Swedish Presidency of the Council of the European Union

Presidency non paper
on differences in the Council general approach and the EP mandate

1. Introduction

The Council general approach and the EP mandate are similar or close on many topics, but the mandates also differ substantially on several issues.

During the first trilogue the EP raised the differences regarding some of these issues, i.e. the level of application for the output floor, capital and liquidity waivers, transitional arrangements, third country branches, fit and proper and the treatment of ESG risks. In addition to that Member States have raised some other topics in bilateral and written comments, where the Council and EP are quite far apart. Please find below an overview of these differences.

2. Main differences between the Council general approach and the EP mandate

2.1 Level of application of the output floor

The Council applies the output floor on an institution level. This is combined with a Member State derogation, where the output floor can be waived in certain cases, according to Article 92(3)(b) CRR. Specifically, this is the case for institutions which are part of a group with a parent institution in the same Member State provided that this parent institution, or in the case of groups composed of a central body and permanently affiliated institutions, the whole as constituted by the central body together with its affiliated institutions calculates its total risk exposure amount in accordance with point (a) on a consolidated basis.

The EP adds, specifically as regards the level of application, that institutions shall calculate the risk-weighted exposure amount on a consolidated basis, new Article 92-a CRR. In paragraph (2) of the same Article, the EP adds that 'where the competent authority responsible for the supervision of a subsidiary credit institution […] deems the application of Article 92(3) would lead to an inappropriate distribution of capital among the group entities, that competent authority may submit a capital redistribution proposal'. Unless a joint decision between the consolidating supervisor and the supervisory competent authority can be reached, the EBA shall have a legally binding mediation role. The EP also adds that the EBA shall assess and issue an opinion on the level of compliance with Article 92-a(2) in light of potential financial stability concerns and the developments in the banking union (by 31 December 2027), new Article 518 CRR. Where appropriate, the Commission shall submit a legislative proposal to amend the level of application in Article 92-a(1), taking EBA's opinion into consideration.

2.2 Capital & liquidity waivers

The EP proposes to add a new paragraph (3a) to Article 7 CRR on capital waivers. Herein, the Commission shall report on the possibility of allowing cross-border capital waivers (by 31 December 2026). The Commission shall pay particular attention to progress made on completing the banking union and consider whether additional safeguards could address potential financial stability concerns and whether the waivers should be accompanied by the requirement for relevant subsidiaries to still have adequate minimum levels of own funds to ensure their resilience etc. The report may be accompanied by a legislative proposal. Should the conditions not yet be met, the Commission shall report back every two years until it deems it appropriate to submit a legislative proposal.

The EP proposal also includes changes regarding liquidity waivers, Article 8 CRR. The EP adds conditions that banks need to meet to benefit from liquidity waivers, e.g. that entities must enter into a group financial support agreement as defined in BRRD, or another group financial support agreement. There are also other specifications added regarding the liquidity sub-group. EP also adds that existing waivers shall remain in force for 24 months after the application of CRR3, and that such waivers shall continue to remain in force provided that the conditions in Article 8(1) and (2) CRR are met. Lastly, the EP also adds that the Commission shall report on the legal form and prudential treatment for group financial support agreements, accompanied by a legislative proposal, where appropriate (by 31 December 2025); and that the Commission shall review and report on the functioning of paragraph (1) of Article 8 (by 31 December 2026), also here taking into account any financial stability concerns and progress made towards completing the banking union, particularly to improvements made to the banking crisis management framework and Union deposit guarantee framework.

2.3 Third country branches

There are several differences between the texts of the co-legislators' with regard to the new proposal for a harmonised framework for the authorisation and supervision of third country branches. Some of the main differences are the following.

The Council general approach does not include Article 21c CRD. The Council instead adds a mandate to the EBA and the ESMA to submit a joint report to the EP, the Council and to the Commission on the merit and modalities of harmonising the conditions under which a third country group may be required to set up a branch in a Member State and seek authorisation in order to provide banking services in that Member State, Article 47(4) CRD.

The Council limits the authorisation requirement to companies conducting the services which require authorisation according to CRR, Article 47(3) CRD. The Council adds that competent authorities may decide that the authorisations of third country branches granted 24 months before the date of application of the amendments shall remain valid, provided that the third country branches that were granted those authorisations comply with the minimum requirements, Article 48c(5) CRD. The Council preserves the principle in CRD that the

assessment of systemic importance is a national decision and consequently deletes the joint decision process and makes the systemic assessment as well as the interventions questions for the respective Member States, Articles 48j, 48k and 48p CRD. The Council also adds a mandate to the EBA to submit a report to the EP, to the Council and to the Commission, taking due account of the geographical limitations applicable to the authorisations granted to third country branches on the merit of e.g. performing an assessment of the systemic importance for the Union of a third country group and the introduction of a cooperation mechanism between the competent authorities concerned for them to perform this assessment jointly, Article 48p(5) CRD.

Furthermore, the Council deletes the provision regarding insolvency and resolution of third country branches, Article 48g CRD.

Contrary to the Council the EP is in favour of a more harmonised approach and preserves Article 21c CRD. The EP introduces additional exemptions from the scope, for interbank and intragroup services, and adds additional wording on the reverse solicitation exemption, Article 21c CRD.

The EP narrows down the scope of the authorisation requirement to certain services in the Annex of CRD, exempts certain services in Annex 1 of MIFID and preserves a joint decision process but without voting rights, Articles 47 and 48k CRD. The EP adds that new third country branches shall not commence their activities in a Member State until the EBA and the third country competent authority have concluded a Memorandum of Understanding, Article 48c(1a) CRD. Furthermore, the EP sets the threshold for the assessment of systemic importance to EUR 40 billion, Articles 48j(1) and 48k(1) CRD. The EP changes the interventions that can be enacted through the joint decision to the measures listed in Article 48p and adds the measure of suspending the authorisation granted as well as the measure of requiring the restructuring of the assets or activities in the Union in such a manner that the branches are no longer classified as systemically important, Article 48k CRD.

2.4 Fit & Proper

The co-legislators have different approaches to the proposal of a more harmonised fit and proper assessment. Some of the main differences are the following:

The Council deleted the harmonised assessments of the management body by institutions and competent authorities, Articles 91a–91b CRD. The Council merges the requirement that the relevant entities shall have the primary responsibility for ensuring that key function holders are fit and proper and the assessment of heads of internal control functions and the chief financial officer by competent authorities but removes the procedures and deadlines for the assessment, and the requirement that the assessment needs to be conducted ex-ante, Article 91a CRD (new Article in the Council general approach). The Council also exempts, from the scope of the competent authority's assessment, a parent institution in a Member

State that qualifies as large institution but is affiliated to a central body, Article 91a(4) CRD (new Article in the Council general approach).

The EP is in favour of a more harmonised approach and preserves the proportionate ex-ante approach, limited to large institutions, for the competent authority's assessment of the management body. The EP excludes from the ex-ante assessment conducted by the competent authorities the parent institution in a Member State that qualifies as large institution if it is affiliated to a central body, Article 91b(8) CRD. In addition, the assessment by institutions is made possible ex post for small and non-complex institutions and when an ex-ante assessment cannot be conducted, Articles 91a(2) CRD. The application to the competent authority in these cases shall instead be provided as soon as possible after the selection of the member, and in any case, without undue delay after the member takes up the position, Article 91b(2), second subparagraph CRD. The EP also introduces the possibility of conducting a lighter assessment by the institution when it is strictly necessary to replace a member of the management body, Article 91a(2) CRD. Also, in these cases the application to the competent authority shall be provided as soon as possible after the selection of the member, and in any case, without undue delay after the member takes up the position, Article 91b(2), second subparagraph CRD.

The EP introduces the possibility of consulting the competent authority for the supervision of anti-money laundering in line with Directive (EU) 2015/849 as well as the possibility to request access to the central AML/CFT database, Article 91b(3) CRD.

The EP preserves the requirement that the relevant entities shall have the primary responsibility for ensuring that key function holders are fit and proper and the procedures and deadlines for the ex-ante assessment by competent authorities of the heads of internal control functions and chief financial officer, Articles 91c and 91d CRD. The EP adds the AML Compliance Officer to the definition of key function holders, Articles 3(9a) CRD. The EP also adds that in relation to parent institution in a Member State that qualifies as a large institution and that is affiliated to a central body only the suitability of the heads of internal control functions and the chief financial officer of the central body shall be assessed, Articles 91d(1) CRD. The same possibility of consulting the competent authority for the supervision of anti-money laundering and requesting access to the central AML/CFT database, is introduced in relation to this assessment, Article 91d(3) CRD.

2.5 ESG

Both the Council and EP have made amendments regarding ESG in CRR and CRD. The EP also adds new requirements (but no minimum statutory capital requirements - Pillar 1) and establishes a closer link between bank prudential rules and sustainability-linked objectives and commitments.

In the CRR, the EP builds on the existent EU Taxonomy regulation and carbon neutrality objectives for "brown sectors" by adding the definitions of "fossil fuel sector entity" and

"assets or activities subject to impacts from environmental and/or social factors", Article 4(1)(152a) and (152b). The EP then adds additional reporting and disclosure requirements on those exposures, climate targets and transition plans, Articles 430(1)h and 449a CRR. Institutions shall report on exposures to fossil fuel sector entities, activities that are deemed to do significant harm to environmental objectives under the Taxonomy regulation and ESG risks in covered pools of covered bonds.

The EP adds a mandate to the ESMA to report on whether ESG risks are appropriately reflected in ECAI credit risk ratings with a subsequent a legislative proposal by the Commission to the EP and the Council no later than 18 months after entry into force, Article 135(3a) CRR. On prudential treatment, the EP expands the EBA mandate to report on dedicated P1 treatment of exposures to environmental and/or social factors by including an assessment on data availability and feasibility of classification system, on top of the assessment of riskiness and effects on financial stability. While moving the deadline to end 2024, the EP also asks the EBA to report on targeted amendments within the current framework, apart from comprehensive revisions, Article 501c CRR. The EP also proposes to factor ESG risks for collateral and respective valuation, Articles 193 (7a) and 210 (2) CRR, and requires banks to take into account those risks when doing their internal stress tests, Article 177(2a) CRR

In CRD, the EP explicitly requires that ESG risks are considered in banks' internal capital adequacy assessment (Article 73) and remuneration policies (Article 76). The EP also requires an adoption via delegated act of the content and format of the (prudential) transition plans, Article 145(ia), to ensure an extra layer of oversight on the content the EBA guidelines on transition plans requested under Article 87a(5)(b). The EP requires consistency of targets, methodologies and content of plans refered to in the CRSD with the ones used for the (transition) plans imposed under the CRD, Article 87a(5). The EP adds explicit powers for supervisors to take supervisory actions on the targets and measures that banks include in their medium and long-term (transition) plans on ESG risks, Article 104(1)(ma). These powers would complement the supervisory review process of Articles 98(1)(ia), with potential effects on additional capital requirements applicable by the supervisors (Pillar 2 requirements), Article 98(9). Finally, the EP sets a 12 months deadline for the publication of ESAs joint guidelines on stress testing of ESG risks, Article 100(4).

2.6 Proportionality

The Council adds to the list of information that non-listed small and non-complex institutions (SNCI) shall disclose annually, e.g. information regarding exposures to credit risk based on Article 433b(2) CRR. The Council also adds a mandate to the EBA to prepare a report on the feasibility of using qualitative and quantitative information reported by institutions other than SNCI, Article 434b CRR.

The EP extends the scope of permanent partial use of SA (PPU) to also include exposures from foreign branches and different product groups in the scope of PPU, Article 150(1) third

subparagraph point a) CRR. Furthermore, the EP reduces the information SNCI shall disclose twice a year, e.g. that key metrics shall be disclosed on an annual basis, Article 433b(1) CRR. The EP also reduces the frequency of when non-listed SNCI shall disclose certain information, from annually to a biennial basis, Article 433b(2) CRR. The EP adds a mandate to the EBA to prepare a report assessing options to introduce in the prudential framework specific prudential, governance and transparency requirements for SNCI with a view to increase the proportionality of the prudential framework, Article 519da CRR. In addition, the EP adds additional proportionality for SNCI with regard to the treatment of risks and the supervisory review and evaluation process, Articles 76 and 97 CRD.

2.7 Capital requirements

Regional governments and local authorities, and public sector entities

The Council's general approach includes changes to the treatment of regional governments and local authorities (RGLA) and public sector entities (PSE) in the Standardised Approach, Articles 115–116 CRR. Due to the changed treatment of exposures to institutions, at least the treatment of RGLA in Article 115(1) will need to be amended. The EP text does not address this issue.

Object finance

The EP retains the Commission proposal for a beneficial risk-weight for 'high-quality object finance', Article. 122a(3)(a) CRR. This is not part of the Council's general approach.

FX risk

The Council's general approach addresses the issue of the relation between the euro and ERM II currencies, e.g. in Articles 123a(3) and 325bd(5) & (5a) CRR. The EP does not include these amendments.

Credit protection

The EP and the Council make amendments as regards the specification on 'unconditional' and 'eligible' with regards to unfunded credit protection, Articles 183(1) and 213(1) CRR. The Council deleted the last part of the Commission proposal in this regard in both instances, while the EP's approach is different in the two instances.

Real estate monitoring and valuation

The Council has shifted the paragraph on the cap to property revaluation to Article 229 CRR, while the EP keeps this in Article 208 CRR as per the Commission proposal. The main differences between the Council and the EP as regards the possibility for revaluation are i) the length of time periods to use when calculating the average values, where the EP proposes four and eight years respectively for commercial and residential properties, while the Council has six for both; ii) the additional detail from the Council on how to calculate the average value; and iii) the additional detail from the EP on the basis upon which a revaluation may be

possible in addition to energy efficiency such as improvements to the resilience, protection and adaptation to physical risks.

Moreover, while the EP restricts the use of advanced statistical or other mathematical methods to monitoring and identification of immovable property in need of revaluation (overall in line with the Council's approach of keeping Article 208(3) under the current CRR unchanged), it also includes a list of conditions in Article 208(3a) points (a)–(f) CRR, which are not part of the Council's text.

The Council also introduces a transitional arrangement for property valuation requirements concerning the stock of outstanding residential and commercial immovable property until a review of the property value is required as per Article 208(3) or 31 December 2027, whichever is earlier, as set out in Article 495f CRR. This latter amendment is not included in the EP position.

Operational risk and the business indicator

The EP proposes to determine the interest, leases and dividend component (ILDC) at jurisdictional level for the purpose of taking into consideration high and low net interest margin jurisdictions, within the scope of the Business indicator, Article 314(2) CRR.

Transitional arrangements for the output floor

The EP modifies the transitional arrangements for the output floor in several instances, Article 465 CRR. This includes i.a. adding that any extension of the arrangements can only be made for up to four years. Other differences between the EP and the Council texts are that the EP adds that the applicable risk-weight within the transitional arrangement for unrated corporates shall be increased to 70 percent (from 65 percent) by 1 January 2031; the EP also includes a reference that the Commission may submit a legislative proposal to modify the value of 'alpha' in the Standardised Approach for Counterparty Credit Risk; and the EP lengthens the time period over which losses are assessed to eight years within the arrangement for low-risk mortgages.

Temporary arrangement for equity exposures

The EP mandate adds additional detail on the transitional arrangement for equity exposures, Article 495a CRR. The EP adds that the treatment in paragraph (3) also can be employed for undertakings where an institution is in the capacity to appoint at least one member of the management body of the entity.

Extension of temporary measures related to sovereign exposures

The Council's general approach includes extensions of two measures agreed within the scope of the Covid-19 quick-fix of the CRR, i.e. the temporary treatment of unrealised gains and losses on sovereign exposures, and the temporary treatment of public debt issues in the currency of another Member State, Articles 468 and 500a CRR. These proposed extensions are not included in the EP mandate.

2.8 Prudential consolidation and own funds

The Council removes factoring and management of unit trusts from the scope of the definition of ancillary services, Article 4(1)(18) CRR. The Council also limits the scope of that definition to the listed activities insofar as those activities are ancillary to banking. Furthermore, the Council adds the possibility for the competent authority to disregard certain indicators when determining what constitutes a financial holding company, Article 4(1)(26) CRR.

The EP preserves the Commission proposal regarding the definitions of ancillary services and financial holding company, Articles 4(1)(18) and 4(1)(26) CRR.

Non-performing exposures

The EP proposes to exclude exposures purchased by a specialised debt restructurer from the NPE-backstop, to widen the scope of exposures that are excluded from the backstop, and to extend the temporary adjustment for massive disposals, Articles 36(1)(m), 47a(7a), 47c(4)(b) and 500 CRR.

Minority interests

The Council amends the Commission proposal in order to allow minority interest and qualifying own funds instruments in third country subsidiaries to be recognised in the own funds in line with the current CRR provisions, Articles 84(1)(a) point (ii) and 85(1)(a) point (ii). EP introduces a new provision which allows the competent authority to decide on what basis the minority interest should be included, Articles 84, 85 and 87, first paragraph, second subparagraph point (a) CRR.

2.9 New proposals in the EP mandate

Securitisation

In the transitional arrangements, the EP includes a lowering of the 'p-factor', as used in Articles 261 and 262 CRR, to be permitted until the completion of the comprehensive review of the Union securitisation framework, Article 465(5a) CRR. The EP links this to the output floor as this derogation is only to be used by institutions when calculating the standardised risk exposure amount according to Article 92(5) CRR. EP also includes that the EBA, in close collaboration with ESMA, shall report on the prudential treatment of securitisation, and that the Commission, where appropriate, shall submit a legislative proposal, Article 506ca CRR

Prudential treatment of crypto assets

The EP ads a dedicated recital on the recent Basel standard plus a requirement for the Commission to submit a legislative proposal by end June 2023 to implement such standard by end 2024. In the meantime, all exposures to crypto assets receive a risk wight of 1250%, recital 42a, Article 461b CRR.

The EP introduces additional disclosure requirements for exposures to crypto-assets (and related activities), Article 451b CRR.

Shadow banking

The EP ads definition of an 'shadow bank entity', Article 4(1) point 152c CRR, and that the Commission shall report the appropriateness and the impact of imposing limits on exposures to shadow banking entities and, if appropriate, an legislative proposal, Article 395a CRR. Also, the EP introduces disclosure requirements for exposures to shadow banking entities and that EBA shall develop draft regulatory technical standards, Article 449b CRR.

Authorisation of large investment firms

The EP proposes to add the possibility for competent authorities to waive the authorisation requirement for large investment firms, Article 8a(4) CRD.

This has not been covered in the Council's banking package discussions but instead in the Council's MIFIR discussions. Contrary to the EP mandate the Council changes the scope of which assets should be included when calculating the threshold value, Article 4(1)(b) CRR.

2.10 Harmonisation

Supervisory independence

Both the Council and the EP have reduced the minimum length of cooling-off periods regarding directly supervised institutions in the same way. The Council ads a national option to fully derogate in view of labour market conditions or to prevent a breach of fundamental rights. The EP ads a EBA mandate to issue guidelines on conditions which allow competent authorities to waive, increase or decrease the cooling off periods. The Council deletes the mandate for the EBA to issue guidelines on best practises, Article 4 CRD.

Both Council and EP introduce new cooling-off periods of equal length for indirect conflict of interest (direct competitors of supervised institutions). The EP also adds a cooling-off period of six months that restricts members of the competent authority's governing bodies and supervisory staff from performing lobbying activities on banking/supervisory matters.

The Council deletes the entitlement to compensation for cooling-off periods and adds a new recital that refers to compensation scheme as a matter left to Member States.

The EP adds new criteria for appointing members of the governing bodies; they shall be appointed for a fixed term mandate that's renewable once and be appointed based on objective, transparent and published criteria. Members of the governing bodies can be dismissed only if they no longer meet the criteria of appointment or have incurred serious criminal convictions.

Administrative sanctions

Both the Council and EP have made amendments regarding the supervisory powers, Art. 66, Art. 67 and 70 CRD. The Council deleted COM proposal to apply periodic penalty payments (PPP) for breaches of obligations arising from a decision issued by the NCA and the proposal regarding cooperation between CA and criminal authorities (ne bis in idem). The EP propose PPP for natural persons on a weekly basis (instead of daily). The Council changed the amount for PPP.

Prudentially relevant transactions

The Council reduces the scope of the notification and assessment for acquisitions of material holdings to financial sector entities only, Article 27a CRD. The Council clarifies that the notification and assessment should be made both at an individual level and on a consolidated level and introduces a joint decision procedure, Articles 27a(1b) and 27c CRD. The Council also introduces exemptions to the notification and assessment for when the acquisition is conducted between entities of the same group and between small and non-complex institutions, Article 27a(3b) and (3c) CRD. The Council deletes the assessment process for material transfers of assets and liabilities, Article 27f-i CRD. Furthermore the Council introduces exemptions to the notification and assessment of mergers or divisions for mergers and divisions that result from the application of BRRD as well as mergers that only involve financial stakeholders from the same group, including a group of credit institutions that are permanently affiliated to a central body and which is supervised as a group, Article 27k(1) and 27k(11) CRD.

The EP preserves the Commission proposal that the notification and assessment of acquisitions of material holdings should relate to financial sector as well as non-financial sector entities as well as the Commission proposal on the level of applying the threshold determining whether an acquisition is deemed material enough to be notified and assessed, Article 27a CRD. Contrary to the Council the EP also preserves the assessment process for material transfers of assets and liabilities and changes the threshold for the notification and assessment so that the intended operation shall be deemed material for an institution where it is at least equal to 10 % of its total assets or liabilities, Articles 27f-i CRD.

3. Discussion

The Council's general approach strikes a balance, implementing the Basel III standards while respecting the specificities of the European banking market. The EP mandate differs substantially on several of the topics that are essential to achieve the balance in the Council's general approach. What are Member States' views on the substantial differences to the EP mandate? In particular, what is the Member States' view on these differences in relation to the agreed balance in the Council, and where Member States can show flexibility?

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