 12 BRRD. Consequently, the Presidency proposes to modify Article 12(5a) accordingly.

Drafting suggestion:

In Article 10 paragraph 8a, the following would be inserted:

> '*10(8a) Resolution authorities, **once they have determined that conditions in point (a) and (b) of Article 32(1) are met,** shall not adopt **a** resolution plan~~s~~ where an institution is **in the***

process of *being wound up in accordance with the applicable national law pursuant to Article 32b or where Article 37(6) applies.*';

In Article 12(5a) the same changes as in Article 10(8a) would be reflected:

'12(5a) Resolution authorities, ***once they have determined that conditions in point (a) and (b) of Article 32(1) are met****, shall not adopt* ***a*** *resolution plans where an entity is* ***in the process of*** *being wound up in accordance with the applicable national law pursuant to Article 32b or where Article 37(6) applies.'*

Recital 4 would be amended as follows:

'(4) An institution or entity that is being wound up under national law, following a determination that the institution or entity is failing or likely to fail and a conclusion by the resolution authority that its resolution is not in the public interest, is ultimately heading towards market exit. That implies that a plan for actions to be taken ***once the failure or likelihood of failure has occurred*** ~~***in case of failure***~~ *is not* ***longer*** *needed, irrespective of whether the competent authority has already withdrawn the authorisation of the institution or entity concerned. The same applies for a residual institution under resolution after the transfer of assets, rights and liabilities in the context of a transfer strategy. It is therefore appropriate to specify that in those situations the adoption of resolution plans is not required*.'

2.2. Article 13(1) BRRD 'Resolution reporting' (alignment with EBA ResCo agreement)

Although the Commission did not propose to amend Article 13(1) BRRD, the EBA proposes to streamline the reporting processes for resolution reporting data with those for MREL reporting or other going concern data. More specifically, the current text of Article 13(1) BRRD, prescribing the flow of information related to resolution reporting, states that information shall be reported to the group-level resolution authority and then shared by the group-level resolution authority to the respective authorities. This flow creates inefficiencies, including with regard to the practical arrangements set out in the SRM, where national resolution authorities are the points of contact for institutions when submitting reporting. The Presidency therefore proposes to modify Article 13(1) BRRD.

Drafting suggestion:

In Article 13, paragraph 1 would be replaced as follows:

'1. Union parent undertaking and, to the extent required, each of the group entities, including entities referred to in points (c) and (d) of Article 1(1,) shall report to their resolution authorities the information that may be required in accordance with Article 11.

The resolution authorities that require information under this Article for entities in their remit shall transmit the information they receive to the group-level resolution authority.

The information provided to the EBA shall include all information that is relevant to the role of the EBA in relation to the group resolution plans.'

2.3. Article 15(5) BRRD / Recital 47 'EBA mandate: internal policies for and implementation of resolvability assessments'

The Commission's proposal introduced in Article 15, paragraph 5 (linked with Recital 47) a new mandate for the EBA to monitor the development of internal policies for and the implementation of the resolvability assessments of institutions or groups by the resolution authorities.

Some Member States however argue that the additional monitoring mandate for EBA on resolvability could add additional burden and interference. Therefore, as a compromise solution, the Presidency proposes to narrow down the mandate to the monitoring of the progress made on resolvability.

Drafting suggestion:

In Article 15, the following paragraph 5 would be added:

> *'5. EBA shall monitor the* ***progress on resolvability of institutions that are not part of a group and of groups*** ~~*drawing up of internal policies for and implementation of the resolvability assessments of institutions or groups provided for in this Article and in Article 16 by resolution authorities*~~*. EBA shall report to the Commission on the* ***progress made by institutions that are not part of a group and by groups for achieving or maintaining resolvability***~~*, existing practices*~~ *on resolvability assessments and possible divergences across Member States by … [PO please insert the date = 2 years after the date of entry into force of this Directive].* ~~*and monitor the implementation of any recommendation set out in that report, where appropriate.*~~
>
> *The report referred to in the first subparagraph shall cover at least the following:*
>
> *(a)* ***an assessment of the actions requested by resolution authorities and the work undertaken by institutions that are not part of a group and by groups to increase or maintain their resolvability*** ~~*an assessment of the methodologies developed by resolution authorities to carry out resolvability assessments, including the identification of areas of possible divergence across Member States*~~*;*
>
> *(b) an assessment of the testing capabilities required by resolution authorities to ensure an effective implementation of the resolution strategy;*
>
> *(c) the level of transparency towards relevant stakeholders of the methodologies developed by resolution authorities to perform resolvability assessments and their outcome.';*

Recital 47 would be modified accordingly, limiting the EBA monitoring to implementation of resolvability assessments only:

> *'(47) In view of the role of EBA in furthering the convergence of authorities' practices, EBA should monitor and report on the* ~~***design and***~~ *implementation of the resolvability assessments of institutions and groups and on the actions and preparations of resolution authorities to ensure an effective implementation of the resolution tools and powers. […]'*

2.4. Article 18(2) BRRD 'EBA involvement in substantive impediments procedure'

The Commission's proposal did not suggest amending Article 18(2) BRRD. The EBA flagged however to the Commission that its role in the procedure laid down in this paragraph is not clear. Said procedure currently envisages the group-level resolution authority to cooperate with the consolidating supervisor and with the EBA when preparing the report in the context of substantive impediments to the effective application of the resolution tools and resolution powers.

Experience shows that EBA's involvement in said procedure is redundant in practice since all relevant information about the groups rests with the supervisory and resolution authorities. Therefore, the Presidency proposes to accommodate the EBA's concern by removing the reference to EBA in Article 18(2) BRRD.

Drafting suggestion:

Article 18(2) would be amended as follows:

> '*2. The group-level resolution authority, in cooperation with the consolidating supervisor* ~~***and EBA in accordance with Article 25(1) of Regulation (EU) No 1093/2010***~~*, shall prepare and submit a report to the Union parent undertaking, to the resolution authorities of subsidiaries, which shall provide it to the subsidiaries within their remit, and to the resolution authorities of jurisdictions in which significant branches are located. The report shall be prepared after consulting the competent authorities, and shall analyse the substantive impediments to the effective application of the resolution tools and the exercising of the resolution powers in relation to the group, and also in relation to resolution groups where a group is composed of more than one resolution group. The report shall consider the impact on the group's business*

model and recommend any proportionate and targeted measures that, in the view of the group-level resolution authority, are necessary or appropriate to remove those impediments.'

2.5. Article 32a BRRD 'Conditions for resolution: cooperatives'

The Commission proposed to modify the conditions for resolution for cooperatives. In view of the limited remarks received by Member States, the Presidency suggests not to amend the Commission's draft proposal.

Drafting suggestion:

Suggestion to maintain the Commission's proposal.

2.6. Article 32b BRRD 'Proceedings in respect of institutions and entities that are not subject to resolution action'

In 2019 the Banking Package introduced Article 32b in 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. The implementation of this provision in national legal frameworks has led to several 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. Some Member States raised the question of whether only normal insolvency proceedings should apply or whether any other national procedures could also be applied. Furthermore, the Commission also aims to further enhance the role of the withdrawal of the bank's license when failing or likely to fail is declared, and no resolution ensues. The new provision of Article 32b(3) empowers the supervisor to withdraw the license solely based on the failing or likely to fail determination.

To enhance legal certainty on these so-called limbo banks, the Commission introduced a new Article 32b, and new Recitals 13 to 16.

Member States have raised the following concerns about the newly introduced Article 32b.

- On the **first paragraph**, a Member State suggested to oblige national administrative or judicial authorities to initiate the winding up procedure, whereas in the Commission's proposal this is left to the discretion of the national administrative or judicial authority (based on the circumstances of the case). Another Member State suggested referring to normal insolvency proceedings rather than to the applicable national law whereas the Commission's proposal maintains a certain diversity in procedures at the national level. Another Member State sought clarification that existing voluntary wind down procedures are also included in Article 32b.
- In the **second paragraph**, a Member State requested to include key elements of the definition of market exit and termination of banking activities, as well as requested the cumulative application of the requirements for market exit and termination of banking activities. While defining key considerations for market exit and termination of banking activities may seem beneficial, it is important to recognise the diversity of national procedures which remain unharmonised.
- The **third paragraph** became redundant and should be deleted now that the preparatory bodies of the Council and Parliament have endorsed the Banking Package, which introduced an additional point (g) in Article 18 CRD stating that the competent authorities may withdraw the authorisation where a credit institution has been declared failing or likely to fail.

- The **fourth paragraph** raised the request for clarification by Member States that the withdrawal of the authorisation is a sufficient condition for the start of winding up proceedings only when the license has been withdrawn because the institution has been determined to be failing or likely to fail.

Based on the above remarks, the Presidency proposes the following drafting for Article 32b and maintaining the text of Recitals 13-16

Drafting suggestion:

Article 32b **'**Proceedings in respect of institutions and entities that are not subject to resolution action'

'1. Member States shall ensure that, when a resolution authority determines that an institution or entity referred to in Article 1(1), points (b), (c) or (d), meets the conditions laid down in Article 32(1), points (a) and (b), but not the condition laid down in Article 32(1), point (c), the relevant national administrative or judicial authority has the power to initiate without delay the procedure to wind up the institution or entity in an orderly manner in accordance with the applicable national law. ***This shall not preclude the possibility for the implementation, where appropriate, of existing voluntary winding-up procedures.***

2. Member States shall ensure that an institution or entity referred to in Article 1(1), points (b), (c) or (d), which is wound up in an orderly manner in accordance with the applicable national law, ***including in a voluntary winding-up procedure, in the circumstances referred to in paragraph 1****, exits the market or terminates its banking activities within a reasonable timeframe.* ***Member States shall ensure that, under the applicable winding-up procedures, the activities of the entity are performed with a clear objective of terminating those activities while avoiding destruction of value unless necessary to achieve the termination objective.***

~~*3. Member States shall ensure that when a resolution authority determines that an institution or entity referred to in Article 1(1), points (b), (c) or (d), meets the conditions in Article 32(1), points (a) and (b), but not the condition in Article 32(1), point (c), the determination that the institution or entity is failing or likely to fail pursuant to Article 32(1), point (a) is a condition for the withdrawal of the authorisation by the competent authority pursuant to Article 18 of Directive 2013/36/EU.*~~

4. Member States shall ensure that the withdrawal of the authorisation of the institution or entity referred to in Article 1(1), points (b), (c) or (d) ***under the conditions of Article 18, point (g), of Directive 2013/36/EU*** *is a sufficient condition for a relevant national administrative or judicial authority to be able to initiate without delay the procedure to wind up the institution or entity in an orderly manner in accordance with the applicable national law.'*

Recitals 13-16: suggestion to keep the text of Commission's proposal

2.7. Article 33(2) BRRD / Recital 21 'Conditions for resolution with regard to financial institutions and holding companies'

Article 33 BRRD describes the conditions resolution authorities should take into account when assessing whether they can take resolution action in relation to the entities referred to in Article 1(1) points I and (d), i.e., grosso modo financial holding companies, mixed financial holding companies and parent financial holding companies. With the new proposed text of Article 33(2), the Commission seeks to clarify when such entities are deemed to be failing or likely to fail.

Member States made two remarks on the proposed text. According to the first remark the new paragraph 2 seems to depart from the definition of failing or likely to fail as provided in Article 32(4)

BRRD. The newly proposed text of Article 33(2) refers to material infringements or elements that show that the entity will, in the near future, infringe materially the requirements. One Member State expressed concern about the wording of "in the near future". Reference can be made however to the text of Article 32(4) point a) in which the same wording on the infringements in the near future is used. The second remark relates to the request of one Member State to delete the condition of Article 33(4) point c) BRRD.

Drafting suggestion:

Suggestion to maintain the Commission's proposal for Article 33(2) and Recital 21, as well as not to amend Article 33(4) BRRD.

2.8. Article 35 BRRD 'Special management'

The Commission proposed to modify Article 35 BRRD in respect to the appointment of the special manager. A Member State raised the question whether the appointment of several special managers could be considered. This would be in line with the new IRRD framework, in which such option is included in Article 42(1) IRRD, as well as with Article 50(1) CCPPR, which states that resolution authorities have the possibility to appoint more than one special manager.

The Presidency proposes to introduce wording in Article 35(1) that allows for the appointment of more than one special manager.

Drafting suggestion:

Article 35 para. 1 sentence 1 would be amended as follows:

> *'1. Member States shall ensure that resolution authorities may appoint ~~a~~ **one or more** special manager**s** to replace or to work with the management body of the institution under resolution or the bridge institution. Resolution authorities shall make public the appointment of ~~a~~ **the** special manager. Member States shall further ensure that the special manager has the qualifications, ability and knowledge required to carry out his or her functions.'*

2.9. Article 40 BRRD 'Bridge institution tool'

The Commission suggested to broaden the introductory sentence of Article 40(1) BRRD by including the reference to any of the resolution objectives in addition to the need to maintain critical functions in the bridge institution. A Member State highlighted that the newly added reference to the resolution objectives includes the resolution objective of ensuring continuity of critical functions, resulting in the conclusion that the reference to the need to maintain critical functions can be deleted. On that ground, the Presidency proposes to amend the proposed Article 40(1).

Some Member States also suggested to allow the bridge institution to be established and commence its activity prior to the formal approval of its license request. The Presidency agrees with the underlying rationale of ensuring a smooth process for allowing the bridge institution to operate. However, the suggestion seems already possible under Article 41(1), second subparagraph (stating that the bridge institution "may" be established and authorised without complying with CRD for a shorter period of time).

Last, a Member State suggested to add the sentence "without prejudice to the control to be exercised by the resolution authority" at the end of the second paragraph for clarity purposes. In the drafting suggestion this sentence is included in the text.

Drafting suggestion:

Suggested modifications to Article 40, paragraph 1, introductory sentence:

> *'1. In order to give effect to the bridge institution tool and having regard to the need* ***~~to maintain critical functions in the bridge institution or~~*** *to pursue any of the resolution objectives, Member States shall ensure that resolution authorities have the power to transfer to a bridge institution all of the following:*'
>
> *[…]*

Suggested modifications to Article 40, paragraph 2, first subparagraph, point (b) and second subparagraph:

> *[…]*
>
> '*(b) it is created for the purpose of receiving and holding some or all of the shares or other instruments of ownership issued by an institution under resolution or some or all of the assets, rights and liabilities of one or more institutions under resolution* ***~~with a view to maintaining access to critical functions~~*** *and selling the institution or entity referred to in point (b), (c) or (d) of Article 1(1).'*
>
> *The application of the bail-in tool for the purpose referred to in Article 43(2), point (b), shall not interfere with the ability of the resolution authority to control the bridge institution. Where the application of the bail-in tool allows for the capital of the bridge institution to be fully provided through the conversion of bail-inable liabilities into shares or other types of capital instruments, the requirement that the bridge institution is wholly or partially owned by one or more public authorities may be waived,* ***without prejudice to the control to be exercised by the resolution authority*****.'**

Suggested modifications to Article 41(2):

> *'2. Subject to any restrictions imposed in accordance with Union or national competition rules, the management of the bridge institution shall operate the bridge institution with a view to maintaining access to critical functions,* ***where relevant,*** *and selling the institution or entity referred to in point (b), (c) or (d) of Article 1(1), its assets, rights or liabilities, to one or more private sector purchasers when conditions are appropriate and within the period specified in paragraph 4 of this Article or, where applicable, paragraph 6 of this Article.'*

2.10. Article 44a BRRD 'EBA mandate in the scope of bail-in tool'

The Commission proposed to include an EBA mandate in respect of the scope of the bail-in tool. However, the EBA reminded that the protection of investors is a topic which is currently under ESMA's responsibility. To accommodate this remark, it is suggested to modify Article 44a by mandating the EBA together with ESMA to draft a joint report.

Drafting suggestion:

In Article 44a, the following paragraph 8 would be added:

> *'8. By … [PO please insert the date = 24 months after the date of entry into force of this Directive], EBA,* ***in coordination with ESMA,*** *shall report to the Commission on the application of this Article. That report shall compare the measures adopted by the Member States to comply with this Article, analyse their effectiveness in protecting retail investors and assess their impact on cross-border operations.'*

2.11. Article 63(2) BRRD 'Resolution powers: exemption from the qualifying holding assessment by the competent authority'

In Article 63(2) the Commission introduced the concept that, when applying the resolution tools and exercising resolution powers, resolution authorities are not subject to the requirement to obtain approval "by the competent authorities for the purposes of Articles 22 to 27 of Directive 2013/36/EU", (i.e. in respect of the qualifying holding assessment). Some Member States however raised concerns that this new addition is contradictory to Article 63 (1) point m), which allows the resolution authority to require the competent authorities to proceed with the assessment of a buyer in a timely manner.

Given these concerns, it should be clarified that the modifications to Article 63(2) aim to clarify that *resolution authorities* are not subject to a qualifying holding assessment when applying resolution tools and exercising resolution powers. For example, when the resolution authority would apply the bridge bank tool, which would be under the control of the resolution authority and capitalised by the resolution authority (resolution fund), the resolution authority would be exempt from the qualifying holding assessment by the competent authority. Any other acquirer of a qualifying holding would remain subject to a qualifying holding assessment (which, however, can be expedited pursuant to Article 63(1), point m). Taken into account this context, the Presidency proposes to clarify in a new Recital the context, as elaborated in this paragraph.

Further, one Member State suggested to extend the coverage of the exemptions on two aspects. First, the resolution authorities should be exempted from the qualifying holding assessment by competent authorities for any member of the resolution group, rather than limit the exemption to the qualifying holding assessment by the competent authority for the institution under resolution. Second, also other types of qualifying holding approvals under the applicable sectoral frameworks should be taken into account. The Presidency is open to explore broadening the scope of the proposed exemption by the Commission and welcomes any drafting proposals.

For now, the Presidency proposes to keep the Commission's text and to add a new Recital 32a.

Drafting suggestion:

Suggestion to maintain the Commission's proposal for Article 63, paragraph 2, point (a) and to add a new Recital (32a):

> ***'(32a) When applying resolution tools and exercising resolution powers, resolution authorities should generally not be subject to requirements to obtain approval or consent from any person. In particular, resolution authorities should not be subject to an assessment of an acquisition of a qualifying holding by the competent authority when exercising control over the institution under resolution.'***

2.12. Article 88(6a) BRRD / Recital 33 'Resolution colleges: significant branches in other Member States'

The Commission modified Article 88 BRRD to ensure alignment with Article 51(3) CRD which provides for the establishment of colleges of supervisors by the competent authorities supervising an institution with significant branches in other Member States to facilitate cooperation and exchange of information. Therefore, a new paragraph 6a was added to also facilitate the cooperation and exchange of information between resolution authorities.

Member States' remarks were fourfold. One Member State suggested to clarify that third country supervisors (and not only third country resolution authorities) could also be invited to resolution colleges as observers. Before providing any drafting proposals, the Presidency would prefer to obtain the precise rationale behind this clarification. Another Member State reiterated that the tasks of such resolution college would be different from the tasks in Article 88(2). In particular, no joint decisions

and corresponding processes may apply as the resolution authority of the institution is the only "voting" member of the resolution college. It should therefore be clarified that the focus of Article 88(6a) is only on cooperation and exchange of information. The Presidency agrees with this statement and highlights that the provisions in Article 88(6a) do not cross-refer to any articles on joint decisions, but only concern recovery planning, resolvability assessment and the exchange of information. The same Member State considered that a mechanism for a crisis scenario should also be created as Articles 91 and 92 do not apply, although a close cooperation and exchange of information in a crisis scenario is key. The Presidency welcomes drafting suggestions to accommodate this consideration. Last, one Member State highlighted that paragraph 6a shall also apply to national groups with no subsidiaries in other Member States but with significant branches in other Member States. This is indeed the situation that was targeted in the Commission's proposal.

Drafting suggestion:

Suggestion to maintain the Commission's drafting for Article 88(6a) and Recital 33.

2.13. Articles 91 and 92 BRRD 'Group resolution involving a subsidiary of the group'

The Commission's proposal modifies the cross-references in Article 91(1) BRRD by carving out the PIA which is now treated in a new point c) of Article 91(1)) in the Commission's proposal. Articles 33(1), 33(2) and 33(4) make a broad cross reference and do not allow such a fine distinction. An additional cross-reference is also added in Article 91(1), point (b), for consistency purposes.

One Member State prefers reverting to the original cross-references to Articles 32 and 33. The same Member State also requested the deletion of the specific college decision on the need for a group resolution scheme (i.e., involving college members in the assessment of whether "the resolution actions or other measures would make it likely that the conditions laid down in Article 32 or 33 would be satisfied in relation to a group entity in another Member State"). Considering this remark, the Presidency proposes no drafting suggestions. Indeed, if there is no discussion on whether, in case of troubles originating in a subsidiary, a group resolution scheme is needed, then it is true that, in case the group-level resolution authority proposes such a scheme, the resolution authorities considering that there is no need for it will be able to object to/block it. However, the possibility for a resolution authority of a subsidiary to request a group resolution scheme in case the group-level resolution authority does not propose one and to make it known that it considers resolution measures to have an impact on its Member State would be lost. This could be quite impactful. Further, another Member State requested to replace the wording "subsidiary of a group" with "subsidiary of a resolution entity". The Presidency accommodates this remark in its drafting proposal.

Drafting suggestion:

Article 91(1) would be amended as follows:

> *'1. Where a resolution authority decides that an institution or any entity as referred to in Article 1(1), points (b), (c) or (d), that is a subsidiary in a group, meets the conditions referred to in* ***Article 32(1), points (a) and (b), or the conditions referred to in Article 33(4), points (a) and (b), as applicable,*** *~~Article 32 or 33~~, that authority shall notify without delay to the group-level resolution authority, if different, to the consolidating supervisor and to the members of the resolution college for the group in question the following information:*
>
> *(a) the decision that the institution or entity referred to in Article 1(1), points (b), (c) or (d), meets the conditions referred to in Article 32(1), points (a) and (b),* ***~~or in Article 33(1) or (2) as applicable,~~*** *or the conditions referred to in Article 33(4)****, point (a) and (b), as applicable*** *;*
>
> *(b) the outcome of the assessment of the condition referred to in Article 32(1), point (c)* ***and Article 33(4), point (c)****;*

(c) the resolution actions or insolvency measures that the resolution authority considers to be appropriate for that institution or that entity.'

[…]

Article 92(1) would be replaced by the following:

'1. Where a group-level resolution authority decides that a Union parent undertaking for which it is responsible meets the conditions referred to in Article 32 or 33 it shall notify the information referred to in points (a), ***(b)*** *and (****c~~b~~****) of Article 91(1) without delay to the consolidating supervisor, if different, and to the other members of the resolution college of the group in question. The resolution actions or insolvency measures for the purposes of point (****c~~b~~****) of Article 91(1) may include the implementation of a group resolution scheme drawn up in accordance with Article 91(6) in any of the following circumstances: […]'*

2.14. Article 84a BRRD 'Exchange of information with centralised automated mechanisms (AML)'

One Member State suggested to replicate the provision inserted in Article 30a SRMR in the BRRD text.

In the modifications to the SRMR framework, the Commission introduced a new Article 30a allowing the SRB to obtain information held by the centralised automated mechanisms (used for AML purposes), which may prove to be relevant when carrying out the public interest assessment. This SRMR provision is limited: the SRB gets a right to access certain information, but not the right to access the database directly, as only a limited set of public entities can have such direct access (police, FIU, competent authorities, etc.). Moreover, the SRMR provision gives a responsibility to the SRB to share the information with the national resolution authorities, but this would not cover (i) resolution authorities outside the Banking Union or (ii) information related to banks not under the direct SRB remit (i.e., for which the NRA would have to ask itself).

Considering the concern, the Presidency proposes to introduce a new Article 84a BRRD, replicating Article 30a SRMR while preserving the limits as set out in the SRMR (scope of information and no direct access).

Drafting suggestion:

Suggestion to add a new Article 84a 'Information held by a centralised automated mechanism':

'Article 84a

1. Member States shall ensure that the authorities operating the centralised automated mechanisms established by Article 32a of Directive (EU) 2015/849 of the European Parliament and of the Council shall provide resolution authorities, upon their request, with information related to the number of customers for which an entity as referred to in Article 1(1) is the only or principal banking partner.

2. Member States shall ensure that resolution authorities shall request the information referred to in paragraph 1 only on a case-by-case basis and where necessary for the purpose of performing their tasks under this Directive and national law.'

2.15. Article 97 BRRD 'Information-sharing rules with third-country authorities'

In its proposal the Commission amended Article 97(4) to split the paragraph on the conclusion of non-binding cooperation arrangements with relevant third-country authorities between resolution authorities on the one hand and competent authorities on the other hand. However, Article 97(4) of the original BRRD text also contained a second subparagraph allowing Member States or their competent authorities to conclude bilateral of multilateral arrangements with third countries. One Member State has noticed that the Commission has unintentionally deleted the original second subparagraph from the new proposed text of Article 97(4). The Presidency proposes to reintroduce this subparagraph in Article 97(4).

Drafting suggestion:

In Article 97, paragraph 4 would be replaced by the following:

> *'4. Resolution authorities shall conclude non-binding cooperation arrangements with the relevant third-country authorities referred to in paragraph 2 where appropriate. Those arrangements shall be in line with EBA framework arrangement.*
>
> *Competent authorities shall conclude non-binding cooperation arrangements with the relevant third-country authorities referred to in paragraph 2 where appropriate. Those arrangements shall be in line with EBA framework arrangement and shall ensure that the information disclosed to the third-country authorities is subject to a guarantee that professional secrecy requirements at least equivalent to those referred to in Article 53(1) of Directive 2013/36/EU are complied with.*
>
> ***This Article shall not prevent Member States or their competent authorities from concluding bilateral or multilateral arrangements with third countries, in accordance with Article 33 of Regulation (EU) No 1093/2010.'***

2.16. Article 98 BRRD 'Exchange of confidential information'

Both the original text of Article 98(1) BRRD and the Commission's proposed amendment to this paragraph describe the exchange of confidential information, including recovery plans, with the relevant third-country authorities if certain conditions are met. A few Member States suggested to exclude recovery plans from the exchange of information provided for in Article 98(1), first subparagraph. As the obligation for the competent authority to exchange confidential information is now regulated in the new subparagraph 3, it would make sense to remove the explicit reference to recovery plans in the first subparagraph. Moreover, recovery plans fall within the competence of competent authorities which are not mentioned in the amended Article 98(1), first subparagraph.

For reasons of consistency, the Presidency suggests deleting the reference to recovery plans in the first subparagraph of Article 98(1) and adding them in the second subparagraph.

Drafting suggestion:

In Article 98, paragraph 1 would be amended as follows:

(a) the introductory sentence would be replaced by the following:

> *'Member States shall ensure that resolution authorities and competent ministries exchange confidential information**~~, including recovery plans,~~** with relevant third-country authorities only if all of the following conditions are met:';*

(b) suggested modification to the second subparagraph:

*'Member States shall ensure that competent authorities exchange confidential information, **including recovery plans,** with relevant third country authorities only if the following conditions are met:'*

[….]

2.17. Article 128a BRRD / Recital 47 'EBA mandate for crisis management simulations'

The Commission's proposal introduced a new Article 128a allowing the EBA to test the application of the Directive and to produce a report setting out the key findings and conclusions of the exercises referred to in this new Article. Some Member States highlighted the need to remain cautious in order not to create additional burdens for NRAs. The EBA also commented on this Article, preferring a reference to "at least the following aspects" instead of "all of the following aspects". This modification ensures that EBA's mandate is not limited in the scope of the simulation exercises and could instead be adapted to the planned objectives.

Taking into account the above-mentioned comments, the Presidency suggests amending the wording in Article 128a.

Drafting suggestion:

Suggestion to maintain Recital 47 and to amend Article 128a as follows :

'1. EBA shall coordinate regular Union-wide exercises to test the application of this Directive, Regulation (EU) No 806/2014 and Directive 2014/49/EU in cross-border situations on ~~all of~~ the following aspects:

(a) cooperation of the competent authorities during recovery planning;

(b) cooperation among resolution authorities and competent authorities before the failure and during the resolution of financial institutions, including in the implementation of resolution schemes adopted pursuant to Article 18 of Regulation (EU) No 806/2014.

2. EBA shall produce a report setting out the key findings and conclusions of the exercises. The report shall be made public.'

2.18. Cooperation of tax authorities with financial supervisors and resolution authorities

A Member State made the comment that the BRRD does not provide for a solid legal basis for the exchange of information between financial supervisors and resolution authorities, and the tax authorities. It therefore proposed amendments to Articles 84 and 90 BRRD to improve the close cooperation of tax authorities with financial supervisory authorities and resolution authorities.

The suggested amendments reflect the wording of recent amendments to the CRD, AIFMD and IRRD which should also be included in the BRRD for reasons of consistency across the financial sector. The Presidency would like to test Member States' views on the proposed amendments.

Drafting suggestions:

A new Recital (XX) would be introduced in BRRD:

'***Notwithstanding current secrecy rules applicable, information exchanges between resolution authorities and tax authorities should be improved. Such exchanges should be in line with national law, and, where the information originates in another Member***

State, it should only be disclosed with the express agreement of the relevant authority which has disclosed it.'

In Article 84 BRRD, the following paragraph 6a would be inserted:

'This Article shall not preclude the exchange of information between resolution authorities and tax authorities in the same Member State to the extent that such exchange is stipulated by national laws of Member States. Where this information originates in another Member State, it shall only be disclosed with the express agreement of the relevant authority which has disclosed it.'

In Article 90 BRRD, the following paragraph 5 would be inserted:

'Article 84 shall not preclude the exchange of information between resolution authorities and tax authorities in the same Member State to the extent that such exchange is stipulated by national laws of Member States. Where this information originates in another Member State, it shall only be disclosed with the express agreement of the relevant authority which has disclosed it.'

3. Selected topics based on the Commission's proposal

Member States are invited to provide, in writing, their views and/or drafting suggestions on the following provisions of the Commission's proposal.

- Article 2(1) (83d), (83e), (93a) BRRD 'Definitions'
- Article 5(2), (3), (4) BRRD 'Recovery plans'
- Article 6(5) BRRD 'Assessment of recovery plans'
- Article 8(2) BRRD 'Assessment of group recovery plans'
- Article 12 (1), (5a) BRRD 'Group resolution plans'
- Article 13(4) BRRD 'Requirement and procedure for group resolution plans'
- Article 17(4) BRRD 'Powers to address or remove impediments to resolvability'
- Article 18(4), (9) BRRD 'Powers to address or remove impediments to resolvability: group treatment'
- Article 32 (1), (2) BRRD 'Conditions for resolution'
- Article 42(5) BRRD 'Asset separation tool'
- Article 45d(1) BRRD 'Determination of MREL of G-SIIs and union material subsidiaries of non-EU GSIIs'
- Article 45m(4) BRRD 'Transitional and post-resolution arrangements'
- Article 71a(3) BRRD 'Contractual recognition of stay powers'
- Article 128 BRRD 'Cooperation with EBA'