Council of the European Union
General Secretariat

Interinstitutional files:
2023/0112 (COD)

Brussels, 02 April 2024

WK 4739/2024 INIT

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WORKING DOCUMENT

From:	Presidency
To:	Working Party on Financial Services and the Banking Union (CMDI) Financial Services Attachés
Subject:	Presidency non-paper on BRRD technical topics

Presidency non-paper on BRRD technical topics

CWP CMDI 25-03-2024

1. Introduction

The Presidency intends to address several provisions of the CMDI proposal through written procedures. In this non-paper, a second 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 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 lists the remarks of the Member States that suggested modifications to the Commission's text of the Articles below. 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 2(1) and (29a) BRRD 'Definition: alternative private sector measure'

The Commission's proposal included the insertion of a new Article 2(29a) to introduce a definition of 'alternative private sector measure'. According to the definition, 'alternative private sector measure' means any support not qualifying as extraordinary public financial support. One Member State proposed to insert the new definition after the definition of 'alternative private sector measure' by changing it to Article 2(28a). One Member State suggested distinguishing between 'usual' measures (such as normal business operations undertaken by a credit institution, group or IPS for economic reasons even if they address deficiencies) and measures where severe difficulties have occurred and / or interventions by the competent authority take place.

The Presidency suggests moving the definition to (point 28a) but to make no distinction between the different kinds of 'alternative private sector measure'. Even if the distinction can be made from a conceptual point of view, it is not relevant to cater for the purpose, i.e., to distuingish between extraordinary public financial support measures that qualify as state aid and are subject to specific rules and those measures that do not constitute state aid.

Drafting suggestion:

Article 2(29a) would be amended as follows:

*'(~~29a~~**28a**) 'alternative private sector measure' means any support not qualifying as extraordinary public financial support;*'

2.2. Article 16a BRRD / Recital 5 'Estimating CBR in case of prohibition of certain distributions'

The Commission's proposal adds a new paragraph 7 to Article 16a BRRD to address the issue of the different basis for the application of MREL and the combined buffer requirement (CBR). While several Member States explicitly supported the new paragraph, one Member State opposed it, stating *inter alia* that this imposes a different and additional component to the MREL requirement. Moreover, having a resolution authority determining a prudential requirement, such as the CBR, in particular when that may lead to imposing such a requirement to an entity which does not have one of the elements of the CBR in place, could create legal risks. It appears that, with this new paragraph, the Commission did not want to give the resolution authority the power to determine the CBR for macroprudential purposes for entities that are not subject to any of the CBR's elements, but it intended to clarify that the power of the resolution authority to prohibit certain distributions should be applied on the basis of the estimation of the CBR resulting from the Commission Delegated Regulation (EU) 2021/1118 (Delegated Regulation) under Article 45c(4) that specifies the methodology to be used by resolution authorities to estimate the CBR in such circumstances. Firstly, the wording of Delegated Regulation as well as Article 45c(4) BRRD are very clear that it concerns an estimation, being a fictious requirement used only for the purpose of the MREL calculation and not about setting any actual requirement. Furthermore, the Delegated Regulation leaves a very limited role for the resolution authority in the process. When performing the estimation, the resolution authority is almost exclusively a taker of the prudential requirements set by the competent authority, whether at the level of the group or of one of its components, starting from the existing requirements and using very mechanistic formulae, not implying any additional discretion (either averages or direct use of the requirement applied at another level as a proxy). The only room for discretion in the estimation process is strictly framed in Article 2 and recital 7 of the Delegated Regulation which makes it clear that any adjustment needs to be based on information from the competent authority. Finally, the provision is necessary for practical reasons. The counterfactual is that the power to prohibit certain distributions would only apply where the macroprudential authority has set a CBR and not in those cases where it is not set at the relevant entity level, creating unlevel playing field for resolution purposes. The ideal situation would be that relevant competent authorities set a CBR at each entity level relevant for resolution purposes. However, this is not the case and could not be imposed.

Notwithstanding the foregoing, paragraph 7 would benefit from more clarity as to its scope. Therefore, the Presidency suggests including a reference to both the resolution entity and the entities that are not themselves resolution entities within the group.

Another Member State indicated that the application of the methodology laid down in the Delegated Regulation will not make it possible to estimate the countercyclical buffer as this is excluded from the MREL calculation and therefore not tackled in the Delegated Regulation. However, for MMDA purposes, the countercyclical buffer needs to be taken into account. The Presidency welcomes drafting suggestions to accommodate this consideration.

Drafting suggestion:

In Article 16(7) the following would be inserted:

'*Where an entity **that is part of a resolution group** is not subject to the combined buffer requirement on the same basis as the basis on which it is required to comply with the requirements referred to in Articles 45c and 45d, resolution authorities shall apply paragraphs 1 to 6 of this Article on the basis of the estimation of the combined buffer requirement **for resolution entities and entities that are not themselves resolution entities respectively** calculated in*

accordance with Commission Delegated Regulation (EU) 2021/1118. Article 128, fourth paragraph of Directive 2013/36/EU shall apply*.'

2.3. Article 45c (4) BRRD / Recital 47 'EBA mandate for RTS on P2R and CBR estimation extended to internal MREL'

The Commission proposal replaces paragraph 4 of Article 45c BRRD adding an EBA mandate for an RTS specifying the methodology to be used to estimate the P2R and the CBR. One Member State raised the concern that the EBA mandate would create additional burden. The Presidency takes note of this comment but believes the extension of the mandate is actually meant to reduce the burden on resolution authorities as well as reduce risk of divergent practices by providing guidance on how to set the MREL when the P2R is set on a basis that does not match the basis on which MREL is set. Another Member State questioned the wording of the EBA mandate as it is not for the resolution authorities to set the combined buffer requirement.

Based on the above remarks, the Presidency proposes the following drafting for Article 45c BRRD while maintaining the relevant part of Recital 47 related to Article 45c BRRD, paragraph 4 BRRD.

Drafting suggestion:

The Article 45c, paragraph 4 would be amended as follows:

'4. EBA shall develop draft regulatory technical standards specifying the methodology ~~***to be used by resolution authorities***~~ *to estimate the requirement referred to in Article 104a of Directive 2013/36/EU and the combined buffer requirement* ***to be used by resolution authorities*** *for:*

(a) resolution entities at the resolution group consolidated level, where the resolution group is not subject to those requirements under Directive 2013/36/EU;
(b) entities that are not themselves resolution entities, where the entity is not subject to those requirements under Directive 2013/36/EU on the same basis as the requirements referred to in Article 45f of this Directive.

EBA shall submit those draft regulatory technical standards to the Commission by … [OP please insert the date = 12 months from the date of entry into force of this amending Directive].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.'

2.4. Article 27 BRRD / Recital 6 'Early intervention measures'

The Commission proposes to replace the current Article 27 BRRD related to Early Intervention Measures (EIM) with a new Article 27 BRRD. The Commission's proposal was discussed during the CWP of 20 July 2023 on the basis of the Commission services' note on 'early intervention measures (EIM) and preparation for resolution' (WK 9017/2023).

Two Member States made the general remark to prefer the inclusion of the EIM in the Capital Requirements Directive (CRD) instead of the BRRD.

Two Member States correctly noted that point (i) of paragraph 1, point (a) should refer to Article 39 of the Investment Firms Directive (IFD) and not to Article 49 of the IFD.

Two Member States preferred to reinstate the trigger of the institution's own funds requirement plus 1,5 percentage points to assess whether the institution is, in the near future, likely to infringe the requirements as mentioned in the current text of Article 27 BRRD. The Presidency notes that this

trigger was identified as an issue in the EBA report on the application of EIM[1] and notes that the Commission, to mitigate the risk of lack of convergence resulting from the deletion, included an EBA mandate for guidelines to promote the consistent application of the EIM triggers.

One Member State would welcome clarification on the addition of "*or the competent authority has determined that the arrangements, strategies, processes and mechanisms implemented by the institution or entity and the own funds and liquidity held by that institution or entity do not ensure a sound management and coverage of its risks*" in paragraph 1, point (a) of Article 27 BRRD. This reference corresponds to the trigger for supervisory measures set out in Article 16(1), point (c) of the SSM Regulation, which comes, within the Banking Union, in addition to those set out in Article 102 CRD. The objective of this introduction is twofold: (i) the reference is introduced to ensure that the same rules and triggers for early intervention apply within the Banking Union where the SSM Regulation applies, as well as in Member States outside the Banking Union where only the CRD applies and, (ii) to create, within the Banking Union, a clear escalation ladder where the conditions for early intervention measures would correspond to the triggers for supervisory measures, plus "aggravating factors".

Two Member States and the EBA suggested leaving open the possibility to take action if the deterioration is not rapid but still significant. The latter further suggest to not only refer to the deterioration of the financial but also the business condition to intervene, which would allow for example to intervene in case of a cyber-attack that has not yet resulted in a material negative impact on the financial performance.

Three Member States proposed to delete the reference to Article 45e and 45f of the BRRD in paragraph 1, point (b) of Article 27 BRRD whereas the monitoring of the compliance with MREL is not within the remit of the competent authority. One Member State indicates this would create an overlap in competences.

One Member State advised to reintegrate the power to require changes to the business strategy or operational structure as this power seems not covered enough by Article 104(1), point (e) CRD. The Presidency notes however that the concerned power to require changes to the business strategy or operational structure does not only seem only covered by Article 104(1), point (e) CRD, but also by points (b) (power to require changes to internal capital adequacy and governance), (f) (power require risk reduction), and (g) (power to require limitations of variable remunerations). Further, even points (d) (power to require specific provisioning policy), (i) (power to require restrictions on AT1 payments) (k) (impose specific liquidity requirements) and (l) (impose specific disclosure) could to some extent fall under this umbrella. The notion seems therefore sufficiently covered under Article 104 CRD as the main objective of the proposal was also to remove overlaps to clarify the provisions and make their use easier.

One Member State noted that the power to contact potential purchasers and to put in place a digital platform for sharing the information that is necessary for the marketing of the institution or entity could be useful as an EIM and not only at the stage of preparation for resolution. The Presidency takes note of this suggestion but would like to clarify that this power as included in Article 30a (4) BRRD is a power granted to the resolution authority in the run-up to a resolution. The resolution authority can exercise this power in parallel with the EIM or even if EIM have not yet been taken. Including it as an EIM would create overlap and confusion.

One Member State preferred the appointment of a temporary administrator being a specific measure with a higher threshold to apply. The Commission's proposal however aims to ensure that the

[1] EBA, report on the application of early intervention measures in the European Union in accordance with Articles 27-29 of the BRRD, 2021, paragraphs 106 – 110.

measure to appoint a temporary administrator is more readily available to authorities in case of need while the language of Article 27, paragraph 2 BRRD should ensure that not only a proportionate approach is taken but also that due regard paid to the more intrusive nature of the concerned measure.

One Member State formulated several proposals to strengthen the governance and to facilitate effective action. Firstly, when early intervention is triggered because the supervisory measures are not sufficient or not complied with, the decision-making process must allow for a swift consideration and, if necessary, adoption of early intervention measures, in order to avoid any further worsening of the outlook. The Presidency believes this comment could be included via an amendment in the Recital. Secondly, the Member State proposed that the deadline for the early intervention measures should be strictly limited to the time necessary to implement the measure under reasonable conditions. The Presidency proposes to accommodate this concern by an amendment in the enacting terms. Thirdly, the Member States suggested that the evaluation of the measure should be carried out immediately after the deadline is reached and shared with the resolution authority and, in case of conclusion that the measures have not been fully implemented or are not effective, the competent authority should assess whether the entity is FOLTF. The Presidency notes that these proposals overlap somehow with Article 30a BRRD which already foresees an exchange of information between the competent authority and the resolution authority in case of early intervention and, also, ensures that the right conditions and incentives are created to proceed to a FOLTF assessment in case such measures do not succeed.

The EBA proposed to amend the wording used in paragraph 4 to the rest of the Article by changing the word 'triggers' to 'conditions'.

Based on the above remarks, the Presidency proposes the following drafting for Recital 6 and Article 27 BRRD.

Drafting suggestion:

Recital 6 would be amended as follows:

> **Recital 6**
>
> *'(6) Early intervention measures were created to enable competent authorities to remedy the deterioration of the financial and economic situation of an institution or entity and to reduce, to the extent possible, the risk and impact of a possible resolution. However, due to a lack of certainty regarding the triggers for application of those early intervention measures and partial overlaps with supervisory measures, early intervention measures have seldom been used. The conditions for the application of those early intervention measures should therefore be simplified and further specified. To dispel uncertainties concerning the conditions and timing for the removal of the management body and the appointment of temporary administrators, those measures should be explicitly identified as early intervention measures and their application should be subject to the same triggers. At the same time, competent authorities should be required to select the appropriate measures to address a specific situation in compliance with the principle of proportionality. To enable competent authorities to take into account reputational risks or risks related to money laundering or information and communication technology, competent authorities should assess the conditions for application of early intervention measures not only on the basis of quantitative indicators, such as capital or liquidity requirements, level of leverage, non-performing loans or concentration of exposures, but also on the basis of qualitative triggers.* ***The decision-making process in relation to early intervention measures should allow for their swift consideration and, if necessary, adoption, in order to avoid any further worsening of the financial and economic situation.****'*

Article 27 BRRD would be amended as follows:

> *1. Member States shall ensure that competent authorities may apply early intervention measures where an institution or entity referred to in Article 1(1), points (b), (c) or (d) meets any of the following conditions:*
>
> *(a) the institution or entity meets the conditions referred to in Article 102 of Directive 2013/36/EU or in Article 38 of Directive (EU) 2019/2034, or the competent authority has determined that the arrangements, strategies, processes and mechanisms implemented by the institution or entity and the own funds and liquidity held by that institution or entity do not ensure a sound management and coverage of its risks, and either of the following applies:*
>
> > *(i) the institution or entity has not taken the remedial actions required by the competent authority, including the measures referred to in Article 104 of Directive 2013/36/EU or in Article **39** ~~49~~ of Directive (EU) 2019/2034;*
> >
> > *(ii) the competent authority deems that remedial actions other than early intervention measures are insufficient to address the problems due inter alia to a ~~rapid and~~ significant deterioration of the financial condition of the institution or entity;*
>
> *(b) the institution or entity infringes or is likely to infringe in the 12 months following the assessment of the competent authority the requirements laid down in Title II of Directive 2014/65/EU, in Articles 3 to 7, Articles 14 to 17, or Articles 24, 25 and 26 of Regulation (EU) No 600/2014 ~~or in Articles 45e or 45f of this Directive~~.*
>
> *[…]*
>
> *3. For each of the measures referred to in paragraph 1a, competent authorities shall set a**n implementation** deadline ~~for completion~~**, which shall be strictly limited to the time necessary to carry out the measure concerned under reasonable conditions. Competent authorities shall conduct an evaluation of the effectiveness of the measure immediately after expiry of the deadline and shall share this evaluation with the relevant resolution authority.***
>
> *4. EBA shall, by … [PO please insert the date = 12 months from the date of entry into force of this amending Directive], issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to promote the consistent application of the ~~triggers~~ **conditions** referred to (….) in paragraph 1 of this Article.'*

2.5. Article 29 'Temporary administrator'

The last subparagraph of Article 29(1) BRRD as proposed by the Commission refers to Article 91(1), (2) and (8) CRD (fit and proper requirements for members of the management body) and determines that the fit and proper assessment shall be an integral part of the competent authority's appointment decision.

Comments received on said subparagraph are threefold. Some Member States were against the reference to Article 91 CRD. One Member State considered that the fit and proper regime for temporary administrators must take into account their special function and cannot be aligned in all respects to the rules applicable to members of the management body. Moreover, the CRD was under revision and the fit and proper regime provisions were therefore uncertain. The Presidency considers that the Commission aimed to align the fit and proper requirements for temporary administrators with some of the CRD rules and procedures applicable to managers appointed by the institutions themselves to facilitate the assessment of the supervisor and ensuring a higher level of consistency across the EU. Following the Banking Package, Article 91 CRD has been substantially amended,

which should be reflected in Article 29(1) BRRD as well. Two other Member States were of the opinion that the requirements for temporary administrators and special managers (per Article 35(1) BRRD) should be aligned. Unlike special managers appointed under Article 35 BRRD, temporary managers are part of the management body of the institution and may have a broad set of objectives, whereas the special manager is appointed by the resolution authority with the exclusive aim of implementing resolution action. The proposed Article 29(1) BRRD does not refer to the entire Article 91 CRD but only to a subset of its suitability criteria (such as being of good repute, act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of the management body where necessary and to effectively oversee and monitor management decision-making, possessing sufficient knowledge, skills and experience to perform their duties) which appear not to be too onerous to assess as part of the appointment decision.

While supporting the reference to Article 91 CRD, one Member State considered the inclusion of the fit and proper assessment in the competent authority's appointment decision redundant as the temporary administrator would fulfil these requirements as part of the decision of the competent authority to appoint him/her. By explicitly providing that the fit and proper assessment shall be an integral part of the competent authority's appointment decision, the provision clarifies that it is the authority's responsibility to ensure the suitability of the temporary administrator.[2]

Lastly, one Member State raised the question whether Article 91, paragraphs 3 to 7 CRD also need to be fulfilled given that Article 91(1) CRD refers to paragraphs 2 to 8.

The new Article 29(3) BRRD provides a non-exhaustive list of roles and functions that the temporary administrator could perform as specified by the competent authority at the time of the appointment. One Member State suggested introducing an additional potential function, namely the assistance in the tasks provided for in paragraphs 3 to 5 of Article 30a BRRD (i.e., provision of information to competent authorities; marketing of the institution to potential purchasers; putting in place a digital platform for sharing information). This addition could indeed help to clarify that role of the temporary administrator could also be to improve cooperation between the institution and the competent and resolution authorities. Therefore, the Presidency suggests including a new point (d) in Article 29(3).

Drafting suggestion:

Article 29(1), subparagraph 4, would be amended as follows:

> '*Member States shall further ensure that any temporary administrator fulfils the requirements set out in Article 91 (1), (2), and ~~8~~* ***2a*** *of Directive 2013/36/EU. The assessment by competent authorities of whether the temporary administrator complies with those requirements shall be an integral part of the decision to appoint that temporary administrator*.'

In Article 29(3) point (d) would be inserted:

> ' ***(d) ensuring compliance of the institution or entity referred to in Article 1(1), points (b), (c) or (d) with any requests pursuant to Article 30a(3), subparagraph 2, Article 30a(4) and (5).*** '

[2] Please note that Article 91 (1) CRD as agreed in the Banking Package correspondingly clarifies that it is not the institution's responsibility to ensure that the suitability criteria are fulfilled with regard to temporary administrators: "*Institutions and financial holding companies and mixed financial holding companies, as approved pursuant to Article 21a(1),("the entities"), shall have the primary responsibility for ensuring that members of the management body are at all times of sufficiently good repute, act with honesty, integrity and independence of mind and possess sufficient knowledge, skills and experience to perform their duties and fulfil the requirements set out in paragraphs 2 to 6 of this Article, except as regards special managers appointed by resolution authorities under Article 35 (1) of the Directive 2014/59/EU and temporary administrators appointed by competent authorities under article 29 (1) of the Directive 2014/59/EU*."

2.6. Article 37(11) BRRD / Recital 47 'EBA mandate in respect of the general principles of resolution tools'

The Commission introduced an EBA mandate for monitoring the actions and preparation of resolution authorities to ensure an effective implementation of the resolution tools and powers in the event of resolution in Article 37(11) BRRD. Some Member States raised the concern that such an additional EBA mandate would create additional administrative and reporting burden for resolution authorities and credit institutions. Another Member State questioned whether such monitoring should not be limited to the preparation of the preferred resolution strategy only. Taking into account these two remarks, the Presidency suggests modifying Article 37(11) BRRD by limiting the EBA mandate to monitoring only the actions and preparation and limiting the scope of the report to be prepared. One Member State also questioned whether the level of transparency vis-à-vis stakeholders regarding the arrangements to operationalise bail-in and other tools (as mentioned in Article 37(11) point c) BRRD) is in line with Article 84 BRRD on the confidentiality requirements. The Presidency notes that point c) requires the EBA to include the level of transparency towards relevant stakeholders regarding points a) and b) in its report but does not establish any additional transparency requirement.

Drafting suggestion:

Suggestion to maintain the (relevant part of) Recital 47 and to modify Article 37(11) as follows:

> *'11. EBA shall monitor the actions and preparation of resolution authorities to ensure an effective implementation of the resolution tools and powers in the event of resolution. EBA shall report to the Commission on the state of play of existing practices 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) the arrangements in place to implement the bail-in tool and the level of engagement with financial market infrastructures and third-country authorities, where relevant;*
>
> *(b) the arrangements in place to operationalise the use of other resolution tools.*
>
> *(c) the level of transparency towards relevant stakeholders regarding the arrangements referred to in points (a) and (b).'*

2.7. Article 52(1) and (5) BRRD 'Business reorganisation plan'

Article 52(1) introduces the possibility for the resolution authority to extend the 1-month deadline for submission of the business reorganisation plan by another month in exceptional circumstances. One Member State asked for more clarity on the exceptional circumstances to postpone the deadline. According to the Commission's proposal, the precise circumstances justifying a postponement of the deadline for the submission of the business reorganisation plan would be left to the discretion of the resolution authorities, but would be expected to cover situations where the planning of the reorganisation is progressing less smoothly than expected.

Drafting suggestion:

Suggestion to maintain the Commission's proposal.

2.8. Article 88(2) BRRD 'Resolution colleges: participation'

During the Council Working Party of 21 November 2023, two Member States suggested to also amend Article 88(2), point b) to provide clarity on the requirement to establish resolution colleges for cross-border groups with financial institution subsidiaries. In the proposal that was provided, the resolution authorities of subsidiaries that are financial institutions and that can be wound up under

normal insolvency proceedings should, in certain cases, be excluded from the resolution college. Moreover, one of the Member States considered it also necessary to amend Article 88(2) point g) to clarify that only for credit institution subsidiaries the authority that is responsible for the deposit guarantee scheme of a Member State should be part of the resolution college, whereas with the current wording also the authority responsible for the deposit guarantee scheme of financial institution subsidiaries that are not allowed to take covered deposits would participate in the resolution college.

The Presidency aims to explore Member States' views on the two proposed amendments to Article 88(2).

Drafting suggestion:

Amend Article 88 (2) points b) and g) as follows:

> *'(b) the resolution authorities of each Member State in which a subsidiary covered by consolidated supervision is established.* ***Where the subsidiary is an entity referred to in point (b) of Article 1(1), the resolution authority of that subsidiary shall decide whether to participate or not in the resolution college concerned if winding-up of this subsidiary under normal insolvency proceedings is considered credible within the meaning of Article 16(1) and (2). If the resolution authority of such subsidiary considers that a membership in the resolution college is not needed, it should notify the group-level resolution authority thereof. Upon receiving the notification by the group-level resolution authority, the resolution authority of the subsidiary shall no longer be a member of the resolution college.***
>
> ***In case of material changes which have the potential to affect the credibility of insolvency proceedings, the resolution authority of such subsidiary shall notify the group-level resolution authority of the need to restore its membership in the resolution college. The group-level resolution authority shall, upon receipt of such notification, invite the concerned resolution authority of the subsidiary to the resolution college."***
>
> *'(g) the authority that is responsible for the deposit guarantee scheme of a Member State, where the resolution authority of that Member State is a member of a resolution college* ***and, where a credit institution referred to in Article 1(2)(d) of Directive 2014/49/EU is part of the group and established in that Member State.***

2.9. Article 102(3) BRRD 'Deferral of *ex ante* contributions and replenishment'

Now that the available financial means (AFM) have reached the steady state and that the size of the resolution funds would only grow on the basis of the evolution of covered deposits, the Commission suggested to offer room to resolution authorities to defer the collection of *ex ante* contributions where the amount to be collected would be minimal having considered the costs it would imply to collect the contributions (e.g., bank-by-bank invoicing, right-to-be-heard, actual transfers). The Commission did not intend to cap the size of the resolution fund (in particular the SRF) nor to deviate in any way from the current functioning of the replenishment process, but only to render the process more efficient in light of related costs.

While no comments on the proposed text were received, Member States made three related remarks. According to a first remark, a paragraph indicating that resolution authorities *may* continue to collect *ex ante* contributions to match the evolution of covered deposits could be inserted. The argument goes that this follows from the current text, which implies that the target size would be capped at the level of 1% of covered deposits observed at the end of the transition period. However, the current text is sufficiently clear that there is no cap and the size of the resolution fund varies based on the volume of covered deposits, i.e., it shall match the amount corresponding to 1% of the covered deposits at

any time and the amount is not fixed as of the end of the build-up phase. The Presidency does not consider it necessary to adjust the current text due to the absence of legal doubt.

Two Member States commented on the replenishment schedule. One Member State advocated that no replenishment should take place before the SRF reached a level of 66% of its capacity, this to alleviate the burden on the industry. If the SRF falls below 66%, it shall be refilled in 6 years as per the current rules. This Member States presupposes that having a SRF at 66% capacity would be fine for financial stability purposes. This approach appears not sufficient prudent and would be against the fundamental rationale of having sufficiently large *ex ante* funded safety nets.

Another Member State wanted to specify the rules related to a replenishment in case the SRF is used for a low amount (less than 33% of the target level) as the legislation only specifies the reimbursement path when the depletion is greater, forcing a replenishment in 6 years. It proposed a gradual approach that is stricter than the current framework and would be open to discuss how to mitigate possible cliff-effects linked to the presence of hard thresholds:

- If the available financial means in the fund decrease below 33%: 6 years.
- If the available financial means in the fund are between 33% and 66%: 3 years.
- If the available financial means in the fund are above 66%: 'reasonable timeframe'.

By inserting clarifications (thresholds and timelines), the framework related to the replenishment could be made clearer, more predictable, and potentially less prone to litigation. However, the mechanism proposed would not work as it bases the replenishment timeline on the starting point of the depletion: the timeline would not change when the available financial means in the fund following replenishment exceed the thresholds and thus the cliff effects are significant. The Presidency does not see an imperative need to amend the framework, which already provides safeguards and accounts for proportionality in terms of burden for the industry (i.e., mandatory timeline of 6 years only if capacity falls below 66%, flexible in other situations).

Drafting suggestion:

Suggestion to maintain the Commission's proposal.

2.10. Article 103(a) BRRD 'IPCs up to 50%'

As the steady state is reached, the Commission suggested to increase the potential share of IPCs from 30% to 50% to limit the amounts of idle funding and to alleviate the burden on the industry. Secondly, the Commission explicitly ruled out the possibility to cap the size of resolution financing arrangements by leaving the text unchanged.

While only one Member State explicitly supported the Commission's proposal, many Member States preferred the current text, namely IPCs up to 30%. Two Member States requested further analysis.

The IPC ratio is ultimately determined by a political discussion and will be part of a broader political agreement on the CMDI package. For the time being, the Presidency takes note of the current practice. For instance, within the Baking Union, despite a share of 30%, IPCs represent in total only up to 10% of the SRF size. Furthermore, the proposed increase of IPCs comes with a potential risk: in theory, up to 50% of the size of a resolution financing arrangement could be met using IPCs, which may trigger financial stability issues if they were to be activated because of the procyclicality of the recognition of accounting losses (most IPCs are booked off-balance sheet without impact in the P&L). Nonetheless, it is not in the interest of the resolution authority to put at stake the liquidity of the resolution fund and create procyclical risks linked to the activation of IPCs. To conclude, the share of 50% will be hardly reachable in practice.

Against this background, the Presidency proposes to retain the Commission's proposal adding an annual assessment of the relevant share of IPCs. This ensures that the resolution authority properly assesses the risks on a regular basis and this assessment can be used to legally ground adjustments to the contribution cycles. The IPC ratio will be determined in a later stage.

Drafting suggestion:

Suggestion to modify Article 103(a) as follows:

> '3. *The available financial means to be taken into account in order to reach the target level specified in Article 102 may include irrevocable payment commitments which are fully backed by collateral of low risk assets unencumbered by any third party rights, at the free disposal and earmarked for the exclusive use by the resolution authorities for the purposes specified in Article 101(1). The share of irrevocable payment commitments shall not exceed* ***[50]*** *% of the total amount of contributions raised in accordance with this Article. Within that limit, the resolution authority shall determine annually the share of irrevocable payment commitments in the total amount of contributions to be raised in accordance with this Article*.'

2.11. Article 103(b) BRRD 'Accounting treatment of IPCs'

The Commission introduces a new paragraph in Articles 103 BRRD and 70 SRMR providing details on the consequences where an institution having used IPCs would exit the scope of BRRD or SRMR, respectively. The Commission's proposal was discussed during the CWP of 9 October 2023 on the basis of the Commission services' note on contributions to resolution financing arrangements and irrevocable payment commitments (WK 12566/2023).

The Commission explained in its note that this inclusion is meant to clarify that ex ante contributions due are to be paid in full, irrespective of the choice of instrument (notably a cash contribution or an IPC). According to the proposal, an institution having used IPCs and exiting the scope of BRRD or SRMR would be entitled to receive back the collateral posted in relation to its IPC, but only if it substituted the collateral with the payment of a cash contribution commensurate to the amount of the IPC. This clarification aims to ensure a level playing field between banks using IPCs (in addition to cash contributions) and banks using only cash contributions, irrespective of the right given to all banks in the framework to request part of their contributions to be met with IPCs. In addition, it mitigates the effect of an institution leaving the scope of BRRD or SRMR with the collateral posted in relation to its IPC (but without having made a corresponding cash payment into the resolution financing arrangement) on the financial situation of the resolution financing arrangement and the burden put on other banks to fill the potential gap.

One Member State requested to clarify the accounting treatment of IPCs, since this is subject to varying practices across the EU. However, it is not part of the CMDI package to discuss, nor amend, the accounting treatment of IPCs. Therefore, this non-paper will not cover the accounting provisions of IPCs.

Two Member States raised the concern that the amendment in Article 103 BRRD might jeopardise the balance reached in BRRD1 and the Council implementing regulation (EU) 2015/81 and, may result in de-recognising the accounting treatment of IPCs, resulting in the commitments impacting the profit and loss statement.

The Presidency suggests reformulating the provision with the aim of i) preserving the objective pursued by the Commission but ii) maintaining the possibility to account these commitments off-balance sheet as per the current framework by de-linking the cancellation of the IPCs/return of the collateral from the payment of a corresponding amount. This would allow to have a similar economic effect (i.e., a bank has to pay its contribution, no matter what instrument it chooses to do so), but with

less changes compared to the Council Implementing Regulation which was used by some banks as a basis for the advantageous accounting treatment.

Drafting suggestion:

In Article 103 the following paragraph 3a would be inserted:

> *'3a. The resolution authority shall call the irrevocable payment commitments made pursuant to paragraph 3 of this Article when the use of the resolution financing arrangements is needed pursuant to Article 101.*
>
> *Where an entity stops being within the scope of Article 1* ~~***and is no longer subject to the obligation to pay contributions in accordance with paragraph 1 of this Article***~~*, the entity shall pay a contribution in the amount of* ~~***resolution authority shall call***~~ *the irrevocable payment commitments made pursuant to paragraph 3 and still due.* ~~***If the contribution linked to the irrevocable payment commitment is duly paid at first call, the resolution authority shall cancel the commitment and return the collateral. If the contribution is not duly paid at first call, the resolution authority shall seize the collateral and cancel the commitment.';***~~

2.12. Article 104(1) BRRD / Recital 36 '*Ex post* contributions'

The Commission proposes to replace the second subparagraph of Article 104(1) BRRD with a new subparagraph, stating *"Extraordinary ex-post contributions shall not exceed three times 12,5% of the target level specified in Article 102."* The same statement is introduced in Article 71(1) SRMR. The Commission's proposal was discussed during the CWP of 9 October 2023 on the basis of the Commission services' note on contributions to resolution financing arrangements and irrevocable payment commitments (WK 12566/2023).

In its note, the Commission explained that the existing Article 104(1) BRRD, respectively 71(1) SRMR creates a dynamic link between the amount of *ex post* contributions and the *ex ante* contributions collected on a yearly basis in accordance with Article 103(2), respectively 70(1) SRMR. With the CMDI proposal, the Commission proposes to de-link the amounts of *ex post* and *ex ante* contributions by replacing the dynamic reference (of the *ex ante* contributions) by a fixed maximum. The objective of this modification is that after the end of the initial build-up period, *ex ante* contributions will depend only, in circumstances other than the use of the resolution financing arrangements, on variations in the level of covered deposits. Therefore, the *ex ante* contributions will likely become small. Basing the maximum amount of extraordinary ex post contributions on ex ante contributions could then have the effect of drastically limiting the possibility for resolution financing arrangements to raise ex post contributions, thereby reducing their capacity for action. To avoid such outcome and to ensure continuity between the build-up and the steady state phases, the Commission's proposal sets the maximum amount of extraordinary *ex post* contributions allowed to be called in a year at three times one-eighth (i.e., 3 x 12.5%, or 37.5%) of the target level of the resolution financing arrangement concerned. This level is equal to the maximum amount of *ex post* contributions that could have been collected during the build-up period under the existing rules, taking into account the linear build-up of resolution financing arrangements.

One Member State suggested to replace the wording "*three times 12,5%*" in the provisions to "37,5%". Two Member States made reservations on the appropriateness of the chosen maximum, while others made the concern that the maximum appears nominally quite high, risking putting pressure on the banking sector. One Member State referenced case law from the Court of Justice that would create operational constraints on resolution authorities when raising *ex post* contributions, without detailing its concerns related to these provisions.

It should be reiterated that the Commission's proposal to modify the maximum amount of *ex post* contributions is purely targeting an amendment at technical level, now that the build-up phase for *ex ante* contributions has come to an end. This modification is not aimed at (re)assessing the relevance of setting a maximum on the amount of *ex post* contributions. Such assessment would raise several issues connected to the design of the ESM common backstop and the recoupment capacity of the banking sector, should the SRF and the backstop be used.

The maximum amount in proposed Articles 104(1) BRRD, respectively Article 71(1) SRMR seems appropriate. On the one hand, having a higher cap would be questionable as to the actual capacity of the sector to disburse up to 55% (additional *ex ante* + *ex post* contributions) of the target level in one given year. On the other hand, having a lower cap would put at risk the ability of the SRB and ESM to design a loan in the context of the common backstop. Against this background and considering that the SRF and contribution framework is not amended with the CMDI package, the Presidency suggests maintaining the Commission's proposal for Articles 104(1) BRRD and Article 71(1) SRMR.

Drafting suggestion:

Suggestion to maintain the Commission's proposal.

2.13. Article 96(3) BRRD 'Reference to Chapter III of Title IV'

Although the Commission did not propose to amend Article 96 (3) BRRD, the attention of the Presidency was drawn on an erroneous reference in this Article. The current provision states the following: '*Where a resolution authority takes an independent action in relation to a Union branch, it shall have regard to the resolution objectives and take the action in accordance with the following principles and requirements, insofar as they are relevant: a) the principles set out in Article 34; b) the requirements relating to the application of the resolution tools in Chapter III of Title IV.'*

As to letter b), Chapter III of Title IV BRRD deals with valuation (in resolution), whereas Chapter IV of Title IV deals with the resolution tools. The reference to valuation raises questions as it is not a requirement relating to the application of resolution tools. Moreover, it is only one requirement, questioning the plural of this provision, cf 'the requirements' in the letter b). The intention seems to have been to refer to Chapter IV of Title IV BRRD that does deal with resolution tools. A correction of the cross-reference seems therefore necessary for the provision to make sense.

Drafting suggestion:

In Article 96(3), first subparagraph, point (b) would be replaced by the following:

'*(b) the requirements relating to the application of the resolution tools in Chapter* ~~***III***~~ ***IV*** *of Title IV.*'

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 45(1) BRRD 'Inclusion of RA determination in compliance to MREL'
- Article 45b BRRD / Recital 27 'De minimis exemption from certain MREL requirements'
- Article 45c (3) and (7) BRRD 'MREL Reference to critical 'economic' function'
- Article 45f (1) BRRD 'MREL'
- Article 45l BRRD/ Recital 47 'EBA report'

- Article 47(1) BRRD ‘Write-down and conversion’
- Article 59(3) BRRD ‘Write down and conversion EPFS’
- Article 101(2) BRRD ‘Additional rules on use of resolution financing arrangements’
- Article 111(1) BRRD ‘Sanctions’